SMOKED SUCCESS? SOCIAL, CULTURAL, AND LEGAL CHANGES IN THE UNITED STATES, JAPAN, AND FRANCE HAVE LED TO A DECLINE IN TOBACCO USE. YET, TEENAGERS REFUSE TO BUDGE!

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By Dalila Hoover*

INTRODUCTION

Once considered a part of everyday life, tobacco consumption has become a global public health crisis that has transcended national borders. According to the World Health Organization (WHO), tobacco is the single most preventable cause of death in the world today and by the end of 2011, tobacco will have killed nearly six million people, including more than 600,000 of people exposed to tobacco smoke; that is, more than tuberculosis, HIV/AIDS and malaria combined. Based on the WHO 2011 report, tobacco use is one of the main risk factors for a number of chronic diseases, including cancer, lung diseases, and cardiovascular diseases. The WHO has further stated that if current smoking patterns continue, the toll will nearly double by 2030 with more than 8 million deaths with a high percentage of them (80%) in developing countries.

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3 Id.
countries to amount a billion estimated deaths in the twenty-first century.\(^4\) Thus, each
government must take action to safeguard the public’s health through the
implementation of laws\(^5\).

Many industrialized countries including the United States, France, and Japan
have implemented tobacco control policies and programs. In their efforts to curb high
smoking rates, these nations have developed anti-smoking programs to de-normalize
the use of tobacco products.\(^6\) They have shared the same ultimate goal to advance the
public health agenda and reduce tobacco consumption. Although they have adopted a
different approach, they successfully altered and redefined their cultural perception of
tobacco products and ultimately contributed to the decline of tobacco consumption
among the adult population.\(^7\) In the United States, anti-tobacco movements concerned
with public health risks posed by tobacco products took the lead to advocate for the
innocent victims\(^8\) and first led to the implementation of regulations. On the other hand,
the French citizens who were not so much interested in protecting and defending the

\(^4\) Id.

\(^5\) Hodge, supra note 1, at 516.

\(^6\) W. O’Neil, Close But No Cigar: A Comparative Analysis of the FDA’s Attempt to Regulate Tobacco Use, 30

\(^7\) Id.

\(^8\) The phrase “innocent victims” was commonly used to refer to second-hand or passive.
vulnerable protected their individual freedom of choice and private right to smoke. The French government proved them wrong and directed their conduct. Finally, in Japan, the government had monopoly ownership and control of the tobacco industry.\(^9\) However, under the need to conform the West and to respond to the WHO pressure, Japan experienced its first change of cultural tobacco acceptance and implemented new regulations.\(^10\)

Yet, teenagers in the United States, Japan, and France continue to view tobacco consumption as culturally acceptable. This is evidenced by tobacco smoking rates among young people which have not differed significantly after the implementation of smoking regulations. Thus, social, cultural, and legal changes in the United States, Japan, and France leave open for debate whether they have been efficient to curb teen smoking. They certainly have led to the decline of tobacco consumption among the adult population. Each nation has implemented alternative policy levers to reduce tobacco consumption through excise tax on tobacco products, public health educational programs to raise the awareness of nicotine dependence, and development of cessation

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programs. Yet, youth smoking rates remain disturbing and raise a novel issue as to why these changes intended to fight teen smoking have had little or no effect. Smoking remains a choice for adults, but not for teenagers. The de-normalization of tobacco consumption has failed to work for them. To date, neither the United States nor Japan nor France has moved to ban the production or usage of tobacco.

Yet, in the United States, under the pressure of staggering rates in teen smoking, a majority of states adopted a more drastic approach. They implemented tobacco laws also known as PUP laws which penalize the purchase, use, and possession of tobacco products by teenagers. While PUP laws remain highly debated, they have not proved to be significantly effective to reduce teen smoking in the United States. Today, there is no indication that Japan and France will follow the U.S. approach and implement PUP laws to curb teen smoking. Indeed, unlike the United States, Japan and France will continue to place their focus on the purchase of tobacco products rather than on their use. Therefore, PUP laws will remain an exclusive product made in United States.

This article will compare the different factors which have led to the decline of tobacco consumption among the adult population in the United States, Japan, and France. In particular, this article will define and analyze the social, cultural, political,


and economical changes which have played a key role in altering the perception of tobacco consumption and ultimately have led to smoking regulations.

Part I examines how the United States, Japan, and France have adopted different approaches at altering and redefining the acceptance of tobacco based on their social, cultural, political, economical beliefs that ultimately led to the reduction of tobacco consumption.

Part II compares the effectiveness of the tobacco regulatory systems that the United States, Japan, and France implemented to curb teen smoking and examines the various factors which may explain why most teenagers have resisted these changes. Finally, this article discusses how the controversial PUP laws adopted in the United States to remedy the current inadequacies of youth tobacco control have proven to be ineffective and will unlikely serve as a model approach in Japan and France.

I. SOCIAL, CULTURAL, AND LEGAL CHANGES LED TO THE DECLINE OF ADULTS’ TOBACCO CONSUMPTION IN THE UNITED STATES, JAPAN, AND FRANCE

Tobacco is the only legal consumer product that can harm everyone exposed to it since its appearance from the New World in 1942. In 1604, King James stated: “[s]moking is a custom loathsome to the Eye, hateful to the Nose, harmful to the Brain,

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[and] dangerous to the Lungs....”14 Yet, tobacco products such as cigarettes became popular, glorified, and well entrenched in the American, Japanese, and French cultures.15 Indeed, tobacco became part of a desirable and acceptable lifestyle and a powerful “symbol of sexuality, power, autonomy, and modernity.”16

However, this view fundamentally changed by the end of the twentieth century. Tobacco consumption was no longer part of an acceptable behavior in society.17 In 1964, the U.S. Surgeon General published its report on tobacco and health and for the first time publicly denounced the unhealthy effects of tobacco.18 Several additional reports on the risks of passive smoking (second-hand smoke) soon followed. This led to a new visualization of tobacco products endangering their users and non-users.19

A new era started.20 Yet, the results of these reports did not have a similar impact in the United States, Japan, and France. Indeed, they were released at a time

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17 Feldman, supra note 10, at 770.

