

Summer 1980

Legal Conflict between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air, The

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THE LEGAL CONFLICT BETWEEN SMOKERS AND NONSMOKERS: THE MAJESTIC VICE VERSUS THE RIGHT TO CLEAN AIR

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I. INTRODUCTION

Ever since the First World War, cigarette smoking has been a popular habit in the United States.¹ As recently as 1966, 42% of the adults in the United States smoked,² and in 1978 an estimated 54 million Americans smoked 615 billion cigarettes.³ During the last sixteen years, however, the popularity of tobacco smoking has suffered some severe jolts. In 1964, the Surgeon General determined that cigarette smoking was hazardous to the health of the smoker and proclaimed it a health hazard of sufficient magnitude to warrant remedial action.⁴ The 1972 Surgeon General's report announced that cigarette smoking was not only dangerous to the smoker,

1. S. WAGNER, CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS 36-44 (1971). The ambivalent public attitude toward smoking is reflected by Mark Twain's description of smoking as "The Majestic Vice." S. CLEMENS, THE ADVENTURES OF TOM SAWYER 114 (1963).

2. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH vii (1979) [hereinafter cited as 1979 REPORT]. The percentage has since dropped to 33%. *Id.*

3. *Id.*

4. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SMOKING AND HEALTH 33 (1964) [hereinafter cited as 1964 REPORT].

but probably dangerous to the people around him, too.⁵ The 1975 and 1979 reports confirmed this finding.⁶

As the dangers of smoking have become more understood, several measures have been taken to protect people who choose not to smoke from those who smoke: states have enacted statutes;⁷ cities have passed ordinances;⁸ federal legislation has been suggested and, in some cases, implemented;⁹ constitutional arguments have been formulated;¹⁰ common law protections have found new application;¹¹ and, familiar tort theories have been considered.¹² The purpose of this Comment is to analyze the legal conflict between smokers and nonsmokers with special emphasis upon the legal remedies that exist for the nonsmoker who cares enough about his rights to seek legal redress.

II. EARLY HISTORY OF THE CONFLICT BETWEEN SMOKERS AND NONSMOKERS

Although the legal battle between smokers and nonsmokers is a recent development in many ways, in some respects it is a resurrection of an earlier crusade against smokers.¹³ Restrictions on smoking reached their zenith in the United States around the turn of the century. In 1901, twelve states had statutes restricting or forbidding the sale or use of cigarettes.¹⁴ Cigarette smoking was considered reprehensible and immoral,¹⁵ in addition to being a fire hazard.¹⁶ The nonsmoking statutes did not remain on the books very long, though; the fiasco of prohibition turned the public mood against such absolute prohibitions and the nonsmoking statutes were repealed simultaneously with the demise of the eighteenth amendment. By 1927, all of the statutes forbidding the sale or use of cigarettes had been repealed.¹⁷

Between 1927 and 1964 very few smoking laws existed. In the late sixties and throughout the seventies, however, more and more studies confirmed the danger a smoking cigarette presents to nearby nonsmokers,

5. PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *SMOKING AND HEALTH* 117-35 (1972) [hereinafter cited as 1972 REPORT].

6. 1979 REPORT, *supra* note 2, ch. 11; PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT TO THE SURGEON GENERAL* (1975) [hereinafter cited as 1975 REPORT].

7. See text accompanying notes 57-120 *infra*.

8. See text accompanying notes 121-30 *infra*.

9. See text accompanying notes 136-46 *infra*.

10. See notes 147-83 and accompanying text *infra*.

11. See notes 184-200 and accompanying text *infra*.

12. See notes 201-74 and accompanying text *infra*.

13. See generally S. WAGNER, note 1 *supra*; Annot., 20 A.L.R. 926 (1922).

14. Comment, *The Resurgence and Validity of Antismoking Legislation*, 7 U. CAL. D.L. REV. 167, 169 (1974) [hereinafter cited as *Antismoking Legislation*].

15. Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 SAN FERN. V.L. REV. 141, 148 (1979) [hereinafter cited as *Non-Smoker*].

16. *Antismoking Legislation*, *supra* note 14, at 168.

17. S. WAGNER, *supra* note 1, at 44; *Antismoking Legislation*, *supra* note 14, at 174.

and nonsmokers began asserting their right to safety. Anti-smoking statutes are appearing again,¹⁸ although the modern statutes are significantly different from their predecessors. When the early laws were enacted, cigarette smoke had not been proven dangerous to humans.¹⁹ Today that danger is widely recognized.²⁰ While the early statutes were enacted largely to enforce moral behavior and to prevent fire hazards,²¹ the recent statutes are specifically designed to protect people from the health dangers of cigarette smoke.²² Also, while the older statutes were aimed at prohibiting all cigarette smoking, modern statutes seek only to protect people in public places from the smoke of others.²³ The modern statutes, unlike the overbroad early laws,²⁴ are probably here to stay.

III. MEDICAL EVIDENCE ON THE HARM OF "INVOLUNTARY SMOKING"

The widely recognized dangers of tobacco smoking²⁵ to the smoker lend credence to Horace Greeley's definition of a cigar as "a fire at one end and a fool at the other."²⁶ The scientific evidence on the subject is so overwhelming that courts have taken judicial notice of "the toxic nature of cigarette smoke and its well known association with emphysema, lung cancer and heart disease."²⁷ In 1979, cigarette smoking was the single most

18. See notes 50-135 and accompanying text *infra*.

19. Speculation existed, though. The Tennessee Supreme Court had this to say about cigarettes as long ago as 1900:

We think they are not [legitimate articles of commerce] because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact

Austin v. State, 101 Tenn. 563, 566, 48 S.W. 305, 306 (1898), *aff'd*, 179 U.S. 343 (1900).

20. See notes 25-49 and accompanying text *infra*.

21. See notes 15 & 16 and accompanying text *supra*.

22. See note 68 and accompanying text *infra*.

23. See note 135 and accompanying text *infra*.

24. Although a city ordinance entirely banning smoking in public streets because of the fire hazard was upheld in *Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847), similar statutes were found too broad in *Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914), and *Hershberg v. Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911). For a lengthy discussion of early antismoking action, see *Anti-smoking Legislation*, *supra* note 14, at 168-75.

25. All tobacco smoking can be dangerous to involuntary smokers. (For the definition of involuntary smoking, see text accompanying note 30 *infra*.) Scientific research indicates that pipe and cigar smoke contain the same compounds found in cigarette smoke. See generally 1979 REPORT, *supra* note 2, ch. 13. When the phrase "cigarette smoking" is used in this Comment, cigars and pipes are also included.

26. S. WAGNER, *supra* note 1, at 31.

27. *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 527, 368 A.2d

important preventable environmental factor contributing to illness, disability, and death in the United States, and health damage resulting from cigarette smoking cost the nation an estimated 27 billion dollars in medical care, absenteeism, decreased work productivity, and accidents.²⁸ In 1970, a public opinion poll reported that 87.5% of the population agreed with the statement: "Smoking cigarettes is harmful to health."²⁹ Despite the wide recognition that cigarette smoking is harmful to the smoker, less is known about the danger of involuntary smoking.

Involuntary smoking, also called passive smoking or second-hand smoking, occurs when a nonsmoker breathes air that contains the tobacco smoke of a smoker.³⁰ The tobacco smoke in the air comes from two sources: mainstream and sidestream smoke. Mainstream smoke is the smoke that is pulled through the cigarette by the smoker. It is filtered both by the cigarette and the lungs of the smoker. Sidestream smoke is the unfiltered smoke from the lit end of a burning cigarette, which, because of the lack of filtering, is even more dangerous to the nonsmoker than the exhaled smoke from the smoker's mouth.³¹

Only recently has involuntary smoking been recognized as a health hazard. The bombshell 1964 Surgeon General's report did not discuss involuntary smoking. The 1972 report, however, mentioned the possible hazards of involuntary smoking,³² and the 1975 and 1979 reports contain additional findings in this regard.³³ In addition, the American College of Chest Physicians, the World Health Organization, and the World Conference on Smoking and Health have issued statements warning of the dangers of involuntary smoking.³⁴ The latter two organizations have recommended restrictions on smoking in public places.³⁵ Also, involuntary smoking has been the subject of a large number of recent articles in medical journals and other scholarly publications.³⁶

408, 414 (App. Div. 1976). *Accord*, 29 AM. JUR. 2d *Evidence* § 120 (1967) (citing four cases). Several legislatures have specifically recognized the danger of cigarette smoke. See notes 66-68 and accompanying text *infra*.

28. 1979 REPORT, *supra* note 2, at vii.

29. *Antismoking Legislation*, *supra* note 14, at 181.

30. See 1979 REPORT, *supra* note 2, at 11-15.

31. A. BRODY & B. BRODY, *THE LEGAL RIGHTS OF NONSMOKERS* 21 (1977) [hereinafter cited as BRODY]; *Non-smoker*, *supra* note 15, at 144.

32. 1972 REPORT, note 5 *supra*.

33. See note 6 and accompanying text *supra*.

34. BRODY, *supra* note 31, at 14; ACTION ON SMOKING & HEALTH, *HISTORY OF THE WAR AGAINST SMOKING 1964-1978* (n.d.). Action On Smoking and Health (ASH), 2000 H. Street, N.W., Washington, D.C. 20006, is a national non-profit charitable organization dedicated to reducing "the deadly toll of smoking, and to protect[ing] the rights of nonsmokers." *Id.* ASH was formed in 1967 by attorneys, physicians, and other citizens who felt there was a need for legal action against smoking.

35. BRODY, *supra* note 31, at 14.

36. The 1979 REPORT, note 2 *supra*, lists 85 documents relating to the dangers of involuntary smoking. Humorist Art Buchwald reports "another side to the story. Smokers believe that Involuntary Smokers are just getting a free smoke from the cigarette addict." Buchwald quotes a smoker, one Morris Phillip, as

Although the full extent of the dangers of involuntary smoking is not yet known, certain conclusions have already been stated with confidence:

1. Most healthy people in involuntary smoking situations suffer minor eye and throat irritation.³⁷

2. Involuntary smoking by healthy people can cause slight deterioration in psychomotor performance, especially attentiveness and cognitive function.³⁸

3. Involuntary smoking does significant harm to fetuses, infants, and children.³⁹

4. People with certain heart diseases may suffer exacerbations of their symptoms as a result of involuntary smoking.⁴⁰

5. People with certain lung diseases (e.g., chronic bronchitis, emphysema) have considerable excess mortality under conditions of severe air pollution, and involuntary smoking situations can produce pollutants to a degree as high or higher than those that occur during air pollution emergencies.⁴¹ The U.S. Public Health Service reports that there are 15½ million people with such chronic lung problems in the United States.⁴²

6. Many individuals appear to be allergic to tobacco smoke.⁴³ Estimates range from 1.5 million to at least 34 million.⁴⁴ Symptoms vary from "eye irritation, nasal symptoms, headache, cough, wheezing, sore throat, nausea, hoarseness, dizziness, upper respiratory tract distress, choking sensation, loss of memory, lightheadedness, difficulty in concentration, depressive personality changes, double vision, short blackouts, to lesions on the skin."⁴⁵

saying, "We primary smokers are sick and tired of being bugged by secondary smokers, particularly when they start wheezing and sneezing and having a good time at our expense." Columbia (Mo.) Tribune, July 31, 1979, at 4, col. 1.

