COMMENTS

Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air

And surely in my opinion, there cannot be a more base, and yet hurtfull, corruption in a Countrey, then is the vile use (or other abuse) of taking Tobacco *in this Kingdome, which hath mooved me, shortly to discover the abuses thereof in this following little Pamphlet.*

If any thinke it a light Argument, so is it but a toy that is bestowed upon it. And since the Subiect is but of Smoke, I thinke the fume of an idle braine, may serve for a sufficient battery against so fumous and feeble an enemy. If my grounds be found true, it is all I looke for; but if they cary the force of perswasion with them, it is all I can wish, and more than I can expect.

James I, *A Counterblaste To Tobacco* (1604)

I. INTRODUCTION: THE POLLUTION PROBLEM

There are approximately 50,000,000 smokers in the United States.[1] The other 165,000,000 Americans do not smoke—at least not voluntarily. In 1975 the smokers combusted about 600 billion cigarettes into the air[2]—an astonishing average of over 30 cigarettes a day per smoker—and forced the nonsmokers in public places to breathe air filled with numerous tobacco contaminants. The most harmful of the pollutants created by burning tobacco is carbon monoxide, a poisonous gas. Other contaminants include tar and nicotine. All told, over 30 different pollutants that are sus-

1. AM. CANCER SOC'Y, '76 CANCER FACTS & FIGURES 20 (1975).

2. In 1975, Americans smoked 607.2 billion cigarettes. The Agriculture Department estimated that approximately 620 billion cigarettes were consumed in 1976. N.Y. Times, Jan. 2, 1977, § 1, at 4, col. 1.

pected of being health hazards have been identified in tobacco smoke.[3]

In 1972 the Surgeon General for the first time included in his report on the health consequences of smoking a section on the adverse effects of tobacco pollution on the health of the nonsmoker.[4] In the past several years nonsmokers have realized that they do not have to endure this additional source of air pollution,[5] which in many places rises to significant and hazardous levels, and they have begun to act through legislatures and courts to clear the air.[6] This Comment discusses nonsmokers' judicial and legislative options.

Tobacco pollution comes from both ends of the smoking article. The smoke which the smoker takes into his mouth and exhales into the air is called mainstream smoke. Sidestream smoke, on the other hand, is smoke which comes from the burning end of the source and from the mouthpiece when not being puffed.[7] Mainstream smoke is filtered by the smoker through absorption by the walls of his mouth, and by his lungs if he inhales. An inhaling

3. PUB. HEALTH SERVICE, HEALTH SERVICES & MENTAL HEALTH AD., U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING—A REPORT OF THE SURGEON GENERAL: 1972, at 141-50 (1972) [hereinafter cited as THE HEALTH CONSEQUENCES OF SMOKING 1972]. Reports to Congress on the health consequences of smoking are issued annually by the Department of Health, Education and Welfare pursuant to the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340, 1337(a) (1970).

4. *Id.* at 117-35. A section on the health consequences of tobacco smoke on nonsmokers was again included in the 1975 report. PUB. HEALTH SERVICE, CENTER FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 1975, at 83-112 (1975) [hereinafter cited as THE HEALTH CONSEQUENCES OF SMOKING 1975].

5. Tobacco is only one of several sources of indoor pollution. Two others are gas stoves and oil or coal heating units, both of which produce carbon monoxide. *See* Note, *Legislation for Clean Air: An Indoor Front*, 82 YALE L.J. 1040 (1973).

6. While not all 165,000,000 nonsmokers object to the presence of tobacco smoke, even some smokers are annoyed by the smoke of other smokers. In a recent study, only 77% of nonsmokers surveyed said that it was annoying to be near a person smoking cigarettes, and 80.1% said that smoking should be allowed in fewer places than it is now. However, 34.8% of *smokers* said that it was annoying to be near a person smoking cigarettes, and 51% said that smoking should be allowed in fewer places than it is now. U.S. NATIONAL CLEARINGHOUSE FOR SMOKING & HEALTH, BUREAU OF HEATH EDUCATION, CENTER FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, DEP'T OF HEALTH, EDUCATION & WELFARE, ADULT USE OF TOBACCO—1975, at 7-8 (1976); U.S. Dep't of Health, Education & Welfare Press Release, June 15, 1976, chart "Public Support is Increasing For Social Action Against Smoking." The cited study contains many interesting statistics about attitudes, knowledge and behavior concerning smoking.

7. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 122.

smoker filters the smoke more than a non-inhaling smoker because the lungs retain a higher percentage of tobacco pollutants than do the walls of the mouth.[8] Sidestream smoke is the more abundant of the two and the more harmful.[9] It contains about twice as much tar and nicotine and almost five times as much carbon monoxide as mainstream smoke.[10] Thus, the major portion of tobacco pollution reaches the nonsmoker regardless of the inhalation habits of the smoker.

Taken together, the sidestream smoke and the mainstream smoke of the average cigarette put into the air approximately 70 milligrams of dry particulate matter and 23 milligrams of carbon monoxide.[11] The actual amount of pollutants to which a nonsmoker is exposed varies with the inhalation habits of the smokers present, the amount of tobacco smoked, the tar and nicotine content of the cigarettes, available ventilation, the proximity of the nonsmoker to the smokers and the duration of exposure.[12] The actual amounts of pollutants the nonsmoker inhales will also vary with the nonsmoker's physiological condition.

Several studies summarized in the 1972 Surgeon General's report showed that, in situations that are not uncommon, levels of carbon monoxide pollution from tobacco smoke may exceed the

8. The mouth absorbs approximately 16% of the particulate matter (*e.g.*, tar and nicotine) and 3% of the carbon monoxide. The lungs absorb from 86 to 99% of the particulate matter and about 54% of the carbon monoxide. *Id.*, citing Dalhamn, Edfors & Rylander, *Mouth Absorption of Various Compounds in Cigarette Smoke*, 16 ARCHIVES ENVIRONMENTAL HEALTH 831 (1968) and Dalhamn, Edfors & Rylander, *Retention of Cigarette Smoke Components in Human Lungs*, 17 ARCHIVES ENVIRONMENTAL HEALTH 746 (1968). Smoke from pipes and cigars is not inhaled, and most of the mainstream smoke from these sources is returned to the air. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 123.

9. THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 88-89. *See also* Schmelz, Hoffman & Wynder, *The Influence of Tobacco Smoke on Indoor Atmospheres*, 4 PREV. MED. 66 (1975).

10. THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 88-89.

11. Owens & Rossano, *Design Procedures to Control Cigarette Smoke and Other Air Pollutants*, 75 AM. SOC'Y HEATING, REFRIGERATING & AIR-CONDITIONING ENG'RS: TRANSACTIONS 93, 94 (1969).

12. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 122. *See also* THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 107. In response to pressure from anti-smoking groups and changes in consumer tastes, tobacco product manufacturers have substantially reduced the tar and nicotine content of cigarettes in the last twenty years. There has also been a large increase in filter cigarette production. AM. CANCER SOC'Y, *supra* note 1, at 19; N.Y. Times, Oct. 30, 1976, at 8, col. 1. *See also* THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 141.

federal ambient air quality standards of 9 parts per million (ppm),[13] and even the standard of 50 ppm[14] promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970.[15] One study found that ten cigarettes smoked in an enclosed car produced carbon monoxide levels of up to 90 ppm.[16] Another study found carbon monoxide levels of up to 20 ppm in a ventilated room after seven cigarettes were smoked in one hour. However, levels as high as 90 ppm were recorded in the area next to the smoker.[17] Yet another study showed that 62 cigarettes smoked in two hours produced carbon monoxide levels of up to 80 ppm in a room with the approximate dimensions of 18 feet by 20 feet with a ceiling 10 feet high.[18]

13. 40 C.F.R. § 50.8 (1975) (maximum eight hour concentration not to be exceeded more than once a year). This figure is established by the Environmental Protection Agency (EPA) pursuant to statutory procedures contained in the Clean Air Act, 42 U.S.C. §§ 1857-1857*l* (1970). The Act calls for the establishment of two levels of protection. The "primary ambient air quality standard" is set at a level "the attainment and maintenance of which in the judgment of the [EPA's] Administrator, . . . allowing an adequate margin of safety, [is] requisite to protect the public health." *Id.* § 1857c-4(b)(1). The "secondary ambient air quality standard" is set at a level "the attainment and maintenance of which in the judgment of the Administrator . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Id.* § 1857c-4(b)(2). The Administrator has determined that the nine ppm maximum concentration for carbon monoxide satisfies both the primary and secondary ambient air quality standards. 40 C.F.R. § 50.8 (1975).

14. 29 C.F.R. § 1910.1000 (1976) (maximum allowable time weighted average exposure in any eight hour work shift of a 40 hour work week). The statute requires the Secretary to "promulgate the standard which assures the greatest protection of the safety or health of the affected employees." 29 U.S.C. § 655(a) (1970).

15. 29 U.S.C. §§ 651-678 (1970).

16. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 123, citing a German study. It should be noted that the cigarettes were smoked until the butts were only 5 millimeters long.

17. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 123, citing Lawther & Commins, *Cigarette Smoking and Exposure to Carbon Monoxide*, 174 ANNALS N.Y. ACADEMY SCIENCES 135 (1970).

18. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 123, citing an earlier German study. The 1975 Report contains a table summarizing the various studies which have measured the constituents released into the air by the combustion of tobacco products in various situations. THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 91-94. Although many of the studies showed carbon monoxide levels considerably lower than 50 ppm, the report noted the following:

> One must be careful when using the levels recorded in Table 2 as a measure of individual exposure because the CO levels were usually measured at points several feet from the nearest smoker and probably would have been higher if measured at points corresponding to the position of a person sitting next to someone actively smoking. In addition, it is the CO absorbed by the body that

Levels of tar and nicotine are found to be equally high. In a room the size of a typical office, a cigarette smoked in four minutes pollutes the air with 36 times the level of tar particulates considered safe under federal clean air standards.[19] The smoking of several cigarettes in a closed room can put such a high concentration of nicotine and dust particles into the air that a nonsmoker can inhale four or five cigarettes worth of these tobacco by-products.[20]

Other components of tobacco smoke which are also considered harmful include nitrogen dioxide, hydrogen cyanide, benzo(a)pyrene, acrolein and acetaldehyde. Few studies, however, have been done to measure their levels in indoor air.[21]

Carbon monoxide, when inhaled, combines with hemoglobin in the blood more readily than oxygen, and forms carboxyhemoglobin.[22] This reduces the ability of the circulatory system to deliver oxygen to the various organs in the body. The heart works harder to circulate more oxygen, but ultimately the body is deprived of the necessary amount of oxygen, leading to dizziness, headaches, and lassitude.[23] Carbon monoxide inhalation alters au-

causes the harmful effects and not that which is measured in the atmosphere. *Id.* at 95.

A recent study measured carbon monoxide levels in bars. The study found that in a poorly ventilated bar a nonsmoking bartender working an 8 hour shift was exposed to a time weighted average of 17 ppm of carbon monoxide and that he inhaled benzo(a)pyrene approximately equivalent to smoking 36 cigarettes. Even with ventilation that provided about six changes of air an hour, the figures were 11.5 ppm for carbon monoxide, and benzo(a)pyrene equivalent to smoking 12 cigarettes. Cuddeback, Donovan & Burg, *Occupational Aspects of Passive Smoking*, 37 AM. INDUSTRIAL HYGIENE A. J. 263 (1976).

19. Nauman, *Smoking and Air Pollution Standards*, 182 SCIENCE 334 (1973) (letter to the editor).

20. 115 CONG. REC. 40382 (1969) summarizing the earlier German study, *supra* note 18. *See also* Russell, *Blood and Urinary Nicotine in Non-Smokers*, 1975 THE LANCET 179. *But see* THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 97.

21. Nitrogen dioxide is an irritating gas, and hydrogen cyanide destroys respiratory enzymes. Their levels in concentrated cigarette smoke far exceed levels considered dangerous to health. *See* Abelson, *A Damaging Source of Air Pollution*, 158 SCIENCE 1527 (1967); 115 CONG. REC. 40382 (1969). Benzo(a)pyrene is a carcinogenic hydrocarbon in tobacco smoke. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 89. Acrolein and acetaldehyde may contribute to eye irritation experienced by nonsmokers. THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 98. For other components of cigarette smoke which are either probable or suspected health hazards, *see* THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 144-45.

22. *See* THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 21-23.