18 Malcolm, supra note 13, at 2.

19 Feldman, supra note 10, at 770.

20 Id.
tobacco products were well ingrained in their culture.\textsuperscript{21} While the U.S. government was the first government to take rapid action, the French government, on the other hand, did not take action until the early 1990s.\textsuperscript{22} As to the Japanese government, it remained unconcerned and waited until the twenty-first century to take action.\textsuperscript{23} These differences clearly showed that more than the publication of the U.S. Surgeon’s reports needed to be achieved to redefine a nation’s cultural perception of tobacco products.\textsuperscript{24}

\textbf{A. The United States: Awareness of the Risk}

American people were among the first to experience a transformation of the perception of tobacco products from popular symbols of modernity, freedom, control, and sexuality to symbols of fragility, foolishness, and addiction.\textsuperscript{25} But what contributed to such transformation?

Shortly after the publication of the U.S. Surgeon’s 1964 report, Congress rapidly took action and enacted the Federal Cigarette Labeling and Advertising Act\textsuperscript{26} which

\begin{itemize}
  \item \textsuperscript{21} John Slade et al., Tobacco Product Regulation: Context and Issues, 53 FOOD & DRUG L. J. 43, 43 (1998).
  \item \textsuperscript{22} Feldman, \textit{supra} note 10, at 770.
  \item \textsuperscript{23} \textit{Id}.
  \item \textsuperscript{25} Nathanson, \textit{supra} note 16, at 446.
  \item \textsuperscript{26} 15 U.S.C. §§ 1331-1341 (1994).
\end{itemize}
mandates tobacco companies to include the warning: “CAUTION: Cigarette Smoking May Be Hazardous to Your Health” on every cigarette package. A few years later, Congress banned cigarette advertising on television and radio. Yet, these governmental measures were not sufficient to the taste of American anti-smoking activists, consumer advocates, and public health experts who believed that more needed to be done to protect nonsmokers exposed to the dangers of tobacco smoke.

Determined to fight for the defenseless and protect the public health, they gathered and embarked on a crusade against smokers determined to make smoking so unpopular that they would be compelled to quit.

Moral crusades and nonsmokers’ rights movements led by well-off and educated people played a key role in raising the awareness of public opinion on the health risks posed by tobacco products. Non-smoking advocates were able to bring credibility to their cause and successfully access the media to disseminate their message. Among

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28 Id.

29 Feldman, supra note 10, at 744.

30 Nathanson, supra note 13, at 431.

31 Id. at 449.

32 Feldman, supra note 10, at 770.
the most affluent and persistent advocate groups is the American Cancer Society which played a significant role in the early stages of curbing tobacco use and addressing health issues.\textsuperscript{33} Other key players such as the Group Against Smokers’ Pollution (GASP) and Action on Smoking and Health (ASH), the nation’s oldest and largest antismoking organization, advocated for the nonsmokers whom they characterized as the “uncalculated preys of tobacco smoke” and thus expected the government to take prompt action.\textsuperscript{34} Annual sponsored events such as the World Tobacco Day and the Great American Smokeout which supported nonsmokers along with the smokers in their fight against tobacco took place with the mission to educate American people. Ultimately, they received the public attention and wide support.\textsuperscript{35} Finally, Campaign for Tobacco-Free Kids, which has more than 130 organizational partners including public health, medical, corporate, education, and civic organizations, has been fighting against youth smoking in the United States for decades.\textsuperscript{36}

Over the past twenty-five years, the discourse addressing innocent victims has proved to be a powerful tool in retaining the attention of the local, state, and some

\begin{itemize}
  \item Nathanson, \textit{supra} note 13, at 446.
  \item \textit{Id.} at 449.
  \item Malcolm, \textit{supra} note 13, at 15.
  \item Campaign for Tobacco-Free kids, About the Campaign, \textit{available at} http://tobaccofreeoregon.org/the_movement/campaign_for_tobacco_free_kids (last visited October 3, 2011).
\end{itemize}
federal government to implement tobacco regulation.\textsuperscript{37} The efforts paid off when in the early 1970s, Arizona became the first state in the United States to take stringent action and ban smoking in public places.\textsuperscript{38} Many other states followed. Thus, leading anti-smoking movements became a generator to implement positive change in how the United States has viewed and regulated tobacco. They have led to the decrease in tobacco consumption and to the implementation of tobacco regulations at the federal, state, and local level. However, although America was experiencing a change in cultural acceptance of tobacco products, many of its citizens were still smoking.\textsuperscript{39}

The next step in advancing the public health agenda was to target the tobacco industry at the state level. State attorneys general brought suits against the industry holding it responsible for the serious health risks posed by its products. As a result, the United States became the scene of huge litigation which led to a mounting condemnation of the tobacco industry in the public’s opinion.\textsuperscript{40} Yet, in light of scientific and medical evidence linking smoking to serious health hazards,\textsuperscript{41} the tobacco industry repeatedly denied that its products were highly toxic and addictive to the consumers.

\begin{footnotesize}
\begin{enumerate}
\item Nathanson, \textit{supra} note 16, at 449.
\item Feldman, \textit{supra} note 10, at 744.
\item Nathanson, \textit{supra} note 16, at 449.
\item Feldman, \textit{supra} note 10, at 770.
\item Malcolm, \textit{supra} note 13, at 2.
\end{enumerate}
\end{footnotesize}
who use them. Rather, in a strategic attempt to minimize the concerns of its consumers, the industry reiterated the safety of its products and promoted the low level of tar and nicotine in them. But this was a deceiving tactic because scientific evidence showed that light cigarettes consumption did not attenuate the health risks, but reduced them to a minimal degree. Furthermore, several documents produced during pre-trial discovery attested that the tobacco industry had been aware of the risks posed by its products for years and did nothing about it. In 1998, forty-six states settled their lawsuits against the major tobacco companies in the U.S. to recover tobacco-related health costs for $246 billion, the largest civil settlement in U.S. history. This multi-state settlement, known as the Master Settlement Agreement (MSA) required the tobacco companies to make annual payments to the states over the first twenty-five years and imposed marketing limitations on tobacco products. In 2008, according to a report on the states’ allocation of the MSA funds, states spent just 3.2 per cent of their total

