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BANNING SMOKING IN CHICAGO'S SOCIAL SCENE: PROTECTING LABOR AND BROADENING PUBLIC HEALTH POLICY

ADRIENNE DETANICO*

INTRODUCTION

Gang, this is not a . . . smoking ban. If it was a smoking ban, ban all smoking – everywhere. In the house, on the street. Get rid of it all. Let's be the cleanest city in the world. Let's start something completely different that nobody else ever did. Let's go get em. If you want to do it, do it right. But don't bull— 'em.¹

“Da Coach,” noticeably angry during a public hearing at Chicago's City Hall, may have it right. Chicago passed a new clean indoor air ordinance that includes restrictions on smoking in restaurants, bars, and other places of leisure and employment.²

* J.D., May 2007, The John Marshall Law School. The author wishes to thank the past and current Editorial Board and Candidates for their positive attitude and dedication. The author also wishes to thank her colleagues at the law school – friends, professors, and Moot Court associates. This Comment is dedicated to Kurt Schafer, who always makes me breakfast on those busy mornings.

1. Fran Spielman, *Where There's Smoking, There's Fire; Da Coach Leads the Anti-Ban Forces in an All-Out Council Session*, CHI. SUN-TIMES, July 13, 2005, at 16 (quoting legendary football coach Mike Ditka, addressing the Chicago City Council).

2. The Chicago City Council began considering a revision of Chicago's clean indoor air ordinances in May 2005. Judy Peres, *New Life is Breathed into City Smoking Ban*, CHI. TRIB., May 6, 2005, at N1. In December 2005, the City Council agreed to a compromise, enacting a total ban on restaurant smoking, and a thirty-month delay for bars who derive sixty-five percent of their revenue from alcohol sales. CHI. ILL. CODE § 7-32-30 (2005). This ban still allows smoking in restaurant bar areas within fifteen feet of the bar. *Id.* Before enactment in Chicago, some individual businesses decided to go smoke-free voluntarily, especially in suburban areas. See Sara Faiwell, *Smoke Ban Begins Highland Park the First in the County To Enforce Law*, CHI. DAILY HERALD, June 2, 2005, at 1 (reporting that as of June 1, 2005, Highland Park passed an indoor smoking ban in restaurants, taxis, and places of work, characterizing the ban as an “important public health principle”); M. Daniel Gibbard, *Evanston Takes Up Smoking Ban Plan; Public Hearing Set on City Proposal*, CHI. TRIB., Mar. 1, 2004, at Metro 3 (discussing Evanston's smoking ban in all indoor workplaces, including bars and restaurants; at the time the ban went into effect, seventy of the city's one hundred and seventy-five restaurants were already smoke-free); Sean D. Hamill, *Anti-Smoking Law is*

The ban, however, was a lukewarm compromise and less comprehensive than other bans in Illinois and the rest of the country. This latest installment of a national debate is more than a battle between the rights of smokers and the comfort of non-smokers. The wisdom of smoking restrictions in Chicago, Illinois, and indeed the nation and world, is part of a much larger social landscape that implicates serious labor, class,³ and health⁴ issues. A more complete indoor smoking restriction in bars, restaurants, and other service industry locations without concessions is possible in Chicago; it also represents necessary public health policy as the nation considers the rising cost of health care and onset of disease.⁵ The quality of life of bar and restaurant workers should be a concern of the Chicago City Council, and should not be

Approved; Wilmette's Extensive Ban Will Go Into Effect July 1, CHI. TRIB., Nov. 12, 2003, at Metro 1 (discussing Willmette's ban, which includes restaurants, bowling alleys, and country clubs since 2004); Maria Kantzavelos, *Foe of Village Ban Clears Eatery's Air; Oak Park Restaurateur Makes Own Decision to Prohibit Smoking*, CHI. TRIB., June 1, 2005, at Metro 1 (discussing Oak Park's consideration of a smoking ban since the beginning of 2005 and a restaurant owner who acted before the ban went into effect).

3. U.S. DEPT. HEALTH AND HUMAN SERVICES, OFFICE ON SMOKING AND HEALTH, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 98 (2000) [hereinafter REDUCING TOBACCO USE]. Although smoking causes serious health ailments and tobacco addiction is a disease, it may not affect race and class equally. While whites and Hispanics smoke at comparable levels (27.4 percent and 26.2 percent respectively), smoking is more prevalent among African Americans (32.1 percent) and American Indians/Alaskan Natives (37.9 percent). *Id.* Similarly, 33.3 percent of all adult smokers are below the poverty line. *Id.* Further, food service industry employment is the 4th largest occupation in the U.S. and growing, which employs higher numbers of minorities and young people. *See generally* Donald R. Shopland et al., *Disparities in Smoke-free Workplace Policies Among Food Service Workers*, 46(4) J. OCCUPATIONAL AND ENVTL. MED. 347 (2004) (studying the relationship between white and blue-collar workers and protection from tobacco exposure at work); *see also* Jim Ritter, *Smoke? Maybe It Depends On Where You Live; N. Lawndale Residents much more likely to light up, study says*, CHI. SUN-TIMES, May 31, 2005, at 9 (reporting study by the American Lung Association of Metropolitan Chicago, finding a disparity in smoking rates in predominately white and predominately African-American neighborhoods and positing more aggressive marketing in African-American neighborhoods as the cause for the disparity).

4. *See* Spielman, *supra* note 1, at 16 (documenting story of a non-smoking career server who developed throat cancer from prolonged workplace exposure to ETS).

5. *See* Myra Wisotzky et al., U.S. DEPT. OF HEALTH AND HUMAN SERVICES, THE NATIONAL TOBACCO CONTROL PROGRAM: FOCUSING ON POLICY TO BROADEN IMPACT, 119 PUB. HEALTH REP. 303-05 (2004) (arguing, in part, that the most effective method of addressing tobacco-related disease and addiction includes clean indoor air policies, providing smoke-free environments that not only protect non-smokers, but also "provide strong reinforcement of non-smoking as a social norm").

compromised for the sake of politics. "Da Coach" is right: if Chicago wants a smoking ban, it should do it right.

Part I of this Comment will provide a background for the movement against second-hand smoke, or Environmental Tobacco Smoke ("ETS").⁶ It will give a brief overview of the Occupational Safety and Health Act ("OSH Act") and its "General Duty Clause,"⁷ a useful analytical tool in deconstructing smoking bans in the labor context. Part I will also consider the recent developments in clean indoor air legislation in Illinois. Part II will compare the Chicago smoking ordinance to the smoke-free initiative in the airline industry, which proves the formation of smoke-free environments is neither revolutionary nor a threat to the service industry. Further, Part II will review smoking bans as a superior method of encouraging smoking cessation, an increasingly necessary public health policy. Part III will propose an incentive program for employers to implement smoking restrictions where not required. Part III will also argue that statewide uniformity in smoking bans affords the most protection for business owners. Finally, it will advocate a total smoking ban in Chicago, without compromising employee health.

I. BACKGROUND

While smoking bans shield federal and state prisoners from harmful exposure to second-hand smoke,⁸ bar and restaurant patrons and service workers are not as protected as well as inmates. Although sixty percent of Chicagoans polled in September 2005 favored blanket smoking prohibitions in restaurants, bars, and other workplaces, the vote in the Chicago City Council on this issue was rescheduled twice to allay fears of anti-ban restaurant owners and lobbyists.⁹ The ban passed the

6. Environmental tobacco smoke (ETS) is "composed of exhaled mainstream smoke (MS) from the smoker, sidestream smoke (SS) emitted from the smoldering tobacco between puffs, contaminants emitted into the air during the puff, and contaminants that diffuse through the cigarette paper and mouth end between puffs." U.S. ENVTL. PROTECTION AGENCY, OFFICE OF HEALTH AND ENVTL. ASSESSMENT, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS 3-1 (1992) [hereinafter EPA ASSESSMENT].

7. Occupational Safety and Health Act (OSHA) of 1970, 29 U.S.C. § 654(a)(1) (2000). The General Duty Clause, provides that "(a) [e]ach employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.*

8. See *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) (holding that a prisoner's exposure to second-hand smoke may violate the prohibition against "cruel and unusual punishment" under the Eighth Amendment but characterizing the analysis as fact-specific).

9. Fran Spielman, *Armed with Results of Poll, Smoking Foes Push Anew for Ban*, CHI. SUN-TIMES, Sept. 16, 2005, at 28. Three out of five respondents

Health Committee, but did not undergo a final vote until aldermen compromised with a nearly¹⁰ three-year moratorium for bars and restaurant bar areas. Mayor Richard Daley never expressed enthusiastic support for a comprehensive smoking prohibition,¹¹ but stressed the need for compromise¹² and advocated voluntary smoke-free initiatives.¹³

The social implications of second-hand smoke exposure informs the question of whether ETS should be covered by the Occupational Safety and Health Administration (“OSH Administration”) standards regarding safe working environments. First, it is important to outline the results of epidemiological studies regarding the effects of second-hand smoke exposure, in general and in the workplace. Second, the basic standards of the OSH Act and Administration serve as a helpful statutory starting point. Third, the growing smoke-free movement in restaurants, bars, and other service-oriented industries offers elucidating precedents in an important social health movement.