23. Abelson, *supra* note 21.

ditory discrimination, visual acuity and the ability to distinguish relative brightness.[24] Increased errors in cognitive and choice discrimination tests appear when there is even a relatively low level of carboxyhemoglobin in the bloodstream.[25] High levels of carboxyhemoglobin in drivers have been shown to increase response time for taillight discrimination and cause variance in distance estimation.[26] Finally, carbon monoxide can be especially harmful to persons with heart disease.[27]

The dry particulate matter in tobacco smoke also causes adverse health consequences. There are more than 34,000,000 Americans who are especially sensitive to tobacco smoke.[28] The smoke can aggravate the conditions of persons with chronic bronchitis, emphysema, chronic sinusitus and asthma or hay fever.[29] Even those nonsmokers who are neither allergic nor especially sensitive to smoke often suffer eye irritation, nasal symptoms, coughing, wheezing and sore throats when exposed to tobacco smoke.[30] Those with allergies suffer from these and other effects with even higher frequency.[31]

24. These results were recorded after exposure to 50 ppm of carbon monoxide for from 27 to 90 minutes. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 125-26, citing Beard & Grandstaff, *Carbon Monoxide Exposure and Cerebral Function*, 174 ANNALS N.Y. ACADEMY SCIENCES 385 (1970).

25. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 126, citing Schulte, *Effects of Mild Carbon Monoxide Intoxication*, 7 ARCHIVES ENVIRONMENTAL HEALTH 524 (1963).

26. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 126, citing Ray & Rockwell, *An Exploratory Study of Automobile Driving Performance Under the Influence of Low Levels of Carboxyhemoglobin*, 174 ANNALS N.Y. ACADEMY SCIENCES 396 (1970). However, some studies contradict the results of the above study and of the studies cited in notes 24 and 25 *supra*, and found little or no change in pyschomotor functions. For a summary of the studies done, *see* THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 100-01.

27. THE HEALTH CONSEQUENCES OF SMOKING 1972, *supra* note 3, at 126-27. Less exercise is needed to precipitate angina (a condition which tends to produce spasmodic suffocative attacks) after exposure to common levels of carbon monoxide than after exposure to fresh air. Aronow, Harris, Isbell, Rokaw & Imparato, *Effect of Freeway Travel on Angina Pectoris*, 77 ANNALS INTERNAL MEDICINE 669 (1972).

28. 115 CONG. REC. 40381 (1969). *See also* N.Y. Times, Nov. 5, 1975, at 51, col. 3.

29. 115 CONG. REC. 40381 (1969). Persons with physical susceptibilities to tobacco smoke may be psychologically affected by the mere presence of tobacco smoke. The anxiety about exposure may itself cause symptoms of the illness to appear or reduce the threshold level of exposure necessary to cause the onset of symptoms. *Id.* at 40382.

30. Speer, *Tobacco and the Nonsmoker*, 16 ARCHIVES ENVIRONMENTAL HEALTH 443, 444 (1968).

31. *Id.*

Exposure to smoke may also harm children. Babies born to women who smoke often weigh less and are shorter at birth than babies born to nonsmoking mothers.[32] Also, several studies have shown that children of parents who smoke at home suffer acute respiratory illnesses more frequently than children whose parents do not smoke.[33]

Although it may not be a health problem, the smell of tobacco is particularly annoying to nonsmokers.[34] Ironically, the smoker cannot smell the odors as acutely because the smoke destroys the inner lining of the nose. In addition, the strong tobacco odors place an added burden on the ventilation requirements of any room or building.[35] Finally, matches and cigarette ashes, butts and wrappers are a source of litter.

II. CONSTITUTIONAL RIGHTS

As a result of increased public awareness in recent years of the dangers of tobacco smoke, many states and municipalities have regulated smoking in public places, and some smokers have begun to complain about interference with what they claim to be their constitutional right to smoke. On the other hand, because there remain many public places where smoking is not regulated, some nonsmokers assert continuing violations of what they perceive to be a constitutional right to be free from smoke.

A. *Smoker's Rights*

The claim has been made that state regulation of smoking in public deprives the smoker of part of his "liberty" without due process of law under the fifth and fourteenth amendments.[36] This

32. Meredith, *Relation Between Tobacco Smoking of Pregnant Women and Body Sizes of their Progeny: A Compilation and Synthesis of Published Studies*, 47 HUMAN BIOLOGY 451 (1975).

33. THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 102-05.

34. Yaglou, *Ventilation Requirements for Cigarette Smoke*, 61 AM. SOC'Y HEATING, REFRIGERATING & AIR-CONDITIONING ENG'RS: TRANSACTIONS 25, 26 (1955).

35. *See id.* at 25; Owens & Rossano, *supra* note 12, at 101; THE HEALTH CONSEQUENCES OF SMOKING 1975, *supra* note 4, at 99. The presence of nonsmokers (or any persons) in a room will reduce the pollution in the air. Tobacco smoke has a high electrical potential and is attracted to the human body, which has a low electrical potential. The tars in the smoke help the odor-causing elements of the smoke to cling to the skin and clothes. AM. LUNG A., SECOND-HAND SMOKE 6 (1975).

36. The right to smoke, if it exists, is an unenumerated right. During the last few years of the 19th century and the first quarter of this one, the Supreme Court pro-

claim may find support in the fact that the Supreme Court has used the due process clause to protect certain unenumerated personal liberties. For example, the Court has recognized the right to travel,[37] the right to send one's child to private school,[38] the right to learn a foreign language,[39] the right to marry and procreate,[40] and, most recently, the right to have an abortion[41] as rights protected by the due process clause.

Two early state cases also support the smoker's assertion that the right to smoke is a protected personal liberty. In *Hershberg v. City of Barbourville*,[42] the city attempted to prohibit the smoking of cigarettes within city limits.[43] The Court of Appeals of Kentucky, noting that the law prohibited smoking of cigarettes within homes and other private premises, invalidated the law as "an invasion of [a citizen's] right to control his own personal indulgences."[44] In

vided protection for unenumerated constitutional rights through the theory of substantive due process under the fifth and fourteenth amendments. The Court used the "liberty" of the due process clauses to protect individual privacy in the sense of individual autonomy—the right to do as one wishes.

> The liberty mentioned [in the due process clause of the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897). Although the Court gradually turned away from using substantive due process to strike down economic legislation, it has continued to use the theory under various rubrics to protect unenumerated personal liberties. *See* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1414-19 (1974).

37. Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).

38. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

39. Meyer v. Nebraska, 262 U.S. 390 (1923).

40. Skinner v. Oklahoma, 316 U.S. 535 (1942).

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

42. 142 Ky. 60, 133 S.W. 985 (1911).

43. The statute read as follows:

> That if any person shall smoke a cigarette or cigarettes within the corporate limits of the city of Barbourville after such person shall have had actual notice of the passage of this ordinance, he shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than fifteen dollars, for each offense.

Id. at 60, 133 S.W. at 985.

44. *Id.* at 61, 133 S.W. at 986. Technically, this part of the decision is dictum. Since Hershberg brought the suit for damages for arrest and imprisonment under a

City of Zion v. Behrens,[45] Behrens was arrested for smoking on a boulevard. The Supreme Court of Illinois found the city ordinance, which prohibited smoking in all public places, indoor and outdoor,[46] void as an unreasonable interference with the "private rights" and "personal liberty" of a citizen and reversed the conviction.[47]

Even if the smoker has a constitutionally protected right to smoke, such a right is subject to reasonable limitation by the state in the exercise of its police power for the protection of the public health, safety and welfare.[48] The courts in *Behrens* and *Hershberg*

statute he claimed was void, and the court held that the city was immune from suit for arrest even though the statute was void, the court affirmed dismissal of the action.

45. 262 Ill. 510, 104 N.E. 836 (1914).

46. The ordinance, which apparently was enacted to protect the nonsmoker, prohibited smoking "in any form, whether in a pipe or by the use of a cigarette, cigar or otherwise, in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, post office, or other public building or public place within the said city of Zion." *Id.* at 510-11, 104 N.E. at 836-37. For a brief history of early anti-smoking legislation, see Note, *The Resurgence and Validity of Anti-Smoking Legislation*, 7 U.C.D. L. REV. 167, 168 (1974).

47. *Id. Cf.* Commonwealth v. Thompson, 53 Mass. (12 Met.) 231 (1847), in which the Supreme Judicial Court of Massachusetts upheld a statute which prohibited smoking on the streets of Boston as a valid ordinance for the protection of the city from fire. The ordinance was not challenged on constitutional grounds.

48. Of course, the individual's liberty-autonomy is subject to the authority delegated to representative government for agreed, limited purposes. The purposes of the federal government are explicit in the Constitution. The Constitution, assuming the existence of the states, says nothing of the purposes of their governments, but these were understood in the prevailing philosophy: the state may limit the people's a priori liberty in the exercise of its "police power," for the proper, accepted purposes of government—to protect and promote health, safety, morals and other public welfare. Since the mass of state regulations served these purposes, individual liberty-autonomy gave way regardless of theoretical claims of substantive due process.

Henkin, *supra* note 36, at 1415-16 (footnote omitted). *See also* 16 C.J.S. *Constitutional Law* §§ 174-98 (1956).

There is no full and complete definition of the police power. Although the power to legislate for the public health, safety and welfare is included within such powers, police power is often more broadly defined:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . .
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> . . . Public safety, public health, morality, peace and quiet, law and order —these are some of the more conspicuous examples of the traditional application

found the no-smoking laws invalid as unreasonable infringements on the smoker's liberty.[49] However, the court in *Behrens*, acknowledging that tobacco smoke is offensive and harmful, recognized the power of the city to prohibit smoking by reasonable regulation in public places "where large numbers of persons are crowded together in a small space."[50] Under this analysis, legislation enacted for the protection of nonsmokers which prohibits smoking within homes and other places where smokers and nonsmokers do not often come into contact, or where there is little concentration of smoke, might be found unconstitutional.[51]

Today, in answer to proliferating legislation, a smoker might assert that his right to smoke is protected by the "right to privacy" which the Supreme Court has developed for the protection of certain unenumerated rights.[52] Personal liberties protected by this

of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.

Berman v. Parker, 348 U.S. 26, 32 (1954).

49. To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Lawton v. Steele, 152 U.S. 133, 137 (1894). In *Hershberg* the court explicitly left open the question of whether a statute limited to prohibiting smoking on the streets would be valid. 142 Ky. at 61, 133 S.W. at 986.

50. 262 Ill. at 511-12, 104 N.E. at 837.

51. Whether a statute prohibiting smoking within the home for the purpose of protecting the smoker from himself would be upheld is a separate question. The issue arises in other areas of attempted state regulation, most notably in statutes such as those requiring the wearing of motorcycle helmets and prohibiting the smoking of marijuana in private. *See, e.g.*, State v. Kantner, 53 Hawaii 327, 493 P.2d 306 (1972) (marijuana); State v. Cotton, 55 Hawaii 138, 516 P.2d 709 (1973) (motorcycle helmets); Note, *Motorcycle Helmets and the Constitutionality of Self-Protective Legislation*, 30 OHIO ST. L.J. 355 (1969); Kaplan, *The Role of the Law in Drug Control*, 1971 DUKE L.J. 1065 (1971).

52. The two principal cases in the development of this right are Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973). Griswold involved the right of married couples to use contraceptives. The Court found that a state prohibition of the use or sale of contraceptives violated their "right to privacy." Justice Douglas, for the majority, found the right in the "penumbra" of several amendments of the Bill of Rights which protect an individual's privacy. Other Justices found other constitutional sources. Justices Harlan and White grounded their decisions on substantive due process. In *Roe*, the Court held that the decision to have an abortion was protected by the right to privacy. Justice Blackmun for the Court found the right in the "concept of personal liberty of the Fourteenth Amendment." 410 U.S. at 153. *See* Henkin, *supra* note 36, at 1421-24; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 673-86, 697-701 (1973).

right are entitled to greater protection than other rights, and the state must show a compelling interest when it seeks to limit them by legislation.[53] However, only unenumerated personal liberties that are "fundamental" or "implicit in the concept of ordered liberty" are included in the right to privacy and entitled to greater protection.[54] Public smoking does not seem to rise to these levels. Moreover, smoking does not fit the conceptual pattern of the cases in which the right to privacy has been found to exist to date, which have upheld constitutional claims relating to marriage and family relationships.[55] Again, although it is possible that smoking in the privacy of the home is protected by the right to privacy, requiring the state to show a greater interest in order to regulate smoking there, the exercise of the police power to regulate *public* smoking would be subject only to a reasonableness test, because of the clear harm to the nonsmoker.[56]

B. *Nonsmokers' Rights*

Nonsmokers may claim that state failure to regulate smoking interferes with their constitutional right to be free from tobacco smoke, or in other words, the right to a clean and non-hazardous environment. To date, the courts have not accorded such a right constitutional protection, although several writers have advocated doing so.[57] Three possible constitutional sources for the right have been suggested.

53. Roe v. Wade, 410 U.S. 113, 155 (1973).

54. *Id.* at 152.