42 Slade, supra note 21, at 43, 62-63.

43 Id.

44 Id.

45 Feldman, supra note 10, at 770.


47 Id.
tobacco-generated revenue on tobacco prevention and cessation programs. As of today, very few states are currently spending a proper amount of their tobacco settlement revenues to curb and prevent tobacco use. In the 2009 Fiscal year, no state was funding tobacco programs at the levels recommended by the U.S. Centers for Disease Control and Prevention (CDC). Non-tobacco producing states tended to invest more of these funds in tobacco-control programs than tobacco producing states. Cultural and economic history may explain the differences of fund allocations to develop tobacco-control programs. Indeed, in a tobacco-producing state like Kentucky, the laws are generally ineffective because the focus is not so much on public health but rather on its economic product. In 2008, for instance, Kentucky received 115.1 million in tobacco settlement revenues but actually spent 3.7 million on tobacco prevention- that is $53.5 million less than the CDC recommended spending. Similarly,

40 Id.


50 The 1998 State Tobacco Settlement, supra note 46.


52 Id. at 1042.

53 Tobacco Settlement Payments, supra note 49.

54 The 1998 State Tobacco Settlement, supra note 46.
Alabama spent more than $115 to market its tobacco products for every single dollar the state spent to prevent and reduce tobacco consumption and its harms. Put another way, Alabama’s tobacco prevention spending amounts to 0.9 per cent of the tobacco industry marketing expenditures in the state.\(^\text{55}\)

Finally, in 1992, Congress enacted the Synar Amendment which requires states to enact and enforce laws prohibiting the sale or distribution of tobacco products to individual under 18 years old.\(^\text{56}\) In order to comply with the Amendment, each state must conduct annual random, unannounced inspections of retail tobacco outlets and to report their findings to the Secretary of the U.S. Department of Health and Human Services (HHS).\(^\text{57}\) States that fail to comply with the Synar requirements are subject to a penalty of 40% of their Federal Substance Abuse Prevention and Treatment (SAPT) Block Grant funding.\(^\text{58}\)

Undoubtedly, the U.S. General Surgeon’s 1964 report which revealed the health hazards of smoking, along with congressional actions, the powerful mobilization of anti-tobacco activists and medical experts fighting for the vulnerable victims of passive

\(^{55}\) See Tobacco Settlement Payments, \textit{supra} note 49. The state of Alabama actually received million in tobacco settlement revenues.


\(^{57}\) Tobacco Settlement Payments, \textit{supra} note 49.

\(^{58}\) \textit{Id.}\)
smoking, and the litigation wave against the tobacco industry all led to the de-normalization of smoking and to a re-definition of tobacco acceptance in the United States, especially in public places.\textsuperscript{59} Smokers felt reproved, disconnected, and alienated.\textsuperscript{60} Joseph Gusfield stated “the smoker was not only a foolish victim of his or her habit but also an obnoxious and uncivil source of danger, pollution, and illness to others.”\textsuperscript{61}

However, the change of culture within the United States has not occurred evenly and unlike the states of Massachusetts and California which welcomed the change, many other states have retained their cultural acceptance of tobacco.\textsuperscript{62} The U.S. federal government chose to delegate the tobacco-control issue to the states. However, because of the fragmentation of the states and the power the tobacco industry has retained despite their vilification by the public opinion, it has become extremely difficult for the U.S. government to advance a comprehensive national tobacco-control policy\textsuperscript{63} and that

\textsuperscript{59} Feldman, supra note 10, at 744.

\textsuperscript{60} Id.

\textsuperscript{61} JOSEPH R. GUSFIELD, PERFORMING ACTION: ARTISTRY IN HUMAN ACTION AND SOCIAL RESEARCH 292 (Transactions Publisher 2000).

\textsuperscript{62} Nathanson, supra note 16, at 450.

despite its recent delegation of authority to the U.S. Food and Drug Administration (FDA) to control tobacco products.\textsuperscript{64}

\textbf{B. Japan: A Need of “Conformity to the West”\textsuperscript{65}}

Japan has the highest smoking rate among all developed nations.\textsuperscript{66} It was not until the twenty-first century that the Japanese government enacted its first tobacco regulations with the exception of the 1900 Law of Prohibition of Smoking by Minors never enforced.\textsuperscript{67} The Ministry of Health, Labour, and Welfare launched Healthy Japan 21 and required separation of smoking areas.\textsuperscript{68} In 2003, Article 5 of the Health Promotion Law was enacted to prevent passive smoking. Voluntary restraints on advertising were put in place. After 2004, health warnings were printed on cigarette packages. In 2008, Taspo, an ID card issued by the Tobacco Institute of Japan upon presentation of a driving license, was introduced to prevent teenagers from purchasing cigarettes from vending machines. What took it so long? For nearly 100 years, the

\begin{flushright}
\textsuperscript{64} See infra Part III.A
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\textsuperscript{65} Feldman, supra note 10, at 748.
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\textsuperscript{66} Levin, supra note 9.
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\textsuperscript{67} See, Kazunari Satomura, Comment, Tobacco Induced Diseases (2008), available at http://www.tobaccoinduceddiseases.com/content/pdf/1617-9625-4-3.pdf (discussing the Law of Prohibition of Smoking by Minors which provides that smoking is prohibited twenty-years of age; offenders have their smoking products confiscated; a parent or a person with authority who does not stop smoking by a minor is fined; and retailers selling tobacco products to underage are fined).
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government had the monopoly ownership and control of tobacco industry and thus actively favored the interests of the tobacco industry and its products while preserving the tobacco smoking strong and its tax revenues rolling.\textsuperscript{69}

In the United States and Western Europe, the social and cultural acceptability of tobacco consumption had long vanished and thus created a cultural gap between the West and Japan where smoking was still socially acceptable.\textsuperscript{70} Consequently, beginning in 2000, the Japanese government started implementing a series of tobacco-control laws “to fill in the gap”\textsuperscript{71} with the West. However, these laws had little effect on public health and the Japanese people kept smoking. Indeed, the Japanese government never acknowledged the link between tobacco products and the health risks posed by their consumption.\textsuperscript{72}

Anti-smoking groups in Japan were weak and unsupported by the government and the public opinion.\textsuperscript{73} Conversely, anti-smoking groups wrongly believed that their fight paid off when in 2004 and for the first time in the Japanese legal history, a court

\textsuperscript{69} Levin, \textit{supra} note 9.

