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THE PROPOSED ILLINOIS CLEAN INDOOR AIR ACT: THE RIGHT OF NONSMOKERS TO A SMOKE-FREE ENVIRONMENT

*The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him. . . .*¹

Medical evidence has established that smoking causes emphysema, lung cancer, heart disorders, bronchitis and other diseases to persons who smoke.² Recently, studies have revealed that tobacco smoke is also harmful to the health of nonsmokers who are forced to inhale tobacco smoke³ in enclosed places.⁴

1. *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 530, 368 A.2d 408, 415 (1976).

2. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *SMOKING AND HEALTH* 33 (1964).

3. Tobacco smoke means smoke from cigarettes, cigars, pipes and any other tobacco product. Scientific research indicates that cigar and pipe smoke contain the same pollutants as those found in cigarette smoke. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL* 176-79, 229 (1973).

4. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL* 117-35 (1972) [hereinafter cited as *1972 Surgeon General Report*]; Aronow, *Effect of Passive Smoking on Angina Pectoris*, 299 NEW ENG. J. MED. 21 (1978); Froeb & White, *Small-Airways Dysfunction In Nonsmokers Chronically Exposed to Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980); Matsukura, *Effects of Environmental Tobacco Smoke on Urinary Cotinine Excretion in Nonsmokers*, 311 NEW ENG. J. MED. 828 (1984). See also A. BRODY & B. BRODY, *THE LEGAL RIGHTS OF NONSMOKERS* 13-31 (1977) [hereinafter cited as *BRODY*].

Many courts have taken judicial notice of the harmful and offensive nature of tobacco smoke. In 1976, the Superior Court of New Jersey stated that "the smoke from burning cigarettes is toxic and deleterious to the health not only of smokers but also of nonsmokers who are exposed to 'second-hand' smoke." *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. at 521, 368 A.2d at 411. In 1914, the Supreme Court of Illinois noted that smoking can be offensive or harmful in certain public places where large numbers of persons are crowded together in a small space. *City of Zion v. Behrens*, 262 Ill. 510, 511-12, 104 N.E. 836, 837 (1914). In 1890, the Supreme Court of Louisiana stated that smoking "is distasteful and offensive, sometimes hurtful, to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places." *State v. Heidenhain*, 42 La. Ann. 483, 486, 7 So. 621, 622 (1890). The proposed Illinois Clean Indoor Air Act also recognizes the harmful effects of tobacco smoke. See *infra* note 85 and accompanying text.

For a discussion of the possibility that involuntary inhalation of tobacco smoke may cause lung cancer, see PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING: CANCER*, A REPORT OF THE SURGEON GENERAL 239-51 (1982).

Because a potentially large number of nonsmokers are exposed to harmful pollutants⁵ contained in tobacco smoke, inhalation of tobacco smoke by nonsmokers⁶ is a serious public health concern.⁷

The danger to the health of nonsmokers,⁸ documented in

5. Among the harmful pollutants that burning tobacco emits into the air are carbon monoxide, tar, and nicotine. Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62 (1976) [hereinafter cited as *Legal Paths*]. Other harmful pollutants emitted from burning tobacco include acrolein, ammonia, formic acid, hydrogen cyanide, nitrous oxides, formaldehyde, phenol, acetaldehyde, hydrogen disulfide, pyridine, methyl chloride, acetonitrile, propionaldehyde and methanol. BRODY, *supra* note 4, at 21.

The pollutants in tobacco smoke enter the air in two ways. Smoke which is exhaled into the air by the smoker is known as mainstream smoke. 1972 Surgeon General Report, *supra* note 4, at 182. Smoke which rises from the mouthpiece and from the burning end of a cigarette is known as sidestream smoke. *Id.* Because sidestream smoke is not purified by either the cigarette filter or the smoker's lungs, it contains greater concentrations of pollutants and is more dangerous to the health of nonsmokers than is mainstream smoke. BRODY, *supra* note 4, at 21. See also Axel-Lute, *Legislation Against Smoking Pollution*, 6 ENVTL. AFF. 345, 347 (1977-78) [hereinafter cited as *Smoking Legislation*]. Studies have shown that sidestream smoke of one cigarette contains 75.5 ml. of carbon monoxide, which is 4.7 times greater than that present in the mainstream smoke of one cigarette. Hoegg, *Cigarette Smoking in Closed Spaces*, 2 ENVTL. HEALTH PERSP. 117, 126 (October 1972).

6. Inhalation of tobacco smoke by a nonsmoker is known as passive or involuntary smoking. Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 447 (1980) (articulates danger posed to nonsmokers from cigarette smoke) [hereinafter cited as *Legal Conflict*].

7. Comment, *Warning: California Antismoking Law May Be Dangerous to Your Health—An Analysis of Nonsmokers' Rights in the Workplace*, 14 PAC. L.J. 1145, 1147 (1983) (passive smoking raises concern about possible serious public health problem) [hereinafter cited as *California Antismoking Laws*]; *Legal Conflict*, *supra* note 6, at 449. In poorly ventilated areas, the noxious chemicals in tobacco smoke may be present in quantities which substantially exceed various nationally recommended air-quality safety limits. 1972 Surgeon General Report, *supra* note 4, at 131. See also, Comment, *The Resurgence and Validity of Antismoking Legislation*, 7 U.C.D. L. REV. 167, 177 (1974) [hereinafter cited as *Antismoking Legislation*]; *Legal Paths*, *supra* note 5, at 64-5.

8. The health dangers to nonsmokers result, in part, from inhalation of carbon monoxide in tobacco smoke. Minimal exposure to carbon monoxide has been shown to affect a person's cardiovascular and central nervous systems and to contribute to lightheadedness, double vision, loss of memory, and lack of concentration. Studies have also shown that exposure to levels of carbon monoxide can have physiological effects, such as altered auditory discrimination, visual acuity and ability to distinguish relative brightness, as well as impaired time interval discrimination. 1972 Surgeon General Report, *supra* note 4, at 123; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. U. CHI. L.J. 610, 613 (1974) [hereinafter cited as *Nonsmokers' Rights in Illinois*].

the Surgeon General's report⁹ and other studies,¹⁰ has heightened public awareness of the need for effective control of tobacco smoke pollution.¹¹ Consequently, nonsmokers are increasingly asserting a right to a smoke-free environment.¹² While smokers claim that they have a constitutional right to smoke,¹³ nonsmokers claim that they have an equal right not to be made ill or seriously inconvenienced by another person's smoking habit.¹⁴ As a result, nonsmokers have been seeking protection through the courts and their state legislatures.

In response, a majority of states have enacted laws to protect nonsmokers from the harmful effects of tobacco smoke in enclosed public places.¹⁵ Although the Illinois legislature has

9. Each year the United States Surgeon General issues a report to Congress on the health consequences of smoking as required by the Public Health Cigarette Smoking Act of 1970. 15 U.S.C. § 1337(a) (1970).

10. See *supra* note 4 and accompanying text.

11. For results of public opinion surveys on smoking, health hazards, and anti-smoking restrictions, see *Antismoking Legislation*, *supra* note 7, at 180-82. Surveys taken in 1964, 1966, and 1970 show that a majority of Americans, both smokers and nonsmokers, favor smoking restrictions. *Id.* See also *Legal Conflict*, *supra* note 6, at 449-50.

12. Nonsmokers assert that they should not have to endure an additional source of air pollution from tobacco smoke. *Legal Paths*, *supra* note 5, at 63. Tobacco smoke is a major source of indoor air pollution. Comment, *Legislation for Clean Air: An Indoor Front*, 82 YALE L.J. 1040, 1043 (1973) [hereinafter cited as *Indoor Front*]. Other sources of indoor air pollution include cooking and heating. *Id.*

13. *Legal Paths*, *supra* note 5, at 68. Even if a person has a constitutionally protected right to smoke, that right is limited by a state's police power to protect the public health, safety, and welfare of its citizens. *Id.* at 70. See *infra* notes 94, 97-101 and accompanying text.

14. Chicago Tribune, October 31, 1983, § 5 (Tempo), at 1, col. 2. Involuntary smoking affects nonsmokers in different ways. Exposure to tobacco smoke may significantly aggravate the medical conditions of nonsmokers who have heart or lung diseases. 1972 Surgeon General Report, *supra* note 4, at 131. See also *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. at 528, 368 A.2d at 414; *Legal Conflict*, *supra* note 6, at 448. Other nonsmokers suffer allergic reactions, such as coughing, wheezing, and eye, nose and throat irritation. BRODY, *supra* note 4, at 33. See also *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. at 528, 368 A.2d at 414. Persons who are allergic to cigarette smoke have been characterized as hypersensitive. *California Antismoking Laws*, *supra* note 7, at 1145. Finally, some nonsmokers are annoyed and uncomfortable when exposed to tobacco smoke. They may also experience eye, nose, and throat irritation. *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. at 528, 368 A.2d at 414. See also *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (discussing constitutional rights of nonsmokers), *aff'd*, 598 F.2d 310 (2nd Cir. 1979), *cert. denied*, 444 U.S. 926 (1979); *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976) (discussing constitutional right to breath clean air), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Smoking Legislation*, *supra* note 5, at 347.

15. For a listing of state statutes regulating smoking in public places, see *infra* note 50 and accompanying text.

Many local governments have also passed ordinances regulating smoking in public places. The scope of this comment, however, is limited to state

not yet passed such a law, a Clean Indoor Air Act has been proposed.¹⁶ Because of the harmful effects of tobacco smoke, Illinois needs a Clean Indoor Air Act to protect the health, comfort, and environment of its smoking and nonsmoking citizens.

This comment examines the proposed Illinois Clean Indoor Air Act [proposed Act] and analyzes three fundamental issues. First, is the proposed Act an unconstitutional infringement on the personal freedom of smokers? Second, is the proposed Act broad enough to provide meaningful protection to the nonsmoking public? Finally, does the proposed Act provide effective means of enforcement? Where relevant, this comment also recommends additional provisions to make the proposed Act more comprehensive and effective. To place this discussion of the proposed Act in its proper perspective, this comment begins with a brief summary of the judicial remedies employed by plaintiffs to secure their right to a smoke-free environment and an overview of the development of anti-smoking legislation.