A. *Second-Hand Smoke or “ETS”*

While tobacco companies may question the statistics, the dangers of second-hand smoke are well documented and recognized.¹⁴ Exposure to ETS is the third leading cause of

also said they thought non-smoking sections in restaurants and bars did not provide enough protection from secondhand smoke; 90% of smokers and non-smokers said they would dine out as often, or even more often, in smoke-free establishments. *Id.*

10. Dan Mihalopoulos & Gary Washburn, *Smoking Ban Given OK, But Not an All Clear*, CHI. TRIB., Oct. 28, 2005, at C1. Mayor Daley reiterated his desire for a compromise, while other advocates have restated that there is no compromise for worker health. *Id.* Exempting bars from the Chicago smoking ban is counterproductive: if the City wishes to promote the safety of workers, bar employees are as in need of protection as restaurant employees.

11. Spielman, *supra* note 9, at 28.

12. Fran Spielman, *Chicago Likely to OK Indoor Smoking Ban*, CHI. SUN-TIMES, Sept. 30, 2005, at 4. Mayor Daley stressed that “[w]e don’t have to be antagonistic towards any industry.” *Id.* Positive health policy should not be construed as “antagonism.”

13. *Id.* Daley further stated that “[e]very restaurant can ban smoking now – you can ban smoking in your business [if a business chooses].” *Id.* Even a week before consideration of the ordinance compromise, Daley publicly endorsed wide-spread exemptions for free-standing bars and bars attached to restaurants. Fran Spielman, *Daley Now Supports Exemptions to Sweeping Smoking Restrictions*, CHI. SUN-TIMES, Dec. 1, 2005, at 23.

14. See Spielman, *supra* note 1, at 16 (quoting Joel J. Africk, CEO of American Lung Association of Metropolitan Chicago and noting that over a ten-year period, 8,372 people died from exposure to second-hand smoke, which is higher than the national homicide rate); see also Wisotzky, *supra* note 5, at 304 (noting that tobacco-related illnesses are the most preventable causes of death and disease in the U.S., responsible for more than 440,000 premature deaths in a four-year period (1995-1999), as well as causing cancer, heart disease and respiratory ailments).

preventable death.¹⁵ The Centers for Disease Control ("CDC") released a 2004 study indicating that minimal exposure to smoke can increase the risk of heart attacks, even for non-smokers.¹⁶ The United States Surgeon General recognized involuntary cigarette smoke exposure as a major public health hazard as early as 1972 and has since reiterated this warning.¹⁷ Despite the known risks of second-hand smoke exposure, opposition to smoking bans persists, perhaps reflecting an American aversion to government intrusion into "private" conduct.

B. Sources of Legal Protections for Workers Affected by ETS

1. The OSH Act and Administration

The OSH Act and the OSH Administration's regulations provide protection for workers by assuring "the safety and health of America's workers by setting and enforcing standards."¹⁸ While the OSH Administration has promulgated regulations pertaining to indoor air quality ("IAQ"), including minimum ventilation rates, it has largely ignored ETS.¹⁹ In the early 1990s, the OSH Administration considered a regulatory program for ETS exposure in the workplace as part of its regulations of IAQ. The program

15. Mark D. Eisner et al., *Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, 280 JAMA 1909, 1909 (1998). This study cited bar and tavern workers as the highest risk group, exposed to levels of ETS four to six times higher than other workplaces. *Id.*

16. Editorial, *Of Smoking Bans and Heart Attacks*, N.Y. TIMES, Apr. 27, 2004, at A24. The article also reported that a six-month ban on smoking in public places in Helena, Montana reduced the number of heart attack admissions in area hospitals from 40 to 24 (with 40 heart attacks the average for the 4.5 years before the ban and the year after). *Id.* While this is anecdotal evidence, it is promising news from an emerging policy trend.

17. Wisotzky, *supra* note 5, at 305. As early as 1964, the Surgeon General had classified smoking as a major health hazard, and by 1972, the Surgeon General had warned of the dangers of second hand-smoke, with the subsequent Surgeon General reiterating this warning in 2000. *Id.* Finally, in June 2006, the Surgeon General released another study, which stated that there is no risk-free level of ETS exposure. U.S. DEPT. OF HEALTH & HUMAN SERVICES, OFFICE ON SMOKING AND HEALTH, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 12* (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/report>.

18. OSH Administration Mission Statement, www.osha.gov/oshinfor/mission.html (last visited Oct. 29, 2005). See also 29 U.S.C. § 654(8) (2005) (defining the role of OSHA to promote "safe and healthful work environments").

19. Memorandum from Richard E. Fairfax, Director of Enforcement Programs, Occupational Safety and Health Admin., on Reiteration of Existing OSHA Policy on Indoor Air Quality: Office Temperature/Humidity and Environmental Tobacco Smoke to Reg'l Adm's State Plan Designees (Feb. 23, 2003), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24602 [hereinafter OSHA IAQ].

would have applied to bars and restaurants and, unlike most OSH Administration regulations, would not have been limited to employers with ten or more employees.²⁰ This effort failed.²¹ In 2001, the OSH Administration withdrew its IAQ proposal and terminated rulemaking concerning IAQ.²² Although recognizing that many of the 4,700 chemical compounds that cigarette smoke contains are subject to Occupational Safety and Health Air Contaminants guidelines, the OSH Administration maintains, "as a matter of prosecutorial discretion," it "will not apply the General Duty Clause to ETS." The "General Duty Clause" requires employers to provide a workplace free from known fatal hazards.²³

Ostensibly, because the Environmental Protection Agency ("EPA") has recognized ETS as a harmful carcinogen,²⁴ it would

20. Jeanne Dugan Cooper, *No Butts About it: Labor Dept. Seeks Smoking Ban in All Workplaces*, NEWSDAY, Mar. 26, 1994, at A5. See also Matthew Baldini, *The Cigarette Battle: Anti-Smoking Proponents Go For the Knockout*, 26 SETON HALL L. REV. 348, 348-49 (1995) (arguing that tobacco regulation is ripe for federal regulation and suggesting that, given the power of tobacco lobbies over legislation, the best method for controlling ETS is employer-motivated and employee-designed work place policies and employer-encouraged cessation programs). Although federal regulation of smoking restrictions will likely be unsuccessful, states are free to regulate smoking restrictions at a higher level. See Crystal Yednak, *Legislators Consider Statewide Smoking Ban; Illinois Bill Would Tie Existing Patchwork of Municipal Laws*, CHI. TRIBUNE, Oct. 24, 2006, at 3 (reporting a comprehensive ban introduced in the Illinois Senate). Thirty-four communities in Illinois have smoking bans in place. *Id.* Some business in these communities have complained that the lack of uniformity has hurt their business as they are forced to compete with smoking establishments in neighboring communities without smoking restrictions in place. *Id.*

21. In contrast, the respective regional occupation health and safety administrations in Australia, for example, are stricter. In the provinces of Victoria and New South Wales, employers can be held criminally liable for knowingly exposing employees to ETS. Francis J. Nolan, *Commentaries: Passive Smoking Litigation in Australia and America: How An Employees Health Hazard May Become An Employer's Wealth Hazard*, 9 J. CONTEMP. HEALTH L. & POL'Y 563, 582 (1993).

22. OSHA IAQ, *supra* note 19.

23. *Id.* Why the OSH Administration abandoned its efforts to regulate ETS is unclear. It may be a matter of prudence or acceptance of the harm of smoking as part of modern society.

24. EPA ASSESSMENT, *supra* note 6, at 1-2. This report concluded that secondhand smoke causes lung cancer in adults and asthma in children. *Id.* at 1-3. Judge Osteen of the Middle District of North Carolina disputed and overruled the EPA's findings in *Flue-cured Tobacco Coop. Stabilization Corp. v. Unites States EPA*, 4 F. Supp. 2d 435, 466 (M.D.N.C. 1998). Plaintiffs, fearful of potential liability under the EPA's report, challenged the EPA's findings as impermissible regulatory action subject to judicial review. *Id.* at 438-39. The Court of Appeals for the Fourth Circuit, however, overruled Osteen's decision in *Flue-cured Tobacco Coop. Stabilization Corp. v. Unites States EPA*, 313 F.3d 852 (4th Cir. 2002), stressing that EPA reports were merely persuasive, created no legal consequences and, therefore, were not appropriate for judicial review. *Id.* at 861-62.

appear that ETS should fall under the "General Duty Clause" of the OSH Act. This has not been the case in the United States, nor in other countries with similar regulatory schemes. For example, Canada has similar occupational safety standards, but the Canadian equivalent to the OSH Administration also has not promulgated standards governing ETS exposure. Instead, individual provinces have passed smoke-free legislation to make public and workplaces smoke-free.²⁵

ETS is an expensive pollutant for businesses, as studies suggest that a business that is not smoke-free incurs substantial additional costs.²⁶ As this money is better spent on worker health, morale, or safety, regulation under the OSH Administration is an ideal, but under-utilized regulatory scheme. Alternative methods, such as legislative action, have been more successful.²⁷

25. Ten Canadian provinces have implemented comprehensive smoke-free policies that provide smoke-free public and workplaces, including bars and restaurants. These provinces are Saskatchewan, Manitoba, Ontario (as of May 2006), Quebec (as of May 2006), New Brunswick, Nova Scotia (as of Dec. 2006), Prince Edward Island (smoking allowed only in enclosed, ventilated rooms, and prohibited in bowling alleys), Newfoundland and Labrador, Northwest Territories, Nunavut (currently 100% smoke-free in work places, bingo halls, bowling alleys, and casinos and all restaurants and bars as of Feb. 2006). American Nonsmokers' Rights Foundation, *Smokefree Lists, Maps, and Data, Smokefree Status of Bars and Restaurants Around the World*, <http://www.no-smoke.org/goingsmokefree.php?id=519> (last visited Jan. 12, 2007).