37. 1979 REPORT, *supra* note 2, at 11-25; 1975 REPORT, *supra* note 6, at 107; *Antismoking Legislation*, *supra* note 14, at 178.

38. 1979 REPORT, *supra* note 2, at 11-34.

39. BRODY, *supra* note 31, at 33; PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, *THE SMOKING DIGEST* 26 (1977) [hereinafter cited as *SMOKING DIGEST*].

40. 1979 REPORT, *supra* note 2, at 11-29; 1975 REPORT, *supra* note 6, at 107; *SMOKING DIGEST*, *supra* note 39, at 24. A recent experiment concluded that involuntary smoking is deleterious to the nonsmoker and significantly reduces small airways function. White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed To Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980).

41. 1979 REPORT, *supra* note 2, at 11-31; 1975 REPORT, *supra* note 6, at 105; *SMOKING DIGEST*, *supra* note 39, at 24-26.

42. Testimony of David P. Cook, Program Director of the American Lung Association of Western Missouri, before the Judiciary Committee of the Missouri House of Representatives (Jan. 16, 1979).

43. BRODY, *supra* note 31, at 33; *SMOKING DIGEST*, *supra* note 39, at 24. The 1979 REPORT, note 2 *supra*, states, "the existence of a true tobacco allergy has not been clearly established," but speculates that people allergic to other things may also be allergic to tobacco smoke. *Id.* at 11-31.

44. BRODY, *supra* note 31, at 33; Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENV'T L. 62, 67 (1976) [hereinafter cited as *Ire*].

45. BRODY, *supra* note 31, at 33 (footnotes omitted).

7. Involuntary smoking may contribute to the development of serious diseases in otherwise healthy individuals.⁴⁶

In short, the danger of cigarette smoke to nonsmokers is a significant health problem. Most healthy people experience discernible, physical irritation as a result of involuntary smoking.⁴⁷ Moreover, an exposure to involuntary smoking that causes only minor consequences to a healthy person may have a much more severe effect on children, people with allergies, or people suffering from heart or lung disease.⁴⁸ The number of people seriously affected by the smoke of other people's cigarettes may be as high as 34 million.⁴⁹

IV. SMOKING LEGISLATION

A. Public Attitude

The recent revelations about the dangers of involuntary smoking have prompted a great deal of legislative action during the seventies. Federal, state, and local governments and agencies are heeding the growing medical evidence and the changing attitudes of the public about smoking. As awareness of the danger of smoking has increased, the attitude of people toward smokers has altered significantly. In surveys done by the Department of Health, Education, and Welfare,⁵⁰ people were asked to respond to the statement, "It is annoying to be near a person who is smoking cigarettes." Their responses:

	1964	1966	1970
Agree	44.8%	47.4%	58.5%
Disagree	51.7%	48.6%	38.3%

A 1978 survey in St. Joseph, Missouri,⁵¹ asked the same question. Over

46. More than 3000 components of tobacco smoke have been identified, and several have been implicated in the development of specific diseases. Upwards of 90% of cigarette smoke is composed largely of a dozen gases that are hazardous to health, and the remainder is particulate matter, of which tar and nicotine are two of the best known components.

SMOKING DIGEST, *supra* note 39, at 17. Research done on laboratory animals has serious implications for human beings: a significant number of mice exposed to second-hand smoke over a two-year period developed severe bronchitis and inflammation of the bronchial tubes that connect the windpipe with the lungs; rabbits exposed to smoke from 20 cigarettes per day for two to five years developed emphysema; dogs exposed to cigarette smoke ten times per week for one year suffered a breakdown in lung tissues; rats exposed to second-hand smoke for 45 minutes a day for two to six months showed twice as many lung tumors as a control group. SECOND-HAND SMOKE—AN AMERICAN LUNG ASSOCIATION BROCHURE, *reprinted in* D. SHIMP, HOW TO PROTECT YOUR HEALTH AT WORK 115-21 (1976) [hereinafter cited as SHIMP BOOK].

47. See note 37 and accompanying text *supra*.

48. 1979 REPORT, *supra* note 2, at 11-29.

49. See note 44 and accompanying text *supra*.

50. *Antismoking Legislation*, *supra* note 14, at 181.

51. The St. Joseph Chapter of the Center for Nonsmokers' Rights conducted a 100-call random telephone survey of adults 18 years and older (Feb. 1978). Information obtained from the American Lung Association of Western Missouri, 2007 Broadway, Kansas City, Mo. 64108.

60% of the population surveyed agreed with the statement, and 40% of the smokers agreed with it.⁵²

In the surveys, the people were also asked for a response to the statement, "The smoking of cigarettes should be allowed in fewer places than it is now."⁵³ Even in 1964, 51.2% agreed with the statement.⁵⁴ Since then, the percentage of people agreeing has steadily increased.⁵⁵ A nation-wide study conducted in 1978 for the Tobacco Institute by the Roper Organization had the following results: 62% favored separating smokers from non-smokers at train stations, airports, and bus stations; 61% favored separation in the work place; 73% favored separation at indoor sporting events; and 73% favored separation in eating places.⁵⁶ The survey results clearly indicate that the legislator who advocates a statute restricting smoking in public has the support of a majority of Americans.

B. State Statutes

As of 1980, thirty-four states and the District of Columbia have legislation restricting smoking in various places in order to reduce involuntary smoking, and one state accomplishes the same result by extensive administrative regulations.⁵⁷ The statutes restricting smoking vary greatly

52.	Smokers	Nonsmokers	Combined %
Agree	40%	75%	61%
Disagree	52.5%	21.7%	34%
Don't know	7.5%	3.3%	5%

53. See notes 50 & 51 *supra*.

54. *Antismoking Legislation, supra* note 14, at 181.

55.

	HEW Survey			1978 St. Joseph Survey		
	1964	1966	1970	Smokers	Non-smokers	Combined %
Agree	51.2%	51.8%	56.8%	35%	68.3%	55%
Disagree	38.8%	36.8%	36.3%	55%	15%	31%
Don't know	—	—	—	10%	16.7%	14%

56. Wall St. J., Oct. 23, 1979, at 5, col. 2.

57. For states enacting legislation to reduce involuntary smoking, see Groups I, II, and III below. Other states have legislation restricting smoking, enacted for reasons other than protecting nonsmokers. See Group IV below. A few states have no legislation restricting smoking. See Group V below.

GROUP I: ALASKA STAT. §§ 18.35.300, .310, .320, .330, .340 (Cum. Supp. 1979); ARIZ. REV. STAT. ANN. § 36-601.01 (1974); ARK. STAT. ANN. §§ 82-3701 to -3703 (Cum. Supp. 1979); COLO. REV. STAT. §§ 25-14-101 to -105 (Cum. Supp. 1978); CONN. GEN. STAT. ANN. § 1-21b (West Cum. Supp. 1980); GA. CODE ANN. § 26-9910 (1977); HAWAII REV. STAT. §§ 321-201 to -206 (1976); IOWA CODE §§ 98A.1-6 (Supp. 1980); KAN. STAT. ANN. § 21-4008 (Cum. Supp. 1979); MASS. GEN. LAWS ANN. ch. 270, § 21 (West Cum. Supp. 1980); MINN. STAT. ANN. §§ 144.411-417 (West Supp. 1980); 1979 Mont. Laws ch. 368; NEB. REV. STAT. §§ 71-5701 to -5713 (Supp. 1979); NEV. REV. STAT. §§ 202.2490-2492 (1975); N.H. REV. STAT. ANN. § 155.42 (Supp. 1979); N.J. REV. STAT. § 2C:33-13 (Supp. 1979); N.Y. PUB. HEALTH LAW §§ 1399-o to -q (McKinney Supp. 1979); N.D. CENT. CODE §§ 23-12-09 to -11 (1978); OHIO REV. CODE ANN. § 379.031 (Page Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1247 (West Supp. 1979); R.I. GEN. LAWS §§ 23-56-1, -2 (Cum. Supp. 1978); S.D. CODIFIED LAWS ANN. §§ 22-36-1, -2 (1979); TEX. PENAL CODE ANN. tit. 10, § 48.01 (Vernon Supp. 1979); UTAH CODE ANN. §§ 76-10-101 to -110 (Cum. Supp. 1975); 248 WAC 152 (1975) (Washington state regulations).

in scope and function. Twenty-five states have a specific and fairly comprehensive statute restricting smoking in public.⁵⁸ Generally, Clean Indoor Air legislation contains the four elements that the American Lung Association has identified as common to effective anti-smoking legislation:

1. Definition of terms, particularly those words which have more than one connotation (e.g., "public place").
2. Requirement that plainly visible signs be posted in all areas where smoking is restricted or prohibited to alert everyone to the regulations in effect.
3. Clear delegation of authority: identification of the officials and/or agencies responsible for the publicity, posting, and enforcement of the regulations.
4. Designation of penalties for violations to provide incentives for adhering to the regulations.⁵⁹

GROUP II: MD. ANN. CODE art. 38A, § 23 (1957) (fireworks), art. 43, § 54-I (1957) (physicians' offices, nursing homes, hospitals), art. 43, § 200 (1957) (food canning), art. 78, § 35A (Supp. 1979) (buses), art. 89, § 64 (1957) (elevators); MICH. COMP. LAWS §§ 333.21333 (1980) (homes for the aged), 333.21531 (1980) (hospitals), 333.21733 (1980) (nursing homes), 408.820 (Supp. 1980) (elevators), 289.707a (Supp. 1980) (retail food establishments), 333.12905 (1980) (restaurants), 289.129 (1967) (canneries); OR. REV. STAT. §§ 243.345, .350 (1979) (state offices), 192.710 (1979) (public meetings), 441.815 (1979) (hospitals), 479.015 (1979) (elevators).

GROUP III: CAL. HEALTH & SAFETY CODE §§ 25940, 25940.5, 25941 to 25947 (West Supp. 1980) (certain areas in publicly owned buildings); CAL. PUB. UTIL. CODE § 561 (West Supp. 1980) (public transportation) (California's Clean Indoor Air Act, ch. 10.7, was rejected at the general election held Nov. 7, 1978); DEL. CODE ANN. tit. 11, § 1326 (1979) (buses); D.C. CODE ANN. § 44-216 (Supp. 1978) (public transportation); FLA. STAT. §§ 823.12 (1976) (elevators), 255.27 (Supp. 1980) (government buildings); IDAHO CODE §§ 18-5904 to -5906 (1979) (public meetings); MISS. CODE ANN. § 97-35-1(4), (7) (1972) (buses); PA. STAT. ANN. tit. 35, § 361 (Purdon Supp. 1980) (hospitals); PA. STAT. ANN. tit. 53, § 3702 (Purdon 1972) (retail stores); PA. STAT. ANN. tit. 35, § 1225 (Purdon 1977) (theatres, public assemblies); WASH. REV. CODE ANN. § 47.56.730 (Supp. 1980) (ferries).