JUDICIAL REMEDIES

While a few courts have recognized the right of nonsmokers to a smoke-free environment,¹⁷ no court has held that such a right exists under the United States Constitution.¹⁸ Courts have

statutes. City ordinances will only be discussed in the footnotes. The most recent and widely publicized city ordinance is that of San Francisco, California. See *infra* note 124 and accompanying text.

The Municipal Code of Chicago prohibits smoking in public elevators, large retail stores, street cars, elevated trains, subways and other public conveyances. CHICAGO, ILL., CODE § 193-7.9-10 (1980).

For a discussion of local government restrictions, see *Antismoking Legislation*, *supra* note 7, at 191-93.

16. Ill. S. 0625, 83d Gen. Ass. (1983). Senate Bill 625, sponsored by Senator Patrick Welch and Senator Frank Savickas, was assigned to the Senate Executive Committee on April 6, 1983. The Executive Committee was discharged from further consideration of the bill on April 21, 1983. The bill was re-referred to the Senate Public Health, Welfare and Corrections Committee and was thereafter placed in a subcommittee.

In the early 1970s, State Rep. Dr. Bruce P. Douglas introduced a similar bill entitled "Public Places Smoking Regulation Act" (H. B. 350). That bill passed the Illinois General Assembly but was defeated in the Senate due to the strong pressure of the tobacco industry. The bill would have required government agencies in Illinois to segregate smokers and nonsmokers in public places. *Antismoking Legislation*, *supra* note 7, at 190. See *infra* notes 77-80 and accompanying text.

17. For a discussion of cases which have recognized a nonsmoker's right to a smoke-free environment, see *infra* notes 36-40 and accompanying text.

18. *Legal Conflict*, *supra* note 6, at 461; *Legal Paths*, *supra* note 5, at 72. See also *infra* notes 19-23 and accompanying text.

The Illinois Constitution, however, specifically guarantees the right of an individual to a healthful environment. ILL. CONST. art. XI, § 1. Section 1 of article XI of the Illinois Constitution states: "The public policy of the State and the duty of each person is to provide and maintain a healthful

repeatedly denied nonsmokers' claims of a violation of their first, fifth, ninth, or fourteenth amendment rights.¹⁹ Allowing smoking in a public place does not create a chilling effect on the exercise of a nonsmoker's first amendment rights.²⁰ Moreover, the presence of tobacco smoke in public places does not deprive nonsmokers of their life, liberty, and property without due process of law.²¹ Courts have held that the fifth and fourteenth amendments were not intended to restrict individual social behavior, such as smoking.²² Further, the right to be free from hazardous tobacco smoke in public facilities is not a fundamental right protected by the ninth amendment.²³ While constitutional arguments have failed thus far, nonsmokers have also sought judicial relief based upon tort²⁴ and statutory remedies.²⁵

environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy." *Id.* Section 2 of article XI states: "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law." LL. CONST. art. XI, § 2. The practical realities of bringing suit under article XI, however, make this constitutional right difficult to enforce. *Nonsmokers' Rights in Illinois*, *supra* note 8, at 610.

19. See *infra* notes 20-23 and accompanying text.

20. *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983) (failure of state to provide smoke-free workplace did not violate nonsmoker's first amendment right on the basis that smoke interfered with ability to think); *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), (failure of United States to make federal buildings smoke-free did not infringe on nonsmokers' first amendment right to petition their government for redress of grievances), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979); *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976) (allowing smoking in enclosed public arena did not violate nonsmokers' first amendment right to receive information and entertainment), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Group Against Smokers Pollution v. Mecklenberg County*, 42 N.C. App. 225, 256 S.E.2d 477 (1979) (allowing smoking in county building did not violate nonsmokers' first amendment right).

21. *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). See also *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983); *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979).

22. *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716, 720-21 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

23. *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983); *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716, 721-22 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

24. See *infra* notes 26-28, 33 and accompanying text.

25. See *infra* notes 34-35, 39-40 and accompanying text. For a discussion of the possible legal bases for assertion of nonsmokers' rights in Illinois, see *Nonsmokers' Rights in Illinois*, *supra* note 8, at 614-29.

Other legal theories which nonsmokers have relied upon to protect their right to a smoke-free environment include the tort remedies of assault and battery,²⁶ intentional infliction of emotional distress,²⁷ and public nuisance.²⁸ In addition, commentators have discussed alternative theories for recovery, including invasion of the nonsmoker's right to privacy,²⁹ private nuisance,³⁰ and breach of contract.³¹ None of the latter theories have been tested in the courts; therefore, the possibility of recovery under those theories is merely speculative.

The majority of cases have been brought by nonsmokers who have suffered adverse affects from tobacco smoke in the workplace.³² In addition to asserting the traditional common law remedies, nonsmoking employees have asserted, with lim-

26. *McCracken v. Sloan*, 40 N.C. App. 214, 252 S.E.2d 250 (1979). In *McCracken*, the plaintiff, a city postal employee, was allergic to tobacco smoke and experienced severe respiratory problems when exposed to tobacco smoke. Since he had voiced complaints about the health dangers of smoking, he claimed that his employer knew that the smell of cigar smoke was personally offensive to him and hazardous to his health. While in a meeting regarding the employee's request for sick leave, the employer smoked a cigar. The employee filed suit against the employer, alleging assault and battery. The court rejected the employee's claim of assault and battery because there was no evidence that he suffered any physical injury from inhaling the cigar smoke. *Id.* The court noted, however, that the employer's action may have caused mental distress to the employee. *Id.* at 217, 252 S.E.2d at 252.

27. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982). In *Hentzel*, a nonsmoking employee claimed that his employer's failure to provide him with a smoke-free workplace caused him severe emotional suffering which resulted in high blood pressure and continued deterioration of his health. The court held that the plaintiff stated a cause of action for intentional infliction of emotional distress. *Id.*

28. *Legal Conflict*, *supra* note 6, at 469 (citing *Stockler v. City of Pontiac*, No. 75-131479 (Cir. Ct. Oakland County, Mich., Dec. 17, 1975)). In *Stockler*, the court held that smoking in the Pontiac Silverdome Stadium violated a local fire ordinance and constituted a public nuisance. The City was ordered to abate the nuisance by prohibiting the sale and use of cigarettes within the stadium. After obtaining a stay of the court order, the city settled the suit. *Id.* The settlement included banning smoking in the stands of the stadium but permitting smoking in concourse areas, restrooms, and private boxes. *Id.* at 469-70.

29. *Antismoking Legislation*, *supra* note 7, at 185 (citing Kennedy, *Invasion of Privacy: New Angle on Smoking*, 11 J. MISS. ST. MED. ASSN. 117, 118 (1970)). See also Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 SAN FERN. V.L. REV. 141, 157 (1979) [hereinafter cited as *Nonsmokers' Rights*].

30. *Nonsmokers' Rights*, *supra* note 29, at 155.

31. Renaud, *Legal Rights of Non-Smokers in Ontario*, 28 CHRTY'S L.J. 37, 38-9 (1980).

32. See *supra* notes 26-27 and accompanying text; *infra* notes 33-40 and accompanying text. See generally Blackburn, *Legal Aspects of Smoking in the Workplace*, 31 LAB. L.J. 564 (September 1980); Jauvtis, *The Rights of Nonsmokers in the Workplace: Recent Developments*, 34 LAB. L.J. 144 (March 1983).

ited success, claims based on an employer's breach of duty to provide a safe workplace.³³ Nonsmoking employees have also had limited success in bringing claims under the Occupational Safety and Health Act of 1970³⁴ as well as other federal statutes.³⁵

Under the diverse theories asserted, courts have granted a few nonsmoking employees various remedies. In New Jersey, an employee who was allergic to cigarette smoke asserted a common law right to a safe workplace.³⁶ The court granted an injunction ordering the employer to ban smoking in work areas.³⁷ In California, state unemployment compensation was awarded to an employee who terminated her employment because she was allergic to the cigarette smoke present in her workplace.³⁸ A federal employee who developed asthmatic

33. *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (cause of action based on employer's duty to provide safe work place dismissed), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979); *Gordon v. Raven Systems and Research, Inc.*, 462 A.2d 10 (D.C. 1983) (employer owes no duty to adopt workplace to particular sensitivities of employees); *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982) (cause of action upheld alleging exposure to tobacco smoke in workplace causing irreparable injury); *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976) (cause of action upheld based upon employer's duty to provide safe workplace).

34. 29 U.S.C. §§ 651-678 (1970). See *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (Occupational Safety and Health Act does not provide employees with a private cause of action against federal agencies as employers), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979). See also *Smith v. Western Elec. Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982) (stated cause of action based on common law right to safe workplace not preempted by OSHA where no OSHA standard covers tobacco smoke); *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976) (judicial recognition that OSHA protects employees' right to safe and healthful working conditions but does not preempt state power to act regarding occupational safety).

35. For a discussion of federal statutes that have been used to assert a right to a smoke-free environment, see *infra* notes 39-40 and accompanying text.

36. *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976).

37. *Id.* The injunction ordered the employer to provide safe working conditions for the employee by restricting smoking to nonwork areas, which consisted of the employees' lunchroom and lounges. *Id.* at 531, 368 A.2d at 416.