\textsuperscript{70} Feldman, \textit{supra} note 10, at 748.

\textsuperscript{71} Id. at 753.

\textsuperscript{72} Id. at 781.

\textsuperscript{73} Id.
awarded damages to a plaintiff in a case involving tobacco. The plaintiff who suffered headaches and sore throats as a result of passive smoking at work sued its employer to recover his medical expenses in the amount of 310,000 yen. However, the court never acknowledged the causation between the plaintiff’s harm and the exposure to smoke. Instead, the court held that the employer was obligated to provide financial support to its employee and thus should pay for his medical expenses in the amount of 50,000. In another decision brought against the government for failure to inform them of the danger of smoking by a 75-year-old man who had a tumor removed from his lung along with five other smokers, the Tokyo District court ruled that “there is a socially well-understood awareness of the risks of harm associated with cigarette smoking” and that “smoking was a personal choice.”

Presiding Judge Kikuo Asaka further found

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74 Id. Feldman cites to the first Japanese case where a court awarded damages to a plaintiff in a case involving tobacco in Jyudō Kitsuen de Hatsu no Baishō Meirei, Tokyo Chisai, Inga Kantei wa Furezu [The First Time Compensation is Ordered for Passive Smoking, Tokyo District Court Does Not Touch on Causal Relationship]. SANKEI SHIMBUN, JULY 13, 2004.

75 Id. Feldman mentioned this case which is actually the very first Japanese case brought up by several Japanese smokers against the government for failure to inform the public of the risks associated to tobacco use. The case is known as Jyudō Kitsuen Soshō [Passive Smoking Lawsuit]. MAINICHI SHIMBUN, JULY 13, 2004.


that other grounds could have caused the plaintiff’s cancer.\textsuperscript{78} In other words, the court merely restated the general accepted view that smoking remained a choice of free-will and that smokers are not victims.\textsuperscript{79} Efforts to raise taxes on tobacco failed three times before the Japanese government finally yielded. However, the tax increase was so minimal that it did not affect smokers’ behaviors as expected.\textsuperscript{80}

Professor Mark Levin argues that factors other than the government’s historical monopoly ownership, the control of the tobacco industry, and the need to fill in the gap to conform to the West may have explained why the Japanese government has remained inactive despite the global recognition of tobacco harm. Levin argues that social and cultural factors may also have justified the government’s inaction.\textsuperscript{81} He stated that although the percentage of male smokers has been high throughout the twentieth century, the actual amount of tobacco consumed by Japanese smokers was rather low until the late 1960s.\textsuperscript{82} As a result, while American citizens were waking up with the harsh news from the U.S. Surgeon General’s 1964 report that tobacco consumption was linked to lung cancer and other related diseases and were counting

\textsuperscript{78} Feldman, \textit{supra} note 10.

\textsuperscript{79} Id.

\textsuperscript{80} Id. at 780.

\textsuperscript{81} Levin, \textit{supra} note 9.

\textsuperscript{82} Id.
their first deaths, fewer Japanese people had witnessed tobacco-related illnesses and deaths in the 1960s. Because tobacco-related diseases were lower in Japan than in most western nations, Japanese people believe that they were physically exempt from tobacco’s harms. Unsurprisingly, the rise in Japanese deaths from tobacco consumption in the mid-1990s proved them wrong.

Additionally, another cultural factor which may explain the Japanese government’s inaction to fight tobacco use is what is known as the Japanese “groupism.” The notion of group among people is well entrenched in the Japanese culture and may explain how social obligations within the group leads to the tolerance of smoking by others. Another factor may be the notion of “uchisi/oto/ outsider(r)). Unlike American people who strongly advocate to protect their public health and that of their peers, Japanese people are less prone to get

83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
involved in anti-smoking groups if the victim who suffered the health consequences of tobacco consumption is not a relative.\textsuperscript{89}

Nevertheless, Japanese people have started to witness the change in their cultural acceptance of tobacco products with the implementation of smoking regulations. They have come a long way since the historical times of the government’s monopoly ownership of the tobacco industry. Yet, the regulations have had no significant impact on tobacco policy or public health. Japan has a long way to go before it becomes in conformity to the West.

C. \textit{France: From the French Resistance to Capitulation}

Smoking has always been part of the French culture, sharing the same social acceptance as eating camembert with fresh baguette or drinking red wine.\textsuperscript{90} Amazingly, the French have had unlimited freedom and leisure to smoke essentially anywhere within the French territory.\textsuperscript{91} Yet, unlike the United States’ motivation to enact anti-smoking laws because of the public health risks linked to tobacco products or unlike Japan’s need to fill in the gap to conform to the West, France’s initial motivation to enact tobacco-control laws was only based on economics.\textsuperscript{92} Indeed, health care costs

\begin{itemize}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} Lerner, supra note 27, at 165.
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.} at 166.
\end{itemize}
catapulted and the government suffered huge losses in production as a result of tobacco-related diseases and a high death toll.\textsuperscript{93} Finally, in 1976, the French government enacted the Law Veil\textsuperscript{94} which banned tobacco advertising, required tobacco manufacturers to include a warning on each cigarette package, and restricted smoking in public places.\textsuperscript{95} However, the French government quietly closed its eyes on the widespread disregard of the law regarding the advertising provisions and in public places.\textsuperscript{96} Several factors have led to such result.

First, it became clear that French people were not prepared to be told what to do and certainly not prepared to give up their national pastime and private right to smoke. They viewed public health not a collective concern, but rather as private one.\textsuperscript{97} Second, non-governmental health organizations such as \textit{La Ligue Nationale contre le Cancer} (the National League Against Cancer) and the \textit{Fédération française de Cardiologie} (the French Federation of Cardiology) did not focus their energy on raising public health awareness.

\textsuperscript{93} O’Neil, \textit{supra} note 6, at 484.