GROUP IV: ILL. ANN. STAT. ch. 96½, § 2105 (Smith-Hurd 1979) (mines); ILL. ANN. STAT. ch. 96½, § 2013 (Smith-Hurd 1979) (magazine); ILL. ANN. STAT. ch. 127½, § 109 (Smith-Hurd Cum. Supp. 1976) (fireworks); IND. CODE ANN. §§ 16-1-22-21, 16-6-4-23 (Burns 1973) (food processed or stored); KY. REV. STAT. ANN. § 352.170(3) (Baldwin 1977) (mines); KY. REV. STAT. ANN. § 438.050 (Baldwin Cum. Supp. 1978) (school premises); LA. REV. STAT. ANN. § 17:416(A) (West Supp. 1980) (school premises); ME. REV. STAT. ANN. tit. 25, § 2433 (1964) (mills, buses, factories, shipyards; fire prevention in mind); RSMo § 320.130 (1978) (fireworks); N.M. STAT. ANN. §§ 63-7-2, -3, 63-14-17 (1974) (mines); S.C. CODE §§ 23-35-90, -100 (1976) (fireworks); S.C. CODE § 59-67-150 (1976) (school bus); TENN. CODE ANN. § 53-3011 (1977) (fireworks); TENN. CODE ANN. §§ 59-6-103(b), 09(j), -510(a), -7-106 (1980) (mines); TENN. CODE ANN. § 59-7-108(h) (1980) (magazine); VT. STAT. ANN. tit. 20, § 2752 (1968) (building with sign posted; fire prevention measure); VA. CODE § 3.1-379 (1973) (food processing); VA. CODE § 45.1-39 (1974) (magazines); VA. CODE § 45.1-98 (1974 & Cum. Supp. 1979) (mines); W. VA. CODE § 21-3-8 (1978) (factories, mercantile establishments); W. VA. CODE § 16-9-7 (1979) (schools); W. VA. CODE § 22-2-57(b) (1978) (mines); W. VA. CODE § 22-2-53 (1978) (mine surface); WYO. STAT. § 30-6-107 (1977) (mines).

GROUP V: Alabama, North Carolina, and Wisconsin.

58. Group I, note 57 *supra*.

59. SMOKING DIGEST, *supra* note 39, at 83.

Three states have a group of statutes, rather than one single comprehensive statute, which limit the places where smoking may occur.⁶⁰ In effect, these statutes are probably just as comprehensive as those in most single-statute states. Seven states and the District of Columbia have statutes for protection of nonsmokers that only prohibit smoking in a particular public place.⁶¹ These statutes typically mention only buses or elevators, although some proscribe smoking in certain public meetings, government buildings, retail stores, or hospitals. Thirteen states have statutes prohibiting smoking in certain areas, not because of the air pollution danger to nonsmokers, but because of fire hazards, food contamination, or restrictions on smoking by children at school.⁶² Three states have no statutes prohibiting smoking.⁶³

All twenty-five comprehensive anti-smoking statutes were enacted since 1974. The first state to pass a comprehensive law prohibiting smoking in designated public places was Arizona.⁶⁴ The most recent was Connecticut, where the Connecticut Clean Indoor Air Act went into effect October 1, 1979.⁶⁵ The comprehensive statutes vary greatly in detail, but many of them contain similar characteristics.

Several state statutes declare in a preamble that smoking is a health hazard⁶⁶ or a public nuisance.⁶⁷ A few legislatures have gone even further in stating the statutory purpose, saying that the statute is meant to protect the right of the nonsmoker to breathe clean air.⁶⁸ Such a statement of

60. Group II, note 57 *supra*.

61. Group III, note 57 *supra*.

62. Group IV, note 57 *supra*.

63. Group V, note 57 *supra*.

64. ACTION ON SMOKING & HEALTH, HISTORY OF THE WAR AGAINST SMOKING 1964-1978 (n.d.).

65. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Sept. 1979). In Missouri, the Missouri Clean Indoor Air Act passed out of the Interstate Committee with a 3-2-1 vote in January 1980. The bill, however, died on the Perfection Calendar.

66. See laws from Arizona, Arkansas, California, Colorado, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, and Washington, cited note 57 *supra*.

67. See laws from Alaska, Arizona, Oklahoma, Rhode Island, South Dakota (statute listed under heading Public Nuisance), and Idaho (statute listed under heading Public Nuisance), cited note 57 *supra*.

68. ARK. STAT. ANN. § 82-3701 (Cum. Supp. 1979) provides:

Information available to the General Assembly based upon scientific research data has shown that nonsmokers often receive damage to their health from the smoking of tobacco by others. It is therefore declared to be the public policy of the state of Arkansas that the rights of nonsmokers be protected in the manner provided in this Act.

The Rhode Island "Smoking in Public Places" statute, R.I. GEN. LAWS § 23-56-1 (Cum. Supp. 1978), has a similar preamble:

The use of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking but also to the non-smoking person who is required to breathe such contaminated air. The most pervasive intrusion of the non-smoker's right to unpolluted air space is the uncontrolled smoking in public places. The legislature intends, by the enactment of this chapter, to protect the health and atmospheric environment of the non-smoker by regulating smoking in certain public places.

legislative intent and purpose seems to be a good idea. A statute restricting smoking might have been enacted for any of several reasons, including the protection of air, the protection of food, the protection of the community from fire, or the protection of the morals of minors.⁶⁹ Situations could arise where the intent of the legislature would be significant, and in such a situation it helps to have the intent clearly spelled out.

A preamble stating that the legislature recognizes the dangers of involuntary smoking might also be useful for educational and public policy reasons. Since the dangers of involuntary smoking have only become publicized during the seventies and many skeptics still exist,⁷⁰ formal recognition of the danger by a state legislature that has heard the evidence can only serve to help the public by further educating them on the issue. Moreover, use of the words "rights of the nonsmoker" emphasizes that nonsmokers *do* have the right to breathe clean air.⁷¹

The definition given smoking in nonsmokers' rights legislation is important. Many states use the definition: "Smoking in a place or vehicle includes the possession, in that place or vehicle, of a lighted cigarette, cigarillo, cigar, or pipe."⁷² Several statutes include the additional phrase, "or any other lighted smoking equipment."⁷³ Under this phrasing, any newly developed tobacco product that is not necessarily a cigarette, cigarillo, cigar, or pipe would still be covered.⁷⁴

The designation of *where* smoking is prohibited is one of the most important parts of the Clean Indoor Air legislation. A few states prohibit smoking in all indoor public places not designated as smoking areas.⁷⁵ Representative of these statutes is Montana's definition of "indoor public place" as "any indoor area, room, or vehicle used by the general public or serving as a place of work, *including but not limited to* restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, assembly and meeting rooms."⁷⁶ This seems a much more efficient statute than one that attempts to list all of the various indoor public places where smoking is prohibited. Since involuntary smoking is dangerous to nonsmokers, it seems better public policy to start with the presumption that smoking is *not* allowed in *any* indoor public place, and then provide

69. Brody, *supra* note 31, at 154.

70. See note 131 and accompanying text *infra*.

71. For the argument that the right to breathe clean air is a fundamental right protected by the Constitution, see notes 147-83 and accompanying text *infra*.

72. E.g., IOWA CODE § 98A.1 (Supp. 1980).

73. E.g., MINN. STAT. ANN. § 144.413 (West Supp. 1980).

74. Professor Alvan Brody drafted a model statute with a slightly different definition: "'Smoking' means carrying or possessing any lighted tobacco product, except temporarily possessing a tobacco product lighted by another for purposes of immediate extinguishment." Brody, *supra* note 31, at 107.

75. See laws from Colorado, Minnesota, Montana, Nebraska, New Jersey, and Utah, cited note 57 *supra*.

76. 1979 Mont. Laws ch. 368, § 3(2) (emphasis added).

specific smoking areas, than to start with the presumption that smoking is allowed, except in certain forbidden places.⁷⁷

In the statutes that list places where smoking is prohibited, some areas are listed more frequently than others: twenty-four states and the District of Columbia prohibit smoking in public transportation;⁷⁸ twenty-four prohibit smoking in elevators;⁷⁹ twenty-three prohibit smoking in public waiting rooms or various other parts of health care facilities;⁸⁰ twenty-one prohibit smoking in places of recreation or entertainment, like libraries, museums, theaters, lecture or concert halls, auditoriums, or swimming pools;⁸¹ fifteen prohibit smoking in public schools;⁸² twelve prohibit smoking in state-owned buildings;⁸³ eleven prohibit smoking in public meetings;⁸⁴ nine restrict smoking in restaurants;⁸⁵ seven prohibit smoking in supermarkets or food stores;⁸⁶ six prohibit smoking in public department stores;⁸⁷ six prohibit or restrict smoking in any place where the proprietor has posted a "No Smoking" sign;⁸⁸ and six prohibit smoking in *any* public place "including but not limited to" a list of specified places.⁸⁹

77. "Model legislation should ban smoking everywhere nonsmokers have a legal right to be. The burden should be on the smoker to discover where smoking is permitted." Brody, *supra* note 31, at 106.

78. See laws from Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

79. See laws from Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, and Washington, cited note 57 *supra*.

80. See laws from Alaska, Arizona, Arkansas, Colorado, Connecticut, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

81. See laws from Alaska, Arizona, Colorado, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

82. See laws from Alaska, Arizona, California, Colorado, Connecticut, Kentucky, Louisiana, Minnesota, Nebraska, North Dakota, Ohio, Rhode Island, South Dakota, Texas, and Washington, cited note 57 *supra*.

83. See laws from California, Colorado, Connecticut, Florida, Iowa, Minnesota, Nebraska, Nevada, North Dakota, Ohio, Oregon, and Utah, cited note 57 *supra*.

84. See laws from Alaska, Colorado, Connecticut, Hawaii, Idaho, Minnesota, Nebraska, Nevada, Oregon, Utah, and Washington, cited note 57 *supra*.

85. See laws from Colorado, Connecticut, Michigan, Minnesota, Montana, North Dakota, Ohio, Nebraska, and Utah, cited note 57 *supra*.

86. See laws from California, Connecticut, Massachusetts, Michigan, Minnesota, Nebraska, and Rhode Island, cited note 57 *supra*.

87. See laws from Colorado, Minnesota, Nebraska, Pennsylvania, Utah, and Washington, cited note 57 *supra*.

88. See laws from Alaska, Arizona, Georgia, New Hampshire, New Jersey, and Utah, cited note 57 *supra*.

89. See note 75 *supra*.

Most of the specifically named no-smoking areas share the characteristic of being a public place where many people are gathered closely together. Buses, elevators, waiting rooms, theaters, classrooms, and public meeting halls are all viewed as places where if one person smokes, everyone smokes, whether they hold the cigarette or not. These are the most obvious places where smoking should be prohibited.

Another obvious place where smoking should be prohibited is the health care facility. Because people who suffer heart and lung disease have been proven to be the most susceptible to immediate injury from exposure to cigarette smoke,⁹⁰ smoking should clearly be prohibited in the places where the sick have gone to seek medical assistance.