38. *Alexander v. California Unemployment Ins. Appeals Bd.*, 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980). The court found that the plaintiff employee was available for work within the meaning of the California Unemployment Insurance Code because the employee could work full-time in her occupation as an x-ray technician if the working environment were smoke-free. *Id.* The plaintiff's employer had instituted a nonsmoking policy in the work area but had failed to enforce it. *Id.* at 99-100, 163 Cal. Rptr. at 412. See generally Annot., 14 A.L.R. 4th 1234 (1982) (right to unemployment compensation by employees who refuse to work in areas where smoking is permitted).

bronchitis after being transferred to an office in which many employees smoked was allowed employment disability retirement benefits under a federal statute.³⁹ Additionally, an employee of the Veterans Administration who was unable to work in an environment which was not completely free of tobacco smoke has been found to be a "handicapped person" within the meaning of the Rehabilitation Act of 1973.⁴⁰ If persons with particular sensitivities to tobacco smoke are considered "handicapped" and found to be discriminated against because of that sensitivity, they may be able to bring actions under anti-discrimination statutes.⁴¹

Nonsmokers have not always been successful in asserting their right to a smoke-free environment in the courts. The few

39. *Parodi v. Merit Systems Protection Bd.*, 690 F.2d 731 (9th Cir. 1982). The plaintiff employee claimed employment disability retirement benefits under 5 U.S.C. § 8331(6) (1976) (repealed Pub. L. 96-499 Title IV, § 1403(b) Dec. 5, 1980), which provides that a person is totally disabled if unable, due to disease or injury, to perform useful and efficient service in his specific position. *Parodi*, 690 F.2d at 737. The court held that the employee was eligible for benefits unless the employer offered her suitable employment in a safe environment within sixty days. *Id.* at 740. See also Appleson, *Fired-up Nonsmokers Take CAB to Court*, 68 A.B.A.J. 1556 (December 1982).

40. *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982). The Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1973), prohibits discrimination against handicapped persons in programs receiving federal funds or programs or activities conducted by an executive agency or by the United States Post Office. Under the statute, "handicapped person" means a person who has a physical impairment which substantially limits one or more of his or her major life activities. 29 U.S.C. § 706(7)(b) (Supp. V 1981). The plaintiff employee claimed that his employer had unlawfully discriminated against him in violation of the statute by failing to provide a work environment that was totally smoke-free. Although the court concluded that the employee's hypersensitivity to tobacco smoke rendered him a handicapped person, the court held that the employer had made reasonable accommodations for him in light of his handicap and, therefore, had not discriminated against him. *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 89 (W.D. Wash. 1982). The accommodations included separating the desks of smokers from the desks of nonsmokers, securing a voluntary agreement from smokers that they would not smoke while in the same room as the plaintiff, installing vents to withdraw smoke-filled air, and offering the plaintiff another job. *Id.* at 88. *Contra* Group Against Smokers Pollution v. Mecklenberg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979). The court held that persons seeking relief under a state statute from harm caused by tobacco smoke in public facilities were not handicapped persons within the meaning of 29 U.S.C. § 706. *Id.* The court used the definition of handicapped persons from the federal statute because the state statute did not specifically define "handicapped person." *Id.* at 227, 256 S.E.2d at 478. The court stated that "[i]t is manifestly clear that the legislature did not intend to include within the meaning of 'handicapped persons' those people with 'any pulmonary problem' however minor, or all people who are harmed or irritated by tobacco smoke." *Id.* at 227, 256 S.E.2d at 479.

41. In Illinois, the Illinois Human Rights Act protects handicapped persons from discrimination. ILL. REV. STAT. ch 68, §§ 5-101-103 (1983) (civil rights violation to deny or refuse full and equal employment of public facilities).

decisions holding in favor of the nonsmoker are too narrow to protect the rights of all nonsmoking citizens to a safe and comfortable environment. A few courts have stated that the resolution of the problem of indoor air pollution from tobacco smoke is better left to the workings of the legislature and not the judiciary.⁴² Because smoking creates air pollution problems which affect all citizens, a legislative, rather than a judicial, solution to the problem is more appropriate.⁴³

THE DEVELOPMENT OF ANTI-SMOKING LEGISLATION

Statutes and ordinances restricting or prohibiting the sale or use of cigarettes were enacted as early as the 1800s.⁴⁴ The stated purpose of the early legislation was to prevent immorality, disease, and fire.⁴⁵ It was not until the end of the nineteenth century that legislation was passed for the purpose of controlling indoor air pollution.⁴⁶ This early anti-smoking movement ceased, however, after World War I when the public began to view smoking as acceptable behavior.⁴⁷ By 1927, all anti-smoking statutes had been repealed.⁴⁸

Anti-smoking statutes began appearing again in the 1970s.⁴⁹ As of this writing, thirty-five states and the District of Columbia have some form of legislation regulating smoking in public

42. *Federal Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979). The court stated that it "firmly believes that such matters are better left to the legislative or administrative process, where a proper balancing of interests can be made." *Id.* at 185. *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). The court in *Gasper* stated that "the process of weighing one individual's right to be left alone, as opposed to other individual's right under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of Government." *Id.* at 720.

43. *Smoking Legislation*, *supra* note 5, at 354.

44. *Antismoking Legislation*, *supra* note 7, at 168.

45. *Smoking Legislation*, *supra* note 5, at 345.

46. *Id.*

47. *Id.* See also *Legal Conflict*, *supra* note 6, at 444-45; *Antismoking Legislation*, *supra* note 7, at 173. Smoking became part of the soldier's everyday life when tobacco was included in army rations. *Id.* Other factors which hastened the demise of the early anti-smoking movement included Prohibition and the development of the American advertising industry. *Id.* Additionally, the states' discovery of tobacco as a taxation revenue source caused legislators to oppose anti-smoking legislation. *Id.* at 174. See *infra* note 78 and accompanying text.

48. *Antismoking Legislation*, *supra* note 7, at 174; *Legal Conflict*, *supra* note 6, at 445.

49. Arizona was the first state to enact a modern statute prohibiting smoking in public places. The statute was enacted in 1974. *Legal Conflict*, *supra* note 6, at 452.

places.⁵⁰ These modern anti-smoking laws do not seek to make smoking illegal or to ban smoking entirely. Rather, they seek to secure the nonsmoker's right to a healthful environment by effectively segregating smoking areas.⁵¹

Modern anti-smoking statutes vary greatly in scope and effect. Some states have detailed statutes which are specifically entitled "Clean Indoor Air Act."⁵² Other states have brief statutes merely entitled "Smoking in Public Places."⁵³ Some states prohibit smoking⁵⁴ in a variety of public places.⁵⁵ Other states limit the places where smoking is prohibited to state operated

50. ALASKA STAT. ANN., §§ 18.35.300-360 (Mitchie 1981); ARIZ. REV. STAT. ANN. § 36-601.01 (West Supp. 1983); ARK. STAT. ANN. §§ 82-3701 to 3703 (Mitchie Supp. 1983); CAL. HEALTH & SAFETY CODE §§ 25940-25947 (West Supp. 1984), CAL. GOV'T CODE § 19262 (West Supp. 1983) (State Department personnel policy); COLO. REV. STAT. §§ 25-14-101 to 105 (Supp. 1978); CONN. GEN. STAT. ANN. § 1-21b. (West Supp. 1983); DEL. CODE ANN. tit. 11, § 1326 (Mitchie 1979) (buses); D.C. CODE ANN. § 44-223(b)(1) (Mitchie Supp. 1983) (public transportation); FLA. STAT. ANN. §§ 255.27 (West Supp. 1983) (government buildings), 823.12 (1976) (elevators); GA. CODE ANN. § 26-9910 (Harrison 1982); HAWAII REV. STAT. §§ 321-201 (Supp. 1982), 321-202 to 206 (1976); IDAHO CODE ANN. §§ 18-5904 to 5906 (Bobbs-Merrill 1979) (public meetings); IOWA CODE ANN. §§ 98A.1-6 (West Supp. 1983); KAN. STAT. ANN. § 21-4008 (1981); ME. REV. STAT. ANN. tit. 22, §§ 1578-79 (West Supp. 1983) (public meetings and jury rooms); MD. ANN. CODE art. 78, § 35A (1957) (buses), art. 89, § 65 (1957) (elevators), MD. HEALTH-ENVIR. CODE ANN. § 11-205 (Mitchie 1982) (hospitals, nursing homes, health clinics, physicians' offices); MD. TRANSP. CODE ANN. § 7-705(c) (Mitchie Supp. 1983) (mass transportation); MASS. ANN. LAWS ch. 270, § 21 (Law. Co-Op. 1980); MICH. STAT. ANN. §§ 12.933(7a) (Callaghan 1981) (retail food stores), 14.15(21333) (Callaghan 1980) (homes for aged), 14.15(21531) (Callaghan 1980) (hospitals), 14.15(21733) (Callaghan 1980) (nursing homes), 17.495(20) (Callaghan 1982) (elevators); MINN. STAT. ANN. §§ 144.411-417 (West Supp. 1984); MISS. CODE ANN. § 97-35-1(4) (1973); MONT. CODE ANN. §§ 50-40-101 to 109 (1983); NEB. REV. STAT. §§ 71-5701-713 (Supp. 1981); NEV. REV. STAT. §§ 202.2490 to .2492 (1979); N.H. REV. STAT. ANN. §§ 155:45-49 (Supp. 1983); N.J. REV. STAT. §§ 26:3D-1 to 22 (Supp. 1983); N.Y. PUB. HEALTH LAW §§ 1399-o-q (Consol. Supp. 1983); N.D. CENT. CODE § 23-12-09-11 (1978); OHIO REV. CODE ANN. § 3791.031 (Page Supp. 1982); OKLA. STAT. ANN. tit. 50, § 1247 (West Supp. 1982); OR. REV. STAT. §§ 433.835-990 (1981); PA. STAT. ANN. tit. 35, § 361 (West Supp. 1983) (hospitals), tit. 35, § 1225 (West 1977) (theatres, places of public assembly); R.I. GEN. LAWS §§ 23-20.6-1, 23-20.6-4 (Bobbs-Merrill 1979), 23-20.6-2 (Mitchie Supp. 1983); S.D. CODIFIED LAWS ANN. § 22-36-2 (1979); TEX. PENAL CODE ANN. § 48.01 (West Supp. 1982); UTAH CODE ANN. §§ 76-10-101 to 110 (1978); 248 WASH. ADMIN. CODE R. 152 (1975) (state regulations).