55. *See* note 48 *supra.*

56. In State v. Kantner, 53 Hawaii 327, 493 P.2d 306 (1972), the Supreme Court of Hawaii held that the inclusion of marijuana within the legislative definition of narcotic did not violate constitutional due process. The majority rejected the argument that the use of marijuana involved a fundamental liberty. Justice Abe, who concurred on procedural grounds, found that there was a fundamental right to smoke marijuana. 53 Hawaii at 336-37, 493 P.2d at 312. Justice Levinson, dissenting, also found that there was a right to smoke marijuana "founded upon the constitutional rights of personal autonomy and privacy." 53 Hawaii at 339, 493 P.2d at 313. However, even Justice Levinson, who would have subjected regulation of the right to the compelling interest standard, admitted that "where [the] conduct is public in nature . . . society has a greater claim to the right of control and the State need not show as compelling an interest in its prohibition." 53 Hawaii at 347, 493 P.2d at 317. This statement applies equally to the fundamental rights in the Bill of Rights. Acts which could not be prohibited when done in private may be prohibited when they interfere with the rights of others. *See* Kovacs v. Cooper, 336 U.S. 77, 85-86 & nn. 10 & 11 (1949).

57. *See, e.g.*, Roberts, *The Right to a Decent Environment*, 55 CORNELL L. REV. 674 (1970); Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of*

The first source is the word "life" in the due process clauses of the fifth and fourteenth amendments. It is argued that the right to life implies a right to be free from pollution which endangers life and the right to live one's life in a non-hazardous environment.[58]

The second source is in the personal liberties protected by the due process clauses of the fifth and fourteenth amendments. The argument is the same as that made by the smokers: the Supreme Court should protect the right to a clean environment under due process just as it has protected other unenumerated liberties.[59] Nonsmokers might not be able to claim the protection of the "right to privacy," however, because under the Court's most recent decisions such a claimed right must be "fundamental" and "implicit in the concept of ordered liberty,"[60] in order to be protected. Even so, it is argued that the right to a clean environment meets these tests, for, without a clean and healthy environment to sustain life, personal liberties would have little meaning.[61]

Finally, the ninth amendment[62] has been suggested as a source for the right to a clean environment, or at least as support for the existence of the right under the fifth and fourteenth amendments.[63]

Administrative Law, 70 COLUM. L. REV. 612 (1970); Note, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVIRONMENTAL AFFAIRS 515 (1975) [hereinafter cited as *The Continuing Search*]; Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970) [hereinafter cited as *Toward a Constitutionally Protected Environment*].

58. *See The Continuing Search, supra* note 57, at 524; *Toward a Constitutionally Protected Environment, supra* note 57, at 465. In one of the few cases in which a court recognized a right to a clean environment, the judge said:

> I have no difficulty in finding that the right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life.

Environmental Defense Fund v. Hoerner Waldorf Corp., 1 ERC 1640, 1641 (D. Mont. 1970). Plaintiff lost in the case for failure to establish sufficient state action. *See* notes 72-74 and accompanying text *infra*.

59. *See* notes 36-41 and accompanying text *supra*.

60. Roe v. Wade, 410 U.S. 113, 152 (1973). *See* notes 52-54 and accompanying text *supra*.

61. *See The Continuing Search, supra* note 57, at 524; *Toward A Constitutionally Protected Environment, supra* note 57, at 463. Related to the due process liberty argument is an argument that pollution intrudes on one's "right to be let alone." *See id.* at 464.

62. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. IX.

63. *See The Continuing Search, supra* note 57, at 524; Beckman, *The Right to a Decent Environment Under the Ninth Amendment*, 46 L.A. BAR BULL. 415 (1971).

For example, the Supreme Court's use of the ninth amendment to find unconstitutional a statute prohibiting the use of contraceptives[64] has strengthened the claim that the Constitution protects fundamental unenumerated rights.

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.[65]

It is argued that the right to a clean environment is one of the unenumerated fundamental rights "retained by the people" under the ninth amendment.

Several attempts to rely on the right to a clean environment have failed in the federal courts.[66] In rejecting the claims, the courts have set forth several objections.[67] One court included among them (1) the lack of historical evidence to support the existence of the right under either the ninth or fourteenth amendment, (2) the lack of "decisional standards" in the due process clause "to guide a court in determining whether plaintiffs' hypothetical environmental rights have been infringed, and, if so, what remedies are to be fashioned," and (3) the court's lack of expertise necessary for the delicate balancing involved in resolving environmental issues.[68] Another court, in rejecting the claim, noted that the right to a clean environment did not satisfy the prevailing test for a fundamental right, that is, one implicitly or explicitly guaranteed in the Constitution.[69]

The nonsmoker relying on constitutional grounds faces the difficult task of overcoming the courts' reluctance to grant the "right" constitutional protection. Other attempts to establish the right, involving pollution on a larger scale than smoking pollution, have also failed.[70] Realistically, if the right to a clean environment is

64. Griswold v. Connecticut, 381 U.S. 479 (1965).

65. *Id.* at 488 (Goldberg, J., concurring).

66. *See, e.g.*, Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971).

67. *See The Continuing Search, supra* note 57, at 519. The author of the Note attempts to deal with all the objections.

68. Tanner v. Armco Steel, 340 F. Supp. 532, 536 (S.D. Tex. 1972).

69. Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 310 (N.D. Ohio 1974).

70. Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D.

ever to be established, it is not going to be in a nonsmoker's suit.[71]

A further obstacle to the use of constitutional claims as a solution to the nonsmoker's problem is the requirement of state action for constitutional claims based on the Bill of Rights and the fourteenth amendment.[72] Where the government itself, either through its legislature or an agency, directly infringes on a constitutional right, the requirement is met. However, in most if not all situations in which the nonsmoker seeks to assert constitutional rights, the state involvement will be the failure to regulate the smoking of private individuals—state inaction. Under present state action theory, it is unlikely that state inaction will satisfy the state action requirement.[73] One source of state action on which the nonsmoker might rely is the regulation by the state of some aspect of the private conduct involved. There may be, for example, some support for a finding of state action where a state or local government regulatory body passes specifically on the question of allowing smoking in a public place and refuses to regulate it or regulates it in part.[74]

The nonsmoker essentially is seeking judicial intervention to

Ohio 1974), involved the building of a large shopping mall; Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972), was a suit against air pollution by petroleum refineries; Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728 (E.D. Ark. 1971), challenged the construction of a dam.

71. One of the writers advocating a constitutional right to a clean environment would exclude pollution from cigarette smoking as not "unreasonable" enough to qualify for this constitutional protection. *Toward a Constitutionally Protected Environment*, *supra* note 57, at 473.

72. The requirement of state action to invoke the protection of the fourteenth amendment was established by the Civil Rights Cases, 109 U.S. 3 (1883).

73. Although there are some cases in which inaction or failure to act was held to be state action, *see, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), these were cases which involved racial discrimination, and so the Court would not be as likely to let the state action requirement prevent the plaintiff from asserting his claim. *But see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a racial discrimination suit in which the Court found no state action. In Environmental Defense Fund v. Hoerner Waldorf Corp., 1 ERC 1640 (D.C. Mont. 1970), the court held that state licensing and the failure of the state to abate the alleged pollution was not sufficient to constitute state action.

74. In Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952), sufficient state action was found where the Commission, after investigation and hearings, approved the action of the regulated bus company. *Cf.* Guthrie v. Alabama By-Products Company, 328 F. Supp. 1140, 1143 (S.D. Ala. 1971), where the court held that "Alabama's issuance of a permit for industrial waste discharges, even though the issuing agency has power to regulate or prohibit the discharges, is not the kind of state action which makes the discharges subject to the limitations of the 14th Amendment." *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

compel the state to exercise its police power in regulating smoking for the protection of the public health, safety and welfare. The Supreme Court has never indicated that there is a constitutional right to have the state exercise its police power.[75] Realistically then, constitutional claims offer little hope to the nonsmoker.[76] Although the smoker may have a right to smoke which the state may limit by reasonable regulation under its police power, it is unlikely that the nonsmoker could successfully assert a claim for protection from tobacco smoke based on constitutional grounds when the state fails to regulate smoking.

Notwithstanding these obstacles, a nonsmokers' class action suit based on constitutional grounds, *Gasper v. Louisiana Stadium & Exposition District*, was brought in Louisiana.[77] The Superdome is a domed sports stadium owned and run by Louisiana. The plaintiff nonsmokers alleged that during events in the indoor facility they suffered ill effects from the haze caused by spectators who smoked, and they sought a permanent injunction prohibiting smoking and the sale of tobacco products while events were held in the facility. The plaintiffs claimed that "the operation of the Superdome and the policies and regulations adopted to regulate the use of said facility constitutes state action."[78] Plaintiffs claimed that their "right of self-preservation; to be let alone; to be free from injury; and to be free from exposure to and the involuntary inhalation and consumption of hazardous smoke, gases, fumes and particulates" were protected by the fifth, ninth and fourteenth amendments and were abridged by the State's failure to prohibit smoking in the facility.[79] Plaintiffs also claimed that by permitting smoking the State was

75. "[O]urs remains a constitution of limitations on government, not of affirmative obligations upon government." Henkin, *supra* note 37, at 1419. *See also* Hughes v. Superior Court, 339 U.S. 460, 468 (1950): "The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate."

76. Several states have amended their constitutions to recognize the right to a clean environment. *See The Continuing Search, supra* note 57, at 534; Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L. J. 610, 616-19 (1974). The validity of the nonsmokers' claim under these amendments may vary with their language. The two Notes point out several difficulties with the state constitution approach toward a right to a clean environment.

77. 418 F. Supp. 716 (E.D. La. 1976), *appeal docketed*, No. 76-3748 (5th Cir. 1976).

78. Plaintiffs' Supplemental Memorandum in Support of Preliminary Injunction at 1.

79. Plaintiffs' Supplemental and Amending Complaint at 7.

forcing nonsmokers to stay away from the facility, thus abridging their first amendment rights to receive ideas and information in the Superdome. Finally, the plaintiffs invoked the pendent jurisdiction of the court to hear claims of nuisance and battery.

The district court, on a motion to dismiss for failure to state a claim on which relief could be granted, dismissed the suit. The court rejected the constitutional claims of the nonsmokers on grounds similar to those cited by other courts in previous attempts to claim constitutional rights to a clean environment.[80] In answer to claims that the right was a fundamental right, the court said:

> [U]nlike the right of privacy as it relates to the institution of marriage, the "right" to breathe smoke-free air while attending events in the Louisiana Superdome certainly does not rise to those constitutional proportions envisioned in *Griswold v. State of Connecticut*. To hold otherwise would be to invite government by the judiciary in the regulation of every conceivable ill or so-called "right" in our litigious-minded society. The inevitable result would be that type of tyranny from which our founding fathers sought to protect the people by adopting the first ten amendments to the Constitution.[81]

The plaintiffs in the suit did make one argument to the court that evidently had not been made before in environmental suits. It was based on *Public Utilities Commission v. Pollak*,[82] where a private transit company operated streetcars and buses in the District of Columbia under a franchise granted by the Public Utility Commission (PUC). After hearings and surveys of passenger opinion, the PUC allowed the transit company to pipe music and advertisements over loudspeakers into its buses. Plaintiffs claimed that they were compelled to use those buses, were thus forced to listen to broadcasts against their will, and that this forced listening was an infringement on their liberty without due process. The Court of Appeals reversed a district court dismissal of the petition, holding that the broadcasts violated the fifth amendment in that the broadcasts were inconsistent with public convenience, and that therefore the Commission had erred in failing to find that they were unreasonable and to stop them.[83] The Supreme Court reversed and found that the PUC had not acted arbitrarily and capriciously but

80. *See* notes 66-71 and accompanying text *supra*.
81. 418 F. Supp. at 722.
82. 343 U.S. 451 (1952).
83. Pollak v. Public Utilities Comm'n, 191 F.2d 450, 458 (D.C. Cir. 1951).

"upon a record reasonably justifying its conclusion."[84]

Plaintiffs in *Gasper* argued that the Supreme Court in *Pollak* reversed the Circuit Court because the Commission's decision to allow radio broadcasts in light of the evidence before it was not an *unreasonable* infringement of the passengers' right to be free from unwanted intrusion. This seems to be a proper reading of the case. The Court did not deny that there was a right to be free from forced listening, but found that it was subject to reasonable limitation, and that such boundary had not been passed in the case:

> [The] position [argued by plaintiffs] wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance.
>
> . . . [W]here a regulatory body has jurisdiction, it will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety. The supervision of such practices by the Public Utilities Commission in the manner prescribed in the District of Columbia meets the requirements both of substantive and procedural due process when it is not arbitrarily and capriciously exercised.
>
> . . . .
>
> . . . The liberty of each individual in a public vehicle or public place is subject to *reasonable* limitations in relation to the rights of others.[85]

The contention in *Gasper* was that just as there is a right to be free from unreasonable forced listening of music there is a right to be free from unreasonable forced inhalation of tobacco smoke. Contrary to the showing made in *Pollak*, where the Supreme Court concluded that in light of the evidence it was not an unreasonable limitation of liberty to pipe in music, forced inhalation of tobacco smoke is physically harmful, annoying and discomforting to a majority of nonsmokers. Therefore, allowing continued smoking can more easily be classified unreasonable. In light of recent public opinion polls, this contention by plaintiffs in *Gasper* does have merit.[86]

84. 343 U.S. at 465.
85. *Id.* at 464-65 (emphasis added).
86. *See* note 6 *supra*.