An often overlooked place where smoking should be prohibited or restricted is the workplace. Only at the workplace is the nonsmoker required to spend eight hours per day at his assigned spot. If the spot is next to a smoker, the nonsmoker will probably experience some discomfort or even illness.⁹¹ Many companies have voluntarily prohibited smoking in the workplace.⁹² Several offer bonuses to employees who stop smoking.⁹³ Other companies, however, may prefer to irritate the nonsmokers than the smokers.⁹⁴ The statutes in Colorado,⁹⁵ Minnesota,⁹⁶ Montana,⁹⁷ Nebraska,⁹⁸ Oregon,⁹⁹ and Utah¹⁰⁰ contain sections specifically dealing with smoking in the workplace.

The Minnesota, Montana, Nebraska, and Utah statutes specify enclosed indoor areas "serving as a place of work" as areas where smoking is prohibited. The Minnesota statute is representative. It states that "the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximation of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of non-

90. See notes 40-45 and accompanying text *supra*.

91. A recent study indicates that 70% of nonsmokers who are not allergic to tobacco smoke suffer eye irritation when exposed to tobacco smoke. Of nonsmokers with allergies, 73% suffer eye irritation. The figures for nasal irritation are 29% and 67%, respectively. See *Antismoking Legislation*, *supra* note 14, at 178.

92. J.C. Penney, N.L.T. Corp., and Continental Illinois Bank separate smokers from nonsmokers. SHIMP BOOK, *supra* note 46, at 3. Thomas Edison refused to hire smokers. S. WAGNER, *supra* note 1, at 42.

93. Cybertek Computer Products, Inc., of Los Angeles, Intermatic Inc., of Spring Grove, Ill., and Speed Call Corp., of Hayward, Cal., all pay their employees not to smoke at work. ACTION ON SMOKING AND HEALTH, ASH NEWSLETTER (Jan.-Feb. 1980).

94. Professor Alfred W. Blumrosen has suggested that a company might take this approach out of inertia. SHIMP BOOK, *supra* note 46, at 42.

95. COLO. REV. STAT. § 25-14-102 (Cum. Supp. 1978).

96. MINN. STAT. ANN. § 144.413 (West Supp. 1980).

97. 1979 Mont. Laws ch. 368, § 3(2).

98. NEB. REV. STAT. § 71-5704 (Supp. 1979).

99. OR. REV. STAT. § 243.350 (1979). The Oregon statute restricting smoking in the workplace only applies to places of employment operated by the state of Oregon.

100. UTAH CODE ANN. § 76-10-101 (Cum. Supp. 1978).

smoking employees.”¹⁰¹ Although involuntary smoking bothers some non-smokers less than others, it is important for courts interpreting “comfort” to be familiar with the evidence that involuntary smoking causes at least physical discomfort to the *majority* of its victims.¹⁰²

One key feature of the legislation restricting smoking in the workplace is an exception for enclosed offices occupied exclusively by smokers.¹⁰³ Under this exception, a private, enclosed office occupied exclusively by smokers, even if visited by nonsmokers, is not considered a public place for purposes of the statute. Without this provision, a law prohibiting smoking in the workplace could have the unintended effect of prohibiting smoking in the confines of one’s private office.

Some statutes restricting smoking include a provision to the effect that existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoking in adjacent nonsmoking areas.¹⁰⁴ The wisdom of this provision is debatable. Existing partitions and ventilation systems may be ineffective in preventing potentially harmful amounts of smoke¹⁰⁵ from drifting into the nonsmokers’ areas. On the other hand, achieving absolute separation by requiring solid walls and new ventilation systems could be inordinately costly for many businesses and organizations. The legislatures evidently have balanced these considerations and have decided the large cost outweighs the questionable harm. Steps should be taken, however, to ensure that new buildings are designed to protect nonsmokers from the outset. Also, government and private bodies large enough to afford the cost should be encouraged to make structural changes necessary to provide the maximum protection immediately.

Many of the Clean Air statutes require “No Smoking” signs in certain situations.¹⁰⁶ These requirements serve several functions: proprietors who, might not do so voluntarily are forced to put up the signs; many smokers notice the signs and presumably obey them; and the people who smoke in spite of the signs have at least been warned that smoking is prohibited in the particular area.

Another important provision of the Clean Air legislation is the section delegating authority for enforcement and implementation. In Minnesota, for example, the State Commissioner of Health is charged with the responsibility of adopting regulations to implement the statute.¹⁰⁷ The commissioner, a local board of health, and any affected party are specifically given the authority to institute injunctive action.¹⁰⁸ Other statutes go into less

101. MINN. STAT. ANN. § 144.414 (West Supp. 1980).

102. See notes 37-49 and accompanying text *supra*.

103. E.g., MINN. STAT. ANN. § 144.413 (West Supp. 1980).

104. See NEB. REV. STAT. § 71-5708 (Supp. 1979).

105. The smoke from one cigarette smoked in four minutes in a room the size of a typical office can produce 36 times the amount of tar particulates considered safe by federal standards. *Ire, supra* note 44, at 66.

106. E.g., MINN. STAT. ANN. § 144.416 (West Supp. 1980).

107. MINN. STAT. ANN. § 144.417 (West Supp. 1980).

108. *Id.*

detail, simply saying the provisions of the act shall be supervised and enforced by local health boards.¹⁰⁹ Many state legislatures have neglected to include any such provision.

The penalty provisions in the various nonsmokers' rights statutes differ significantly, though none are as severe as Tsar Michael's penalties of torture or exile for persons violating his rule against the sale or use of tobacco.¹¹⁰ The stiffest penalties in the United States are in Minnesota, where the offending smoker is subject to a fine of up to five hundred dollars, or a jail sentence of up to ninety days.¹¹¹ The least severe penalties are in Colorado and Massachusetts, which have no penalty provisions at all.¹¹² Typical penalties in other states are fines of "not more than two hundred dollars,"¹¹³ "ten to one hundred dollars,"¹¹⁴ or as low as five dollars.¹¹⁵ Since the purpose of the nonsmoking statutes is to protect the health of nonsmokers, the stiffer penalties seem justified; the penalty ought to be at least high enough to deter violations.

Some statutes penalize not only the smoker, but the proprietor, or person in control of the area, for breach of his duty to protect nonsmokers.¹¹⁶ In order to justify punishment at this level, the statutes first create a duty. For example, the Minnesota statute states that the proprietor or other person in charge of a public place shall make reasonable efforts to prevent smoking by: (1) posting "No Smoking" signs; (2) arranging separate smoking and no-smoking areas; (3) requesting smokers violating the law to cease; or (4) by other appropriate means.¹¹⁷ Several states inflict a higher penalty on proprietors who have failed to stop the smoker than on the smoker himself.¹¹⁸ A proprietor who faces a potential \$500 fine for his failure to act has a strong incentive to take affirmative action to stop smoking in no smoking areas.

Another statutory remedy available to the nonsmoker in some states is the injunction. Minnesota law specifically allows an injunction to be sought by the State Commissioner of Health, a local board of health, or any affected party.¹¹⁹ Even in states where injunctive relief is not expressly allowed by statute, it might be available under common law theories.¹²⁰

109. 1979 Mont. Laws ch. 368, § 8.

110. S. WAGNER, *supra* note 1, at 12.

111. MINN. STAT. ANN. § 609.03(3) (West Supp. 1980). Utah also has a stiff penalty, providing for a fine of up to \$299 and a jail sentence not exceeding 90 days. UTAH CODE ANN. §§ 76-3-204, -205, -301, -10-110 (1978).

112. COLO. REV. STAT. §§ 25-14-101 to -105 (Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 270, § 21 (West Cum. Supp. 1980).

113. E.g., N.J. REV. STAT. § 2C:33-13 (Supp. 1979).

114. E.g., ARK. STAT. ANN. § 82-3703 (Cum. Supp. 1979).

115. E.g., IOWA CODE § 98A.6 (Supp. 1980) (\$5 for the first violation, \$10 to \$100 for each subsequent violation).

116. See laws from Alaska, Connecticut, Iowa, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, and Utah, cited note 57 *supra*.

117. MINN. STAT. ANN. § 144.416 (West Supp. 1980).

118. See laws from Alaska, North Dakota, and Utah, cited note 57 *supra*.

119. MINN. STAT. ANN. § 144.417 (West Supp. 1980).

120. See notes 184-200 and accompanying text *infra*.

In addition to the many state laws concerning involuntary smoking, several local ordinances are on the books. Chicago has a special "smokers' court," the Public Safety Court, set up in 1975 to prosecute violators of the ban on smoking in public places.¹²¹ New York City and Cincinnati have ordinances prohibiting smoking;¹²² Kansas City has ordinances prohibiting smoking on buses and in stores;¹²³ and St. Louis has ordinances prohibiting smoking on buses, on street cars, in the multi-sports arena, and in motion picture projection booths.¹²⁴

Although many state and local measures exist, the enforcement of these laws has had uneven success. In Florida in 1976, a man was convicted and fined \$250 for smoking in an elevator.¹²⁵ A nonsmoker with a chronic bronchial asthma condition had been in the elevator with the smoker and, pointing to the "No Smoking by Law" sign, had asked that he stop smoking. The man declared that he had enough money to pay a fine and he blew smoke into the face of the nonsmoker. The nonsmoker filed a complaint, and the smoker became the first person ever to be convicted and fined for smoking in an elevator.¹²⁶ In Minnesota in 1976, George McKeever, a 70-year-old man, was convicted under the Minnesota Clean Indoor Air Act and fined \$10.¹²⁷ The judge, who did not approve of the Minnesota law, suspended the minimum fine and dismissed the old man with the gentle rebuke, "Go and sin no more."¹²⁸ The result of the McKeever case may have been affected by factual questions of whether the old man's pipe had been lit, and whether the nonsmoker had banged him in the leg with her shopping cart. A survey conducted by the *Minnesota Tribune* in June 1978 indicated that 75% of Minnesota nonsmokers and 70% of Minnesota smokers favored strict enforcement of the Minnesota law.¹²⁹ New York City has evidently been very effective in handling violations of its non-smoking ordinance. The statistics as of March 1975 revealed an 88% conviction rate.¹³⁰

One recent commentator has criticized laws that make smoking in indoor public places a crime as being the enforcement of moral condemnation through the criminal law.¹³¹ Dismissing the evidence that involun-

121. BRODY, *supra* note 31, at 105 (803 arrest citations were issued in 1975 for violations); SMOKING DIGEST, *supra* note 39, at 84; 7 STUDENT LAW. 15, 56 (Mar. 1979).

122. SMOKING DIGEST, *supra* note 39, at 84.

123. KANSAS CITY, MO., CODE OF GENERAL ORDINANCES §§ 26.43, .44 (1967).

124. ST. LOUIS, MO., REVISED CODE §§ 716.060(16), 792.010, 811.010 (1960).

125. GOOD HOUSEKEEPING, Apr. 1979, at 118.

126. *Id.* at 120.

127. 7 STUDENT LAW. 15, 58 (Mar. 1979).