\textsuperscript{94} Loi Veil [Law Veil] Law No. 76-616 of July 9, 1976, art. 16 (Fr.).


\textsuperscript{96} Id.

\textsuperscript{97} Ogien Albert, « Qu’est ce qu’un Problème de Santé Publique ? », 225-244 (Fr.) [hereinafter \textit{What is a Public Health Issue?}].
of the risk of tobacco consumption but rather on raising funds for their research.\textsuperscript{98} Third and lastly, labor unions which play a key role in the life of its French members regularly resented new government action and contributed to making the law unpopular. It was not until the early 1990s that the French people started to witness changes in the perception of tobacco acceptance. Health organizations along with the Comité National contre le Tabagisme (The National Committee against Smoking), for instance, advocated and pushed for the enforcement of the law.\textsuperscript{99} Furthermore, five professors of medicine and specialists in lung cancer known as “les cinq sages” (the five wise men) lobbied and published a report in a major French newspaper, Le Monde denouncing the lack of enforcement of the 1976 Law Veil.\textsuperscript{100} Subsequently, in 1992, the government enacted the Law Evin.\textsuperscript{101} For the first time, the French government told its citizens when and where they could smoke.\textsuperscript{102} Subsequently, the French people could no longer smoke in public places and businesses premises other than in the designated smoking areas.\textsuperscript{103} The law

\textsuperscript{98} Palley, \textit{supra} note 95, at 1049.

\textsuperscript{99} Id. at 1050.

\textsuperscript{100} Id. at 1070.

\textsuperscript{101} Loi Evin, Law No. 92-478 of May 29, 1992, art. 4 (Fr.) [hereinafter Law Evin].

\textsuperscript{102} Lerner, \textit{supra} note 27, at 165.

\textsuperscript{103} Law Evin, art. 3.
provides harsh fines for violators of public smoking restrictions.\(^{104}\) Tobacco consumers who violate the law are subject to a fine of 450 Euros and public places owners to a fine up to 1500 Euros. The government was also able to raise the price of cigarettes because the law removed tobacco from the government’s cost- of-living index.\(^{105}\) For the first time, the French government supported by leading health organizations placed the rights of nonsmokers above those of the smokers. The French government declared the war against tobacco.

Yet, French citizens continue to resent the 1992 law. Business employers rejected the idea of spending money to reconfigure their premises and install ventilation systems to comply with the Law Evin.\(^{106}\) They were also concerned that their employees would use their smoking habit as a pretext to disorganize the office climate.\(^{107}\) As for the labor unions, they consider the law constraining and unfair because employers could refuse to employ smokers.\(^{108}\) Subsequent laws followed. The French government specifically targeted underage smokers when it enacted a law

\(^{104}\) Law Evin, art. 14.

\(^{105}\) Palley, supra note 95, at 1070.

\(^{106}\) Lerner, supra note 27, at 166.

\(^{107}\) Id. at 169.

\(^{108}\) Id. at 170.
prohibiting the sale of tobacco products to youths under the age of sixteen\textsuperscript{109} and a law prohibiting the sale of cigarette packet containing less than twenty cigarettes.\textsuperscript{110} Finally, in 2008, the French government took the most drastic measures and banned smoking in all public places in France.\textsuperscript{111}

Despite an initial resentment of public smoking restrictions, smoking rates in France started to lower. At last, those engaged in the resistance against the government capitulated and agreed to give up their national pastime to comply with the law. Today, the French public opinion in general has welcomed the law which has drastically changed the cultural acceptance of smoking as individual right of freedom.

Another effective policy lever that the French government used to reduce smoking and changed the perception of smoking was the implementation of a high excise tax on tobacco products. The French measure has proven that as the price of tobacco products increases the demand for those products fails. Unlike in the United


\textsuperscript{110} French youths were able to buy cigarette packets containing ten cigarettes at a lower price.

States where the level of tobacco taxes differs substantially\textsuperscript{112} between tobacco-growing states with the lowest excise tax and non tobacco-growing states,\textsuperscript{113} the French national government has repetitively imposed significant excise tax increases. It is currently sixty-four percent of the average retail price\textsuperscript{114} while it is fifty-three percent in Japan.\textsuperscript{115}

The French government has proven to its citizens that what was once considered a national pastime could be changed over time and become an unacceptable social behavior.\textsuperscript{116} But above all, the French government has proven to its citizens that what was considered once as a private right to public health has now become a legitimate collective right.\textsuperscript{117}

\textbf{II. ANALYSIS}

Social, cultural, and legal changes in the United States, France, and Japan have sought to achieve the same goal: to reduce health related issues and tobacco consumption. Their governments have implemented tobacco-control programs to prevent the initiation of tobacco use among teenagers. They also have promoted the

\textsuperscript{112} Table for State Cigarette Excise Tax, \textit{Each Rate and Rankings, available at} http://tobaccofreekids.org/research/factsheets/pdf/0097.pdf.

\textsuperscript{113} Chapoupka, \textit{supra} note 51, at 1018.

\textsuperscript{114} Data available at http://www.eubusiness.com/Health/tobacco-duty-guide/.

\textsuperscript{115} Data available at www.idrc.ca/uploads/user-S/11846727912007-July-AY-Excise_taxes_COP2_presentation.ppt. [hereinafter Excise Taxes].

\textsuperscript{116} Excise Taxes, \textit{supra} note 115; see Slade, \textit{supra} note 21, at 165.

\textsuperscript{117} Albert, \textit{supra} note 9, at 225-244.
cessation of tobacco use among adults, eliminated the exposure to environmental tobacco smoke, and identified disparities among population groups.118 Yet, smoking rates among their youth population have remained significantly high. In the United States, for instance, according to a 2010 monitoring survey, smoking has stopped declining and has shwon signs of increasing among teenagers in both 8th and 10th grade students.119 This signals how the United States has overall failed to reduce underage smoking rates below its “2010 Healthy People” goal.120 The state of California, which provides one of the most successful prevention programs in the U.S., continues to struggle to lower underage smoking rates. In 2011, 15.4% of Californian high school students still light up and more than 36,900 teenagers have become new daily smokers in that same year.121 A similar pattern of regular smoking has kept developing among French and Japanese teenagers. On the French side, while data


showed a decline for daily smoking from 30% in 1999 to 18% in 2007, the rate of heavy smokers (more than 19 cigarettes per day) remained stable over that same period. This highlights the difficulty for most dependent smokers, including teenagers, to change behaviors. Conversely, the rate of occasional smokers (less than one cigarette a day) has increased significantly. In Japan, the sale of tobacco products is prohibited to youth under the age of twenty. Yet, according to a survey conducted by the Aichi Cancer Center in Nagoya, almost 31% of teenagers between the age of 15 and 17 smoked in 2004 compared to 45% in 2000.