26. See, e.g., W.F. Stewart, et al. *Lost Productivity Work Time Costs From Health Conditions in the United States: Results from the American Productivity Audit*, 45(12) J. OCCUPATIONAL & ENVTL. MED. 1234, 1234-46 (Dec. 2003)(noting that tobacco use was a greater variable in determining lost production time than alcohol consumption, family emergencies, age, or education). There are, of course, other costs associated with tobacco use that affects employers beyond lost productivity, including higher medical expenditures, more frequent premises maintenance, and higher insurance payments. Americans for Nonsmokers' Rights, *Business Costs in Smoke-filled Environments* (2006), <http://www.no-smoke.org/pdf/businesscosts.pdf>.

27. Other options have been pursued. The Americans with Disabilities Act ("ADA") protects plaintiffs with sensitivity to secondhand smoke that amounts to a disability, like asthma. See, e.g., *Bell v. Elmhurst Chicago Stone Co.*, 957 F. Supp 1025 (N.D. Ill. 1990) (allowing suit for ETS exposure under the ADA). *But cf.* *Harmer v. Virginia Electric & Power Company*, 831 F. Supp 1300 (E.D.Va. 1993)(recognizing plaintiff's asthma as a disability and retaliation against plaintiff for requesting a smoke-free work place, but dismissing case for failure to show entitlement to a complete ban as a reasonable accommodation for the disability). Common law negligence claims for failure to provide safe working environments were explored in *Smith v. W. Elec. Co.*, 643 S.W.2d 10 (Mo. App. E.D. 1982), and *Shrimp v. N.J. Bell*, 368 A.2d 408 (N.J. Super. Chanc. 1976). Under the common law, employers had a duty to provide a safe and healthy work environment. *McCarthy v. Dep't. of Soc. and Health Servs.*, 759 P.2d 351, 354 (Wash. 1988). Today, many of these common law tort claims may be subsumed under workers' compensation statutes. A full analysis of tobacco-related tort litigation, however, is beyond the scope of this

2. Clean Indoor Air Regulations

Illinois moved to the forefront of clean indoor air regulation in 2005. Governor Rod Blagojevich signed House Bill 672, which took effect January 1, 2006, and revised the Illinois Clean Indoor Air Act.²⁸ This new legislation makes Illinois the second state to repeal a pro-tobacco industry law that prohibited cities from enacting smoking regulations more strict than the state's overall regulatory scheme. When Illinois passed the original Clean Indoor Air Act, tobacco industry lobbyists pushed for the addition of a "preemption" provision, which limited community choice to pass more stringent smoke-free workplace ordinances than those already in place.²⁹ Now, Illinois citizens are permitted to lobby their municipal leaders to pass stricter smoking regulations. This type of legal action paves the way for effective smoke-free legislation propelled by civic participation.

C. The Smoke-Free Workplace Movement

The creation of a smoke-free public and smoke-free workplaces may be the most effective method for reducing the social costs associated with smoking and combating the countervailing efforts of the tobacco industry's widespread promotion of smoking.³⁰ The Surgeon General endorses the creation of smoke-free environments as a method for reducing daily tobacco consumption and increasing cessation rates among smokers.³¹ In 2002, 6.6 million people worked in the food service industry, making it the fourth largest occupation.³² Although seventy percent of workers are covered by some smoke-free policy, food and beverage service employees are the least protected workers.³³ Additionally, the average annual salary of such a worker was \$16,720 in 2000.³⁴ This raises the possibility that "large numbers of food preparation and service occupation workers could be without sufficient financial resources to pay for health

article.

28. 410 ILL. COMP. STAT 80/1, et seq. (2005), amended by Ill. Pub. L. No. 94-517 (Jan. 1, 2006).

29. Mary Massingale, *Governor Signs Smoking Bill; Local Indoor Bans Will be Allowed after Jan. 1*, THE STATE JOURNAL-REGISTER (Springfield, IL), Aug. 11, 2005, at 1. One of the tobacco industry's top legislative lobbying priorities are such preemption provisions. REDUCING TOBACCO USE, *supra* note 3, at 195.

30. REDUCING TOBACCO USE, *supra* note 3, at 8.

31. *Id.* at 16.

32. Shopland, *supra* note 3, at 353.

33. *See id.* at 352 (noting food service workers reported higher rates of noncompliance).

34. *See id.* at 353 (concerning low income workers' inability to pay for healthcare).

insurance or health care should they become ill as a result of job-related ETS exposure.”³⁵

Importantly, tobacco use in general is a serious health and social concern, not just for the United States, but also for the world. The World Health Organization (“WHO”) identifies tobacco and its effects as a public health priority.³⁶ Tobacco use is prevalent in countries with high poverty populations and exacerbates disease burdens in such countries by utilizing scarce resources that could be used to combat other widespread health challenges.³⁷ The WHO recognizes the establishment of smoke-free environments in public spaces and workplaces as the best method of alleviating such burdens on the world because smoke free initiatives encourage climates that foster smoking cessation and respect for the importance of human health.³⁸ Considering the societal implication, smoking bans are the most sensitive means for reducing ETS exposure and, ultimately, tobacco use.³⁹

About sixty-nine percent of workspaces, mostly offices, in the United States have smoking policies that protect workers.⁴⁰ On

35. *Id.*

36. Katharine M. Esson & Stephen R. Leeder, WORLD HEALTH ORGANIZATION, THE MILLENNIUM DEVELOPMENT GOALS AND TOBACCO CONTROL: AN OPPORTUNITY FOR GLOBAL PARTNERSHIP 3 (2004). The WHO recognizes that tobacco-related illness is the second major cause of death in the world and the fourth most common risk factor for disease worldwide, killing 4.9 million people each year (or one in ten adult deaths worldwide). *Id.* at viii. The WHO is also concerned about the effect tobacco use and production has on global poverty. Tobacco companies aggressively market in underdeveloped countries, fearing losses in developed countries due to increased health consciousness. For example, while “consumption of cigarettes remained stable in the developed world between 1970 and 2000, it trebled in the developing world.” *See id.* at xi (arguing that over the next 25 years, total cigarette consumption could rise by 60% to 100% in countries with medium to low levels of human development).

37. *See id.* at xi-xiii (arguing that globally, 5.3 million hectares of arable land are used for tobacco cultivation, land which could be agriculturally cultivated to feed 10–20 million people).

38. These methods include “population-wide public policies, like bans on direct and indirect tobacco advertising, tobacco tax and price increases, smoke-free environments in all public and workplaces, and large clear graphic health messages on tobacco packaging.” *Id.* at xv. *See also* WORLD HEALTH ORGANIZATION, *Tobacco Free Initiative*, available at <http://www.who.int/tobacco/en> (last visited Jan. 28, 2006) (providing information about developments in tobacco-related policy around the world, including the position that public health policy programs such as bans on advertising and the creation of smoke-free places are efficient methods of minimizing the impact of tobacco on national populations).

39. *See* REDUCING TOBACCO USE, *supra* note 3, at 23 (outlining the effects of tobacco regulation).

40. *See* WISOTZKY, *supra* note 5, at 305 (finding smoke-free environments provide strong reinforcements of non-smoking as a social norm). This percentage is not consistent throughout the country. For example, 48.9% of workers are protected in Nevada, while 81.7% are protected in Maryland. *Id.*

the other hand, workers in bars, restaurants, bowling alleys, billiard halls, and betting establishments that are often exempt from smoke-free policies, endure second-hand smoke levels that are one hundred and sixty to six hundred percent higher than those in office work environments.⁴¹ Service industry workers are exposed to higher levels of second-hand smoke than other types of workers, and they exhibit the highest levels of cotinine (a biological marker of the presence of metabolized nicotine in the body accumulated by second-hand smoke exposure) than any other workers. This places many service employees at an increased risk of developing lung cancer (from one in one thousand to one in one hundred).⁴² Smoke-free laws and policies protect approximately seventy-six percent of United States white-collar workers. However, only forty-three percent of the more than 6.6 million service workers enjoy similar protection.⁴³ Major chains have realized the wisdom of smoke-free policies and have joined other corporations that have implemented broad smoke-free policies.⁴⁴ Though the recent success of smoking bans in restaurants and

This may correspond to high levels of service industry employment in Nevada, especially casinos. For a discussion of how reducing smoking dependence in the work place and public smoking restrictions correlate, see DAVID HILL & RON BORLAND, *ADULTS' ACCOUNTS OF ONSET OF REGULAR SMOKING: INFLUENCES OF SCHOOL, WORK, AND OTHER SETTINGS*, 106 PUB. HEALTH REP. 181-185 (Mar. 1991) (publishing study conducted in Australia, which showed that twenty percent of smokers took up smoking at their places of employment; the study concedes, however, that many people begin smoking in school). See Jeremy W. Peters, *Company's Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 8, 2005, at C5, for a report on a new policy at Weyco, an insurance company in Michigan, which tests employees for cigarette use and fires them if they test positive. The president sees this as a health and cost issue, because studies report that smokers cost companies an extra \$3,391 a year in productivity losses and increased health care. *Id.* Some employees have quit, either smoking or the job, as a result. *Id.* Other companies have implemented a non-smoking policy off-hours, but utilize an honor system rather than testing: Alaska Airlines has had such a policy since the 1980s; recently, Union Pacific stopped hiring smokers. *Id.*

41. M. Siegel, *Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects*, 270 JAMA 490-93 (1993).

42. Wortley P. et al., *Exposure to Secondhand Smoke in the Workplace: Serum Cotinine By Occupation*, 44(6) J. OCCUP. & ENVTL. MED. 503-509 (Jun. 2002).