128. *Id.* Prosecutions under the Minnesota Clean Indoor Air Act reportedly have decreased since the McKeever case. *Id.*

129. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Apr.-May 1979).

130. BRODY, *supra* note 31, at 105.

131. 7 STUDENT LAW. 15, 56-58 (Mar. 1979).

tary smoking is harmful to nonsmokers, the commentator equates nonsmokers' rights legislation with laws concerning littering, dogs misbehaving on public grass, and people playing their loud radios on the public bus.¹³² The major fallacy in this analysis is the non-recognition of the fact that involuntary smoking is dangerous.¹³³ Unlike laws regulating morality, Clean Air statutes are health measures, just as are laws penalizing drunk driving. A statute prohibiting the consumption of alcoholic beverages would clearly constitute government enforcement of moral judgments. A statute prohibiting *driving* while intoxicated, however, is obviously designed to protect the health and safety of other members of society. In the same way, modern Clean Air legislation is not enacted to prohibit smokers from smoking, as the old statutes were,¹³⁴ but to prohibit them from smoking *in public places where their smoke might harm other members of the public*.¹³⁵

Another criticism of Clean Air legislation is the argument that if nonsmokers are the majority of the population, and if they are bothered or injured by cigarette smoke, they will stay away from public places where smoking is allowed, and the ensuing economic pressure will force proprietors to provide nonsmoking areas, without undesirable arm-twisting by the government. The answer to this argument is that this problem is a health issue, not an economic issue. Laws regarding the safety of food and the safety of transportation exist. Laws regarding the safety of the air seem equally important. In addition, common sense dictates that the nonsmoker should not be forced to stay away from public places out of fear for his health; rather, the smoker should be restricted to practicing his habit in places where innocent bystanders will not be injured.

C. Federal Actions

Nonsmokers currently receive some protection from federal legislation and regulations. The legislative protection has, to this point, been indirect. Since 1965, the federal government has required each package of cigarettes to bear a label warning of the dangers of cigarette smoking.¹³⁶ Since 1971, cigarette commercials have been banned from television and radio.¹³⁷ These measures may have helped the nonsmoker by reducing the percentage of the population that smokes, thereby reducing the exposure of the nonsmoker

132. *Id.* at 16.

133. The author reports that *only* 34 million people are allergic to tobacco smoke, evidently considering that to be an insignificant number. *Id.* at 17.

134. See notes 14-16 and accompanying text *supra*.

135. See BRODY, *supra* note 31, at 112; *Non-smoker*, *supra* note 15, at 164. In a recent case, the Virginia Supreme Court said that ordinances restricting smoking in public places are "clearly within the police power of the legislature." *Alford v. City of Newport News*, 260 S.E.2d 241, 243 (Va. 1979).

136. 15 U.S.C. § 1333 (1976).

137. 15 U.S.C. § 1335 (1976).

to tobacco smoke. Federal legislation that would directly protect nonsmokers, however, has been suggested,¹³⁸ but not passed.

Several federal regulations offer direct protection to nonsmokers. The Department of Defense (D.O.D.) has a comprehensive regulation prohibiting smoking in auditoriums, elevators, shuttle vehicles, medical care facilities, conference and class rooms, and work areas.¹³⁹ The regulation also requires nonsmoking areas to be designated in D.O.D. eating facilities. The General Services Administration has a similar regulation, which became effective in April 1979.¹⁴⁰ The Interstate Commerce Commission has a regulation limiting the smoking section of a bus, when such a section is provided at all, to the back thirty percent of the seats.¹⁴¹ A Civil Aeronautics Board regulation requires passenger aircraft to provide a "No Smoking" area large enough to include all passengers who want it.¹⁴² Smoking is also prohibited in trains, except in designated areas.¹⁴³

Expansion of federal legislation and regulation would have both advantages and disadvantages. One advantage of a federal "Clean Indoor Air Act" would be more nationwide uniformity. One of the problems with enforcement of no-smoking legislation has been "the patchwork quality of such legislation."¹⁴⁴ To illustrate, a resident of Missouri, who has never been subjected to a no-smoking law, might assume that smoking is allowed in a bus in California. Even a "No Smoking" sign might not adequately inform him of the California law. Nevertheless, the health hazard of smoking seems to be the type of public problem that is best controlled by the state, rather than the federal government. Although the federal government arguably has the power to enact a comprehensive non-

138. Massachusetts Representative Robert Drinan has introduced nonsmokers' rights legislation several times. Brody, *supra* note 31, at 118. The bill he introduced in 1975 would have restricted smoking in all federal facilities and public facilities associated with common carriers engaged in interstate commerce, and would have guaranteed, as much as economically feasible, smoke-free work areas for federal employees. *Id.*

139. 32 C.F.R. § 203 (1979).

140. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Sept. 1979).

141. 49 C.F.R. § 1061 (1979).

142. 14 C.F.R. § 252 (1979). This regulation was enacted in response to complaints from nonsmokers and a government study showing that 60% of nonsmoking passengers and 38% of all passengers were bothered by smoke. SMOKING DIGEST, *supra* note 39, at 81. See also 38 FED. REG. 12,210 (1973).

143. 49 C.F.R. § 1124.21 (1979). In 1972, a nonsmoker was bothered by the tobacco smoke in the first-class section of an Amtrak train. When he complained to the conductor he was told that smoking was permitted in the first-class car, and if he did not like it he could move to a second-class car. He later complained to Amtrak officials and as a result of his influence, cigar and pipe smoking were banned in the first-class club car of the train. Not all nonsmokers, though, have the clout of Chief Justice Warren E. Burger. *Tobacco Pollution and the Nonsmoker's Rights*, 4 ENV'T L. 451 (Spring 1974).

144. Brody, *supra* note 31, at 106.

smokers' rights statute,¹⁴⁵ uniformity can also be achieved by adoption of uniform legislation by the states.¹⁴⁶

V. CONSTITUTIONAL THEORIES

Commentators on the issue of nonsmokers' rights are fond of quoting the observation of George Bernard Shaw that "smokers and non-smokers cannot be equally free in the same railway carriage."¹⁴⁷ The pithy quote captures the essence of the dilemma: should the smoker be permitted to smoke, or should the nonsmoker's right to breathe clean air be protected? Although many jurisdictions have resolved the problem through legislation, in other jurisdictions the nonsmoker who seeks relief¹⁴⁸ must try alternative routes. One of these routes is constitutional law.

Three parts of the Constitution have been advocated as support for the right of the nonsmoker to breathe clean air: (1) the ninth amendment; (2) the fifth and fourteenth amendments; and (3) the first amendment. At this writing, no court has squarely accepted any of these arguments.¹⁴⁹

A good argument can be made that the ninth amendment protects nonsmokers from cigarette smoke in public places. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁵⁰ As Justice Story wrote, the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them."¹⁵¹ Therefore, as Professor Lawrence Tribe explains, the ninth amendment "at least states a rule of construction pointing away from the reverse incorporation view that only the interests secured by the Bill of Rights are encompassed within the fourteenth amendment, and at most provides a positive source of law for fundamental but unmentioned

145. A Federal Clean Indoor Air Act probably could be supported by the Commerce clause. BRODY, *supra* note 31, at 119.

146. The Minnesota Clean Indoor Air Act is often used as a model by other states. SMOKING DIGEST, *supra* note 39, at 86.

147. *Antismoking Legislation*, *supra* note 14, at 167; *Non-Smoker*, *supra* note 15, at 165; 7 STUDENT LAW. 15, 16 (Mar. 1979).

148. The nonsmoker considering legal action might be able to obtain organized assistance. Action On Smoking and Health (ASH), 2000 H Street, N.W., Washington, D.C. 20006, is a national nonprofit organization dedicated to protecting the rights of nonsmokers. The American Lung Association, 1740 Broadway, New York, N.Y. 10019, might be of some help. Nonsmokers in the Midwest should contact the American Lung Association of Western Missouri, 2007 Broadway, Kansas City, Mo. 64108.

149. The dictum of *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 E.R. 1640, 3 E.L.R. 20,794 (D. Mont. 1970), supports a constitutional right to clean air. See note 160 and accompanying text *infra*.

150. U.S. CONST. amend. IX.

151. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 715-16 (1833), quoted in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 570 (1978).

rights."¹⁵² Several authorities have argued persuasively that a basic unenumerated constitutional right is the right to breathe clean air.¹⁵³ One writer has said that "like food and water, the biological necessity of clean air to support life dictates that the right to a healthful environment be recognized, or all other rights are meaningless phrases."¹⁵⁴

Courts that have considered the issue of a fundamental right to a clean environment under the ninth amendment have consistently refused to recognize such a right.¹⁵⁵ The issue was directly addressed in 1978 in *Gasper v. Louisiana Stadium & Exposition District*.¹⁵⁶ There, plaintiffs brought a class action under 42 U.S.C. § 1983 to enjoin officials from allowing tobacco smoking during events in the enclosed Superdome. The district court disagreed with the argument in no uncertain terms: "To hold that the First, Fifth, Ninth, or Fourteenth Amendments recognize as fundamental the right to be free from cigarette smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries."¹⁵⁷ The judge felt that the right to breathe smoke-free air was not on a constitutional par with the right to privacy in marriage, and he believed the legislative and executive branches should make the "final decisions in matters of this type."¹⁵⁸

Closely related to the ninth amendment claim are the claims made under the fifth and fourteenth amendment due process clauses. Under these theories, forcing a nonsmoker to choose between staying in a smoke-filled room where he has the right to be or leaving the area deprives him

152. L. TRIBE, *supra* note 151, at 570. Some of the fundamental but unenumerated rights that have been recognized are: the right to use birth control, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right to travel abroad, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); the right to be free of certain bodily intrusions, *Rochin v. California*, 342 U.S. 165 (1952); the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); the right to send one's child to a private school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and the right to teach one's child a foreign language, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

153. *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 E.R. 1640, 3 E.L.R. 20,794 (D. Mont. 1970); Brody, *supra* note 31, at 87-88; *Ire, supra* note 44, at 72; *Non-Smoker, supra* note 15, at 143, 165; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 Loy. CHI. L.J. 610, 614 (1974).

154. *Non-Smoker, supra* note 15, at 143.

155. *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971); *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Federal Employees for Non-smokers' Rights v. United States*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979); *In re "Agent Orange" Prod. Liab. Litigation*, 475 F. Supp. 928 (E.D.N.Y. 1979); *Pinkney v. Ohio Environmental Protection Agency*, 375 F. Supp. 305 (N.D. Ohio 1974); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972); *Environmental Defense Fund v. Corps of Eng'rs*, 325 F. Supp. 728 (E.D. Ark. 1971); *GASP v. Mecklenburg County*, 42 N.C. App. 228, 256 S.E.2d 477 (1979). *But see* the dictum in *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 E.R. 1640, 1641, 3 E.L.R. 20,794, 20,799 (D. Mont. 1970).

156. 577 F.2d 897 (1978), *aff'g* 418 F. Supp. 716 (1976), *cert. denied*, 439 U.S. 1073 (1979).

157. 418 F. Supp. at 721.