51. *Antismoking Legislation*, *supra* note 7, at 194.

52. CAL. HEALTH & SAFETY CODE § 25940 (West Supp. 1984); MINN. STAT. ANN. § 144.411 (West Supp. 1984); MONT. CODE ANN. § 50-40-101 (1983); NEB. REV. STAT. § 71-5701 (Supp. 1981); OR. REV. STAT. § 438.835-990 (1981).

53. *See, e.g.*, ARIZ. REV. STAT. § 36.601.01 (West Supp. 1983); CONN. GEN. STAT. ANN. § 1-21b. (West Supp. 1983); GA. CODE ANN. § 26-9910 (Harrison 1982); HAWAII REV. STAT. §§ 321-201 (Supp. 1982); KAN. STAT. ANN. § 21-4008 (1981).

54. Most state statutes define smoking to include the carrying of a lighted tobacco product. *See, e.g.*, CONN. GEN. STAT. ANN. § 1-21b. (West Supp. 1983); IOWA CODE ANN. §§ 98A.1 (West Supp. 1983); ME. REV. STAT. ANN. tit. 22, § 1578(a), § 1579(2) (West Supp. 1983); MASS. ANN. LAWS ch. 270,

facilities⁵⁶ or places where public meetings are held.⁵⁷ Only a few states specifically include places of work in their definition of places where smoking is prohibited.⁵⁸ In some states, a violation of the smoking prohibition is a misdemeanor,⁵⁹ while in other states it is a petty offense.⁶⁰ Furthermore, various statutes provide for a civil fine,⁶¹ while others impose a criminal penalty.⁶²

These modern statutes differ significantly from the earlier anti-smoking laws. The recently enacted statutes seek to restrict smoking only in public places, while the former statutes were aimed at prohibiting cigarette smoking entirely.⁶³ In addition, current statutes seek to protect the rights of both smokers and nonsmokers,⁶⁴ while the former statutes were overly broad and sometimes found to be an unconstitutional restriction on

§ 21 (Law. Co-Op. 1980); MINN. STAT. ANN. LAWS § 144.413(4) (West Supp. 1984); NEB. REV. STAT. § 71-5706 (Supp. 1981).

55. See, e.g., ALASKA STAT. ANN. §§ 18.35.300 (Mitchie 1981); ARIZ. REV. STAT. § 36.601.01A. (West Supp. 1983); COLO. REV. STAT. §§ 25-14-102, 103 (Supp. 1978); IOWA CODE ANN. § 98A.2 (West Supp. 1983); MINN. STAT. ANN. § 144.413 (West Supp. 1984); UTAH CODE ANN. § 76-10-101 (1978).

56. HAWAII REV. STAT. § 321-201 (Supp. 1982).

57. IDAHO CODE ANN. § 18-5904 (Bobbs-Merrill 1979) (public meetings); ME. REV. STAT. ANN. tit. 22, §§ 1578-79 (West Supp. 1979) (public meetings and jury rooms).

58. COLO. REV. STAT. § 25-14-102(2) (Supp. 1978); MINN. STAT. ANN. § 144.413(2) (West Supp. 1984); MONT. CODE ANN. § 50-40-103(2) (1983); NEB. REV. STAT. § 71-5704 (Supp. 1981); OR. REV. STAT. § 433.850(2)(b) (1981); UTAH CODE ANN. § 76-10-101 (1978).

59. ARK. STAT. ANN. § 82-3703 (Mitchie Supp. 1983); GA. CODE ANN. § 26-9910 (Harrison 1982); KAN. STAT. ANN. § 21-4008 (c) (1981); NEB. REV. STAT. § 71-5712 (Supp. 1981); NEV. REV. STAT. § 202.2492 (1979); OKLA. STAT. ANN. tit. 50 § 1247E (West Supp. 1982); TEX. PENAL CODE ANN. § 48.01(f) (West Supp. 1982); UTAH CODE ANN. § 76-10-110(2) (1978).

60. ARIZ. REV. STAT. ANN. § 36-601.01B (West Supp. 1983); S.D. CODIFIED LAWS ANN. § 22-36-2 (1979).

61. See, e.g., ALASKA STAT. ANN. § 18.35.340 (Mitchie 1981) (not less than five dollars nor more than twenty-five dollars for each offense); IOWA CODE ANN. § 98A.6 (West Supp. 1983) (five dollars for first violation and not less than ten nor more than one hundred dollars for each subsequent violation); N.D. CENT. CODE § 23-12-11 (1978) (maximum of one hundred dollars); R.I. GEN. LAWS § 23-20.6-2(b) (Mitchie Supp. 1983) (not less than ten dollars nor more than one hundred dollars).

62. See, e.g., ARK. STAT. ANN. § 82.3703 (Mitchie Supp. 1983) (misdemeanor and fine of not less than ten dollars nor more than one hundred dollars); KAN. STAT. ANN. § 21-4008 (1981) (misdemeanor and fine not more than twenty-five dollars); NEV. REV. STAT. § 202.2492 (1979) (misdemeanor punishable by fine of not less than ten dollars nor more than one hundred dollars); OKLA. STAT. ANN. tit. 50, § 1247 (West Supp. 1982) (misdemeanor and upon conviction punishable by fine of not less than ten dollars nor more than one hundred dollars).

63. *Legal Conflict*, *supra* note 6, at 446.

64. *Id.*

personal behavior.⁶⁵

The present anti-smoking legislation has, to a large extent, been the result of the influence of public pressure groups.⁶⁶ In recent years, nonsmokers have organized national and local anti-smoking groups to protect their rights.⁶⁷ In addition to these public pressure groups, national and local medical groups and disease associations have taken a public stand against smoking.⁶⁸ These organizations attempt to exert pressure on government and private businesses to ban smoking in public places.⁶⁹ They also attempt, through newspapers and advertisements, to educate the public on the adverse effects of tobacco smoke.⁷⁰

In response to evidence of the harmful effects of tobacco smoke and complaints from nonsmokers, the federal government has enacted regulations for various aspects of smoking.⁷¹

65. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 826 (1914); *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911). See also *Antismoking Legislation*, *supra* note 7, at 183-84.

66. See Sapolsky, *The Political Obstacles to the Control of Cigarette Smoke in the United States*, 5 J. HEALTH, POL. POL'Y & L. 277, 286 (1980) [hereinafter cited as *Political Obstacles*].

67. Action On Smoking and Health (ASH), 2013 H Street, N.W., Washington, D.C. 20006, is a national nonprofit organization dedicated to protecting the right of nonsmokers to clean air in public places. John F. Banzhaff III, a major leader of anti-smoking forces, founded the organization in 1967. Other organizations include Group Against Smokers' Pollution (GASP), P. O. Box 632, College Park, Maryland 20740, and Association for Nonsmokers Rights (ANSR), 1829 Portland Avenue, Minneapolis, Minnesota 55404. See generally *Antismoking Legislation*, *supra* note 7, at 179-80. For a listing of national and local nonsmokers' organizations, see BRODY, *supra* note 4, at 218-32.

68. *Antismoking Legislation*, *supra* note 7, at 179. Among these associations are the American Cancer Society, the American Heart Association and the American Lung Association. *Political Obstacles*, *supra* note 66, at 286.

The American Lung Association has identified four elements that are necessary for effective anti-smoking legislation: definition of terms, posting of visible signs, delegation of authority and designation of penalties. *Legal Conflict*, *supra* note 6, at 451 (citing PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, THE SMOKING DIGEST 26, 83 (1977)). See generally *Nonsmokers' Rights*, *supra* note 29, at 151-54.

69. *Nonsmokers' Rights*, *supra* note 29, at 151. See also *Political Obstacles*, *supra* note 66, at 286.

70. *Nonsmokers' Rights*, *supra* note 29, at 151. 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. *Legal Conflict*, *supra* note 6, at 447.

71. The federal government's power to regulate smoking comes from its power to tax and to regulate commerce. *Antismoking Legislation*, *supra* note 7, at 186. A federal Clean Indoor Air Act, to prevent indoor air pollution from smoking, heating and cooking, has been proposed but not passed. H.R. Rep. No. 862, 95th Cong., 1st Sess. (1976) (Rep. Drinan's proposed "Federal Nonsmokers' Protection Act"). See *Indoor Front*, *supra* note 12, 1050-54; *Legal Conflict*, *supra* note 6, at 460; *Smoking Legislation*, *supra* note 5, at 360.

In 1970, Congress passed the Public Health Cigarette Smoking Act,⁷² which requires, among other things, that all cigarette packages contain a conspicuous statement warning of the dangers of cigarette smoking to the health of smokers.⁷³ In 1972, the Civil Aeronautics Board enacted a regulation calling for mandatory no-smoking sections on airplanes.⁷⁴ Additionally, the federal government prohibits smoking in certain areas of government facilities⁷⁵ and in public transportation vehicles.⁷⁶

72. 15 U.S.C. §§ 1331-1340 (1970). The purpose of the Public Health Cigarette Smoking Act is to establish a comprehensive federal program to deal with cigarette labeling and advertising regarding smoking and health. 15 U.S.C. § 1331 (1970). The Act was passed in response to the evidence of the harmful effects of cigarette smoke. *Id.*

73. The Public Health Cigarette Smoking Act makes it unlawful to manufacture or sell cigarettes in the United States unless the statement, "Warning: The Surgeon General has determined that Cigarette Smoking Is Dangerous to Your Health," is conspicuously printed on every package. *Id.* at § 1333. The Act also makes it illegal to advertise cigarettes and little cigars on any medium of electronic communication regulated by the Federal Communications Commission. *Id.* at § 1335.

It has also been suggested that the warning statement on cigarette packages should include the words "and the Health of Others." *Nonsmokers' Rights*, *supra* note 29, at 172.