With respect to smokeless tobacco products, the U.S. largest smokeless tobacco manufacturer (USSTC) claimed in 2005 that smokeless tobacco was less harmful than cigarettes. This misleading and erroneous information regarding the effects of


124 Spika, * supra* note 122.


tobacco products on public health has since been corrected by the USSTC which now recognizes in agreement with the US Surgeon General and other public health authorities that its products are addictive and cause serious disease such as oral cancer, oral leukoplakia (white plaque in the mouth), other cancers, cardiovascular diseases.\textsuperscript{127}

Additionally, the U.S. National Institute on Drug Abuse released a survey conducted in 2008 which stated that the rates of Smokeless Tobacco users (mainly boys) are considerably higher which translates in nearly one in eight boys in 12\textsuperscript{th} grade is a current Smokeless Tobacco user.\textsuperscript{128} In 2009, 6.1\% of high school students were current users of smokeless products.\textsuperscript{129} These rates still remain high today among teenagers.

\textbf{A. Governments’ Measures to Control Teen Smoking Have Proved to Be Ineffective}


Despite the use of different strategies to tackle underage smoking, governments from the United States, France, and Japan all agree that the problem remains an ongoing challenge.

In the United States, federal and state governments have rallied their efforts to combat underage smoking. On two occasions, the U.S. government attempted to enact a law to regulate tobacco products but it failed because of the power of the tobacco lobby in Congress.\textsuperscript{130} Indeed, lawmakers believe that money from the tobacco companies helps silence legitimate minority concerns over rising rates of smoking within their communities.\textsuperscript{131} In a first attempt, the government tried to classify tobacco products as a “chemical substance” which would fall under the jurisdiction of the Environmental Protection Agency.\textsuperscript{132} In another attempt, the government tried to classify the product as a “controlled substance” under the authority of the Drug Enforcement Agency.\textsuperscript{133} Both failed.\textsuperscript{134} In 2007, the debate on the FDA’s authority to

\textsuperscript{130}Lerner, \textit{supra} note 27, at 188-190.

\textsuperscript{131}\textit{Id.} at 201.

\textsuperscript{132}\textit{Id.} at 189.

\textsuperscript{133}\textit{Id.}

\textsuperscript{134}\textit{Id.}
regulate tobacco products was brought back on the table after the FDA initially determined in 1996 that it had jurisdiction over tobacco products because they overwhelming met criteria as drugs and devices. The FDA rule included regulations to reduce the availability of tobacco products to teenagers and the volume of advertising for these products that could reach them. However, the U.S. Supreme Court overturned the FDA Rule. The Supreme Court found that neither the FDA nor any other federal entity could exercise jurisdiction over tobacco products or implement measures to restrict tobacco marketing to teenagers unless Congress passes new legislation that expressly provides the authority to do so. Indiana Republican Representative, Steve Buyer, offered an alternative bill proposing to leave the FDA out of tobacco product regulation and rather establish a new agency with the U.S. Department of Health and Human Services. His proposal failed. This shows the willingness of Congress not to let the tobacco industry itself regulate or influence any

135 The bills are H.R. 1108.IH in the House and S. 625.IS in the Senate to grant the FDA the authority to regulate the manufacturing, marketing and sale of tobacco products. H.R. 1108.IH was passed by the House and was referred to the Senate on August 1st, 2008.

136 Slade, supra note 21, at 45.

137 FDA v. Brown and Williamson Corp., 529 US 120, 120 (2000) (holding that neither the FDA nor any other federal entity may exercise jurisdiction over tobacco products or implement measures to restrict tobacco marketing to youth unless Congress passes new legislation that expressly provides the authority to do so. To this day, Congress has not done so).

agency that would operate under its authority. It was not until April 2009 that the House of Representatives and the Senate approved an historic bill which became law on June 22, 2009 to grant FDA the authority to regulate tobacco products. It is known as the Family Smoking Prevention Tobacco Control Act. Yet, despite the U.S. federal government’s attempt to curb underage smoking, rates among teenagers remain high.

Additionally, the U.S. federal government currently penalizes states which fail to comply with the Synar requirements and subjects them to a 40% penalty of their SAPT block grant funding. However, critics argue that because those funds are provided to pay for treatment services or prevention for individuals with alcohol or drugs addiction who do not have the ability to pay for such services, the measure penalizes the individual rather the non-complying state.

Thus, unless Congress passes a law equaling the stricter state tobacco regulations, it is unlikely that its implementation will reach identical results especially in states where tobacco production remains the main economic source.

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139 The Family Smoking Prevention and Tobacco Control Act. The text of this law can be read at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h1256enr.txt.pdf

140 U.S. Department of Health and Human Services, supra note 56, at 2.
In France, although the legal drinking age rose from sixteen to eighteen, retailers do not generally ask for or check the identification card of the purchaser. Thus, a risk remains with respect to teenagers who can legally access alcohol or tobacco products or both. In Japan, to prevent teenagers from purchasing cigarettes from vending machines, the Japanese government introduced the Taspo\textsuperscript{142} card in 2008. However, this measure has remained ineffective because teenagers can still purchase cigarettes in convenience stores, or sneak their parent’s card, or borrow the card from a legitimate cardholder.\textsuperscript{143}

Finally, one of the strongest policy levers to reduce underage smoking has been to implement an excise tax on tobacco products in the United States (uneven among states), Japan, and France (the highest). Numerous studies have confirmed that the price increase in tobacco products has helped reduce cigarette consumption among teenagers but has resulted in an increase of consumption of other tobacco products such