158. *Id.* at 722.

of life and liberty under the due process clause.¹⁵⁹ Advocates of this argument believe the right to life involves a right to health. The dictum in one environment case declared, "[T]he right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life."¹⁶⁰ Since the due process clause has been read with the ninth amendment to protect many unenumerated rights,¹⁶¹ including the right to have an abortion,¹⁶² it seems reasonable that the right to clean air be considered a fundamental right worthy of due process protection.

The *Louisiana Stadium* court rejected the due process claims, distinguishing the situation in the Superdome from that in *Pollak v. Public Utilities Commission*,¹⁶³ cited by the plaintiff. In *Pollak*, a bus company enjoyed a virtual monopoly of the mass transit in the District of Columbia, as a result of congressional authorization. The company contracted with a radio station to install speakers in the buses and to play only that station's programming. Plaintiffs were passengers who were forced to ride the bus by the lack of alternative transportation. They claimed the forced listening deprived them of liberty without due process of law. The District of Columbia Circuit Court of Appeals found that the arrangement violated the fifth amendment.¹⁶⁴ The primary distinction between *Pollak* and *Louisiana Stadium* is that the Superdome plaintiffs were not compelled to use the facility, as were the plaintiffs in *Pollak*, who had no alternative transportation.¹⁶⁵ This argument has been criticized, though, on the ground that to live a "full, normal, and healthy" life, one will inevitably find it necessary to be in public places.¹⁶⁶

Another recent case, *Federal Employees for Non-Smokers' Rights v. United States*,¹⁶⁷ followed *Louisiana Stadium* and denied nonsmokers a cause of action under the due process clause. In *Federal Employees*, plaintiffs were nonsmokers employed by the federal government, who sought an injunction restricting smoking to designated areas of federal buildings. The

159. *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897 (5th Cir. 1978), *aff'd* 418 F. Supp. 716 (1976), *cert. denied*, 439 U.S. 1073 (1979); *Federal Employees for Non-Smokers' Rights v. United States*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979); Brody, *supra* note 31, at 88-90; *Non-Smoker*, *supra* note 15, at 143, 165-70.

160. *Environmental Defense Fund v. Hoerner Waldorf Corp.*, 1 E.R. 1640, 1641, 3 E.L.R. 20,794, 20,794 (D. Mont. 1970).

161. See note 152 and accompanying text *supra*.

162. *Roe v. Wade*, 410 U.S. 113 (1973).

163. 191 F.2d 450 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952).

164. The Supreme Court held that there had not been a violation of due process, and reversed the court of appeals. 343 U.S. 451, 465 (1952). The plaintiff in *Louisiana Stadium*, however, argued that the *Pollak* Court had reversed on grounds other than the due process issue. 418 F. Supp. 716, 719 (1976).

165. 418 F. Supp. at 720; Brody, *supra* note 31, at 87.

166. *Ire*, *supra* note 44, at 80.

167. 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979).

court denied the plaintiffs' causes of action under the Constitution and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 668(a), but refused to dismiss the count brought under the common law duty of the employer to make the workplace safe.¹⁶⁸

The first amendment argument was made in both *Federal Employees* and *Louisiana Stadium*. The first amendment has been interpreted to protect the right to receive information and ideas freely.¹⁶⁹ The ability of the nonsmoker to receive information is arguably impaired when smoking is allowed in government buildings where ideas and information are transmitted (e.g., schools, auditoriums, museums, libraries).¹⁷⁰ The *Louisiana Stadium* plaintiffs complained that their right to exposure to events at the Superdome fit under this analysis.¹⁷¹ The *Federal Employees* plaintiffs were an even better example since their right to exposure involved the workplace situation, rather than a place of entertainment.¹⁷² In both cases the Court rejected the first amendment argument.

One commentator has suggested that nonsmokers might have a constitutional claim under the equal protection clause of the fourteenth amendment. He argues that when the state promotes legislation allowing smoking in public buildings, people sensitive to tobacco smoke are denied the equal protection of the law. In sanctioning smoking in public buildings, he contends, the state is denying to the sensitive person what it warrants to all other persons—the right of occupancy without harm to one's well-being.¹⁷³ This argument is unlikely to survive the traditional equal protection analysis. In equal protection, the rational basis test is usually used to determine the legitimacy of government actions. Only if a fundamental right or a suspect class is involved will the strict scrutiny/compelling state interest test be used.¹⁷⁴ Nonsmokers could hardly be called a suspect class,¹⁷⁵ and most courts have not considered the right to clean air as fundamental.¹⁷⁶ Thus, the rational basis test would be applied and the government action would probably be upheld. The equal protection clause does not seem a likely source of relief for nonsmokers.

A threshold problem with the equal protection argument is common to all of the constitutional claims by nonsmokers—the necessary element of state action. In the vast majority of cases, the problem is state *inaction*, rather than action. Only two states, Arkansas and Pennsylvania, have

168. 446 F. Supp. 181, 182, *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979).

169. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307-08 (1965); BRODY, *supra* note 31, at 86-87.

170. BRODY, *supra* note 31, at 86-87.

171. 418 F. Supp. at 717-18.

172. 446 F. Supp. at 183-85.

173. *Non-Smoker*, *supra* note 15, at 166.

174. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 524 (1978).

175. *Id.* at 525.

176. See note 155 and accompanying text *supra*.

statutes specifically *allowing* smoking in public places.¹⁷⁷ In fact, the Pennsylvania statute goes so far as to prohibit city councils from passing ordinances that would "prohibit smoking in any restaurant room, rest room, beauty parlor, executive office or any room designated for smoking in such store."¹⁷⁸ In states other than Pennsylvania and Arkansas, however, the state has taken no action allowing smoking. Under present state action theory, it appears unlikely that state inaction would satisfy the state action requirement.¹⁷⁹ Since most states have enacted some type of non-smoking statute, however, state action might be found in passage of an inadequate statute.¹⁸⁰ This argument also seems weak.

Realistically, the chances of succeeding under a constitutional theory seem small for the nonsmoker at this stage of the legal conflict. The United States Supreme Court denied certiorari for the *Louisiana Stadium* case in January 1979,¹⁸¹ and for the *Federal Employees* case in October 1979.¹⁸² In light of the present Court's narrow interpretation of the concept of "Constitutional Rights" in other cases,¹⁸³ it seems unlikely this Court would resolve these constitutional theories in favor of the nonsmoker.

VI. TORT THEORIES

A. Common Law Torts

When legislation has not provided nonsmokers an adequate remedy at law, the common law has been found to provide protection. In what is probably the single most significant legal stride in the nonsmokers' rights movement, a New Jersey court ruled in *Shimp v. New Jersey Bell Telephone Co.*¹⁸⁴ that the common law duty of the employer to provide a safe workplace for employees mandates that the employer protect nonsmoking employees from the hazard of second-hand cigarette smoke.

In *Shimp*, a case of first impression, plaintiff had been employed in the offices of New Jersey Bell Telephone Company for several years. In the early seventies she began suffering a variety of severe symptoms as a result of an allergy to cigarette smoke.¹⁸⁵ Her allergic reaction could be

177. ARK. STAT. ANN. § 82-3702 (Cum. Supp. 1979); PA. STAT. ANN. tit. 53, §3702 (Purdon 1972).

178. PA. STAT. ANN. tit. 53, § 3702 (Purdon 1972).

179. See *Ire*, *supra* note 44, at 75.

180. *Id.*

181. 439 U.S. 1073 (1979).

182. 100 S. Ct. 265 (1979).

183. *E.g.*, *Paul v. Davis*, 424 U.S. 693 (1976).

184. 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976), *noted in Note, Torts—Nonsmokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area*, 9 TEX. TECH. L. REV. 353 (1977); *Note, Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions*, 30 VAND. L. REV. 1074 (1977).

185. Her symptoms included skin eruptions, SHIMP BOOK, *supra* note 46, at 60, as well as severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes resulting in corneal abrasion and corneal erosion, headaches, nausea, and vomiting. 145 N.J. Super. at 521, 368 A.2d at 410.

triggered by the presence of as little as one nearby smoker.¹⁸⁶ In the office to which she was transferred in 1975, seven of thirteen employees smoked heavily.¹⁸⁷ Shimp's utilization of company grievance mechanisms resulted only in the installation of an ineffective exhaust fan.¹⁸⁸ Shimp was offered the opportunity to move to a different location, but the move would have entailed a demotion and a decrease in pay.¹⁸⁹ After seeking relief through several governmental agencies, she brought suit in equity for injunctive relief.

In a landmark opinion, Superior Court Judge Phillip A. Gruccio carefully analyzed the relationship of the common law to the nonsmoker in the workplace. He stated that an employee has a right to work in a safe environment and an employer has a concomitant, affirmative duty to provide a safe work area.¹⁹⁰ These are widely recognized common law concepts.¹⁹¹ The court noted that the Occupational Safety and Health Act did not preempt the field of occupational safety since it specifically recognized the concurrent power of a state to affect the employee-employer relationship through common law judicial and legislative action.¹⁹² The judge recognized that cigarette smoke was toxic and dangerous to the health of this plaintiff and that of smokers and nonsmokers generally.¹⁹³ Judge Gruccio ruled that the plaintiff had not assumed the risk of harm since cigarette smoke is not a natural by-product that is a *necessary result* of the operation of the telephone business.¹⁹⁴ The judge noted that New Jersey Workmen's Compensation law might be a bar to monetary damages, but did not prohibit a suit for injunctive relief.¹⁹⁵ After considering the issues and the evidence, the court granted the injunction, and ordered New Jersey Bell to provide Shimp with safe working conditions "by restricting the smoking of employees to the nonwork area presently used as a lunch room" and prohibiting smoking "in the offices or adjacent customer service area."¹⁹⁶

Although *Shimp* is a New Jersey case, it offers strong precedent for nonsmoking workers in other jurisdictions. This would be especially true in Missouri since a Missouri judge will probably find no local case directly on point. Of particular precedential value in *Shimp* are the strong statements of legal recognition of the dangers of cigarette smoke.¹⁹⁷ Although a

186. 145 N.J. Super. at 521, 368 A.2d at 410.

187. SHIMP BOOK, *supra* note 46, at 61.

188. 145 N.J. Super. at 521, 368 A.2d at 410.

189. SHIMP BOOK, *supra* note 46, at 61-62.

190. 145 N.J. Super. at 521, 368 A.2d at 410.

191. W. PROSSER, THE LAW OF TORTS 526 (4th ed. 1971).

192. 145 N.J. Super. at 522, 368 A.2d at 410-11.

193. *Id.* at 526, 368 A.2d at 413.

194. *Id.* at 523, 368 A.2d at 411.

195. *Id.* at 524, 368 A.2d at 412.

196. *Id.* at 531, 368 A.2d at 416.