43. See Shopland, *supra* note 3, at 351 (noting company trends between white collar and service workers).

44. *Surgeon General Comments on KFC and Pizza Hut Restaurants' Smoking Bans*, HEART-DISEASE WEEKLY, Sept. 12, 2005, at 1413. The Surgeon General thanked Pizza Hut and KFC for their contribution to the anti-tobacco cause in his 2004 report on smoking: "the toxins from cigarette smoke go everywhere blood flows . . . An estimated \$92 billion in productivity losses occurs annually from deaths due to smoking; and when combined with an additional \$75.5 billion in smoking-related medical expenditures, the total economic toll exceeds \$167 billion each year in the United States." *Id.*

bars seems revolutionary,⁴⁵ even airplane cabin smoking was not banned until 1990, and airplane cabin smoking continues on many foreign carriers.⁴⁶

Thus far, judicial challenges to smoke-free ordinances have been unsuccessful.⁴⁷ Of judges polled in one study, ninety-two percent believed public smoking bans represented good public policy, and sixty-seven percent thought the government should do more to deter smoking.⁴⁸ The best method of deterrence is to make

45. See American Nonsmokers' Rights Foundation, *Smoke-Free List & Maps*, <http://www.no-smoke.org/goingsmokefree.php?id519> (last visited Apr. 12, 2007) (providing lists and maps of the 2,000 municipalities and twelve states that prohibit smoking in some fashion). This is some evidence that the movement has gained momentum. See Maurice Possley, *Smokin' and Drinkin' Take a Hit in Montana; Laws Against Puffing in Public Places and Imbibing While Driving Are Radical for Montana*, CHI. TRIB., Apr. 21, 2005, at 17, for an interesting development in recent laws in Montana, where a state-wide smoking ban (MONT. CODE ANN. § 50-40-104 (2005)) was put in place alongside a prohibition on driving with an open container of alcohol (which would be uncontroversial in most states, but not in Montana). (MONT. CODE ANN. § 61-8-460 (2005)).

46. Tim Hensley, *Smoke-Free Skies – A Reality*, 82 J. NAT'L CANCER INST. 350 (March 1990). The first president Bush signed a smoking ban on domestic flights in November 1989, and it went into effect Feb. 1990. Flight attendants fought for the bans, concerned about their exposure to ETS. A report by the National Academy of Sciences suggested in 1986 that a smoking ban on flights would "lessen irritation and discomfort to passengers and crew, reduce potential health hazards to cabin crew associated with environmental tobacco smoke, eliminate the possibility of fires caused by cigarettes, and bring the cabin air quality into line with established standards for other closed environments." *Id.* It was not until 1992 that the International Civil Aviation Organization proposed smoking prohibitions on international flights. Francis X. Mahaney, Jr., *U.N. to Consider Smoking Ban on International Flights*, 84 J. NAT'L CANCER INST. 1235 (Aug. 1992). The international ban on in-flight smoking on flights to and from the U.S. is governed by 49 U.S.C. § 41706 (2005).

47. See *Pankos Diner Corp. v. Nassau County Legislature*, 321 F. Supp. 2d 520, 526 (E.D.N.Y. 2003) (granting a preliminary injunction, due to unchallenged evidence of loss of business to neighboring county that did not have a smoking ban, and demonstrating the importance of uniformity in enacting these bans to ensure no loss of business); *The Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 537 (S.D.N.Y. 2005) (affirming summary judgment in favor the defendants and dismissing plaintiffs' contention that the use of warrantless searches by city health department to assess compliance with smoking bans violated Fourth Amendment protection); *NYC C.L.A.S.H, Inc. v. City of New York*, 315 F. Supp. 2d 461, 496 (S.D.N.Y. 2004) (upholding smoking bans against constitutional challenge, and citing smoking as a volitional act, on which government interference need only satisfy a rational basis test); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 860 (N.D. Ohio 2004) (upholding Toledo's Clean Indoor Air Act of 2003, which banned smoking in most public places, and granting a permanent injunction against the establishment refusing to comply with the Act).

48. Christine M. Perrucci & Richard Fox, 43 JUDGES' JOURNAL 12 (ABA Summer 2004).

smoking less acceptable in public, a goal already accomplished on airplanes and in many offices. This same pattern of ETS regulation can function in bars and restaurants.

II. ANALYSIS

Despite the dangers linked to smoking and ETS, and the controversy surrounding smoking restrictions, experiments have been successful in creating safe and comfortable smoke-free environments. These studies included smoke-free offices and non-smoking sections in restaurants. An even more useful example is the push for smoke-free commercial airline cabins.

A. *The Movement for Smoke-Free Skies: A Useful Lesson for Today's Smoke-Free Movement in Private Workplaces*

A functional analogy that demonstrates the need for safe working environments is the successful implementation of smoke-free environments on domestic flights and international flights to and from the United States. While this movement progressed slowly, its accomplishments are undiminished by recent successful efforts to create more smoke-free environments.⁴⁹ The push for a ban on in-flight smoking was an important national, and even global, advocacy process. The smoke-free skies campaign successfully combated public misconceptions and tobacco industry resistance by utilizing a matrix of methods.

At the campaign's inception, smoking cigarettes, pipes, and cigars was still allowed on both domestic and international flights. Many considered it a substantial victory when the Civil Aeronautics Board ("CAB") required separate smoking and non-smoking sections on airplanes.⁵⁰ Separate sections, however, particularly on commercial airplanes, did little to protect non-smokers and employees from the dangers and discomfort of

49. A.L. Holm & R.M. Davis, *Clearing the Airways: Advocacy and Regulation for Smoke-free Airlines*, 13 TOBACCO CONTROL 30 (2003), available at http://tobaccocontrol.bmj.com/cgi/content/abstract/13/suppl_1/30.

The campaign started in 1966, led by feminist-flight attendant activist Patty Young, and was well supported by a strong union and public health advocates. *Id.* The campaign had a noteworthy start through Ralph Nader's efforts in 1969, with his petition to the Federal Aviation Administration ("FAA"); however, at the time, the FAA failed to respond to this call to action, "citing a lack of evidence that tobacco smoke was harmful in the concentrations experienced on an aircraft." *Id.* The FAA minimally responded by banning smoking in lavatories after a fatal crash caused by a smoldering cigarette butt. *Id.* at 31. After the FAA proved ineffectual, the activists turned to the Civil Aeronautics Board ("CAB"), with marginal success.

50. *Id.* at 35. Polls taken at the time reported that the smoke bothered 60% of passengers; in 1976, activists were successful in securing a ban on cigar and pipe smoke in airplanes. *Id.* It was largely a symbolic step; indeed, after extensive lobbying by the Cigar Association, the ban was repealed. *Id.*

cigarette smoke.⁵¹ Throughout the early history of the campaign, the CAB “flip-flopped” on this issue as it struggled to incorporate a cultural shift in the acceptance of smoking into its policy making.⁵²

The emergence of sound scientific studies pointing to the damaging effects of ETS on non-smokers, such as passengers and crew, successfully rebutted CAB's concern that there was insufficient evidence to support even a limited ban on in-flight smoking. Industry changes propelled the movement forward when CAB disbanded due to airline deregulation in the mid-1980s.⁵³ The movement also received a scientific impetus with the publication of scholarly research on the effects of ETS exposure.⁵⁴ For example, the National Research Council (“NRC”) of the National Academy of Sciences published its report on airline cabin air and safety in which it “unanimously and forcefully” proposed “that smoking be banned on all commercial flights within the United States.”⁵⁵ The NRC additionally found that flight attendants endured secondhand smoke exposure that was equivalent “to living with a pack-a-day smoker.”⁵⁶

At the time, critics believed that smoking bans on even domestic flights would negatively impact tourism, and today, current smoking ban critics echo this concern.⁵⁷ For most passengers, flying in a smoke-free environment seems natural and customary, but, many international carriers outside of the United States still allow in-flight smoking.⁵⁸ The smoke-free movement

51. Measures such as ventilation systems or no-smoking sections placed in the same space as smoking areas have a minimal effect on second-hand smoke exposure. JAMES L. REPACE, ESTIMATED MORTALITY FROM SECONDHAND SMOKE AMONG CLUB, PUB, TAVERN, AND BAR WORKERS IN NEW SOUTH WALES, AUSTRALIA (2004), <http://www.cancerCouncil.com.au/editorial.asp?pageid=1020>; see also Shopland, *supra* note 3, at 348, 353 (noting that the creation of ventilation systems may protect patrons but do little to protect service workers because it would require “80 air changes per hour, a level of ventilation almost impossible to achieve.”).