\textsuperscript{141} See Code de la santé publique, article R3353-811-25. The full text of these articles which prohibit the sale of alcoholic beverages to minors under the age of eighteen is accessible in French at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072665&dateTexte=20111026

\textsuperscript{142} The term “Taspo” stands for “Tobacco Passport.” The card allows any person who is twenty year old or older to purchase cigarettes from vending machines after she or he submitted an application with a photo and proof that she or he is at least 20 years old (the legal smoking age in Japan). Additional information is available on the official Taspo web site in Japanese and in English at http://www.taspo.jp/english/index.html (last visited October 3, 2011).

as chewing tobacco and smokeless products (ST). Taxation has been an effective policy lever to lower tobacco products purchases. As a fact, in April 2009, the U.S. Congress passed a 61.66 cent per pack increase to the cigarette tax, along with other tax increases to fund the expansion of the State Children’s Health Insurance Program (SCHIP). Yet, teenagers are still smoking. Since governments remain the main beneficiaries of the tax increase on tobacco products, it can be easily suspected that those governments do not act in the name of a politic of public health (as this has shown in Japan and still is) but rather that they fill in their own budgetary pockets. Thus, a complete retreat of the governments in the war against tobacco could constitute a clear and strong message of their willingness to adhere to the process in terms of public health and receive public support from their medical professionals and citizens. This is unlikely to happen because governments like Japan and France want to retain their control over their citizens while the U.S. government may be willing to delegate such decisions to the states or to the FDA as it recently did with respect to tobacco control.

B. So What? Are Teenagers More Resilient to Social, Cultural, and Legal Changes?

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The need to impress peers who smoke, copy them, transgress the laws, and feel independent is certainly among the major reasons why teenagers start smoking early age and continue to smoke. Of course, not all teenagers will become addicted. Although teenagers are aware of the serious health risks posed by tobacco products and the addiction to nicotine, their temptation to impress peers is often too high to resist their first cigarette. According to Dr. Joseph DiFranza,\textsuperscript{146} children who have smoked only a few cigarettes experience the same symptoms of nicotine addiction as adults who smoke heavily.\textsuperscript{147} He further adds that “people used to think that long-term heavy used to cause addiction; now we know that it’s the other way round: addiction is what causes long-term heavy use.”\textsuperscript{148} Thus, governments’ attempts to raise teenagers’ awareness to those risks through the use of media, public health education, and ultimately laws have not been significantly sufficient to stop teenagers from smoking or prevent them from starting smoking.

\\textsuperscript{146} Doctor Joseph Difranza is a Professor of family medicine at the University of Massachusetts who has been a member of the Board of Directors of the Tobacco Control Resource Center since 1985.


\textsuperscript{148} \textit{Id.}
Scientists have shown that adolescence is an age prone to emerging addictive behaviors such as smoking.\textsuperscript{149} Indeed, smoking among teenagers starts as a social behavior that is still valued in the American, Japanese, and French culture. According to Constance Nathanson, smoking in France has been perceived as a private and personal judgment and a symbol of solidarity which commands that teenagers should not be excluded from it. Consequently, teenagers tend to transgress laws and tobacco-control measures that limit their individual freedom and exclusively target them.\textsuperscript{150} Yet, the need to establish legal references as to what is acceptable and non-acceptable still remains. Following the enactment of the 2003 law which bans the sale of tobacco products to teenagers under the age of sixteen, French critics have argued that the 2003 law could mislead teenagers and make them believe that tobacco products would no longer be more toxic once they turn eighteen.\textsuperscript{151}

Furthermore, studies have shown that teenagers generally do not purchase most of the tobacco products they consume because they can access them through other


\textsuperscript{151} Law No. 2003, \textit{supra} note 109.
avenues (friends, adults, fake identification, shoplifting, and the internet).152 According to a 2008 survey conducted in the U.S., 57 percent of teenagers most of whom are 13 or 14 year old and even younger admitted that they could procure cigarettes without difficulty compared to 77 percent in 1996.153 Although the rate has lowered, it remains significantly high despite the efforts of governmental and various organizations to target retailers selling to underage smokers.154 In France, although the legal age to purchase cigarettes and tobacco rose from age 16 to age 18,155 too many teenagers continue to smoke. In the United States, children as young as 11, have been successful more than 90 percent of the time in purchasing cigarettes over the Internet156 since the age verification at the time of purchase is generally limited to the checking off of a box

152 O’Neil, supra note 6, at 503.

153 National Institute on Drug Abuse, supra note 128, at 3.

154 Id.


declaring that the purchaser had the legal age to buy cigarettes.\textsuperscript{157} To respond to this spreading issue, the state of New York, which offers the stronger tobacco control programs to reduce underage smoking, attempted to enact a statute to regulate the sales of tobacco products over the internet. A court ruled that the ban was discriminatory on its face against interstate commerce and prohibited direct sales of cigarettes from out-of-state vendors via the internet or other means.\textsuperscript{158} Today, no U.S. law prohibits the purchase of tobacco products over the internet. The 2009 New Federal PACT Act – the Prevent All Cigarette Trafficking Act of 2009\textsuperscript{159} at most prohibits the internet sale of untaxed tobacco products including cigarettes and smokeless products in the United States and bans the delivery of tobacco products to customers through the U.S. mail. By avoiding paying taxes, tobacco users generally paid a lower price which in turn diminished their incentive to stop smoking. Similarly in France, underage smokers can easily purchase cigarettes over the internet once they check off the box stating that they have the legal age to purchase. In Japan, a purchaser of cigarettes over the internet is merely required to provide his or her date of birth.