197. *Id.* at 526-31, 368 A.2d at 413-14. Legislative declarations in state statutes and federal regulations are also valuable. See notes 66-71 and accompanying text *supra*.

given jurisdiction might never have recognized tobacco smoke in the air as an unsafe work environment in the past, the strong language of *Shimp* and the ever-increasing medical evidence of the danger of involuntary smoking may be enough to persuade a court of the real danger involved. Although it might be argued that *Shimp* only supports plaintiffs with allergic reactions to tobacco smoke, the New Jersey court recognized the danger of tobacco smoke to nonsmokers in general,¹⁹⁸ as well as to those with allergies. The only real problem for the plaintiff bringing a suit like *Shimp* is that the subject is still new and controversial; a judge hesitant to apply old law to a new fact situation, even when warranted by the evidence, might be reluctant to follow *Shimp*.¹⁹⁹

Shimp involved only the employer's common law duty of providing a safe workplace, but different theories of common law duty might be found to protect nonsmokers from cigarette smoke in other places. In states where the legislature has not already dealt with the matter, the common law might protect people from cigarette smoke in common carriers, theaters, lobbies, bowling alleys, and other public and semi-public places where the person in charge of the premises has been deemed to have a general duty to protect people on the premises from harm.²⁰⁰

B. Nuisance

Several authorities have suggested nuisance theories as a possible remedy for the nonsmoker.²⁰¹ The private nuisance tort is probably of little use in this context²⁰² because of its definition as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."²⁰³ In the normal situation where the nonsmoker is seeking relief from tobacco smoke in public places, the use and enjoyment of his land will not be involved.²⁰⁴ One commentator has suggested, without citing authority, that an interest in a seat at a sports event or theatrical performance might be considered a limited property interest worthy of protection by private

198. 145 N.J. Super. at 526, 368 A.2d at 413.

199. Donna Shimp's lawyer emphasizes the importance of choosing a judge who is "innovative and fearless and not hesitant to make new law if the evidence warrants it." SHIMP BOOK, *supra* note 46, at 45. He also feels it is important to make a low-key presentation, showing that the case is simply one involving a worker's right to a healthy environment based on the medical evidence presented. *Id.*

200. BRODY, *supra* note 31, at 82.

201. *Id.* at 83-86; *Ire*, *supra* note 44, at 81-86; *Non-Smoker*, *supra* note 15, at 155-57; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 618-22 (1974).

202. See *Ire*, *supra* note 44, at 82.

203. RESTATEMENT (SECOND) OF TORTS § 821D (1979) (emphasis added).

204. In a few unusual situations, the use or enjoyment of land would be impaired by cigarette smoke. For instance, a nonsmoker might suffer a health impairment when his neighbors in an apartment building smoke heavily. See *Ire*, *supra* note 44, at 82 n.97. The plaintiff would have to show, however, that the quantity and probability of harm outweighs the utility of the conduct. RESTATEMENT (SECOND) OF TORTS §§ 822, 829 (1979).

nuisance law.²⁰⁵ A nonsmoker in Missouri may have a better chance of success than those in most states because Missouri has a special line of cases that do not require the *use of land* as an element of private nuisance.²⁰⁶ A private nuisance action by a nonsmoker against a smoker would nonetheless be a case of first impression and the outcome is highly uncertain.

The nonsmoking plaintiff seems to have a better chance of recovery under the public nuisance theory.²⁰⁷ Several states specifically designate smoking in public as a public nuisance.²⁰⁸ Other statutes describe smoking as a health hazard.²⁰⁹ In these states, a cause of action for public nuisance can surely be brought; the question would be *who* could bring the suit. Most states have a broad statute defining a public nuisance as "any activity which interferes with the health and comfort of the public."²¹⁰ Under these statutes, the plaintiff will have to show tobacco smoke is a health hazard sufficiently substantial and unreasonable to constitute a public nuisance.²¹¹ If the smoking was done in a place prohibited by statute, however, the statute would be persuasive evidence of the unreasonableness of the act.²¹² Because forty-seven states list at least one place where smoking is prohibited,²¹³ the public nuisance theory would seem to be available in most states.

The principal problem with using the public nuisance theory is the widely accepted limitation that a public nuisance claim may only be brought by a public official acting on behalf of the public and not by a private individual.²¹⁴ Thus, the nonsmoker should first contact a local prosecutor, the attorney general or designated health officials and try to persuade one of them to bring the suit. Failing that, the individual himself might be able to bring the public nuisance action. A private individual is allowed to bring a public nuisance action if he can show he suffered damage peculiar to himself and not shared in common by the rest of the public.²¹⁵ Thus, the typical nonsmoker whose only injury is eye and nasal irritation might not be able to bring a public nuisance claim because his injury is arguably not different in kind from that of others.²¹⁶ According

205. BRODY, *supra* note 31, at 83.

206. See cases cited in Comment, *The Law of Private Nuisance in Missouri*, 44 MO. L. REV. 20, 23 n.12 (1979) (criticizing these cases as inappropriate applications of nuisance law).

207. See generally *Ire*, *supra* note 44, at 82; *Non-Smoker*, *supra* note 15, at 156.

208. See note 67 *supra*.

209. See note 66 *supra*.

210. *Ire*, *supra* note 44, at 82, citing Arizona, California, Oklahoma, and South Dakota statutes.

211. *Id.* at 81-82.

212. *Id.* at 83, citing 58 AM. JUR. 2d Nuisances § 30 (1971).

213. See notes 57-63 and accompanying text *supra*.

214. W. PROSSER, *supra* note 191, at 586-87. One commentator speculates that special injury may no longer be required. Comment, *Toward Recognition of Non-smokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 621 (1974).

215. W. PROSSER, *supra* note 191, at 586; Comment, *The Law of Private Nuisance in Missouri*, 44 MO. L. REV. 20, 31 (1979).

216. *Ire*, *supra* note 44, at 85.

to the *Restatement of Torts*, however, "when the public nuisance causes personal injury to the plaintiff, the harm is normally considered different in kind from that suffered by other members of the public and the tort action may be maintained."²¹⁷ Moreover, even if the minor eye and nasal irritation is not considered different in kind, individuals who suffer heart, lung, or allergic conditions undoubtedly suffer an injury different in kind from the general members of the public.²¹⁸

The remedies available under nuisance theories include damages and injunctive relief.²¹⁹ The plaintiff may recover damages for the injury to his health, plus the value of any personal discomfort or inconvenience that he has suffered.²²⁰ As a practical matter, however, these damages might only be nominal.²²¹ The availability of an injunction is probably more valuable to the nonsmoker.²²² Although enjoining an individual who smoked in a public place from doing so again might be an inefficient method for dealing with smoking in public under many circumstances,²²³ an injunction might be the perfect remedy in cases involving the workplace or elevators, where the same smoker constantly comes into contact with the plaintiff.²²⁴ The *Restatement of Torts* provides that the public official is not the only party who can bring a suit for injunctive relief: a person who has suffered damages different from those suffered by other people may also seek an injunction.²²⁵

At least one suit has been brought in which the nonsmoking plaintiff claimed public smoking was a public nuisance. In *Stockler v. City of Pontiac*,²²⁶ the plaintiff, a pipe smoker and season ticket holder for Detroit Lions games, brought a public nuisance suit in his own name and in the name of the state of Michigan.²²⁷ He claimed that smoking during events in the 80,000-seat Pontiac Silverdome Stadium violated a local fire ordinance and constituted a public nuisance. The court heard medical testimony and other evidence and found that smoking in the stadium constituted a public nuisance. The court issued a writ of mandamus ordering the city to abate the nuisance by prohibiting smoking and the sale of cigarettes within the facility. The city obtained a stay of the writ and the suit was ultimately settled. The out-of-court settlement agreement

217. RESTATEMENT (SECOND) OF TORTS § 821C, Comment d (1979). See also *id.*, Comment d, Illustration 2.

218. *Ire*, *supra* note 44, at 85.

219. W. PROSSER, *supra* note 191, at 602.

220. *Id.* at 603.

221. *Ire*, *supra* note 44, at 85.

222. *Id.*

223. BRODY, *supra* note 31, at 85; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 621 (1974).

224. *Ire*, *supra* note 44, at 86.

225. RESTATEMENT (SECOND) OF TORTS § 821C, Comment j (1979).

226. No. 75-131479 (Cir. Ct. Oakland County, Mich., Dec. 17, 1975).

227. See SMOKING DIGEST, *supra* note 39, at 88; *Ire*, *supra* note 44, at 88 n.111.

bans smoking in the stands, but permits it in concourse areas, restrooms, and private boxes.²²⁸

C. Battery

A cause of action for battery is another possibility for the nonsmoker in his legal conflict with the smoker. The results of a battery suit will largely depend on the facts of each case. In the blatant example where the smoker blows smoke directly into the face of the nonsmoker and says, "I can afford to pay the fine!," a battery action will lie.²²⁹ In other cases where the smoker is quietly smoking and the nonsmoker across the aisle becomes ill, the result is more questionable.²³⁰

The *Restatement of Torts* states the elements of battery as: (1) intent to cause a harmful or offensive contact, plus resulting (2) harmful or offensive (3) contact.²³¹ In order to succeed in a claim for battery, the nonsmoker must establish three propositions: (1) breathing tobacco smoke is a contact; (2) such contact was harmful or offensive; and (3) the smoker intended the consequences of his act.

Exposure to cigarette smoke probably meets the requirement of a "contact." There is no question that the particles of smoke do in fact come into contact with the person of the nonsmoker.²³² In fact, studies show that because of the comparative chemistries of the human body and cigarette smoke, the smoke is actually attracted to human bodies like metal shavings to a magnet.²³³ Battery does not require direct application of force by one person to another.²³⁴ It is enough that the defendant has set into motion a force that ultimately produces the result.²³⁵

Exposure to cigarette smoke probably meets the requirement of a harmful or offensive contact. At least one case,²³⁶ several legislative bodies,²³⁷ and extensive medical evidence²³⁸ have recognized involuntary exposure to cigarette smoke as dangerous to the nonsmoker. Even if it were not dangerous, the contact would likely be offensive, particularly since 75% of nonsmokers find it annoying to be around a smoker.²³⁹ Ordinary contacts that are "customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a

228. SMOKING DIGEST, *supra* note 39, at 88.

229. This was the fact situation of the Sabina Shalom incident, in which the smoker was prosecuted under a state law, rather than being sued for battery. See notes 125 & 126 and accompanying text *supra*.

230. *Ire*, *supra* note 44, at 88.

231. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

232. See *Ire*, *supra* note 44, at 87.

233. BRODY, *supra* note 31, at 32.

234. W. PROSSER, *supra* note 191, at 34.

235. *Id.* at 35.