Congress has recently approved a bill that requires cigarette manufacturers to more forcefully warn smokers that smoking is dangerous to their health. *N.Y. Times*, Sept. 27, 1984, at A1, col. 1. The bill is designed to establish a national program to increase the availability of information on the health consequences of smoking. H.R. 3979, 98th Cong., 2d Sess., 120 Cong. Rec. 11,845 (1984).

74. 14 C.F.R. § 252 (1979). Under the CAB regulation, cigarette smoking is permitted only in designated sections on airplanes. An airplane must enlarge the no-smoking section on an airplane if it is not sufficient to accommodate all passengers who request seating in a no-smoking section. *Id.* This regulation was enacted in response to numerous complaints from non-smoking air travelers and a government survey which indicated that a majority of smoking and nonsmoking passengers were annoyed by smoke on aircraft and preferred either prohibiting or segregating smoking. *Nonsmokers' Rights*, *supra* note 29, at 152.

The Civil Aeronautics Board recently considered banning smoking entirely on commercial flights of less than two hours. *Wall Street Journal*, Mar. 20, 1984, at 7, col. 1. The CAB decided, however, to prohibit smoking only on aircraft that seat thirty or fewer passengers. *Id.* This was done because it is impossible to effectively segregate smokers and nonsmokers on such small planes. *Id.* The CAB also decided to ban cigar and pipe smoking on all domestic commercial flights. *Id.*

75. *Antismoking Legislation*, *supra* note 7, at 186. The Department of Health, Education and Welfare (HEW) has a regulation prohibiting smoking in all HEW conference rooms. *Political Obstacles*, *supra* note 66, at 279. The Department of Defense (DOD) prohibits smoking in auditoriums, elevators, shuttle vehicles, medical care facilities, conference rooms, class rooms and work areas. 32 C.F.R. § 203 (1979). The DOD regulation also requires that no-smoking areas be set aside in eating facilities. *Id.* The General Services Administration has a similar regulation. *Legal Conflict*, *supra* note 6, at 460.

76. The Interstate Commerce Commission (ICC) regulates smoking on interstate buses. 49 C.F.R. § 1061.1(a) (1979). When a smoking section is

The major source of opposition to anti-smoking legislation is the tobacco industry.⁷⁷ The industry's objections focus on the adverse effect that restrictive legislation will have on its lucrative market and the resulting detrimental effect on the national economy.⁷⁸ In addition, the tobacco industry has challenged the validity of studies documenting the harmful effects of involuntary smoking and asserts that the inhalation of tobacco smoke is not harmful to nonsmokers.⁷⁹ Consequently, the industry continues to lobby against anti-smoking legislation.⁸⁰

Although the tobacco industry lobbies vigorously against anti-smoking legislation, the conflict remains between a person's right to smoke and another person's right to a healthful environment. A viable solution which would accommodate these competing interests is to provide a place for smokers to smoke while at the same time providing clean air for nonsmokers.⁸¹ The most comprehensive and effective means to accomplish this objective is through state legislation.⁸²

provided, it is limited to the back thirty percent of the seats. *Id.* The ICC also prohibits smoking on interstate trains, except in designated areas. *Id.* at § 1124.21.

77. The tobacco industry's lobbying arm is the Tobacco Institute. *Political Obstacles*, *supra* note 66, at 283.

78. *Id.* at 280-85, 287-88. The United States is a leading producer of tobacco leaf. *Id.* at 280. Gross revenues from the manufacture of cigarettes approximate \$16 billion. *Id.* at 284. The tobacco industry has a compelling argument when it focuses on the revenue generated by taxes imposed upon manufacturers, wholesalers and retailers of tobacco products. The sizeable revenue collected provides a significant source of income to federal, state, municipal and county governments. *Id.* at 285.

79. The tobacco industry claims that the evidence linking smoking to disease is scientifically inconclusive because it is merely statistical. *Id.* at 284. The tobacco industry, through the Council for Tobacco Research, constantly develops studies to refute any study that links cigarette smoking to disease. *Id.* See also Hinds & First, *Concentrations of Nicotine and Tobacco Smoke In Public Places*, 292 NEW ENG. J. MED. 844 (1975).

80. After spending six million dollars, tobacco interests were successful in their efforts to get voters in California to defeat a referendum issue on restricting smoking in indoor work areas and public places. *Political Obstacles*, *supra* note 66, at 279. California has subsequently enacted, however, a Clean Indoor Air Act. CAL. HEALTH & SAFETY CODE §§ 25940-47 (West Supp. 1984).

In 1973, the enormous lobbying pressure of the tobacco industry was successful in defeating the proposed Illinois Public Places Smoking Regulation Act (H. B. 350). *Antismoking Legislation*, *supra* note 7, at 190. See also *supra* note 16 and accompanying text.

81. *Legal Paths*, *supra* note 5, at 95; *Smoking Legislation*, *supra* note 5, at 350.

82. *Legal Paths*, *supra* note 5, at 93; *Smoking Legislation* *supra* note 5, at 347.

THE PROPOSED ILLINOIS CLEAN INDOOR AIR ACT

Illinois is presently considering passage of a Clean Indoor Air Act to protect the rights of both smokers and nonsmokers in enclosed public places.⁸³ The proposed Act consists of ten sections, covering the name,⁸⁴ purpose,⁸⁵ definitions,⁸⁶ prohibition of smoking,⁸⁷ establishment of smoking areas,⁸⁸ guidelines for implementation,⁸⁹ delegation of enforcement authority,⁹⁰ offenses and penalties,⁹¹ equitable relief,⁹² and effective date.⁹³ This analysis of the proposed Act considers the sections relating

83. For the history and current status of the proposed Illinois Clean Indoor Air Act, see *supra* note 16 and accompanying text.

84. Ill. S. 0625, 83d Gen. Ass. § 1 (1983). Section 1 states: "This Act shall be known and may be cited as the 'Illinois Clean Indoor Air Act.'" *Id.*

85. *Id.* at § 2. Section 2 states:

The Illinois General Assembly has found that substantial scientific evidence exists that tobacco smoke causes cancer, heart disease and various lung disorders. Increasing evidence further demonstrates that the harmful effects of tobacco smoke are not confined to smokers, but also cause severe discomfort and, in some cases, grave illnesses to the nonsmokers who constitute a growing majority of the population. The purpose of this Act is to protect the public health, comfort and environment by creating areas in public places and at public meetings that are free from the toxic and nuisance effects of tobacco smoke.

Id. See *infra* notes 94-118 and accompanying text.

86. Ill. S. 0625, 83d Gen. Ass. § 3 (1983). Section 3 defines "Department" as the Office of the State Fire Marshall. *Id.* For the definitions of "Designated area," "Proprietor" and "Smoking," see *infra* notes 109, 121, 136 and accompanying text.

87. Ill. S. 0625, 83d Gen. Ass. § 4 (1983). Section 4 states: "No person shall smoke in a designated area, except that a person may smoke in that portion of a designated area which has been established and posted under Section 5 as a smoking area." *Id.* See *infra* notes 98-110 and accompanying text.

88. Ill. S. 0625, 83d Gen. Ass. § 5 (1983). Section 5 states:

Unless otherwise prohibited by law, ordinance or department rule, a proprietor of a property which includes a designated area may establish a reasonable portion of the premises as a smoking area where smoking shall be permitted. When establishing an area as a smoking area, a proprietor shall utilize physical barriers, ventilation systems and other physical elements of the premises to minimize the intrusion of smoke into no smoking areas. Where a designated area consists of a single room or enclosure, a proprietor may satisfy the purposes and provisions of this Act by establishing a reasonable portion of the room or enclosure as a no smoking area. Nothing in this Act shall prevent a proprietor from establishing the entirety of a designated area as a no smoking area.

Id. See *infra* notes 102-03, 110-11 and accompanying text.

89. Ill. S. 0625, 83d Gen. Ass. § 6 (1983). For a discussion of implementation of the proposed Act, see *infra* notes 140-53 and accompanying text.

90. Ill. S. 0625, 83d Gen. Ass. § 7 (1983). For a discussion of the enforcement provisions of the Act, see *infra* notes 154-70 and accompanying text.

91. Ill. S. 0625, 83d Gen. Ass. § 8 (1983). For a discussion of offenses and penalties, see *infra* notes 174-78 and accompanying text.

92. Ill. S. 0625, 83d Gen. Ass. § 9 (1983). For a discussion of the relief available under the Act, see *infra* notes 171-73 and accompanying text.

to the proposed Act's constitutionality, its scope of protection, its implementation, its enforcement, and its penalties.

Constitutionality

For the proposed Act to survive constitutional scrutiny, it must satisfy three criteria. First, the Illinois legislature must have the authority to enact such a law. Second, the proposed Act must be reasonably related to a proper legislative purpose. Finally, the proposed Act must not be oppressive, arbitrary, or discriminatory.

The Illinois legislature has the authority to regulate personal activity in the exercise of its police power for the protection of the public health, safety, and welfare.⁹⁴ Medical and scientific evidence supports the correlation between the inhalation of tobacco smoke and the impaired health of both smokers and nonsmokers.⁹⁵ The proposed Act clearly states that the Illinois legislature's purpose is "to protect the public health, comfort and environment by creating areas in public places and at public meetings that are free from the toxic and nuisance effects of tobacco smoke."⁹⁶ Because the proposed Act is designed to safeguard the public health, it must be considered a valid exercise of the State's police power.

Although the proposed Act is a constitutionally permissible exercise of the police power, the Act must also be reasonably necessary to accomplish its legislative purpose.⁹⁷ Because it is

93. Ill. S. 0625, 83d Gen. Ass. § 10 (1983) (Act takes effect upon enactment).

94. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914). The court recognized the authority of cities and villages to pass ordinances under their police power which are necessary or expedient for preserving the public health. *Id.* at 513, 104 N.E.2d at 187. The police power of cities and villages is delegated to them by the state. *Id.* See also *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911); *Austin v. State*, 101 Tenn. 563, 48 S.W. 305 (1898), *aff'd sub nom.*, *Austin v. Tennessee*, 179 U.S. 343 (1900); *Antismoking Legislation*, *supra* note 7, at 182; *Legal Paths*, *supra* note 5, at 94; *Smoking Legislation*, *supra* note 5, at 357.