The district court, rather than dealing directly with this argument, distinguished *Pollak* in two respects:

> First, the Circuit Court did not have occasion to weigh or balance an individual's "right" to bring a radio on the bus or streetcar for his own pleasure against the "right" of others to remain in silence. To the extent the Circuit Court found in favor of those who wished to remain free of forced listening, as opposed to those who wished to listen to the broadcasts provided by Transit Radio, the Court was specifically reversed. The question remains whether the Circuit Court's decision in *Pollak* would have been the same if a private citizen, rather than the transit company itself, had been permitted to bring and play a radio on the bus or streetcar. This latter factual situation would be analogous to that before this Court, as opposed to that which the Circuit Court had before it in *Pollak*.
>
> More important, however, is the fact that the passengers in *Pollak*, unlike the spectators in this case, were "a captive audience." Put another way, those commuters in *Pollak* were forced to listen to the broadcasts in question because they were forced to ride the transit system. There was no other alternative to taking the bus or streetcar. In fact, because Capital was the only transit company authorized by Congress to operate in the District of Columbia, it had a virtual monopoly of the entire local business of mass transportation.
>
> The gravamen of the Circuit Court's opinion in *Pollak* was the fact that the Capital Transit Company was bombarding passengers with sound they could not ignore in a place where they had to be.
>
> This case differs greatly from the scenario in *Pollak* since those who attend events in the Louisiana Superdome are in no way compelled to use the facility. On the contrary, they are free to attend or not attend as they see fit, and consequently the most important premise upon which the *Pollak* decision rests is absence [*sic*] in the case *sub judice*.[87]

These attempts by the district court to distinguish *Pollak* are not convincing. The first distinguishing factor is not responsive to the argument of the plaintiffs in *Gasper* that, since the Supreme Court recognizes a right to be free from forced listening of music, it should similarly recognize the right to be free from forced inhalation of smoke. The right is admittedly subject to reasonable limitation. The only question to be asked in each case, then, is whether the limitation involved is reasonable. Whether the intrusion upon one's constitutional right is by the state or by a private citizen does

87. Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. at 719-20.

not go to the question of the existence of the right. The district court's first objection seems to go more to the question of state action.

The second distinguishing factor, the "captive audience" rationale, was not mentioned by the Supreme Court in its implicit acknowledgment of the right to be free from forced listening. Furthermore, it is not clear that even if there had been other transit companies serving the area in *Pollak* the Circuit Court's decision would have been different. That court seemed to be more concerned that Transit passengers were forced to listen to the music while they rode Capital Transit buses. In any case, the distinction made by the court in *Gasper* between the captive audience of mass transit riders and the uncompelled users of the Superdome is also unconvincing. To live full, normal, healthy lives most people in society find it necessary to, at times, be in public places. Therefore, by allowing smoking in the Superdome, those annoyed and harmed by tobacco smoke are forced to inhale smoke in a place in which they must sometimes find themselves.

The real motivating factor of the district court seems to have been a reluctance to take the step of recognizing a constitutional right to be free from tobacco smoke. In concluding, the court said:

> It is worth repeating that the United States Constitution does not provide judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.[88]

In finding no basis for constitutional claims, the court found it unnecessary to reach the state action question. The court also dismissed the pendent claims since it was found that there was no claim to support federal jurisdiction.[89]

III. TORT CLAIMS

Perhaps one of the reasons courts have rejected constitutional claims of a right to a clean environment is that tort theory, specifi-

88. *Id.* at 722.

89. At the outset of the suit, plaintiffs' attorney expressed his intention to pursue the case to the Supreme Court. Letter from Jacob J. Meyer to *Columbia Journal of Environmental Law*, February 27, 1976.

cally nuisance, may provide an alternative, less drastic ground for relief from pollution.[90] Nuisance suits had been used to recover damages and enjoin continued air pollution long before environmental consciousness arose.[91] However, nonsmokers, because of the circumstances of public smoking, may find it difficult to use nuisance theory against polluting smokers. Yet they may look to the torts of battery and intentional infliction of emotional distress as alternative grounds of relief.

A. *Nuisance*

Nuisance theory looks to the reasonableness of an activity in light of its utility and the resultant harm.[92] There are two types of nuisance: private nuisance and public nuisance. A private nuisance is an interference with the use and enjoyment of private land, or at least with some property right.[93] A public nuisance, on the other hand, is an interference with an interest or right common to the general public rather than peculiar to an individual.[94] Such rights include the public health, safety, peace, comfort and convenience.[95] In both cases, the interference must be substantial and

90. *See, e.g.*, Tanner v. Armco Steel Corp., 340 F. Supp. 532, 537 (S.D. Tex. 1972), an industrial air pollution suit where the court, in rejecting constitutional claims, stated: "[T]o the extent that an environmental controversy such as this is presently justiciable it is within the province of the law of torts, to wit: nuisance."

91. The people of a community are entitled to pure, fresh, untainted, unpolluted, uncontaminated, inoffensive air, and every person is entitled to a necessary supply and reasonable use thereof for himself and family for the ordinary purposes of breath and life. In determining to what degree the air should be fresh and pure, it should at least not be incompatible with the physical comfort of human existence, but the locality and the circumstances at the time should be considered.

J. JOYCE & H. JOYCE, LAW OF NUISANCES, § 38 (1906).

See generally Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126; Comment, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories to Control Pollution*, 16 WAYNE L. REV. 1085, 1106-14 (1970); Schuck, *Air Pollution as a Private Nuisance*, 3 NATURAL RESOURCES LAW. 475 (1970); Rice, *Pollution as a Nuisance: Problems, Prospects, and Proposals*, 34 J. AM. TRIAL LAW. A. 202 (1972).

92. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 87 at 573 (4th ed. 1971) [hereinafter cited as PROSSER].

93. *Id.* § 89 at 591, 593.

94. *Id.* § 88 at 585. This does not mean that to be an interference with a public right the nuisance must affect the entire community; rather, the nuisance need only "interfere with those who come in contact with it in the exercise of a public right." *Id.*

95. *Id.* § 88 at 583-85.

unreasonable, such that it would definitely offend, inconvenience or annoy the normal person in the community.[96]

Because of the requirement of private nuisance theory that a property right be involved, the theory is of little use to the nonsmoker in the normal situation where the nonsmoker seeks protection in public areas.[97] Public nuisance theory offers more hope, although here too the nonsmoker encounters difficulties.

Creating or maintaining a public nuisance is a crime—that is, an offense "against the public order and economy of the State,"[98] and most states have enacted statutes broadly defining a public nuisance as any activity which interferes with the health and comfort of the public.[99] In addition, all states have statutes declaring specific types of activities to be public nuisances.[100] Only a few states have enacted legislation which specifically declares smoking a nuisance, and even then the declarations were limited to places enumerated in the statute.[101] Consequently, in most instances, a nonsmoker will have to predicate his action on the state's general public nuisance statute, the broad language of which in many states

96. *Id.* § 87 at 577-81.

97. *See* Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, *supra* note 76, at 618-20. In unusual instances a smoker may create a nuisance for which private nuisance law may supply the remedy. In an apartment building, for example, a next door neighbor may smoke tobacco regularly while leaving his door open, or may hold a party where the smoke is so heavy as to interfere with the use and enjoyment of the nonsmoker's neighboring apartment. Where the smoker intends to disturb the nonsmoker by his conduct other tort theories may be available. *See* notes 100-10 and accompanying text *infra*.

98. JOYCE & JOYCE, *supra* note 91, § 5.

99. *See, e.g.*, ARIZ. REV. STAT. § 13-601 (1956):

> Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by a considerable number of persons . . . is a public nuisance, and is no less a nuisance because the extent of the annoyance or damage inflicted is unequal.

Other states have similar statutes. *See, e.g.*, CAL. PENAL CODE § 370 (West 1970), OKLA. STAT. ANN. tit. 50, § 1 (West 1962), and S.D. COMPILED LAWS ANN. § 21-10-1 (1967).

100. *See, e.g.* ARK. STAT. ANN. § 84-2320 (1960) (owning, operating or leasing a cigarette vending machine without a license is maintaining a public nuisance); FLA. STAT. ANN. § 386.041 (West 1975) ("air pollutants, gases and noisome odors which are harmful to human or animal life" are presumptive evidence of a public nuisance); MO. REV. STAT. § 71.760 (1969) ("The emission or discharge into the open air of dense smoke within the corporate limits of any city of this state is hereby declared to be a public nuisance.").

101. *See, e.g.*, ALASKA STAT. §§ 18.35.300- .340 (Cum. Supp. 1975); ARIZ. REV. STAT. § 36-601.01 (1974); OKLA. STAT. ANN. tit. 21, § 1247 (West Cum. Supp. 1975).

would seem to cover the annoyance created by tobacco smoke.[102]

One difficulty which a nonsmoker would face in bringing a public nuisance action is in establishing that the interference and annoyance created by the tobacco smoke is sufficiently substantial and unreasonable to constitute a public nuisance. It is clear that tobacco smoke does not rise to the level of a nuisance in every place in which a smoker lights up. Whether smoking constitutes a nuisance will depend on the circumstances surrounding the occurrence.[103] There is no such issue when the legislature has declared smoking in the place involved to be a public nuisance. If the smoking occurs in a place where smoking is prohibited by statute, though not declared a public nuisance, the statute would be persuasive evidence of the unreasonableness of the act and a court might find a nuisance based on the statute.[104] In the absence of a specific statutory prohibition of smoking, the nonsmoker must prove that smoking in that particular situation was an unreasonable and substantial interference with the public health and comfort.

Although to be a public nuisance the interference must be substantial, it does not have to be of gross magnitude or cause any but nominal damages.[105] The discomfort, annoyance and danger to health caused by public smoking are similar to that caused by other interferences declared to be public nuisances.[106] In view of the medical evidence, a court should be able to find that tobacco smoke in general can substantially and unreasonably interfere with the public health. Surveys of public opinion,[107] the large demand for nonsmoking sections on railroads and airplanes,[108] and the in-

102. In the absence of either type of statute, there may be liability in tort for a common law nuisance, even in a state which does not have common law crimes. PROSSER, *supra* note 92, § 88 at 586.

103. *See* JOYCE & JOYCE, *supra* note 91, §§ 15 & 19.

104. *See* 58 AM. JUR. 2d *Nuisances* § 30 (1971).

105. JOYCE & JOYCE, *supra* note 91, § 39.

106. For example, the keeping of a hogpen, shooting off of fireworks in the street and loud noises all have been considered public nuisances. *See* PROSSER, *supra* note 92, § 88 at 583-84. Causing bad odors, smoke, dust and vibration by carrying on a business has also frequently been found to be a public nuisance. *Id.* Since this is often true, even when the interference of the smoke and the like is balanced against the utility of carrying on the business involved, it can be argued that the smoke caused by smoking, which is of, at best, limited utility and seemingly less than that of a profitable business, should be more easily found a nuisance.

107. *See* note 6 *supra*.

108. The Civil Aeronautics Board (CAB) has had regulations calling for mandatory no smoking sections aboard aircraft since 1973, 14 C.F.R. § 252.1-.5 (1976). The CAB has issued proposed rules calling for the complete prohibition of cigar and pipe

creasing number of vocal nonsmokers[109] may be offered as evidence that smoking can also interfere with the general public comfort and convenience.[110] However, to establish a public nuisance the nonsmoker must prove to the court that in the situation sued upon the smoking reached the level of an unreasonable interference. As a practical matter, this will entail evidence of the size of the room, ventilation conditions, the number of cigarettes smoked and the effects of the tobacco smoke on normal nonsmokers in general under the same or similar conditions. Testimony of medical experts and of persons of normal health who were present and who were adversely affected may also be presented. This evidentiary showing may require considerable pre-trial preparation and expense to the nuisance plaintiff.[111] There is also the possibility that

smoking aboard aircraft and better segregation of smokers and nonsmokers. 41 Fed. Reg. 44424 (1976). In response to the great number of complaints it has received concerning smoking on aircraft, the CAB also "specifically invit[ed] comments to focus on the possible adoption of rules completely prohibiting smoking aboard aircraft. . . ." *Id.*

109. In the past several years nonsmokers have organized local and national nonsmokers groups to assert their rights. Among them is Action on Smoking and Health (ASH), whose organizer, John Banzhaf III, successfully sued to have the "fairness doctrine" of the Federal Communications Commission applied to cigarette advertising on television. *See* note 150 *infra*.