52. Holm & Davis, *supra* note 49, at 36. In fact, while the debate continued in the aviation industry, the Air Transport Association said before the CAB that “smoking is a fact of life; it is something we must accommodate.” *Id.*

53. *Id.*

54. See discussion *supra* Part I.A and accompanying notes (discussing the recognized dangers of ETS exposure).

55. Holm & Davis, *supra* note 49, at 31.

56. *Id.*

57. Joyce Pan et al., *Smoke-Free Airlines and the Role of Organized Labor: A Case Study*, 3 AM. J. PUB. HEALTH 398, 401 (2005). Tobacco companies cautioned that there would be job losses, union problems, and a loss of smoking clientele; these fears never materialized. *Id.* When Northwest Airlines extended its voluntarily-implemented two-hour smoking ban to all its flights in 1988, there were some repercussions: the marketing company that advertised Northwest's decision lost all of its R.J. Reynolds-Nabisco contracts. Holm & Davis, *supra* note 49, at 33.

58. There is criticism of the U.S. decision to require flights coming into or

won a major victory in 2000 when the Wendell H. Ford Aviation Investment and Reform Act made all flights between the United States and foreign destinations smoke-free.⁵⁹ Since then, the International Civil Aviation Organization (“ICAO”) has committed itself to the implementation of a worldwide smoke-free aviation industry.⁶⁰ This contextualizes the smoke-free movement in

leaving from the U.S. to remain smoke-free. William Karas & Carol Gosain, *Recent U.S. Regulation of Foreign Airline Practices: Impermissibly Unilateral or Not?*, 16 SPG AIR & SPACE LAW. 4 (2002). Karas and Gosain argue that the U.S. implementation of this foreign carrier smoking ban is unilateral, a violation of bilateral international agreements: “[n]o bilateral or other international aviation agreement permits the United States to prescribe and impose on another state’s airline U.S. notions regarding smoking . . . as a condition to that airline’s right to operate to or from the United States.” *Id.* at 4-5. The authors further contend that the U.S. smoking bans applicable to foreign airlines “violate international law by regulating conduct on a foreign carrier’s foreign-registered aircraft not only when such aircraft are in U.S. airspace . . . but also when they are in international airspace.” *Id.* at 5. Though there is criticism, such uniform policy is effective in protecting employees and passengers, and this same policy should be extended to other workplaces to illustrate that some health issues are beyond politics.

59. 49 U.S.C. § 41706 (2005). The flight attendants’ successful lobbying before Congress in 1988 influenced the decision to make domestic flights of two hours or less smoke-free, followed by the 1990 decision to make all domestic flights of six hours or less smoke-free. In 1992, the International Civil Aviation Organization urged its 152 member-nations to go smoke-free.

60. INTERNATIONAL CIVIL AVIATION ORGANIZATION (“ICAO”), A29-15: SMOKING RESTRICTIONS ON INTERNATIONAL PASSENGER FLIGHTS (Sept. – Oct. 1992), available at http://www.icao.int/cgi/goto_m.pl?icao/en/conf/conf_arch.html (last visited Oct. 21, 2005). The relevant provisions which demonstrate a commitment to public and employee health are:

Whereas ICAO Assemblies have demonstrated a concern for and a contribution to human welfare in the quality of life and in the environment in which human beings work and engage in other pursuits

Whereas ICAO Assemblies have recognized a responsibility to achieve maximum compatibility between civil aviation operation and the quality of the human environment;

Whereas States have been recognizing increasingly and taking action against the known health hazards caused by tobacco smoke at the work place, in public buildings and transportation systems

. . . .

Whereas the World Health Organization (WHO) and the International Labour Organization (ILO), consider that occupational safety and health are interrelated and cannot be separated; and

Whereas the World Health Organization (WHO) unanimously adopted a Resolution urging Member States to ban smoking in public conveyances where protection against involuntary exposure to tobacco smoke cannot be ensured and requested its Director General to collaborate with ICAO; The Assembly: . . .

. . . .

2. Requests the ICAO Council, with the assistance and co-operation of the World Health Organization, to take appropriate measures to promote a smoke-free travel environment on all international flights;

workplaces as a national and global struggle that does not end with legislation affecting cabin air quality, but with quality of life for all workers.

Strong union leadership and federal Congressional champions, however, separate the smoke-free skies campaign from the establishment of universal smoke-free workplaces.⁶¹ During the debates over the domestic ban, flight attendants and their union representatives were present in the United States House of Representatives, to provide a visual reminder of the need for considerations of health to prevail in the deliberations.⁶² Flight attendants, through their union and growing empowerment, flight attendants led the struggle against ETS in airline cabins not only for their own health and safety, but also for their passengers.⁶³

3. Urges all Contracting States, in the meantime, to take necessary measures as soon as possible to restrict smoking progressively on all international passenger flights with the objective of implementing complete smoking bans by 1 July 1996.

61. When Richard Durbin (then U.S. Representative from Illinois, now Senator) pushed for the bill, it became part of a major lobbying effort. An impressive league of organizations, with flight attendant unions poised in the middle, supported the bill publicly, including the American Heart Association, the American Cancer Society, the American Lung Association, the American Public Health Association, the Joint Council of Flight Attendants Unions, the Association of Flight Attendants, and, of course, then U.S. Surgeon General, C. Everett Koop. Holm & Davis, *supra* note 49, at 32.

62. *Id.*

63. AMERICANS FOR NONSMOKERS' RIGHTS, *Flying the Smokefree Skies Milestones*, <http://www.no-smoke.org/learnmore.php?id=186> (last visited Jan. 28, 2006). In 1971, United Airlines became the first airline to have separate smoking and non-smoking sections. *Id.* By 1986, the Surgeon General stated that "[t]he simple separation of smokers and nonsmokers within the same airspace may reduce, but cannot eliminate, nonsmoker exposure to environmental tobacco smoke." *Id.* See also FLIGHT ATTENDANT MEDICAL RESEARCH INSTITUTE: FLIGHT ATTENDANT HISTORY, http://www.famri.org/fa_history/index.php (last visited Oct. 24, 2004) (giving overview of flight attendants' unpleasant experiences flying before implementation of smoke-free cabins). Flight attendants recount tales of flying transoceanic flights that were as long as 16 hours, breathing pure oxygen in the cockpit for relief, and "neglecting" to pass out the free cigarettes airlines used to give to passengers. *Id.* Due in part to the efforts of Patty Young and the surrounding empowerment of flight attendants, this fight culminated in a class action law suit against the tobacco industry and the gradual ban of smoking on flights. See *Broin v. Philip Morris Co.*, 641 So. 2d 888 (1994) (certifying a class action lawsuit against the tobacco industry on behalf of all similarly situated flight attendants seeking damages for strict liability, negligence, fraud, and conspiracy to commit fraud). The settlement in *Broin* funded the Flight Attendant Medical Research Institute, a not-for-profit foundation dedicated to investigating and curing ETS-caused diseases. See generally FLIGHT ATTENDANT MEDICAL RESEARCH INSTITUTE: MISSION STATEMENT http://www.famri.org/mission_statement/index.php (last visited Nov. 17, 2005) (providing useful information about the continuing activism of flight attendants).

Although in-flight smoking bans achieved ultimate success on a national level, the campaign's milestones serve as a useful example of the importance of a uniform system and as a reminder of how grass-roots campaigns can achieve substantial results.⁶⁴

For some young Americans, the idea of smoking on an aircraft seems unthinkable, a long-gone social faux pas. However, a complete ban on in-flight smoking on commercial carriers was a recent development, and certainly not a global one. This is strong evidence that changing social norms and shifting cultural perceptions can bolster public health policy. Just as flying in smoke-filled cabins proved a hellish experience for asthmatics and flight attendants, many bar and restaurant patrons and employees are unnecessarily exposed to ETS and subjected to uncomfortable health hazards.

B. The Friction Caused by the Movement: Why Service Industry Workers Have Not Been as Enthusiastic or Successful in Implementing Smoke-Free Policies

Servers and bartenders are poised to lead their own fight for smoke-free workplaces. Nevertheless, service industry workers tend to smoke more and are less organized and issue-driven than the flight attendants.⁶⁵ Would similar union leadership pave the way for successful smoking prohibitions in the service industry?⁶⁶

64. See generally Keith Krehbiel, *Committee Power, Leadership, and the Median Voter: Evidence from the Smoking Ban*, 12 J.L. ECON. & ORG. 234 (1996) (chronicling the voting process which ultimately led to the adoption of the 1987 domestic flight smoking ban). Richard Durbin quietly introduced the ban into the Appropriations Committee to circumvent southern representatives reluctant to support a smoking ban; the amendment to the annual appropriations bill in the Subcommittee on Transportation would have denied Federal Aviation Administration funds to any airports that accommodated planes that permitted smoking. *Id.* at 234-35.