95. See *supra* notes 2, 4-5, 7-8 and accompanying text. The proposed Act expressly recognizes the health consequences of inhaling tobacco smoke. For a text of section 2 of the Act, see *supra* note 85. This express recognition of the dangers of tobacco smoke by the state legislature serves to educate the public and provides statutory recognition of the rights of nonsmokers to breathe clean air. *Legal Conflict*, *supra* note 6, at 453.

Some modern anti-smoking statutes also declare smoking in any form a public nuisance. See, e.g., ALASKA STAT. ANN. § 18.35.300 (Mitchie 1981); ARIZ. REV. STAT. ANN. § 36-601.01 (West Supp. 1983); OKLA. STAT. ANN. tit. 50, § 1247 (West Supp. 1982); R.I. GEN. LAWS § 23-20.6-2 (Mitchie Supp. 1983).

96. Ill. S. 0625, 83d Gen. Ass. § 2 (1983). See *supra* note 85.

97. *Lawton v. Steele*, 152 U.S. 133, 137 (1894) (establishes test for states to justify imposing its authority on public's behalf).

unlikely that all smokers would voluntarily refrain from smoking in public places and that all proprietors would voluntarily create no-smoking areas, the proposed Act is reasonably necessary to protect the public health. Therefore, the proposed Act is constitutional as it is the most effective means to safeguard the public health.

Furthermore, Illinois' police power is limited by the reasonableness of its restriction;⁹⁸ that is, the means employed must be neither oppressive nor arbitrary.⁹⁹ A statute is oppressive if the restriction goes beyond what is reasonably necessary for the protection of the nonsmoker.¹⁰⁰ Consequently, prohibition of smoking may be limited only to those places where smokers come in contact with nonsmokers and where smoking can cause significant discomfort.¹⁰¹ In compliance with these limitations, the proposed Act prohibits smoking in enclosed public places,¹⁰² but requires that smoking areas be established in those places where nonsmokers can be adequately protected from the harmful effects of tobacco smoke.¹⁰³ For this reason, the proposed Act does not unreasonably infringe on a smoker's right of personal liberty.¹⁰⁴

Additionally, an anti-smoking statute is arbitrary if it indis-

98. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).

99. *Id.*

100. *Id.* See also *Legal Paths*, *supra* note 5, at 95; *Smoking Legislation*, *supra* note 5, at 358.

101. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914). The court held that a city had the power "to prohibit smoking in certain public places, such as street cars, theaters and like places where large numbers of persons are crowded together in a small space." *Id.* at 512, 104 N.E.2d at 837. See also *State v. Heidenhain*, 42 La. Ann. 483, 7 So. 621 (1890) (upholding a city ordinance prohibiting smoking in the city streetcars as necessary to protect the health of passengers in a small, enclosed place).

102. Ill. S. 0625, 83d Gen. Ass. § 4 (1983). For a description of indoor public places where smoking is prohibited, see *infra* note 121 and accompanying text.

103. Ill. S. 0625, 83d Gen. Ass. § 5 (1983).

104. See *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914). The court in *Zion* held that a city ordinance which prohibited smoking on open city streets and in city parks was invalid as an unreasonable restraint on a citizen's private rights. *Id.* See also *Hershberg v. City of Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911). In *Hershberg*, the Court of Appeals of Kentucky held that a city ordinance which prohibited cigarette smoking within the corporate limits of the city was an unreasonable invasion of the plaintiff's right of personal liberty. *Id.* The court said that the ordinance was "so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city." *Id.* at 61, 133 S.W. at 986. But see *Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847). In *Thompson*, the court sustained the validity of a state statute which prohibited tobacco smoking on public streets in the City of Boston, where the purpose of the statute was to protect the city against damage from fire. *Id.*

criminally prohibits public smoking.¹⁰⁵ Rather, a properly constructed statute provides for effective segregation of smoking and nonsmoking areas to protect the rights of both the smoker and the nonsmoker.¹⁰⁶ In large areas where smoking can be effectively segregated, a statute may require the designation of smoking areas.¹⁰⁷ In public places that are too small to permit smoking areas within them without affecting the health and comfort of nonsmokers, smoking may be banned entirely.¹⁰⁸ The proposed Act is constitutionally permissible because it prohibits smoking in designated areas, but it permits a proprietor¹⁰⁹ to create areas where smoking is permitted if nonsmokers can be adequately protected.¹¹⁰

Although the proposed Act does not prohibit smoking indiscriminately, it does not place a limit on the permissible size of a smoking area.¹¹¹ By not indicating the relative size of smoking areas, the proposed Act leaves open the possibility that the non-smoking area will be insufficient to effectively protect nonsmokers.¹¹² This possibility could be eliminated by adding a provision that the size of the "smoking area shall not be more than proportionate to the demand of users of that place for a smoking area and should not include areas which all persons need to enter."¹¹³ Limiting the size of a smoking area will help to accomplish the proposed Act's legislative purpose.¹¹⁴

105. *Legal Paths*, *supra* note 5, at 94.

106. *Id.* at 95. See also *Smoking Legislation*, *supra* note 5, at 358-9.

107. *Legal Paths*, *supra* note 5, at 95.

108. *Id.*

109. "Proprietor" is defined as "any individual or his designated agent who, by virtue of his office, position, authority or duties, has legal or administrative responsibility for the use or operation of property." Ill. S. 0625, 83d Gen. Ass. § 3(b) (1983).

110. *Id.* at §§ 4-5.

111. *Id.* at § 5. The proposed Act only provides that a smoking area can be established from a reasonable portion of the room or enclosure. *Id.* See *supra* note 88 and accompanying text. See also *Smoking Legislation*, *supra* note 5, at 359.

112. *Smoking Legislation*, *supra* note 5, at 359. In order to be effective, a no-smoking area must either be physically separated from a smoking area or be large enough to provide a buffer zone so that only those who smoke are affected by the smoke. *Id.* at 361. Ventilation systems and physical barriers can be used to prevent smoke from drifting into no-smoking areas. *Id.* See, e.g., MINN. STAT. ANN. § 144.415 (West Supp. 1984) (existing physical barriers and ventilation systems used to minimize toxic effects); UTAH CODE ANN. § 76-10-108 (1978) (implementation of ventilation to minimize toxic effect). The proposed Act states that the proprietor is to use "physical barriers, ventilation systems and other physical elements of the property to minimize the intrusion of smoke into no-smoking areas." Ill. S. 0625, 83d Gen. Ass. § 5 (1983).

113. *Smoking Legislation*, *supra* note 5, at 359.

114. See *Alford v. City of Newport News*, 220 Va. 584, 260 S.E.2d 241 (1979). A no-smoking ordinance was held unconstitutional where the

Disclaiming an intent to allow smoking where it is otherwise prohibited will avoid a conflict with existing state laws which prohibit smoking for purposes other than to protect the health and comfort of nonsmokers, such as fire prevention.¹¹⁵ Additional conflict can also be eliminated if the proposed Act voids those provisions of existing state statutes which allow smoking in a place where smoking is prohibited in the proposed Act.¹¹⁶ Further, a local government should not be prevented from adopting its own Clean Indoor Air Act which accounts for local considerations as long as the local regulation does not conflict with the proposed Act.¹¹⁷ The proposed Act should also provide for severability so that if a portion of the proposed Act is declared unconstitutional, the remaining portions will still be effective.¹¹⁸

means employed were not reasonably suited to achieve the ordinance's legislative goal. *Id.* at 586, 260 S.E.2d at 243. The city ordinance made it unlawful for a person to smoke in a restaurant except in designated smoking areas. The restaurant owner was required to post a sign indicating that smoking was prohibited. *Id.* at 585, 260 S.E.2d at 242. By relying on the sign posted, a nonsmoking patron entered the restaurant, expecting to be protected from the toxic effects of tobacco smoke. Since the restaurant owner had only designated one table as a no-smoking area, the patron was exposed to the toxic effects of tobacco smoke from which the ordinance purported to protect him. *Id.* at 586, 260 S.E.2d at 243.

115. *Smoking Legislation, supra* note 5, at 368. Illinois has three laws that prohibit smoking for fire prevention purposes: ILL. REV. STAT. ch 96½, § 2013 (1983) (magazine stores); ILL. REV. STAT. ch. 96½, § 2105 (1983) (mines classified as gassey mines); ILL. REV. STAT. ch 127½, § 109 (1983) (stores where fireworks are offered for sale).

116. *Smoking Legislation, supra* note 5, at 368.

117. *Id.* See, e.g., COLO. REV. STAT. § 25-14-105 (Supp. 1978); GA. CODE ANN. § 26-9910(c) (Harrison 1982). Section 25-14-105 of the Colorado Revised Statutes states, in part: "Nothing in this article shall prevent any town, city, or city and county, nor any county within the unincorporated areas thereof, from regulating smoking; and such county, town, city, or city and county is hereby expressly authorized to adopt ordinances embodying such regulations." COLO. REV. STAT. § 25-14-105 (1982). Section 26-9910(c) of the Georgia Code Annotated states: "This Code section shall be cumulative to and shall not prohibit the enactment of any other general and local laws, rules and regulations of state or local agencies, and local ordinances prohibiting smoking which are more restrictive than this Code section." GA. CODE ANN. § 26-9910(c) (Harrison 1982).

118. *Smoking Legislation, supra* note 5, at 371 (Sec. 21 of A Model State Smoking Pollution Prevention Act). See R.I. GEN. LAWS § 23-20.6-3 (Bobbs-Merrill 1979). Section 23-20.6-3 of Rhode Island General Laws states:

If any section, subsection, sentence, clause, phrase, or portion of this chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portions thereof.

Id.