110. The fact that a portion of both smokers and nonsmokers are not disturbed by the smoke does not remove the possibility of a nuisance action:

> The judgment of reasonable men should be the test, and also the effect which the alleged nuisance would have upon men of normal nervous sensibilities and of ordinary tastes, habits and modes of living, having in view all the circumstances of the case, the vested and clear rights of the complainant, and also the actual injury produced. On the other hand, a nuisance is none the less one because there may be persons whose habits and occupations have brought them to endure the same annoyance without discomfort or inconvenience, where such nuisance is offensive to persons generally, or produces physical discomfort, annoyance and inconvenience in a material degree, and substantially interferes with the ordinary comfort of human existence.

JOYCE & JOYCE, *supra* note 91, § 20 at 32.

111. A nonsmoker's suit based partially on nuisance grounds was brought in state court in Pontiac, Michigan. Stockler v. City of Pontiac, No. 75-131479 (Cir. Ct. Oakland County, Mich. Dec. 17, 1975). The plaintiff, an attorney, brought suit individually and in the name of the State of Michigan on the grounds that smoking during events in the Pontiac Silverdome Stadium violated a local fire ordinance and constituted a public nuisance. The court found on the basis of expert medical testimony and other evidence offered that smoking in the Stadium constituted a public nuisance. It issued a writ of mandamus ordering that the city abate the nuisance by prohibiting smoking and the sale of cigarettes within the facility. The city obtained a stay of the writ and ultimately settled the suit. As a result of the settlement, signs are posted in the seating area of the stadium requesting people voluntarily not to smoke. Smoking is permitted in the concourse outside the seating area.

the plaintiff may not be able to meet his evidentiary burden.

Even if the smoke can be shown to have risen to the level of public nuisance in a particular situation, the nonsmoker may not have a private right of action based on that nuisance. Ordinarily, because a public nuisance is an offense against the public, enforcement is left to the state. A private citizen cannot sue to enforce a public nuisance statute unless the statute specifically authorizes a citizen to sue on behalf of the public.[112] However, under the theory of public nuisance, a citizen may sue in tort if his own injury from the nuisance is different from that of the general public, that is, particular to him.[113] There is some confusion in the law as to what determines when a private party has sufficient particular damage to support his private action. Personal injury, harm to health and mental distress are usually accepted as damage particular to the plaintiff, and a private action based on such claims is allowed.[114] Although the medical evidence shows that tobacco smoke is unhealthy for all nonsmokers, the nonsmokers who are merely discomforted and annoyed by the smoke probably do not suffer injury or harm to health sufficient to bring a private action. The nonsmoker suffers the same injury as the public in general: exposure to polluted air. The fact that someone is annoyed or discomforted by the tobacco smoke does not create a personal cause of action, it merely establishes the nuisance. However, nonsmokers with respiratory disease or allergies to smoke who suffer greater injury to health and discomfort than the normal person could possibly make a showing sufficient to bring a private action against such a nuisance.

The nuisance remedy, then, may be of limited usefulness to the nonsmoker. However, if the nonsmoker can overcome these difficulties and is successful in establishing liability in a private action, he can seek damages for any discomfort or inconvenience which he may have suffered in addition to the injury to his health.[115] Yet these often turn out to be only nominal; more important to the nonsmoker is the availability of an injunction as a remedy. In many situations where damages will not be an adequate remedy in that it

112. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1005 (1966). For examples of statutes authorizing citizen suits, *see* FLA. STAT. ANN. § 60.05 (West Cum. Supp. 1975); OKLA. STAT. ANN. tit. 50, § 10 (West 1962).

113. PROSSER, *supra* note 112, at 1004-08.

114. *Id.* at 1008-12.

115. PROSSER, *supra* note 92, § 90 at 603.

will not abate the nuisance, an injunction will be granted.[116] The nonsmoker would most probably want to seek an injunction where he regularly confronts the same smoker or smokers, such as in work places and elevators. As a means of preventing continuation of the smoking, an injunction gives the nonsmoker more than the rules of common courtesy to bolster his request that the smoker stop smoking, since he can go to court and seek enforcement of the injunction.[117]

B. *Battery*

A second tort theory that may be available to the nonsmoker is battery. An action in battery allows recovery for "intentional and unpermitted" contacts with the plaintiff's person.[118] Not only are intentional contacts which cause physical harm batteries, but contacts which are only insulting and offensive are batteries as well.[119] The tobacco smoke which is released into the air by the smoker, and which fills the lungs and clings to the clothes of the nonsmoker, is considered offensive, injurious and insulting by many nonsmokers, but here again there may be difficulty in establishing the right to recover.

The first question the nonsmoker faces is whether the tobacco

116. *Id.* If the state were to prosecute for the public nuisance, it too could seek an injunction if the criminal penalty were inadequate to prevent continuation of the nuisance. *Id.* With regard to injunctions as a remedy in air pollution suits, *see* Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970).

117. When an individual suffers special damages from a public nuisance, he may abate the nuisance by self-help. PROSSER, *supra* note 92, § 90 at 605. However, the individual may do only what is reasonably necessary under the circumstances to protect himself from harm. *Id.* Although the remedy is especially appealing to a nonsmoker frustrated with a smoker's discourteous behavior, there are two limitations which make the remedy unsuitable for the nonsmoker's problem. First, the person who abates a public nuisance subjects himself to criminal prosecution or civil liability if the conduct does not in fact constitute a nuisance. *Id.* Since it is uncertain, in the absence of a clear statute, that a court will find a particular instance of smoking a nuisance, the nonsmoker resorting to self-help would be risking those penalties. Second, one cannot abate a nuisance when to do so would lead to a breach of the peace. *Id.* at 606. Since grabbing a cigarette, pipe or cigar from the hand or mouth of the noncompliant smoker may result in a breach of the peace, the nonsmoker's use of the abatement remedy is limited. Perhaps a court would find abatement justified, however, in situations where the smoking poses a great danger to the health of the nonsmoker; for example, a person afflicted with emphysema might invoke self-help justifiably.

118. *Id.* § 9 at 34.

119. *Id.* § 9 at 36.

smoke is a sufficient "contact" for an action in battery. It is clear that the contact need not be brought about by direct physical force: any intentional act which produces the result is sufficient.[120] For example, if the defendant spits or throws water in the face of the plaintiff there is sufficient contact for battery.[121] There is no question that the particles of smoke do in fact come into contact with the person of the nonsmoker. Arguably, then, the smoke should satisfy the requirement of contact.

The second question is the intent of the smoker. Liability in intentional torts requires a voluntary act and a state of mind consisting of a desire to bring about the physical consequences of the act.[122] Consequences which the actor knows, or which a reasonable person should know, are certain or substantially certain to result from his act are treated by the law as if desired by the actor.[123] In the usual case of the public smoker, it is clear that the smoker's primary desire is not to contact the nonsmoker with the smoke; he merely desires to put smoke into the air. However, it may be argued that the reasonable smoker should know that "contact" with the nonsmoker is certain to follow and therefore the requirement of intent for an action in battery may also be satisfied.

However, even if the requirement of the intent to bring about the contact is satisfied, the nonsmoker must still prove that it was the smoker's intention to bring about a harmful, insulting or offensive contact. Where the smoker is knowingly in violation of a statute prohibiting smoking, an action in battery will lie whether or not the smoker intended to injure or offend the nonsmoker.[124] Absent this *de jure* finding of intent, it is questionable whether in any but the rarest of situations will it be the smoker's intent to be harmful or offensive. Nor will the smoker usually know, nor should a reasonable person know, that the nonsmoker is certain or substantially certain to find the smoke harmful or offensive. Finally,

120. *Id.* § 9 at 34. *See* RESTATEMENT (SECOND) OF TORTS § 18, Comment c (1965):

> It is not necessary that the contact with the other's person be directly caused by some act of the actor. All that is necessary is that the actor intend to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive.

121. *See* Alcorn v. Mitchell, 63 Ill. 553 (1872); Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).

122. PROSSER, *supra* note 92, § 8 at 31.

123. *Id.* at 32.

124. *See* 6A C.J.S. *Assault & Battery* § 9 (1975).

even if it was the smoker's intent to be harmful or offensive, the nonsmoker may have difficulty establishing that fact in court.

Independent of the smoker's intent is the question of whether the court or jury will consider the smoke which contacts the nonsmoker adequately harmful or offensive to support an action in battery. Once again, unless the nonsmoker has a special sensitivity to the smoke, a court or jury may find that the exposure to the smoke was not physically harmful but only annoying and discomforting and therefore insufficient for an action in battery.[125] Similarly, a court or jury may find that most nonsmokers do not find the smoke offensive in the sense necessary for an action in battery, that is, offensive to a sense of personal dignity.[126] Even if the plaintiff nonsmoker did so find it, that may not be sufficient for battery; not every contact which a person finds offensive is impermissible in the eyes of the law. Although one is "entitled to protection according to the usages of decent society," a certain amount of contact is inevitable in today's world, and consent is assumed to contacts which are "customary and reasonably necessary to the common intercourse of life."[127] While the increasing number of nonsmokers who complain about tobacco smoke argues against the presumption of consent to such contact, it is questionable whether a court will find a smoker who is quietly smoking liable in battery simply because the nonsmoker considered it an affront to his personal dignity.

Thus it seems that, absent the most blatant case of blowing smoke in the face of a nonsmoker for the purpose of being offensive, an action in battery is, at best, of limited use to the non-

125. *See* RESTATEMENT (SECOND) OF TORTS § 15:

What Constitutes Bodily Harm

Bodily Harm is any physical impairment of the condition of another's body or physical pain or illness. Comment: a. There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm. . . .

126. RESTATEMENT (SECOND) OF TORTS § 19 (1965).

127. PROSSER, *supra* note 92, § 9 at 37. Prosser continues:

There is yet no satisfactory authority as to whether even such innocuous and generally permitted contacts can become tortious if they are inflicted with knowledge that the individual plaintiff objects to them and refuses to permit them. Although where there is any doubt at all the plaintiff's expressed wishes may very well turn the scale as to what is reasonable, it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability.

Id.

smoker. If a plaintiff were successful in an action in battery, however, he might recover either nominal or punitive damages or both, depending on the nature of the defendant's act.[128] Also, since battery is an intentional tort, the smoker would be liable for any unforeseeable consequences such as injury to a person who is hypersensitive to tobacco smoke.[129]

C. *Intentional Infliction of Mental Distress*

Finally, a nonsmoker may have a remedy in the theory of intentional infliction of mental distress. This theory imposes liability for conduct which both exceeds all bounds usually tolerated by decent society and is especially calculated to cause, and does in fact cause, mental distress of a very serious kind.[130] It is often not necessary to show physical effects resulting from defendant's conduct in order to recover; damages for mental disturbance alone may be allowed.[131] The nonsmoker's problem in recovering under this theory is to demonstrate that the smoker's conduct has reached the requisite level of disturbance. A nonsmoker's claim would seem reasonable where the smoker continues to smoke after being informed that the nonsmoker is sensitive to tobacco smoke and fears suffering adverse physical effects should the smoker continue to smoke. This conclusion is supported by the fact that there is evidence that the apprehension of contact with tobacco smoke may intensify or cause the onset of symptoms to nonsmokers with smoke sensitive conditions.[132] Whether less extreme conduct by the smoker would result in liability is questionable, but since there are many discourteous smokers,[133] and as many as 34,000,000

128. *Id.* § 9 at 35.

129. *Id.* A suit in battery has been brought in a state court in North Carolina. The complaint alleges the following facts: the plaintiff was a letter carrier working for the United States Post Office in Charlotte, North Carolina. He made numerous complaints to his supervisor, the defendant in the case, about the adverse health effects which he had suffered from tobacco smoke in his work environment. When the plaintiff submitted a request for sick leave because of his allergy to tobacco smoke, the supervisor rejected the request and summoned the plaintiff to a meeting to discuss the problem. At the meeting the supervisor smoked a cigar. The plaintiff became ill and subsequently had to miss work and seek medical care. Plaintiff seeks actual damages of $5,000 and punitive damages of $10,000. McCracken v. Sloan, No. 75-cas-4270 (Super. Ct., Mecklenburg County, N.C.).

130. PROSSER, *supra* note 92, § 12 at 56.

131. *Id.* § 12 at 59.

132. *See* note 29 *supra*.

133. Incidents of discourteous smokers are legion. At one public meeting a man, ignoring a no-smoking sign, lighted a cigarette. Upon being requested by the woman

Americans who have conditions aggravated by tobacco smoke, the possibility of an action under this tort theory is not entirely fanciful.