\textsuperscript{157} \textit{Id.}


\textsuperscript{159} PACT Act entered into force on March 31, 2010. The full text is accessible at http://thomas.loc.gov/cgi-bin/query/D?c111:4:/temp/~c111qlUJKY::.
Another reason which may explain why teenagers still smoke is because they do not conceptualize the risk of death or illness derived from tobacco consumption. Indeed, since tobacco-related health effects are not instant, the teenager’s perception of tobacco is significantly altered from that of an adult smoker who often had to deal with the consequences. According to the WHO, most of tobacco harm to health does not become evident until years or even decades after the onset of use.\textsuperscript{160} Thus, teenagers believe that they have control over the product because they are young and healthy and can give up any time they want. Yet, more than five million children alive today die prematurely from smoking-related illness.\textsuperscript{161}


Strategies to reduce underage smoking have been either proposed but never implemented or have been rejected or ineffective. Since the effects of tobacco are less obvious in the short-term, teenagers will continue perceiving smoking as an acceptable

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\textsuperscript{160} WHO, \textit{supra} note 2.
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and legal social behavior. Hence, teenagers refuse to budge and continue using tobacco products despite the health risks incurred.

In an article discussing tobacco reduction among teenagers, Timothy DeGeeter stated that “tobacco should be treated like alcohol with serious consequences for minors caught with tobacco products.” DeGeeter further stated that teenagers caught illegally possessing or using tobacco products should face monetary penalties and serve community service. This controversial approach has been widely shared in the United States where a majority of states implemented tobacco laws which penalize the purchase, use, or possession of tobacco products by teenagers with the hope to change teenagers’ behavior.

In 2010, forty-five states and the District of Columbia enacted laws that penalize for tobacco sales-related offenses. Among these states, 38 states and the District of

162 Id.
164 Id.
166 Id. at 8.
Columbia prohibit teenagers from possessing and/or use tobacco products.\textsuperscript{167} Under PUP laws, young offenders are held accountable and face penalties that vary from state to state in terms of the offense. Generally, state laws vary in terms of the offense itself (purchase, attempt to purchase, possession, and use), the penalty imposed (confiscation of products, fine, community service, mandatory attendance to cessation counseling programs, attending smoking education, suspension of driver’s license or learner’s permit, jail time for recidivists), and the agency responsible for the enforcement.\textsuperscript{168} The driving license suspension has proven to be the most effective as teenagers cannot wait to reach sixteen to drive.

Typically, in local communities, when a youth is caught in possession or use of tobacco products, a citation is issued, the parents are notified, a warning is issued, and the youth must appear in court.\textsuperscript{169} However, states try to avoid criminal records for young offenders. Thus, they rarely face jail time and generally face a fine, community

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\textsuperscript{167} Id.

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service, participation in cessation program, and unlimited counseling. In Arizona, for instance, teenagers who buy, possess, or accept tobacco products are guilty of a petty offense. If the teenager previously caught in possession of tobacco fails to appear in court after being issued a citation, his driving license is suspended. If the teenager does not have a driving license yet, he is prevented from obtaining one until the age of eighteen. In California, a teenager who purchases, receives, or possesses any type of tobacco product is punished by a fine of USD75 and 30 hours of community service. States like Florida, Indiana, and Utah have set up teen smoking courts where young offenders must appear with their parents. Although the process remains traditional, the process resembles that of a prevention program. Generally, the offending teenager appears before the judge and must attend a lecture given by a throat cancer survivor and watch an anti-smoking video. Penalty for a teenager’s first violation

170 Id.


172 Id.

173 Id.


176 Id.

177 Id.
within 12-week period is 16 hours of community service or a fine of USD 25 and attend a school approved anti-tobacco program.\textsuperscript{178}

In addition to PUP laws enacted at the state level, many local communities have issued ordinances that make it illegal for a teenager to possess or use tobacco products.\textsuperscript{179} However, eighteen states have totally or partially prevented local communities from implementing stronger or inconsistent local teen laws. California provides a limited preemption regarding penalties for violation of some of its youth access laws.\textsuperscript{180}

Thus, U.S. states’ governments initially focused their efforts on penalizing the vendor who would sell tobacco products to teenagers rather than on the user. However, in light of the growing rise in teen tobacco use, they have implemented PUP laws to help vulnerable teenagers who reject the idea that they need help or will inevitably face a premature death. By doing so, they shifted their focus on the user of tobacco products.

Tobacco control advocates argue that this is a drastic and excessive measure which tends to penalize youths instead of supporting them in their fight against their

\textsuperscript{178} FLA. STAT. Ch. 569.11 (2001).

\textsuperscript{179} Id.

\textsuperscript{180} CA BUS. & PROF. CODE sec. 22952 (1994)
nicotine addiction. In a review of the subject, Wakefield and Giovino argue that PUP laws shifts the attention away from vendors who illegally sell tobacco products to teenagers and may create a black market opportunity for tobacco products. Others advance that PUP laws are effective because teenagers are likely to seek help because of the fear of being penalized.

No teen PUP laws exist in Japan and France and it is unlikely that these countries will follow the U.S. PUP laws approach to deter teenagers from smoking. Rather, they believe that the focus of their efforts to curb underage smoking should remain on the sale of the product rather than on its use and possession. By doing so, they target and penalize vendors who are responsible for selling illegally tobacco products to teenagers or employers who fail to comply with non-smoking laws in the work place.

No recent empirical studies exist on PUP laws. However, while the effectiveness of PUP laws remains mixed and controversial, studies have shown that teenagers are often not aware of their existence. In addition to issues of detection, PUP laws are difficult to enforce.

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182 Id.

CONCLUSION

Tobacco products pose serious health risks to teenagers. Once it was believed that if governments did not act more effectively by condemning the purchase, use, and possession of tobacco products by teenagers and rapidly enacting laws to make them illegal, teen smoking would be on the rise. To that extent, most states in the United States have followed this approach and implemented PUP laws that penalize teen smoking. Yet, recent studies show that teen smoking is still on the rise. Japan and France have not followed the U.S. approach to penalize and criminalize teen tobacco use and will unlikely do so because they understand that punishment and intimidation are not the answer to curb underage smoking. Instead, they believe rightfully that teenagers are likely to become more resilient to these laws and to continue smoking. Therefore, their primary focus remains on the purchase of the product rather than on its use targeting vendors and suppliers of tobacco products who provide these products illegally to underage smokers. The war against tobacco has been declared and so far, despite encouraging results made in the United States, Japan, and France, victory is still away and can only be achieved when teenagers are freed from the smoke. Although time has come to render compliance to the law a shared responsibility, the success of combating teen smoking should rest in the hands of those who promote educational and support cessation programs rather than punishment.