Scope of Protection

One of the most important sections of the proposed Act is the description of prohibited smoking areas.¹¹⁹ The areas where smoking is restricted are diverse.¹²⁰ The proposed Act does not attempt to limit or list all of the indoor public places where smoking is prohibited. Under the proposed Act, smoking is prohibited in "designated areas" which are defined as, but not limited to, hospitals, elevators, indoor theaters, libraries, art museums, concert halls, commuter mass transit, public transportation, nursing homes, and public access areas in all municipal or county buildings in the State of Illinois.¹²¹ Rather than labeling these places "designated areas," however, it would be more appropriate to call them "public places" and to label the areas where smoking is permitted as "designated areas."

Although the proposed Act does not limit the areas where smoking is prohibited to the places listed, more places should be expressly included. A comprehensive statute regulates smoking in all public places, publicly and privately owned, to which the general public has free access, where smokers and nonsmokers are forced to be in close proximity for long periods of time, and where food is sold or consumed.¹²² Specifically listing all types of places that are subject to smoking prohibition, however, is burdensome, inefficient, and may not be inclusive. To avoid the possibility of forcing proprietors and the public to speculate whether the proposed Act could be enforced in certain places, the proposed Act should define places where smoking is prohibited more broadly as "any indoor area, room or vehicle used by the general public or serving as a place of work."¹²³

The proposed Act is also deficient because it does not include "place of work"¹²⁴ in the definition of designated area,

119. See *Legal Conflict*, *supra* note 6, at 453.

120. For a listing of various public places where smoking can be restricted, see *infra* note 121 and accompanying text.

121. Ill. S. 0625, 83d Gen. Ass. § 3(c) (1983). Other places that the proposed Act does not include in its definition of "designated area" are eating places, waiting lines, waiting rooms, doctors' offices, banks, educational institutions, class rooms, lecture halls, auditoriums, indoor and outdoor stadiums and sports arenas, retail stores, supermarkets, barber and beauty shops, laundromats, jury rooms, polling places, voter registration places and welfare offices.

122. *Legal Paths*, *supra* note 5, at 99-105. See also *Legal Conflict*, *supra* note 6, at 455; *Smoking Legislation*, *supra* note 5, at 362.

123. See, e.g., MINN. STAT. ANN. § 144.413(2) (West Supp. 1984); MONT. CODE ANN. § 50-40-103(2) (1983); NEB. REV. STAT. § 71-5704 (Supp. 1981). A definition this broad may be unconstitutional, but it has not yet been tested in the courts.

124. The San Francisco, California, no-smoking ordinance regulating smoking in the workplace went into effect on March 1, 1984. The ordinance

moreover, because it specifically excludes private offices in all municipal and county buildings in the State of Illinois.¹²⁵ Since most of the controversy over nonsmokers' rights arises in the workplace, the proposed Act, in order to fulfill its statutory purpose, should specifically include "place of work" in the definition of places where smoking is prohibited.¹²⁶ In a poorly ventilated office or one in which many of the workers smoke, the nonsmoker can be forced to inhale polluted air for the entire workday.¹²⁷ The Illinois Safety and Health Act (Illinois SHA)¹²⁸ provides protection from exposure to harmful levels of air pollutants in the workplace.¹²⁹ If the amount of tobacco smoke does not reach harmful levels, however, Illinois SHA would not protect the nonsmoking employee.¹³⁰ As a result, the employee is left with the alternative of pursuing a legal remedy under the theory of the common law duty of an employer to provide a safe

is the toughest measure passed in any American city to date. The no-smoking ordinance requires all employers to provide smoke-free areas for employees who are bothered by cigarette smoke in the workplace. If any employee complains that the measures taken by the employer are inadequate, the employer must prohibit smoking entirely. An employer who violates the law could be fined \$500 a day. *San Francisco Smokers Get Little Heat Over Law*, Chicago Tribune, Mar. 2, 1984, § 1, at 6, col. 1.

Many private business have voluntarily taken action against smoking. Some companies have offered bonuses to employees who stop smoking. If the habit is taken up again, however, the employee must repay the bonus. *Antismoking Legislation*, *supra* note 7, at 180; *Legal Conflict*, *supra* note 6, at 455. Other businesses have voluntarily segregated smokers from nonsmokers or have made it a policy not to hire smokers. *Antismoking Legislation*, *supra* note 7, at 180.

125. Ill. S. 0625, 83d Gen. Ass. § 3(c) (1983).

126. For a discussion of the inadequacy of California anti-smoking legislation that does not include the workplace, see *California Antismoking Laws*, *supra* note 7, at 1164-69.

127. *Legal Paths*, *supra* note 5, at 103.

128. ILL. REV. STAT. ch. 48, §§ 137.1-137.23 (1983).

129. ILL. REV. STAT. ch. 48, § 137.3(a) (1983). Section 137.3(a) states:

It shall be the duty of every employer under this Act to provide reasonable protection to the lives, health and safety and to 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. The Illinois Safety and Health Act does not, however, expressly provide protection from tobacco smoke. See *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 14 (Mo. Ct. App. 1982) (no provision covering tobacco smoke in the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1970)).

130. For a discussion of the Illinois Safety and Health Act in relation to Nonsmokers' rights, see *Nonsmokers' Rights in Illinois*, *supra* note 8, at 625-29. See also Note, *Torts—Nonsmokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in Work Area*, 9 TEX. TECH. L. REV. 353, 357-61 (1977-78) (discussion of OSHA regulations in relation to nonsmokers' rights).

workplace, with no guarantee of success.¹³¹

Further, the omission of the words "public meeting room" may prevent the proposed Act from achieving its legislative goal. The expressed purpose of the proposed Act is to protect the public health in public places and at public meetings.¹³² However, the only reference to such places in the definition of "designated area" is to public access areas in all municipal or county buildings.¹³³ The language of the statute is confusing because it is unclear as to whether it includes public meeting rooms or only hallways and waiting rooms.¹³⁴ The proposed Act¹³⁵ should specifically include "public meeting rooms" in the definition of "designated area."

Another important provision of the proposed Act is its definition of smoking. The proposed Act properly defines smoking as "the act of inhaling the smoke from or possessing a lighted cigarette, cigar, pipe or any other form of tobacco or similar substance used for smoking."¹³⁶ This provision covers the carrying of a lighted cigarette, cigar or pipe, as well as the actual puffing of a lighted tobacco product.¹³⁷ This is significant because it is the lighted tobacco product itself which emits harmful tobacco smoke, not only the exhalation of tobacco smoke by smokers.¹³⁸ Additionally, the words "or similar substance" cover any tobacco product which is not necessarily a cigarette, cigar or pipe.¹³⁹ To achieve the express legislative purpose of protecting the non-

131. *California Antismoking Laws*, *supra* note 7, at 1158-62. *See supra* note 33 and accompanying text. *Compare* *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (1976) (employee who is allergic to cigarette smoke has a common law right to a safe working environment) with *Gordon v. Raven Systems & Research, Inc.*, 462 A.2d 10 (D.C. 1983) (common law does not impose duty on employer to provide smoke-free environment for particular employee with special sensitivity to tobacco smoke).

132. Ill. S. 0625, 83d Gen. Ass. § 2 (1983). *See supra* note 85 and accompanying text.

133. Ill. S. 0625, 83d Gen. Ass. § 3(c) (1983). *See supra* note 121 and accompanying text.

134. This is the author's analysis and interpretation based on the proposed Act as a whole. The proposed Act does not define public access areas.

135. Further problems with the wording of the proposed Act include the use of the words "art museum" and the omission of state buildings in the definition of "designated area." Ill. S. 0625, 83d Gen. Ass. § 3(c) (1983). By using the words "art museum," the proposed Act excludes other types of museums, such as history museums or science museums. Further, designated areas include public access areas in all municipal and county buildings in the State of Illinois, but not state buildings.

136. *Id.* at § 3(d).

137. *See Smoking Legislation*, *supra* note 5, at 365.

138. *See supra* note 5 and accompanying text.

139. *See Smoking Legislation*, *supra* note 5, at 364.

smoking public from tobacco smoke pollution, however, the proposed Act must provide adequate methods of implementation.

Implementation

A comprehensive anti-smoking statute delegates the authority to implement smoking restrictions.¹⁴⁰ The proposed Act gives this power to the proprietor.¹⁴¹ A proprietor must make reasonable efforts to prevent smoking in a designated area outside established smoking areas.¹⁴² This is to be done "by posting appropriate signs, providing areas for nonsmokers, asking persons to refrain from smoking when requested to do so by a [person] who is suffering discomfort from the smoke, or other appropriate means."¹⁴³

Requiring the posting of no-smoking signs serves to notify smokers that smoking is prohibited in that area.¹⁴⁴ No-smoking signs also serve to alert smokers to extinguish their tobacco substances before entering a no-smoking area.¹⁴⁵ In addition, posting of signs is essential for effective enforcement of the statute.¹⁴⁶ Unless adequate notice of the prohibited conduct is given, the proposed Act could be declared an unconstitutional restriction.¹⁴⁷

Although the proposed Act provides for the posting of signs, it does not provide guidelines for the content, size, and placement of those signs.¹⁴⁸ A no-smoking sign should read "Smoking Prohibited By State Law"¹⁴⁹ and should be legible and visible.¹⁵⁰ To avoid any confusion as to what is legible, the pro-

140. *Id.* at 367. See also *Legal Conflict*, *supra* note 6, at 457; *Legal Paths*, *supra* note 5, at 109.

141. Ill. S. 0625, 83d Gen. Ass. § 6 (1983). For the definition of "proprietor," see *supra* note 109 and accompanying text.

142. Ill. S. 0625, 83d Gen. Ass. § 6 (1983).

143. *Id.*

144. *Legal Paths*, *supra* note 5, at 106.

145. *Id.* at 106-07.

146. *Id.* See also TEX. PENAL CODE ANN. § 48.01(b) (West Supp. 1982) (failure to have prominently displayed a reasonably sized notice that smoking is prohibited by state law is a defense to prosecution).

147. *United States v. Harriss*, 347 U.S. 612 (1954). A statute will be held unconstitutional if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Id.* at 617.