65. Pan, *supra* note 57, at 402. The American Federation of Labor and Congress of Industrial Organizations, with the Service Employee International Union, endorsed smoke-free policies in Massachusetts, citing the cancer risks to bar and restaurant workers; further, these unions decried the oft-repeated mantra that if these workers do not like the smoke, they should find different employment. Letter from Robert J. Haynes, President, Mass. AFL-CIO, to the Hon. Marjorie Decker, Cambridge City Council member (Jun. 5, 2003), available at http://www.laborandtobacco.org/docs/haynes_6-5-03.pdf.

66. It may have been a singular and momentous point in history, with the convergence of several factors, all of which contributed to the success of the flight attendants participation in this grass-roots campaign. For example, airlines were struggling due to oil prices and global economic problems and deregulation forced airlines to focus on serious competition. Flight attendants had already been successful through their union in eradicating the no-marriage and no-pregnancy requirement in the 1970s, easing weight and age requirements, and securing pensions, job security, and even, single rooms on overnight stays. United Flight Attendant History, available at <http://www.united.com/page/article/0,6722,3361,00.html> (lasted visited Oct.

Commentators have attributed the flight attendants' success to the "singularity of focus in the message put forth by health groups," the public identification with the airline industry employees and their exposure, the "incremental nature" of the movement, and the support of Congressional leaders.⁶⁷ This same rubric might be utilized in the current fight to make bars and restaurants in Chicago, and the nation, smoke-free. Indeed, the movement in Chicago was backed by policy heavyweights such as the American Cancer Society, which invested four million dollars to the effort. Similar to the commercial airlines movement, the focus in the restaurant and bar context should be on worker health and safety, and greater union leadership.⁶⁸

Although the aviation industry faces greater and more immediate safety concerns regarding ETS exposure on airplanes, this analogy can, and should, be extended to restaurant and bar workers. This would ensure not only the health and safety of workers, but also foster an environment of safe, clean air that is free of the harmful pollution caused by smoking. Smokers and non-smokers would both benefit.⁶⁹

C. The Convenient Libertarian: Tobacco Companies' Intervention in the Smoking Ban Issue and the Need for Uniformity

Tobacco companies often advocate minimal government regulation of adults' smoking behavior. This seems incongruous given the tobacco companies' reliance on government intrusion, such as beneficial trade policies.⁷⁰ Similarly, tobacco crops enjoy

24, 2005).

67. Holm & Davis, *supra* note 49, at 35. The movement was "incremental" because it began with separate sections and wound its way to in-flight smoking bans, even on international flights. This is not unlike today's smoke-free movement, where we have moved for the creation of smoking sections in restaurants to comprehensive municipal and state-wide regulations and restrictions on smoking.

68. *Id.* Partly because of the movement, many airlines went smoke-free voluntarily before the federal regulation. *Id.* at 34-35. Now, Chicago has its own partial ban. Fran Spielman, *City Council Snuffs Out Cigarettes: Smoking Ban Starts Jan. 16 For Most*, CHI. SUN-TIMES, Dec. 8, 2005, at 8.

69. A survey after the first airline smoking ban showed that eighty percent of 30,000 passengers polled approved of the smoking ban on flights of two hours or less, and the FAA received only one hundred and twenty complaints "during a period when 445 million people traveled." Holm & Davis, *supra* note 49, at 33. Smokers, therefore, benefit from an environment that encourages smoking cessation and non-smokers benefit from a lack of exposure to dangerous ETS.

70. Trade Act of 1974 § 301, 19 U.S.C. § 2411 (1996). This act helped open foreign markets to American tobacco. The American tobacco trade has been criticized because the U.S. trade policy "perpetuates the problem of smoking by trying to develop overseas a market that is drying up at home." *A.M.A. Assails Nation's Export Policy on Tobacco*, N.Y. TIMES, June 27, 1990, at A1, A12.

subsidy schemes that present two important moral and economic questions:⁷¹ first, whether it is appropriate for governments to subsidize an addictive and harmful substance, and second, whether subsidies are appropriate when governments are attempting to reduce tobacco consumption in their populations.⁷² It may be disingenuous for tobacco companies to enjoy successful overseas marketing, where labeling and ingredient standards are less stringent than in the United States, and possibly lead to more smokers at an earlier age.⁷³ Unfortunately, as consumption of tobacco products has decreased in developed nations, where consumption is often a more informed choice, tobacco use has increased in developing nations.⁷⁴ In response, some have called for an international framework for tobacco control.⁷⁵

The concept of an international framework is an important consideration in city and state experiments with smoking regulation. Uniformity may be the key to this puzzle: by creating environments where tobacco use is not tolerated, it may decrease the world's reliance on tobacco products to fuel economies. Establishing uniform smoking regulations in bars and restaurants will accomplish three goals. First, businesses will suffer less by reducing competition with non-restricted businesses. Second, workers will enjoy comprehensive protection. Third, the United States can serve as an example for effective health policy and responsible production and consumption to the rest of the world. Although tobacco companies have aggressively countered the movement for smoke-free public and workplaces, smokers have been willing to tolerate smoking bans, and the flood of complaints that the tobacco industry attempted to generate has never come to fruition.⁷⁶

71. David J. Malcolm, *Tobacco, Global Public Health, and Non-Governmental Organizations: An Eminent Pandemic or Just Another Legal Product*, 28 DEN. J. INT'L L. & POL'Y 1, 31-33 (1999)

72. *Id.* at 33.

73. *Id.* at 47-48.

74. *Id.* at 47.

75. *Id.* at 45. The WHO, through the World Health Assembly, has "adopted a resolution calling on the WHO Director-General to begin developing an international framework convention for tobacco control in accordance with . . . the WHO Constitution" in the hopes of an "adoption of comprehensive tobacco control policies" to deal "with aspects of tobacco control that transcend national boundaries." *Id.* Some critics have suggested that tobacco should fall within the regulation of a psychotropic drug. *Id.* at 27. A psychotropic drug is "a dependence-creating substance that stimulates the central nervous system and one's cognitive functions, thoughts, behavior, perceptions, and/or moods." *Id.* Despite the international regulatory scheme in place for such drugs, the author admitted that such a regulatory scheme would be improbable given the tobacco industry's power and influence over policy-makers. *Id.* at 48.

76. Holm & Davis, *supra* note 49, at 34-35. The tobacco industry's campaign against the airline-smoking ban may have developed the nation's

D. OSH Administration and ICAO: A Framework for Analysis

The International Civil Aviation Organization utilized strong language in its four-part concern about smoking on airplanes, and it is a useful analytical framework for municipal indoor smoking ordinances. The ICAO endorsed the viewpoint "that occupational safety and health are interrelated and cannot be separated."⁷⁷ Despite the OSH Administration's mission to protect the safety and health of America's workers, the creation of a workable regulatory scheme under its administration seems unlikely. The OSH Administration has resisted such regulation, evidenced by its dropping the IAQ proposal regarding smoking.⁷⁸

Better health policy in this nation is essential for society to continue to function, and such a health policy should start with citizen and employee health.⁷⁹ Thus far, regulation of workplace ETS exposure has been a failed regulatory experiment for the OSH Administration. The possibility of comprehensive smoke-free policies at the federal level has been ignored, despite ETS presenting "a greater risk to the public health of nonsmokers than all other hazardous industrial air pollutants regulated by the United States Environmental Agency combined, including airborne radionuclides, arsenic, asbestos, benzene, coke oven emissions, and vinyl chloride."⁸⁰ Studies conclude that the lung cancer risk to non-smokers is two thousand times the de minimis level; therefore, no level of exposure for employees in bars and restaurants is acceptable.⁸¹ Many offices are now smoke-free, and bar and restaurant workers in Chicago should not be subjected to a heightened risk level due to a perceived right to smoke, especially in light of the compromise that protects restaurant employees and patrons but not bars for another three years.⁸²

awareness of the dangers of second-hand smoke. *Id.*

77. *Id.* The ICAO has no enforcement power and can only make suggestions. It does, however, have the power to influence market forces through public opinion, along with the WHO, which arguably has had an effect on the movement for a smoke-free society. Malcolm, *supra* note 71, at 43-44.

78. See generally discussion *supra* Part I.B.1 and accompanying notes (discussing the failed regulatory scheme under the OSHA).

79. See James L. Repace, *Risk Management of Passive Smoking At Work and At Home*, 13 ST. LOUIS U. PUB. L. REV 763, 764 (1994) (recommending smoking bans in work places to ensure the safety of workers as the most cost-effective method, posing the least risk to employees).

80. *Id.* at 765.

81. *Id.* at 776. The Department of Transportation utilized this risk methodology in assessing cabin air quality before the U.S. domestic ban on smoking. *Id.* at 774. The EPA, the OSH Administration, and the FDA, when assessing carcinogens from a variety of sources, also use this type of risk assessment; generally, in large populations at risk for cancer, the de minimis level of risk is one lifetime death per one million people. *Id.* at 773.