D. *Right of an Employee to a Safe Work Place*

The likelihood of relief under any of the theories outlined above is still uncertain. However, there is one common law tort theory that has already proved successful in one instance, and which may have widespread implications as a precedent in the future. The suit, *Shimp v. New Jersey Bell Telephone Co.*,[134] was based on the common law right of an employee to a safe work place and the corresponding duty of the employer to take reasonable care to provide a work area free from unsafe conditions.[135] Mrs. Shimp, a service representative for the telephone company, was granted a permanent injunction against the company for the right to work in an environment free of tobacco smoke. The smoke from even one smoker was enough to cause Mrs. Shimp to suffer an allergic reaction, the symptons of which included "severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes which . . . resulted in corneal abrasion and corneal erosion, headaches, nausea and vomiting."[136] As a result of the smoking by her coworkers in the office, Mrs. Shimp was forced to stay home from work for three months. When the company offered to take her back as a telephone operator, a job in which no smoking was allowed as a matter of company policy, Mrs. Shimp refused and sued successfully for the right to work at her old, higher paying job in a smoke-free environment.[137]

Rather than suing for damages, Mrs. Shimp sought an injunction

sitting next to him to extinguish the cigarette, he looked at her, blew his smoke in her face, and finally complied with her request three puffs later. N.Y. Times, Dec. 26, 1975, at 1, col. 6 and *id.* at 10, col. 1. *See also id.*, Nov. 5, 1975, at 51, cols. 3-4.

134. No. C-2904-75 (Super. Ct., Chanc. Div., Salem County, N.J., decided Dec. 20, 1976) [hereinafter cited as *Shimp*, unpublished opinion].

135. *See* PROSSER, *supra* note 92, § 80 at 526. For a more expanded discussion of the common law rights and duties, *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, §§ 80-81 (3d ed. 1964).

136. *Shimp*, unpublished opinion, *supra* note 134, at 3.

137. Before suing Mrs. Shimp complained to her employer, her union, the New Jersey Clean Air Council, the Environmental Protection Agency and the Occupational Safety and Health Administration, all to no avail. The suit was handled pro bono by a team of five lawyers. For the story of the suit in Mrs. Shimp's words, *see A Precedent-Setting Case: Nonsmokers' Rights Upheld in Court*, AM. LUNG. A. BULL., Nov. 1976, at 2.

to enforce her right. The court was convinced by Mrs. Shimp that the smoke from burning cigarettes was toxic and deleterious to the health of nonsmokers in general and Mrs. Shimp in particular:

> The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs. The portion of the population which is especially sensitive to cigarette smoke is so significant that it is reasonable to expect an employer to foresee health consequences and to impose upon him a duty to abate the hazard which causes the discomfort.[138]

The court lacked clear precedent for issuing an injunction to abate the condition; the usual remedy for breach of the employer's common law duty is damages. However, the court relied on cases dealing with the enforcement of collective bargaining rights and the generally broad powers of equity underlying the cases to protect employees' rights by injunction.[139]

Although a good number of employees work in situations where smoking is not allowed as a matter of company policy or fire ordinances, such as in retail stores, assembly lines and the like, many workers, notably office workers like Mrs. Shimp, are faced with a possible 40 or more hours a week in a smoke-filled environment. The implications of the suit for these workers is difficult to assess.

Generally, the duty of the employer is limited to taking reasonable care to make the work place safe and is not an absolute duty.[140] The duty is eased further by three common law defenses —contributory negligence, assumption of risk and the fellow servant rule.[141] The one that may be the most troublesome in this contest is assumption of risk.[142] Although the law will vary from

138. *Shimp*, unpublished opinion, *supra* note 134, at 17-18.

139. *Id.* at 7-10.

140. PROSSER, *supra* note 92, § 80 at 526.

141. *Id.*

142. The fellow servant rule broadly stated is that an employer is not liable for injuries caused solely by the negligence of a fellow servant. The rule absolving the employer is limited by several restrictions. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 81 at 551-54 (3d ed. 1964). In the nonsmokers context, the employer would not be liable for injury caused by a worker smoking in violation of a no-smoking rule even if such conduct may be considered negligent; the employer might be liable for failing to take reasonable care to provide a safe work place if he

jurisdiction to jurisdiction, an employee is considered to have assumed the risk of hazards normally incident to his job.[143] Assumption of risk may also be found even when the employer has violated his duty to supply a safe place to work, when the employee remains after he recognized the danger.[144] This may be so even though an employee continued to work under protest or under an order from his employer carrying a threat of discharge.[145] The court in *Shimp* pointed out that tobacco smoke was not ordinarily incident to Mrs. Shimp's employment and that she could not have assumed the risk under that theory.[146] The court did not respond, however, to the argument that Mrs. Shimp had assumed the risk by remaining at work after protesting to her employer.

There are several variables which may alter the outcome for other plaintiffs in other jurisdictions. Since the duty is a common law duty, the common law of each jurisdiction will have to be relied upon. Tobacco smoke in the air may not fit every jurisdiction's definition of an unsafe work environment. Also, where an injunction is sought as a remedy, rather than damages, the equity law of the jurisdiction must be consulted to see whether it allows an injunction under the circumstances. A third variable is the physical condition of the plaintiff. Is it necessary that the plaintiff suffer symptoms as severe as those of Mrs. Shimp in order to convince the court to issue an injunction, or can a worker who is discomforted and annoyed or perhaps only slightly nauseated by the smoke also successfully bring a suit? Finally, the last variable is the possible interplay of legislation in the jurisdiction.[147] Where the legislation is in effect it may preclude relying on common law remedies.[148] It may, however, provide an easier alternative on

does not prohibit smoking by his employees. Thus the fellow servant rule would not be applicable in situations where the employer has not regulated smoking.

143. PROSSER, *supra* note 92, § 80 at 527.

144. *Id.* at 527-28.

145. *Id.*

146. Cigarette smoke . . . is not a natural byproduct of N.J. Bell's business. Plaintiff works in an office. The tools of her trade are pens, pencils, paper, a typewriter and a telephone. There is no necessity to fill the air with tobacco smoke in order to carry on defendant's business, so it cannot be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary [*sic*].

Shimp, unpublished opinion, *supra* note 134, at 6.

147. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 82 at 554 (3d ed. 1964).

148. *Id.*

which to base a suit for an injunction if smoking clearly violates the law.[149]

E. *Insufficiency of Tort Remedies*

There are several limitations on the use of tort claims as a solution to the nonsmoker's problem. First, as shown above, the chances of maintaining a successful suit under any of the theories is uncertain. Even if the technical requirements of a tort can be proven, a court may be reluctant to find the smoker liable for the generally accepted act of smoking, particularly because over the last 40 years the tobacco industry has fostered the social acceptability of public smoking through the use of advertising.[150] Second, a tort action may be impractical since litigation is both expensive and time-consuming. Finally, each tort action offers only piecemeal relief to nonsmokers; only a limited group of persons—the most militant nonsmokers—are likely to initiate a suit. Moreover, only the nonsmoker who brings the action benefits from its successful conclusion, and only those smokers party to the suit are bound by any injunction which the court issues.[151] Other smokers are free to pollute the air. Hope for comprehensive relief, therefore, seems to lie not in tort actions, but in legislation protecting all nonsmokers in every public place where nonsmokers come into contact with tobacco smoke.[152]

149. *See* note 213 and accompanying text *infra*.

150. The federal government has attempted to limit the effects of tobacco advertising. In 1967 the Federal Communications Commission (FCC) sustained a listener's complaint that the fairness doctrine was applicable to cigarette advertising, requiring television and radio stations which carry cigarette advertising to devote a significant amount of time to the case against smoking. The FCC regulation was upheld by the courts. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968). The entire controversy was made moot by the passage of the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-1340 (1970), which, in an effort to stem the increasing number of deaths caused by cigarette smoke, made it unlawful to advertise on radio and television after January 1, 1971. The beneficial effect of the ban is questionable. Since the year of the ban tobacco companies have increased their advertising in newspapers, magazines and billboards, setting a new record for advertising expenditure of around $400,000,000, in 1975, and tobacco consumption has continued to grow. N.Y. Times, Jan. 11, 1976, § 3, at 15, col. 6.

151. *But cf. Shimp*, unpublished opinion, *supra* note 134, in which all the nonsmokers in Mrs. Shimp's office benefited from the injunction issued.

152. In connection with the statutory solution, an additional remedy under tort theory is a suit against a governmentality in negligence for failure to control the pollution of smokers by enforcing or enacting statutes. *See* Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17, 28-29 (1966).

IV. LEGISLATION

Legislation protecting nonsmokers has been introduced in most jurisdictions and passed in a significant number of them.[153] The scope of the protection offered by the legislation to date varies widely, since some states have prohibited smoking only in buses and elevators, while other states have enacted comprehensive statutes regulating smoking in most public places.

Protection in public places is the primary concern of nonsmokers. Although many nonsmokers would probably like to see smoking confined to consenting adults in private, passage of legislation to that effect is not likely, nor are the chances of enforcement high. It probably would be unconstitutional as well. The state's power to regulate smoking is based on the police power—the power to legislate for the public health, safety and welfare.[154] To be constitutionally permissible, legislation enacted pursuant to the police power must be reasonably necessary for the accomplishment of a proper end.[155] Reasonable legislation is permissible even when it limits the constitutional rights of those regulated.[156] Although protecting protecting the nonsmoker's health and comfort is a permissible end of legislation, a statute enacted for that purpose, which prohibited all public smoking indiscriminately, would most likely be considered to go beyond what is reasonably necessary for the nonsmoker's protection and found to violate the due process rights of the smoker.[157] Moreover, overbroad legislation may antagonize

153. At least two states, Arizona and Utah, and several cities had substantial nonsmoker statutes prior to 1975. In 1975, 138 bills or resolutions concerning the protection of nonsmokers were introduced in 45 states. Eighteen of these bills were enacted by 15 states. CENTER FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, STATE LEGISLATION ON SMOKING AND HEALTH 1 (1975).

As of November 3, 1976, the following states had statutes protecting nonsmokers to some degree: Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Virginia, Washington. For a partial listing of current and proposed federal, state, county and city legislation for the protection of nonsmokers, *see* Action on Smoking and Health, Digest of Nonsmokers' Rights Legislation, Nov. 3, 1976 [hereinafter cited as ASH Digest].

154. For an examination of the legal bases for legislation regulating smoking, *see* Note, *The Resurgence and Validity of Anti-Smoking Legislation*, 7 U.C.D. L. REV. 167, 182 (1974).

155. *See* note 49 *supra*.

156. *See* note 48 *supra*.

157. *See* notes 42-47 and accompanying text *supra*.

smokers and even reduce compliance by currently courteous smokers. Rather, statutes should protect nonsmokers only in those public places, indoor and outdoor, where smoking causes, or can cause, significant discomfort. Legislation should balance the conflicting interests of the nonsmoker's health and comfort and the smoker's desire to smoke to achieve a solution fair to both parties in every situation. More importantly, to gain as much voluntary compliance as possible, any legislation should not only be fair, but must also appear to be fair to the smoker. Where it seems that the desires of smokers and nonsmokers exactly balance, however, the nonsmoker's desires should prevail since otherwise he would have no choice but to breathe smoke-filled air. The smoker, on the other hand, whose need to smoke is generally not as continuous as the need to breathe clean air, may more easily postpone his pleasure to a more appropriate time or place.

A. *General Statutory Approach*

A properly constructed, comprehensive no-smoking statute should combine three different approaches to smoking regulation. Each of the approaches is well-suited to some, but not all, public areas where it is desirable to regulate smoking.

The first approach prohibits smoking entirely.[158] This approach should be used with respect to public places which are too small to permit smoking within them without interfering with the comfort of the nonsmokers. Although it is desirable to create smoking sections wherever possible in order to afford the smoker an outlet, complete prohibition is appropriate where no effective separation is possible. Such areas include elevators, supermarkets, doctors' waiting rooms and small one-room facilities in general.

The second approach prohibits smoking but mandates the establishment of designated smoking areas in public places large enough to effectively separate smokers from nonsmokers.[159] A practical ad-

158. *See, e.g.*, CONN. GEN. STAT. ANN. § 1-21b(a) (West Cum. Supp. 1976):

> No person shall smoke in any room in a public building while a meeting open to the general public is in progress in such room. Any person found guilty of violating this section shall be fined not more than five dollars.

159. *E.g.*, in certain enumerated buildings where smoking is regulated in Alaska, "reasonable smoking areas must be provided, unless prohibited for the protection of the public safety or the protection and the preservation of the building and its contents." ALASKA STAT. § 18.35.320(a) (Cum. Supp. 1975).

If the person in charge of a place which falls within this category wishes not to permit smoking at all, the statute should allow him to obtain a variance from the agency administering the statute upon a showing of reasonable grounds, *e.g.*, that he

vantage to this approach is that when the smoker is allowed to smoke in a place within the facility, he is less likely to smoke in a no-smoking area. This approach should be applied to large indoor areas such as airport and railroad terminals, theaters, museums, libraries and the like, where no special hardship arises from setting aside areas for smoking.

The last approach prohibits smoking in public places, but permits the person in charge to create designated smoking areas if nonsmokers can be adequately protected.[160] This approach is ap-

is constantly present at his place of business but is severely allergic to tobacco smoke. *See* note 167 and accompanying text *infra*.