148. See *Legal Paths*, *supra* note 5, at 107.

149. See, e.g., CONN. GEN. STAT. ANN. § 1-21b.(b)(2) (West Supp. 1983); HAWAII REV. STAT. § 321-203 (1976); IOWA CODE ANN. § 98A.4 (West Supp. 1983); R.I. GEN. LAWS § 23-20.6-4 (Bobbs-Merrill 1979). Perhaps a better approach would be to have the sign read "Smoking in This Area Prohibited By State Law" or to define the designated no-smoking area in the wording of the sign.

150. *Legal Paths*, *supra* note 5, at 106; *Smoking Legislation*, *supra* note 5, at 366.

posed Act should set forth the minimum size of lettering on all signs.¹⁵¹ To insure visibility, the proposed Act should state that signs are to be conspicuously posted at all entrances to non-smoking areas.¹⁵² Furthermore, the proposed Act could require a proprietor to provide facilities for extinguishing smoking substances at all entrances to nonsmoking areas.¹⁵³ Because proprietors may fail to implement the proposed Act, it must contain methods to insure compliance.

Enforcement

In a carefully drafted anti-smoking statute, the primary authority responsible for enforcing the statute should be delegated to a governmental agency.¹⁵⁴ The proposed Act gives the primary enforcement authority to the State Fire Marshall.¹⁵⁵ The State Fire Marshall has the power to administer the provisions of the Act¹⁵⁶ and to promulgate rules necessary to administer and enforce the Act.¹⁵⁷ The State Fire Marshall is also allowed to grant exemptions from the provisions of the Act when warranted if issuance of the exemption will not significantly affect the public's health and comfort.¹⁵⁸ In addition, the State Fire Marshall has the discretion to determine whether a proprietor has made a reasonable effort to comply with the Act.¹⁵⁹ Moreover, the State Fire Marshall, among others,¹⁶⁰ is given the power to institute a civil action seeking an injunction against a

151. See, e.g., CONN. GEN. STAT. ANN. § 1-21b.(c) (West Supp. 1983) (letters on signs are to be at least four inches high and not less than one-half inch wide); OKLA. STAT. ANN. tit. 21, § 1247(C) (West Supp. 1982) (signs are to be a minimum of eight inches by ten inches and lettering is to be a minimum of one inch; letters are to be of a contrasting color to sign).

152. See, e.g., COLO. REV. STAT. § 25-14-103(3) (Supp. 1978); CONN. GEN. STAT. ANN. § 1-21b.(c) (West Supp. 1983); MONT. CODE ANN. § 50-40-104 (1983).

153. *Smoking Legislation*, *supra* note 5, at 366. Extinguishing facilities will help to avoid litter caused by matches, cigarette ashes, butts and wrappers. The Texas Penal Code makes the failure to provide facilities for extinguishing smoking materials a defense to a smoking violation. TEX. PENAL CODE ANN. § 48.01(c) (West Supp. 1982).

154. *Legal Conflict*, *supra* note 6, at 456; *Legal Paths*, *supra* note 5, at 99.

155. Ill. S. 0625, 83d Gen. Ass. § 7 (1983).

156. *Id.* at § 7(a).

157. *Id.* at § 7(b). The rules are to be promulgated pursuant to the Illinois Administrative Procedure Act of 1975, ILL. REV. STAT. ch. 127, §§ 1001-1021 (1983).

158. Ill. S. 0625, 83d Gen. Ass. § 7(c) (1983).

159. *Id.* at § 7(d).

160. Others authorized to bring suit under the Act include "any analogous individual or department in any local government, any law enforcement agency, or any individual personally affected by violation of" the proposed Act. *Id.* at § 9.

proprietor for a violation of the proposed Act.¹⁶¹

By giving the enforcement power to the State Fire Marshall, the proposed Act seems to be confusing fire prevention with its stated purpose of protecting the public health. Under the proposed Act, the State Fire Marshall is to determine whether a proprietor has complied with the Act in the course of routine fire inspections.¹⁶² Because the proposed Act is a health measure, the function of its enforcement would be more properly vested with the State Board of Health.¹⁶³ The State Board of Health is in a better position to determine if the environment is healthful than is the State Fire Marshall because the State Fire Marshall is only concerned with fire safety.

Although the primary enforcement authority should be with a governmental agency, additional enforcement authority can be granted to others to insure effective enforcement. The proposed Act grants some enforcement power to the proprietor when he witnesses a person smoking in a no-smoking area,¹⁶⁴ but more is needed. Although the proprietor has the authority to ask a person to refrain from smoking,¹⁶⁵ he does not have the power to remove the offender by the use of a reasonable amount of force if the smoker does not comply with his request.¹⁶⁶ Nor does the proprietor have the authority to refuse service to the offender unless he stops smoking.¹⁶⁷ The proposed Act should give the proprietor these powers and should also make it the proprietor's duty to notify law enforcement authorities if a person violates the law.¹⁶⁸ By doing so, law enforcement officials could respond and issue citations to insure effective enforcement.

Furthermore, the proposed Act does not grant enforcement power to a person other than a proprietor who witnesses a person smoking in a designated area. Even though the proposed Act allows an individual to seek an injunction against a proprietor,¹⁶⁹ it does not allow a private citizen to seek an injunction

161. *Id.*

162. *Id.* at § 7(d).

163. ILL. REV. STAT. ch. 127, §§ 55.00-55.37 (1983) (Department of Public Health). See *Legal Conflict*, *supra* note 6, at 456. See, e.g., MINN. STAT. ANN. § 144.417 (West Supp. 1984); NEB. REV. STAT. § 71-5710 (Supp. 1981); R.I. GEN. LAWS § 23-20.6-2(d)(2) (Mitchie Supp. 1983).

164. Ill. S. 0625, 83d Gen. Ass. § 6 (1983). See *supra* note 142-43 and accompanying text.

165. *Id.*

166. See *Legal Paths*, *supra* note 5, at 109.

167. See *Smoking Legislation*, *supra* note 5, at 367.

168. *Id.*

169. Ill. S. 0625, 83d Gen. Ass. § 9 (1983). See also *Legal Paths*, *supra* note 5, at 109.

against the smoker.¹⁷⁰ Granting these additional powers to the proprietor and individuals would provide greater enforcement opportunities for the protection of nonsmokers from the adverse effects of tobacco smoke in public places.

The proposed Act does allow more flexibility in the enforcement of the proprietor's obligation to prohibit smoking and to establish no-smoking areas than it does for an actual smoking violation. The proposed Act provides that "[t]he State Fire Marshall, any analogous individual or department in any local government, any law enforcement agency, or any [person] affected by violation" of the Act may seek an injunction against a proprietor who fails to comply with the Act.¹⁷¹ While an injunction would most likely bring about compliance with the law, this method of enforcement is extreme and expensive.¹⁷² To eliminate the deterrent effect of costly litigation, the proposed Act could provide for recovery of court costs and attorney's fees in successful suits.¹⁷³

Penalties

In order for anti-smoking legislation to be effective, realistic fines, rather than merely nominal sums, must be imposed.¹⁷⁴ The fines should be large enough to act as a deterrent to the violator and other smokers, yet reasonable enough so that the law can be enforced.¹⁷⁵ Under the proposed Act, a person who smokes in a no-smoking area would be guilty of a petty offense and would be fined no more than \$100 and no less than \$10.¹⁷⁶ These minimum and maximum fines appear to be adequate for effective enforcement.¹⁷⁷

Under the proposed Act, a proprietor who violates the provi-

170. See *Legal Paths*, *supra* note 5, at 108. This remedy would be most effective for situations in which the nonsmoker repeatedly comes into contact with a particular smoker. *Id.*

Another alternative is to allow individuals to make a citizen's arrest when they witness a smoking violation. *Id.* This remedy may not be too useful, however, because it may subject citizen enforcers to civil suits for false imprisonment and battery. *Id.*

171. Ill. S. 0625, 83d Gen. Ass. § 9 (1983).

172. *Legal Paths*, *supra* note 5, at 108.

173. *Id.* See CAL. HEALTH & SAFETY CODE § 25945 (West Supp. 1984) (provision for recovery of all reasonable costs of suit, including reasonable attorney fees to be determined by the court).

174. *Legal Paths*, *supra* note 5, at 108.

175. *Nonsmokers' Rights in Illinois*, *supra* note 8, at 630.

176. Ill. S. 0625, 83d Gen. Ass. § 8 (1983).

177. Many statutes provide for a minimum fine of \$10 and a maximum fine of \$100. See, e.g., ARK. STAT. ANN. § 82-3703 (Mitchie Supp. 1983); GA. CODE ANN. § 26-9910(b) (Harrison 1982); NEV. REV. STAT. § 202.2492 (1979); N.Y. PUB. HEALTH LAW § 1399-p (West Supp. 1983).

sions of the Act would also be guilty of a petty offense.¹⁷⁸ The proposed Act does not, however, provide minimum and maximum fines for violations by a proprietor. A hefty fine imposed on the proprietor would serve as a strong incentive for the proprietor to make a reasonable effort in the future to comply with the provisions of the proposed Act.

CONCLUSION

Constitutional, statutory, and tort remedies do not provide adequate protection of nonsmokers from the harmful effects of tobacco smoke pollution. In addition, individual legal actions are both expensive and time-consuming, and are not as effective as is legislation. Legislation regulating smoking in public places where nonsmokers come in contact with tobacco smoke provides more comprehensive protection to nonsmokers from the health hazards and discomfort caused by passive inhalation of tobacco smoke.

Because passive smoking is a serious public health concern, the Illinois legislature should enact a Clean Indoor Air Act. Passage of such a law will protect nonsmokers from the toxic and nuisance effects of tobacco smoke in enclosed public places. Moreover, a Clean Indoor Air Act will help to secure the right of nonsmokers to a healthy, smoke-free environment.

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178. Ill. S. 0625, 83d Gen. Ass. § 8 (1983).