82. See Tetsuya Mizoue, Kari Reijula, and Kjell Andersson, *Environmental Tobacco Smoke Exposure and Overtime Work as Risk Factors for Sick Building*

III. PROPOSAL

Considering the social and health effects of smoking and ETS exposure and the benefits of creating environments that facilitate smoking cessation, the development of smoke-free bars, restaurants, and other places of leisure and employment is good public health policy.⁸³ Accordingly, an improved Chicago indoor smoking ordinance is appropriate and necessary. The attempt, however, to create exceptions, such as delayed implementation, is counterproductive to the purpose of smoking bans. Therefore, smoking restrictions in Chicago should be comprehensive: it is contrary to public health policy and a futile exercise in enforcement to create exceptions concerning health and safety. This Comment proposes a uniform system and a collaborative effort among the City of Chicago, Cook County, and the outlying suburban areas.

Syndrome in Japan, 154 (9) AMER. J. EPIDEMIOLOGY 803-08 (2001), available at <http://www.aje.oxfordjournals.org/cgi/content/abstract/154/9/803> (showing possible associations among overtime work, ETS, work environment, and the inexplicable “sick building syndrome,” which is an “irritation of mucous membranes and the skin and general malaise”).

83. See Michael Siegel & Michael Skeer, *Exposure to Secondhand Smoke and Excess Lung Cancer Mortality Risk Among Workers in the “5 B’s.” Bars, Bowling Alleys, Billiard Halls, Betting Establishments, and Bingo Parlours*, 12 TOBACCO CONTROL 333 (2003) (arguing that smoke free initiatives in past years have focused on restaurants, largely ignoring the health risks of service workers in the “5 B’s”). Dr. Siegel also argued that the reason for such neglect has been “the relationship that exists between these establishments and the tobacco industry and the support that the industry has provided them to help them oppose regulations.” *Id.* See also Wendy Ritch & Michael Begay, *Strange Bedfellows: the History of Collaboration between the Massachusetts Restaurant Association and the Tobacco Industry* 91 AM. J. PUBLIC HEALTH 598 (2001) (noting the strong political and financial connections between restaurants and the tobacco industry in Massachusetts); Joanna Dearlove, et al, *Tobacco Industry Manipulation of the Hospitality Industry to Maintain Smoking in Public Places*, 11 TOBACCO CONTROL 94 (2002) (accusing the tobacco industry of co-opting the service industry to promote its values of smoking acceptability). On a similar note, a controversy flared in Chicago surrounding the hefty contributions of several powerful restaurant owners to a major smoking ban opponent, Alderman Burton F. Natarus, as well as to Major Daley, who had not been strong in his support of the ban. Fran Spielman, *Restaurants Gave \$150K to Smoking Ban Foe: Alderman Promoting Compromise Law Calls Idea of Link “Ludicrous”*, CHI. SUN-TIMES, Nov. 6, 2005, at A03. Of course, there is no clear connection, but it has certainly raised eyebrows: as watchdog group the Better Government Association stated, \$150,000 “is a lot of money for one sitting alderman . . . It’s naïve to think those types of campaign contributions have no influence [on smoking policy].” *Id.*

A. Community Education

A well-informed public can solve many of the problems of implementation and enforcement.⁸⁴ Comparisons to twentieth-century Prohibition illustrate that many citizens are not clear on what a smoke-free ordinance entails.⁸⁵ Cigarettes are legal products, but, like other potentially dangerous goods, such as guns and alcohol, tobacco and its use should be heavily regulated. Just as alcohol consumption is relegated to certain public spheres, so should cigarette smoking.⁸⁶ Although a highly political issue,

84. See Damon Nagami, *Article: Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW.J.ENVTL.L. & POL'Y 159 (2001) (surveying the problems in enforcing smoke-free ordinances in California and suggesting a combination of "aggressive policing, citizen reporting, and litigation," as well as time for citizens to adjust to a new social norm). See also David Sharos, *Roselle Panel Postpones Decision On Smoking Ban*, CHI. TRIB., Nov. 1, 2006, Metro 4 (reporting Roselle's decision to await movement by the state or DuPage County before enacting ban after holding a two-hour presentation and public comment meeting); Denise Linke, *Public Hearing Set on Smoking Ban*, CHI. TRIB., Dec. 20, 2006, at Metro 11 (noting movements in the far west suburban areas of Batavia, Geneva, and St. Charles to discuss publicly the viability of a smoking ban). In fact, the Chicago Clean Indoor Air Ordinance of 2005 contains a specific provision encouraging public education as a method of enforcement. See CHI. ILL. CODE § 7-32-140 (2005) (stating that "[t]he Chicago Department of Health shall engage in a continuing program to explain and clarify the purposes and requirements of" the ordinance to citizens and business-owners alike).

85. An opponent of a state-wide smoke-free ordinance in Washington state stated that "[w]e are trying to bring back Prohibition here . . . It didn't work then, and it won't work now." Lynn Marshall, *Stringent Smoking Curb Goes on Ballot; Initiative 901 Favored in Washington State*, CHI. TRIB., Nov. 7, 2005, at CN8. The Washington state measure passed on Nov. 8, 2005; it is the strictest state-wide smoking legislation in the nation, banning smoking in bars, restaurants, clubs, bowling alleys, non-tribal casinos, and within 25 feet of any doors, windows, or vents. Julie Davidow, *Smoking Ban Sails to Victory, State will Have Strictest Restrictions in Nation*, THE SEATTLE POST-INTELLIGENCER, Nov. 9, 2005, at A18. The smoking bans, unlike alcohol during the Prohibition era, do not make the manufacture, sale, or transport of cigarettes illegal, and instead, merely proscribes cigarette use in public spaces.

86. The reasons for regulating the use of alcohol have parallels to reasons for regulating public smoking. Not only are there similar public health issues, such as addiction and examples to young people, but also the order of public spaces reflects the society as a whole. See generally Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105(3) AM. J. SOC. 603 (1999) (expounding on the effect of visual cues on modern urban society); see also Lisa Trotter et al., *Socially Cued Smoking in Bars, Nightclubs, and Gaming Venues: A Case For Introducing Smoke-Free Policies*, 11 TOBACCO CONTROL 300, 300-04 (2002) (suggesting that socially cued smokers, or those who begin smoking or relapse due to direct and indirect pressure from other smokers, are often young and associate smoking with a glamorous lifestyle; bars and nightclubs may be "nicotine classrooms" and restricting smoking in such locations may "encourage cessation and remove a context where many young

public health concerns should be part of societal discourse. Local governments, retailers of tobacco products, and the tobacco companies should be more willing to invest in public education and debate, which will create self-regulating smoking bans.⁸⁷

B. Intricacies of Implementation in Bars and Restaurants

1. Smoking Licenses and Moratoriums Are Contrary to Public Health Policy

Mayor Daley and some aldermen voiced support for a proposal by the Illinois Restaurant Association that would have allowed walled-off restaurants, free-standing bars, beer gardens, sidewalk cafes and the concourse and lounge areas of bowling alleys to apply for a smoking license.⁸⁸ Some termed this sort of scheme “a license to kill.”⁸⁹ Although compromise generally is applauded, in this case, it is counterproductive. As addressed above, ETS exposure in service industry workers represents a serious health concern, as does the general health risk of smoking.⁹⁰ To proclaim that a particular hazard exists, and then to allow certain businesses to buy a way out of compliance is incongruent with the spirit of public health.⁹¹ This holds true for the present ordinance’s delay of the implementation of smoking prohibitions in bars and restaurants: new data will not show that smoking and ETS exposure is suddenly good for human health. Therefore, smoking licenses and delayed enactment will not solve the problem of worker health or alleviate the social costs of smoking.

2. Compromise Will Confirm the Fears of Bar and Restaurant Owners

If exceptions or delayed implementation for free-standing bars or restaurants with walled-off smoking areas are allowed to continue business-as-usual, then other smoke-free restaurants and bars may suffer the economic effects they have feared. A uniform system is a method that will protect worker and patron health

people are induced to try smoking”).

87. Shopland, *supra* note 3, at 355.

88. Fran Spielman, *Smoking Ban Passes Council Panel: Plan Could Change Substantially By Full Vote Nov. 30*, CHI. SUN-TIMES, Oct. 28, 2005, at 3.

89. See James Janega & Gary Washburn, *Eateries Edgy Over Giving Up Smoking; City Restaurants Fear Being on the Wrong End of Partial Ban*, CHI. TRIB., Oct. 7, 2005, at C1 (quoting chairman of the city’s Health Committee and smoking ordinance sponsor, Ald. Ed Smith).

90. See discussion *supra* Part I.A and accompanying notes 14-17 (surveying the epidemiological studies that document ETS as harmful to non-smokers).

91. See Mihalopoulos & Washburn, *supra* note 10, at C1 (noting the possibility of smoking ordinance exceptions).

while protecting businesses from unfair advantages. At this point in the implementation, statistical studies on the effect of smoking bans on businesses are incomplete and possibly flawed.⁹² However, it is likely that neighboring businesses with different smoking policies would skew the results. Exempting bars may also create loopholes that will encourage "gaming" the system.⁹³ A prohibition scheme that includes blanket exemptions for bars, rather than individualized assessments of needed waivers,⁹⁴ may only serve to widen the economic and health disparities of service employees.⁹⁵

92. See Lisa Colangelo, *Ban's Foes Blow Smoke: Study*, N.Y. DAILY NEWS, Mar. 29, 2004, at 23 (reporting increased revenue of 8.7% in New York City's bars and restaurants a year after the ban went into effect; critics challenged the study as inaccurate because it compared sales from March 2002, which some analysts say was the worst marker of New York City hospitality revenues because of the destruction of the World Trade Center in 2001).