236. See notes 184-200 and accompanying text *supra*.

237. See notes 66-71 and accompanying text *supra*.

238. See notes 37-49 and accompanying text *supra*.

239. See note 52 and accompanying text *supra*.

passage,"²⁴⁰ on the other hand, have been held not to be offensive touchings. Smoking, though, is certainly not reasonably *necessary* to the common intercourse of life,²⁴¹ and the effects of smoking appear to be more serious than the slight jostlings mentioned by Dean Prosser. Nonetheless, a jury might find the particular plaintiff involved did not suffer an offensive contact. A stronger showing on this issue could, of course, be made by a plaintiff who is one of the 34 million Americans allergic to tobacco smoke.²⁴²

The most difficult element to prove in the battery case would be the smoker's intent to commit the battery. All consequences that the actor *desires* to bring about are intended.²⁴³ Thus, the smoker who blows smoke in the face of the nonsmoker is guilty of battery and is liable for any actual damages, even those that are unforeseeable,²⁴⁴ and may be liable for punitive damages as well.²⁴⁵ Intent is not limited to consequences that are desired, however. "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."²⁴⁶ Thus, a smoker who knew involuntary smoking was harmful or offensive to nonsmokers would be liable for smoking around them. A smoker who honestly did not know of the danger would probably not be liable. If the nonsmoker notifies the smoker that breathing second-hand smoke makes him ill, it would seem the smoker should no longer be able to plead ignorance.²⁴⁷

Battery has been involved in a few colorful nonsmokers' rights cases. In Sidney, Australia, a smoker who intentionally blew smoke into the face of a nonsmoker was found guilty of assault and fined \$298.²⁴⁸ In North Carolina, a postman made numerous complaints to his superior about the

240. W. PROSSER, *supra* note 191, at 37.

241. The *Shimp* court said: "There is no necessity to fill the air with tobacco smoke in order to carry on defendant's business, so it cannot be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary." 145 N.J. Super. at 523, 368 A.2d at 411.

242. See text accompanying note 44 *supra*. But see *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979). See notes 249-56 and accompanying text *infra*.

243. RESTATEMENT (SECOND) OF TORTS § 8A, Comment b (1965).

244. W. PROSSER, *supra* note 191, at 35. As a practical matter, the damages will often be too small to pay the cost of the suit. BRODY, *supra* note 31, at 78.

245. W. PROSSER, *supra* note 191, at 35.

246. RESTATEMENT (SECOND) OF TORTS § 8A, Comment b (1965).

247. Brody & Brody would go a step further: "In fairness, a nonsmoker should not be required to object to a smoker in order to establish a battery." BRODY, *supra* note 31, at 77. The *McCracken* court, however, took the opposite view: "In examining the plaintiff's claim, we observe that it has been said 'it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability.'" 40 N.C. App. at 217, 252 S.E.2d at 252 (citing W. PROSSER, *supra* note 191, at 37).

248. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Oct. 1978).

adverse health effects he had suffered at work from tobacco smoke in the work environment. He finally asked for a sick leave because of his allergy to the smoke.²⁴⁹ The supervisor denied the request and summoned the postman to a meeting to discuss the problem. The supervisor smoked a cigar at the meeting, and the postman became ill and had to miss work and seek medical care. The postman filed suit seeking actual damages of \$5,000 and punitive damages of \$10,000.²⁵⁰ Although a doctor had testified that the plaintiff had "severe respiratory problems when around cigarette smoke," the court held in *McCracken v. Sloan*²⁵¹ that there had been no competent evidence presented that the plaintiff suffered a physical illness from exposure to cigar smoke. The court stated:

We express no opinion as to what the result would be if there were evidence of some physical injury, but on the facts of this case we cannot hold it is an assault or battery for a person to be subjected either to the apprehension of smelling cigar smoke or the actual inhaling of the smoke. This is an apprehension of a touching and a touching which must be endured in a crowded world.²⁵²

The *McCracken* court arguably made two mistakes. First, the court seemed to consider aggravation of an allergy to be a totally insignificant harm. Actually, allergies to cigarette smoke can involve serious symptoms,²⁵³ and the record before the court included expert testimony that the plaintiff suffered "*severe respiratory problems* when around cigarette smoke."²⁵⁴ Even if causing severe respiratory problems is not physical harm, it certainly could be considered an offensive touching. The court's second mistake, therefore, was requiring plaintiff to show a physical illness in order to prove battery. Tort law in most jurisdictions,²⁵⁵ including North Carolina,²⁵⁶ recognizes an offensive touching as sufficient.

D. *Intentional Infliction of Mental Distress*

The intentional infliction of mental distress tort has been mentioned as a possible remedy available to the nonsmoker.²⁵⁷ Although at first glance the tort does not seem to apply to smoking conflicts, closer examination reveals certain circumstances in which a plaintiff should be allowed this cause of action.

To recover under a theory of intentional infliction of mental distress, a plaintiff must show that the extreme and outrageous conduct of the

249. *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979).

250. *Ire*, *supra* note 44, at 89 n.129.

251. 40 N.C. App. at 215, 252 S.E.2d at 251.

252. *Id.* at 217, 252 S.E.2d at 252.

253. See notes 43-45 and accompanying text *supra*.

254. 40 N.C. App. at 215, 252 S.E.2d at 251 (emphasis added).

255. *E.g.*, *Stowers v. Ardmore Acres Hosp.*, 19 Mich. App. 115, 126, 172 N.W.2d 497, 502-03 (1969); 6A C.J.S. *Assault & Battery* § 8 (1975).

256. *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E.2d 405, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972).

257. *Ire*, *supra* note 44, at 89.

defendant has caused him to suffer emotional distress.²⁵⁸ Bodily harm is not required. The emotional distress might include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."²⁵⁹

In the majority of nonsmokers' rights cases, the requirement of "extreme and outrageous conduct" would probably not be met. The *Restatement of Torts* states it is not enough that an act be inconsiderate and unkind. Rather, the *Restatement* would impose liability only where the conduct of the defendant has been so atrocious and utterly intolerable that the average member of the community would view the conduct and exclaim, "Outrageous!"²⁶⁰ The cases where cigarette smoking in public can truly be considered "outrageous" are few.

Comment f to section 46 of the *Restatement* explains that the extreme and outrageous character of the conduct may arise from the defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. "The conduct may be heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know."²⁶¹ For example, suppose the plaintiff were a nonsmoker who was often bothered by smoking at his workplace. He had complained to his supervisor about the problem, and his supervisor was well aware of plaintiff's aversion to cigarette smoke. Plaintiff was made sick at work by the smoke and he went to the hospital. The supervisor visited the plaintiff in the hospital room and blew smoke in his face. In these or similar circumstances, the average member of the community might well exclaim, "Outrageous!," and a cause of action for intentional infliction of mental distress would lie.²⁶²

E. Strict Liability

It has been suggested that the smoker should be held strictly liable for the injury he inflicts on the nonsmoker under the "abnormally dangerous activity" doctrine.²⁶³ Under this theory, a person who carries on an abnormally dangerous activity is subject to liability for resulting harm to the plaintiff, if the harm is the kind of harm that made the activity dangerous in the first place.²⁶⁴ The paramount question in nonsmokers' rights cases brought under this theory would be whether tobacco smoking should be considered an abnormally dangerous activity.

258. RESTATEMENT (SECOND) OF TORTS §§ 46-47 (1965).

259. *Id.*

260. *Id.*

261. *Id.*

262. See RESTATEMENT (SECOND) OF TORTS § 46, Comment f, Illustration 12 (1965); Cf. notes 249-56 and accompanying text *supra* (the *McCracken* fact situation, see text accompanying notes 249 & 250 *supra*, arguably presents an intentional infliction of mental distress).

263. BRODY, *supra* note 31, at 93-95.

264. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

The *Restatement of Torts* lists several factors to consider when determining whether an activity is abnormally dangerous, including: (1) the existence of a high degree of risk of a great harm to others; (2) the inability to eliminate the risk even by the use of reasonable care; (3) whether the activity is a matter of common usage; (4) whether the activity is appropriate to the place it is done; and (5) the extent to which its value to the community is outweighed by its dangerous attributes.²⁶⁵ All six factors do not have to be present in order for liability to be found, but all are of importance.²⁶⁶

In applying these factors to the nonsmokers' rights setting, the prospects for successful use of this theory seem remote. One factor that would be insurmountable in most cases would be the requirement of "great harm." Although the *Restatement* mentions nuclear explosions²⁶⁷ and the like, persons suffering heart or lung disease might meet the requirement, as might children.²⁶⁸ In the nonsmokers' favor are the facts that there would be a high risk of harm to nonsmokers, the smoker cannot make the smoke less dangerous by the use of reasonable care, smoking is inappropriate in many enclosed indoor places, and smoking has little value to the community as compared to its danger to involuntary smokers. When all of the factors are considered, even though each does not have to be met, it would seem the nonsmoker would rarely have a good cause of action under this theory. As Professor Brody suggests, however, "Smoking in the intensive care unit of a hospital may well be 'abnormally dangerous.'"²⁶⁹

F. Product Liability

An analysis of the product liability suits against tobacco companies is somewhat beyond the scope of this Comment. It might be important for the nonsmoker to keep in mind, though, that at one time during the late fifties and early sixties, when the link between cigarette smoking and cancer was suspected but not proven, several cancer victims brought product liability actions against cigarette companies.²⁷⁰ Without exception, these suits failed. In the mid-sixties, legal commentators felt suits against tobacco companies would never overcome the assumption of the risk doctrine, since the smoker knew just as much about the alleged danger of smoking as did the tobacco companies.²⁷¹

Product liability suits might well enjoy a revival, however, as a result of the mounting evidence that involuntary smoking is harmful to innocent

265. *Id.* § 520.

266. *Id.*, Comment f.

267. *Id.*, Comment g.

268. BRODY, *supra* note 31, at 94; see notes 39-42 and accompanying text *supra*.

269. BRODY, *supra* note 31, at 94.

270. For a collection of cases and articles dealing with the product liability suits against tobacco companies, see W. PROSSER, *supra* note 191, at 660 nn. 82 & 83.

271. See Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q.

bystanders near a smoker.²⁷² Innocent bystanders, unlike smokers, do not assume the risk. Modern tort cases have allowed bystanders to recover in product liability cases.²⁷³ Nevertheless, many difficulties would be encountered in such a suit: the plaintiff must convince the court to follow the cases allowing a bystander to recover; the plaintiff must establish that tobacco products are legally defective; the plaintiff must establish that the tobacco product was a substantial factor in the cause of his injury; and the plaintiff must convince the court that his claim is not frivolous.²⁷⁴

VII. CONCLUSION

Less than a decade has passed since the 1972 Surgeon General's report warned that cigarette smoke could be dangerous to nonsmokers who breathe it involuntarily. As recognition of the danger to nonsmokers has increased, the movement to solidify the rights of nonsmokers to be free from the danger has also increased. State legislatures and courts should be given credit for reacting fairly quickly to this significant health hazard. At the present time, only fourteen states have not yet enacted a regulation or statute giving some protection to nonsmokers. Although constitutional arguments have failed so far, nonsmokers have had some success with tort claims, particularly in the workplace situation. During the last decade, nonsmokers have tested the water in a new area of law, with the clear result that legal remedies now exist for the nonsmoker who cares enough about his rights to seek legal help.

MORLEY SWINGLE

678, 719-21 (1966); Comment, *Can Cigarettes Be Merchantable, Though They Cause Cancer?*, 6 ARIZ. L. REV. 82, 91 (1964).

272. One lawyer who evidently feels such a revival is possible is Melvin Belli, who is reportedly eager to find the right case. READER'S DIGEST, Feb. 1980, at 105.

273. See, e.g., *Elmore v. American Motors Co.*, 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

274. These issues are examined in BRODY, *supra* note 31, at 90-93.