An alternative to this approach requires no-smoking sections to be created in places where smoking is permitted. By expressing a preference toward smokers, however, such a statute treats nonsmokers as the minority, and persons who administer such a statute may tend to underestimate the space necessary for nonsmokers. For example, before the Civil Aeronautics Board promulgated its rules requiring air carriers to provide no-smoking sections, the airlines voluntarily attempted to segregate smokers and nonsmokers. One recurrent theme of complaints submitted by passengers to the Board during its consideration of the issue was that nonsmokers had to take seats in the smoking section because the no-smoking section was full. 38 Fed. Reg. 12207, 12208 (1973). Although there may be some situations where smokers will outnumber nonsmokers, legislation should express a preference for nonsmokers since nationally there are three times as many nonsmokers as smokers. The legislature enacting or the agency administering the act can make special provisions or allow variances where smokers do constitute the majority.

160. The Minnesota statute, MINN. STAT. ANN. §§ 144.411-.417 (West Cum. Supp. 1976), allows proprietors or the persons in charge of public places to designate smoking areas in all places where smoking is prohibited. The statute provides that "existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas" and presumes this requirement is met in a single room facility if one side of the room is a no-smoking area. *Id.* § 144.415. Utah has a similar option but adds the requirement that the ventilation in single room facilities where smoking sections are created be "sufficient to prevent the smoke pollution from becoming either a health hazard or a discomfort to nonsmokers." 1976 Utah Laws—Budget Session (House Bill No. 25), *adding* UTAH CODE ANN. § 76-10-108 (1976) [hereinafter cited as 1976 UTAH ACT]. In both states, no area other than a bar may be designated a smoking area in its entirety. However, in an attempt to avoid complying with the law, restaurants in Minnesota have been calling themselves bars. NEWSWEEK, Dec. 12, 1975, at 35. This kind of statute, lacking the proper use of the first two approaches, will satisfy neither the smoker nor the nonsmoker in certain situations. For example, the statute allows smoking areas in one room areas in which no effective separation may be possible. At the same time, it allows all smoking areas to be designated by option even when it is possible and desirable to have mandated smoking areas. Kansas has enacted a no-smoking statute which allows optional designation. Smoking is prohibited in certain specified areas only if the person in charge chooses to post no-smoking signs, and he may at the same time reserve areas for smoking. KAN. STAT. § 21-4008 (Supp. 1975). This statute offers little hope of proper protection to the nonsmoker who now must prevail on persons in charge to post signs. The Governor of Kansas called the bill a "token gesture" and a "feeble" attempt to urge greater courtesy by smokers. Governor's

propriate for areas which, because of their size, are not well-suited to either of the first two approaches. Although this category is admittedly vague, a limited use of the option is justified because not every public place can be fitted into one of the other two categories. The possibility of abuse of the option to the disadvantage of either the smoker or the nonsmoker is lessened by the mandates of the first two categories.[161] A possible drawback is that smoking areas will not be designated in all places where it is possible to do so,[162] but by the prohibition of smoking in these intermediate areas, the nonsmoker is given preference.[163]

B. *Smoking Area Guidelines*

Since in most public places there will be areas in which smoking is permitted, certain guidelines should be established to ensure

Message on Senate Bill No. 121, in 1975 Kan. Sess. Laws 1737-38. The Georgia statute also uses this type of option, although it is not clear who can exercise the option. The statute states that it is a misdemeanor to smoke in elevators, any public transportation vehicle and "any area used by or open to the public which is clearly designated by a no smoking sign." GA. CODE ANN. § 26-9910 (Cum. Supp. 1975). This sort of statute may confuse and anger smokers and nonsmokers alike by failing to specify the areas used by or open to the public where smoking is or may be prohibited and also by failing to set forth who may post signs. The option to create no-smoking areas, like the option to create smoking areas, is open to abuse to the disadvantage of the smoker and the nonsmoker: smoking may be allowed where it should be prohibited to protect the nonsmoker, and smoking may be prohibited entirely in places large enough to allow the smoker a place to smoke, all according to the preference of the person in charge.

161. That is, by specifying the areas where smoking is prohibited entirely, the nonsmoker is assured that the person in charge is not given an option to permit smoking in a place too small to allow it. And by specifying in the second category the areas where smoking sections are required, the smoker is assured that a person in charge is not given an option to refuse to permit smoking in a place where smoking clearly will not interfere with the comfort of the nonsmoker.

162. If persons in charge of the intermediate areas are required to enforce the no-smoking law, as is recommended, *see* notes 211-12 and accompanying text *infra*, then it would be to their advantage wherever possible to designate smoking areas to make enforcement easier for themselves. By giving smokers an outlet there is less chance they will smoke in a no-smoking area, and if they do smoke in an area where it is prohibited, it may be easier to ask that they move rather than to ask that they stop smoking.

163. Of the state statutes, only Alaska's approximately follows this trichotomy. ALASKA STAT. §§ 18.35.300 -.340 (Cum. Supp. 1975). Smoking is prohibited entirely in elevators, public transportation and public waiting rooms of health care laboratories. Smoking areas are required in libraries, indoor theaters, museums, concert halls, gymnasiums, swimming pools and other publicly owned indoor places of entertainment, public schools, state buildings where state public meetings are held, and hospitals, nursing homes and health care institutions. Finally, proprietors of places of business may prohibit smoking by posting appropriate signs.

that the separation between smokers and nonsmokers is as effective as possible. Ideally, smoking areas will not be located in areas which nonsmokers must use or pass through.[164] This can be accomplished most effectively by making the smoking area a separate room, a separation which should be possible in many large buildings such as museums, libraries and hospitals. In some places, however, the smoking permitted areas may be areas also used by nonsmokers. In theaters, for example, rest rooms and rest areas might be the smoking areas, since in those places it may be better to expose the nonsmoker briefly to tobacco smoke than to close off the outlet for the smoker entirely. In large, one-room facilities where smoking sections are required and in one-room places of intermediate size where smoking sections are established by the person in charge, effective separation should be maintained by physical barriers and proper ventilation.[165]

164. *See* Utah State Board of Health, Rules and Regulations Relating to Utah Indoor Clean Air Act, Aug. 18, 1976, § 3.2.3:

> Entry or exit areas, ticket areas, registration areas, restrooms, common traffic areas or similar sections of public places shall not be designated as smoking-permitted areas if non-smokers would be required to use the area to participate in activities for which the public place is intended. This rule shall not be construed to prevent designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity. A portion of the seating area of a lobby or lounge may be designated as a smoking-permitted area.

Similarly, *see* Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Oct. 27, 1975, MHD 443(a)(3).

165. *See* Utah Rules and Regulations, *supra* note 164, § 2.1:

> Acceptable "smoke-free area" means:
>
> 2.1.1 A contiguous portion of the public place or public meeting area, including seating arrangements, where smoking is prohibited *and*, where,
>
> 2.1.2 At least one of the following conditions exists in addition to adequate room-wide ventilation:
>
> 2.1.2.1 There is a physical barrier such as a wall, partition or furnishing to separate the smoking-permitted and no-smoking areas, adequate to accomplish the purposes of the Act. The barrier may contain doors or portals for exit and entry.
>
> 2.1.2.2 There is a space of at least four feet (1.22 meters) in width to separate the smoking-permitted and no-smoking areas. This space may be either an unoccupied area or a section of a seating area acting as a buffer zone in which smoking is not permitted, but which itself is not part of the "acceptable smoke-free area".
>
> 2.2.2.3 [*sic*] There are mechanical or other devices which accomplish the purposes of the Act.

166. Admittedly, in some places the smoking section may be separated from the main area of a facility. For example, in libraries and museums the smoking area would be a separate room, and if a person wished to smoke he would have to leave

The size of any smoking section can vary with the smoking preferences of the persons who frequent the place, but in no case should the smoking area be so large as to destroy the effectiveness of the separation. On the other hand, the section should not be so small as to disadvantage the smoker by failing to provide him with an outlet. If the person in charge of each place determines the proper size section for that place, the regulation should disadvantage neither the smoker nor the nonsmoker in the enjoyment or use of the facility.[166] Rather, the nonsmoker's enjoyment will be enhanced by the existence of a smoke-free area, while the smoker will be able to smoke if he so wishes.

The implementation of these approaches and guidelines may create confusion despite careful drafting. Delegating power to implement the statute to an administrative agency (for example, the state board of health) may reduce confusion. In carrying out this task the agency may formulate rules and regulations, grant variances when there are compelling reasons to do so, and have the primary responsibility for enforcement of the statute. With experience the agency should acquire an expertise in solving recurring difficulties which arise.[167]

C. *Places of Smoking Regulation*

The comprehensive statute should regulate smoking in all "public places," meaning all places, publicly or privately owned, to which the general public has free access.[168] It should exclude out-

the main area of the facility. In other places, however, the smoker would have the same access to the facililty as the nonsmoker. For example, smokers should suffer no disadvantage by being separated from nonsmokers in restaurants, large waiting rooms and arenas.

167. For example, Minnesota empowered the state board of health to (1) adopt rules and regulations to implement its Indoor Clean Air Act, (2) waive the Act's requirements where appropriate, and (3) to penalize failures by persons in charge to enforce the Act. The state department of labor and industry in consultation with the state board of health is responsible for implementing the Act in places of work. MINN. STAT. ANN. §§ 144.414, 144.417 (West Cum. Supp. 1976). Utah gives enforcement power to local boards of health. 1976 UTAH ACT, *supra* note 160, 26-15-90.

168. An example of a definition of "public place" is in 1976 UTAH ACT, *supra* note 160, § 76-10-101(1):

> "Public place" means any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to, restaurants, hospitals, medical or dental clinics, public conveyances, retail stores, offices and other commercial establishments, nursing homes, auditoriums, theaters, arenas, meeting rooms and commercial kitchens, and buildings constructed, maintained, or

door areas, with certain exceptions, such as waiting lines and outdoor stadiums.[169] In some areas to which the general public does not have free access, such as places of work, smoking should also be regulated for the protection of the nonsmokers whose presence is compelled. The public places should be divided by size into each of the three categories described above. Specifying as many areas as possible in each category will minimize argument, confusion and delay in proper implementation. Since most states which have enacted any legislation have limited regulation to elevators, public transportation, libraries, museums, concert halls and health facilities, there remain many facilities in which smoking should be regulated—places where nonsmokers continue to suffer discomfort, inconvenience and danger to health from tobacco smoke.[170]

One facility which most statutes have overlooked is the indoor arena, although several arenas do have privately imposed bans on smoking.[171] Smoking in such arenas may discomfort and annoy not only the nonsmoking sports fan in attendance, but the athlete who plays as well.[172] Several states already ban smoking in theaters, concert halls and meeting rooms,[173] where the duration of events is similar to that of athletic and other events held in arenas. There is no rational reason why a statute should free the nonsmoker from inhaling polluted air for several hours at a concert, but not at a basketball game. Smoking should also be regulated at outdoor

otherwise supported by tax revenues in whole or in part. In addition, enclosed indoor areas where the proprietor posts conspicuous signs such as "No Smoking" or "Thank you for not smoking," shall be considered public places.

See also MINN. STAT. ANN. § 144.413(2) (West Cum. Supp. 1976).

169. *See* notes 174 & 185 and accompanying text *infra*.

170. The number of facilities where smoking continues is reduced somewhat by the existence of local ordinances. *See* ASH Digest, *supra* note 153, *passim*.

171. N.Y. Times, Feb. 14, 1970, at 11, col. 3 (Toronto, Montreal and Detroit); U.S. NEWS & WORLD REP., Aug. 26, 1974, at 55 (Houston); *id.*, Oct. 20, 1975, at 45 (Atlanta). Utah, 1976 UTAH ACT, *supra* note 160, § 76-10-101(1), and Minnesota, MINN. STAT. ANN. § 144.413(2) (West, Cum. Supp. 1976), have regulated smoking in arenas by statute, and the State of Washington Board of Health regulates smoking in indoor sports arenas in that state. ASH Digest, *supra* note 153, at 18.

172. *See, e.g.*, N.Y. Times, Jan. 25, 1976, § 5, at 2, cols. 3-4 (letter to the editor). The ban in the arena in Houston was imposed at the request of the athletes. U.S. NEWS & WORLD REP., Aug. 26, 1974, at 55. One college basketball coach, when his team was to come to play in the old Madison Square Garden in New York City, used to practice with a smudge pot in his gymnasium to simulate the smoke to be encountered in the arena. N.Y. Times, Mar. 14, 1976, § 5, at 4, col. 3.