93. See Editorial, *Smoking Ban Evasions*, COURIER-JOURNAL (Louisville, KY), Sept. 17, 2005, at 12A (observing the possibility of bowling alleys and pool halls sidestepping the smoking bans as these public spaces would likely qualify as "free-standing bars," exempted by the Louisville ban); see also Jeremy Laurence, *Pubs Will Shut Kitchens To Evade Smoking Ban*, THE INDEPENDENT (U.K.), Sept. 5, 2005 at 5 (reporting that 40% of English pubs could evade a possible smoke-free ordinance, which would exempt pubs that do not serve food, by simply closing their kitchens); see generally Matthew A. Stinnett, *A Breath of Fresh Air: A Smoking Ban's Legal Invasion of Property Rights in Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 32 N. KY. L. REV. 239 (2005) (marking the surprising triumph of a smoking ban in a state whose main cash crop is tobacco and concluding that the city's smoke-free ordinance was a legitimate use of municipal police powers to protect health and safety).

94. The proposed ban already includes provisions relating to need-based exceptions: "[r]estaurants and bars with gross receipts to prove that sales have dropped by 15 percent after one smoke-free year would be able to apply for a one-year 'non-renewable exemption.'" Spielman, *supra* note 88, at 3.

95. See Laurence, *supra* note 93, at 5 (reporting concerns that the exemptions likely would be concentrated in the poorest parts of England and leave those workers needlessly at risk). The British Medical Association expressed its dismay at this double standard: "[I]f the Government is aware of the hazards [of passive smoking], how can it defend only a partial ban . . . exposing workers to toxic chemicals just because they are unlucky enough to work in pubs and bars not selling food?" *Id.* The current proposed ordinance in Chicago may raise similar unnecessary compliance issues and costs. The City Council is still attempting to formulate an effective method of proving that bars do generate more than 65% of revenue from alcohol sales. So far, they have suggested an "honor system" based on proprietor-prepared affidavits and audits. This will be at the bar-owners expense. Some already fear that the City's Department of Business Affairs and Licensing has neither the money nor manpower to ensure that the owners are not taking advantage of the system. Fran Spielman, *Bars May Need Proof For Smoke Break: City Could Force Them to do Own Audits to Delay Ban Until 2008*, CHI. SUN-TIMES, Dec. 14, 2005, at 24.

3. *Incentives for Neighboring Communities*

To ensure uniformity, short of statewide or federal regulation, neighboring communities without comprehensive smoking restrictions should develop an incentive program to encourage bars and restaurants to become voluntarily smoke-free. This type of small-scale regulation might encourage these cities to consider a more comprehensive ban and will gradually contribute to protecting workers as well as businesses. Incentive proposals, such as discounted liquor licenses, have been suggested in other cities.⁹⁶

4. *Stronger Union Representation*

As discussed above in the Analysis, stronger union representation in the Chicago service industry, with employees willing to take an active role in their own advocacy will also encourage uniform smoke-free ordinances. Strong union leadership in the service industry could take charge of a serious health issue that exacerbates class disparities.⁹⁷ Workplace

96. As Washington, D.C. considered a smoking ban, some city council members proposed a tax incentive to those restaurants and bars that ban smoking and charge higher fees to those that allow smoking. Robert Redding Jr., *Orange Backs Anti-Tobacco Bill: Smoke-Free Workplace Measure Has Council Support*, WASH. TIMES (D.C.), Sept. 22, 2005, at B01. In Madison, Wisconsin, the city council reconsidered the city's smoking ban and voted to uphold it twice since its passage. Dean Mosiman, *Neither Side Angry After Smoking-Ban Vote; Opponents are Glad They Gained Momentum*, WIS. STATE JOURNAL, Sept. 22, 2005, at A1. Opponents there have suggested grandfathering bars that had liquor licenses before 2004 or reducing licensing fees for already smoke-free restaurants. *Id.* Additionally, there is talk of a Cook County smoking ban, even as other suburban cities pass smoke-free legislation. Gary Wisby, *Stroger Wants to Double Cig Tax: County's \$2 Portion Would Avoid Property Tax Hike for 7th Year*, CHI. SUN-TIMES, Dec. 20, 2005, at 6; see also Metro Briefs, *Deerfield Adopts Smoking Ban*, CHI. SUN-TIMES, Dec. 20, 2005, at 27 (detailing smoking ban passed in the suburb of Deerfield); Stanley Ziemba & Janice Neumann, *Metro, Oak Forest Bans Smoking; Town Joins Neighbors in Ban That Includes Bars, Outdoor Events*, CHI. TRIB., Nov. 29, 2006, at 3 (joining neighbors Orland Park and Tinley Park); Benji Feldheim, *Metro, Public Smoking Ban Greenlighted*, CHI. TRIB., Nov. 15, 2006, at 9 (reporting Palatine's ban and concerns from business owners who fear losing customers to neighboring Arlington Heights and Hoffman Estates businesses, who have exempted bars where tobacco sales are incidental to the business); Metro, *Smoking Ban Adopted, but Racetrack is Exempt*, CHI. TRIB., Nov. 9, 2006, at 3 (reporting the dissatisfaction of some Arlington Heights business owners that the racetrack was exempted from compliance with the city's smoking ban); Jennifer Taylor, *Naperville Split Over Smoking; Proposed Public Ban Has 'Limited' Exceptions, and that Sparks a Debate*, CHI. TRIB., Sept. 15, 2006, at Metro 3 (reporting criticism by Restaurant Association of Naperville that the smoking ban would harm businesses if neighboring communities had not enacted smoking bans, thus underlining the importance of a uniform approach).

97. See Shopland, *supra* note 3, at 354 (noting that while smoking rates

tobacco restriction policy "is an area where organized labor can work in partnership with tobacco control advocates."⁹⁸ As the Analysis notes, and the policy-makers in Chicago are aware, collaboration is extremely beneficial to the smoke-free movement.

C. Regulation at State and Federal Levels

An OSH Administration regulation could be a beneficial regulatory scheme.⁹⁹ This type of regulation seems, at first glance, a perfect marriage: worker safety and health governed by the Occupational Safety and Health Administration. Unfortunately, the OSH Administration has proved a cumbersome and ineffectual regulatory agency that has deliberately removed itself from the controversy.

Although the OSH Administration is now an unlikely candidate, other forms of federal regulation are possible. Similar to the commercial airline smoking regulation, there is now some impetus to create a federal regulatory scheme for smoking in indoor public spaces beyond OSH Administration regulations. Recently, the American Medical Association's Medical Student Section proposed a resolution embracing federal regulation to the policymaking House of Delegates that recommended smoking bans in "all cafeterias, restaurants, cafes, coffee shops, food courts or concessions, supermarkets or retail food outlets, bars, taverns, or in a place where food or drink is sold to the public and consumed on the premise."¹⁰⁰ Precedent for such Congressional action is found in the in-flight smoking prohibition.¹⁰¹ Indeed, the WHO endorsed the need for tobacco control at the national level to promote health, tobacco education, and comprehensive intervention.¹⁰²

Federal regulation, however, may be an even more difficult fight than implementation of individual, municipal smoking restrictions. This is an area traditionally left to the states and cities as part of their powers to regulate health and safety and, at least initially, smoking regulations are better handled at the state and municipal level. While federal regulation of commercial airline in-flight smoking made sense due to its national and international character, the same factors may not be present for

declined by 8.2% among white-collar workers, 48% of bartenders and 42% of servers smoke at "a rate of smoking that has not been observed among the general U.S. population since the 1960s").

98. Pan, *supra* note 57, at 402.

99. See generally, discussion *supra* Part I.B.1 and accompanying notes 18-27 (discussing relevant OSH Administration regulation).

100. Bruce Japsen, *AMA May Support Broad Public Smoking Ban*, CHI. TRIB., Nov. 3, 2005, at C3.

101. *Id.*; see also discussion *supra* Part II.A and accompanying notes 49-64 (presenting smoke-free initiatives in the context of the airline industry).

102. Esson & Leeder, *supra* note 36, at 71-72.

federal regulation of second-hand smoke exposure in the service industry until there is a more uniform national message about the role of tobacco in our society.

IV. CONCLUSION

The Chicago smoking ordinance is sound public health policy that should be fully implemented and faithfully enforced. Taking a lesson from the successful movement of flight attendants in the last century, service employees should rally and join their union representation or engage in grass-roots campaigns to forge partnerships of health and safety. In the absence of union leadership (considering that many service workers do not benefit from such representation), cities and states should be ready to implement uniform, comprehensive smoke-free policies in lieu of federal regulation under the OSH Administration or any other proposed regulatory scheme. Each city can take individual steps toward a safer, healthier place for America's workers and citizens.