173. *See, e.g.*, ALASKA STAT. § 18.35.300(2), (3) (Cum. Supp. 1975); NEB. REV. STAT. § 28-1031.01 (Supp. 1975); N.Y. PUB. HEALTH LAW § 1399*o* (McKinney Supp. 1975).

stadiums, since sitting next to or among smokers, even outdoors, can be annoying and discomforting.[174]

The need for regulation in restaurants and cafeterias is also clear. In addition to posing the same health hazard as in all public places, smoking can interfere with the dining pleasure of nonsmokers. While some nonsmokers are made nauseous by tobacco smoke wherever it is encountered,[175] even more are nauseated by the presence of tobacco smoke while they are eating.[176] Smoke may also have an effect on the taste of food.[177] Therefore, a smoking area should be set aside in restaurants of sufficient size. Since some nonsmokers may refrain from eating in restaurants because of the presence of tobacco smoke, a consequence of a separation of smokers and nonsmokers may be to increase the number of customers.[178]

A third area which most statutes have overlooked is retail stores. Although fire ordinances already ban smoking in several types of

174. *See, e.g.*, N.Y. Times, Feb. 14, 1970, at 11, col. 7; *id.*, Dec. 26, 1975, at 10, col. 3. In outdoor stadiums and indoor arenas, if there is proper ventilation, there should be separate seating with smoking and no-smoking sections in each price level of seats. Since modern arenas and stadiums are built symmetrically, seats could be divided in a way that disadvantages neither smoker nor nonsmoker in seat location. Demands for smoking and nonsmoking sections may vary from event to event, but section sizes can be varied with the help of portable barriers. A bill has been introduced in the New York legislature which would require baseball parks, race tracks, and indoor and outdoor athletic or entertainment stadiums which charge admission and are licensed to sell alcoholic beverages to reserve 50 percent of seating capacity for nonsmokers. Assembly Bill No. 1062 (1975, automatically reintroduced 1976).

175. N.Y. Times, Nov. 5, 1975, at 51, col. 3.

176. *See, e.g.*, N.Y. Times, Dec. 26, 1975, at 10, col. 4.

177. "When a patron of the Dr. Jazz Ice Cream Parlor [in Chicago] lights a cigarette, wall sirens wail and red lights falsh [*sic*]. The owner says ice cream absorbs the smoke, which ruins the flavor." AM. LUNG A. BULL., Dec. 1975, at 14.

178. Since eating facilities like lucheonettes may be too small to divide into smoking and no-smoking areas, a law compelling proprietors to ban smoking altogether may cause them to lose some of their smoking customers (1) if another lucheonette does not enforce the law, or has obtained a variance, or (2) if a slightly larger competitor can provide separate eating areas. Loss of the smokers' patronage, however, may be offset by a gain in patronage by nonsmokers, and if the competitor benefits by not enforcing the law, the proprietor may file a complaint with the agency which administers the statute and seek enforcement. But if a proprietor can demonstrate that a majority or perhaps even a substantial minority of patrons (*e.g.*, some percentage significantly higher than the 25 percent of the population, which, on a national basis, smokes) will not eat at the luncheonette absent permission to smoke, then perhaps the agency should grant a variance to prevent undue hardship. In granting the variance, the agency may require the proprietor to make additional efforts to improve ventilation.

retail stores[179] and some cities ban smoking in retail food stores and supermarkets,[180] very few statutes ban smoking in all retail stores.[181] Although retail stores may present a less cogent case for banning smoking than do, for example, arenas, because the stores are usually less crowded and smokers and nonsmokers are not seated next to each other for extended periods of time, nevertheless smoking should be prohibited. Shoppers go to retail stores regularly and frequently, often to purchase essentials such as food. Those who are especially sensitive to smoke may find shopping difficult where smoking is permitted. A law regulating smoking in retail stores should not result in a loss of the smoker's business, because the law would apply to all retail stores. Since smoking, in addition to polluting the air and adding to air conditioning and ventilation requirements,[182] produces ashes and butts which dirty floors and merchandise, prohibiting smoking might result in saving retailers money in cleaning and maintenance costs. Therefore, although retailers may have to expend some time to enforce the no-smoking provisions, they should also benefit from the law.

Another common place which has been neglected in most no-smoking statutes is the waiting area. Legislatures to date have, for the most part, limited legislation to prohibiting smoking in waiting areas of health-related facilities only.[183] Although it is likely that more persons whose health is especially threatened by tobacco smoke will be found in waiting rooms of health-related facilities than elsewhere, regulation of smoking in public waiting rooms should not be limited to those places only. For instance, waiting rooms are frequently found in government agency offices and public transportation terminals.[184] Waiting in these areas may be quite

179. *See, e.g.*, 3 N.Y.C. AD. CODE § c19-165.2 (1969).

180. *See generally* ASH Digest, *supra* note 153.

181. Among the states, Utah and Minnesota are the exceptions. 1976 UTAH ACT, *supra* note 160, § 76-10-101(1); MINN. STAT. ANN. § 144.413(2) (West Cum. Supp. 1976).

182. *See* note 35 and accompanying text *supra*.

183. *See, e.g.*, ALASKA STAT. § 18.35.300(4)-(5) (Cum. Supp. 1975) ("public waiting room of laboratories associated with health care or the healing arts," and "the waiting room, restroom, lobby or hallway of a hospital, nursing home, rest home or other health care institution or facility"); NEV. REV. STAT. § 202.2491(1)(d)(2) (1975) ("Office of any chiropractor, dentist, physical therapist, physician, podiatrist, psychologist, optician, optometrist, osteopath or doctor of traditional Oriental medicine.").

184. State and local legislation would not cover federal offices; however, federal legislation has been proposed regulating smoking in federal agency offices and inter-

prolonged—perhaps due to bureaucratic delay or bad weather—and waiting areas may be crowded, forcing smokers and nonsmokers into close proximity for long periods. Smoking should also be regulated in waiting lines,[185] both indoor and outdoor. Even outdoors, waiting in lines with smokers for extended periods can be discomforting to nonsmokers. Of course, if a place has multiple lines, separate lines may be established for smokers and nonsmokers.[186]

Probably the one place where smoking regulation is needed most, but which has been almost entirely neglected, is the work place.[187] Workers are already protected from some harmful air pollutants in their work environments by the Occupational Safety and Health Act of 1970 (OSHA).[188] The need for the protection of workers from tobacco smoke, however, has been overlooked. In a poorly ventilated office or one in which the majority—or even a substantial minority—of the workers smoke, the nonsmoker can be forced to inhale polluted air for the entire work day. Even in a normally-ventilated office, a person seated next to a smoker will be exposed to high levels of air pollution every time his coworker smokes.[189] Workers protected under OSHA against exposure to harmful levels of air contaminants from the work materials should be protected against pollution from fellow workers as well. Although levels of carbon monoxide in enclosed spaces due to to-

state passenger carrier facilities. H.R. 10748, 94th Cong., 1st Sess. (1975). The bill has also been introduced in the Senate, S. 2906, 94th Cong., 2d Sess. (1976), but no action has been taken in either body other than referral to committee.

185. In many places where lines form, such as supermarkets, retail stores and banks, smoking would be prohibited entirely by other provisions in the statute.

186. Should, for example, the nonsmokers' lines become longer than those for smokers, the management may equalize the lengths by increasing the number of lines available to nonsmokers. And, of course, smokers or nonsmokers may voluntarily give up their respective privileges by joining shorter lines. For a suggested statute covering waiting lines, *see* P. Axel-Lute, Non-Smokers' Rights Legislation, Appendix: A Suggested Model Non-smokers' Rights Act § 5 (unpublished paper distributed by the National Interagency Council on Smoking & Health).

187. In the absence of a statute or a regulation covering places of work, an employer may possibly seek a tobacco-free work environment under the common law duty of the employer to provide a safe place to work. *See* notes 134-49 and accompanying text *supra*. Some companies on their own initiative have segregated smokers from nonsmokers, urged employees to quit smoking, or have made it a policy not to hire smokers. Wall St. J., Jan. 26, 1971, at 1, col. 5.

188. 29 U.S.C. §§ 651-678 (1970). The purpose of the act was stated to be to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* § 651.

189. *See* note 17 and accompanying text *supra*.

bacco smoke can exceed OSHA standards,[190] OSHA has not, to date, been applied to tobacco pollution.[191] There is, therefore, a need for state statutes regulating smoking in work places.[192] Because of the wide variation in the size and shape of work places and the nature of the work involved, drafting legislation to cover all possibilities may prove difficult; instead, guidelines may be formulated and authority to carry them out given to an administrative agency.[193]

Employers may complain about the possible costs of complying with such a law.[194] However, the cost to the employer under the

190. *See* notes 14-18 and accompanying text *supra*.

191. Ironically, the Assistant Secretary of Labor in charge of the Occupational Safety and Health Administration, Milton Corn, has banned smoking at Administration meetings and conferences. Mr. Corn said in a memorandum that this policy is "a fair recognition of the rights of others not to be exposed to airborne chemicals which pose a real challenge to the health of many individuals and an annoyance to many others." 5 BNA OCCUPATIONAL SAFETY & HEALTH REP. 1172 (1976). The California Occupational Safety and Health Standard Board considered a proposal advanced by the California State Department of Health that would have required employers to take appropriate and reasonable measures to prevent nonsmoking employees from having to inhale tobacco smoke. The Board rejected the proposal because it did not meet the Board's policy of "enforceability and reasonableness." *Id.* at 1047, 1206.

192. OSHA does not preempt the field of occupational safety, but specifically recognizes concurrent state power to enact statutes or act through the common law to protect employees at their jobs. 29 U.S.C. § 653(b)(4) (1970).

Among the states, Utah and Minnesota have included places of work in their statutes regulating smoking. 1976 UTAH ACT, *supra* note 160, § 76-10-101(1); MINN. STAT. ANN. § 144.413(2) (West Cum. Supp. 1976).

193. For effective separation, smokers and nonsmokers should be placed in distinct and separate work areas whenever possible. If, because of the nature of the work or the physical layout of the work area, to do so would be especially disruptive or expensive, the best possible method of separation—such as physical barriers and improved ventilation—should be used. Where the work area is so small as to preclude effective separation by such methods, smoking should be prohibited. This general approach is similar to the approach of the proposed federal legislation covering federal employees. *See* H.R. 10748, 94th Cong., 1st. Sess. (1975) and S. 2906, 94th Cong., 2d Sess. (1976). Of course workers may smoke outside the work area, although requiring workers to leave the work area to smoke may create disruption and loss of time. This has been a complaint of employers in Minnesota where smoking at work is regulated. *See* NEWSWEEK, Dec. 8, 1975, at 35. Regulation might result in increased worker productivity, however, since nonsmokers will no longer be subjected to the discomfort of tobacco smoke. Also, perhaps some smokers will smoke less because of the regulation and consequently less time will be lost to smoking breaks and smoker illness.

194. Possible costs include constructing physical barriers and separations, improving ventilation, creating duplicate facilities for smokers and nonsmokers such as lunch rooms, rest rooms and lounges, and loss of productivity due to increased smoking breaks for smokers and the possible disruption of the office routine and layout.

statute should not be greater than that justified by the need to protect nonsmokers. In addition, employers should not overlook some possible advantages of smoking regulation. As in retail stores, a ban on smoking or even confining smoking to certain areas might save in cleaning costs. More significantly, there is evidence that exposure to carbon monoxide may impair cerebral functions and reduce the efficiency and productivity of workers.[195]

Even so, an employer might decide to employ only smokers, in an effort to avoid any expenses of complying with a law calling for the separation of smokers and nonsmokers.[196] Such discrimination would be unwise for several reasons. In addition to exposing all the employees to efficiency-impairing smoke, the employer would be narrowing his choice of employees to those adults who either smoke or do not object to tobacco smoke. Moreover, smoking workers are out of work more often than nonsmoking workers.[197] Finally, since the death rate from all causes is significantly higher for smokers than for nonsmokers,[198] the employer stands a greater chance of losing through death or serious illness an experienced worker. As a corollary, employing a higher percentage of smokers may raise pension costs. Consequently, it is in the employer's interest to hire nonsmokers[199] or to discourage his workers from smoking.

When one of its employees won a permanent injunction against the New Jersey Bell Telephone Company for the right to work in a smoke-free environment, the Company found it necessary only to prohibit smoking in the office, create a separate smoking lounge and grant smokers extra smoking breaks. *A Precedent-Setting Case: Nonsmokers' Rights Upheld in Court*, AM. LUNG. A. BULL., Nov. 1976, 2 at 9. *See also* notes 134-49 and accompanying text *supra*.

195. Schulte, *supra* note 25, at 529.

196. Federal law prohibits employment discrimination only when it is on the basis of age, sex, race, color, religion or national origin. 29 U.S.C. § 623 (1970), 42 U.S.C. § 2000e-2 (1970). If an employer wishes to discriminate against either smokers or nonsmokers on the basis of their smoking habits he may do so as long as he does not use smoking rules in a prohibited discriminatory manner. For example, he may not prohibit smoking on the job by female employees and permit it by male employees. CCH EEOC DEC. ¶ 6165 (1970). If a state, federal or local government law, regulation or policy is involved, there may be sufficient "state action" for constitutional equal protection claims.

197. CENTER FOR DISEASE CONTROL, HEALTH SERVICES & MENTAL HEALTH AD., U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHART BOOK ON SMOKING, TOBACCO, & HEALTH 19 (1972).

198. *Id.* at 11.

199. Of course, an employer who hires only nonsmokers may disadvantage himself by limiting his choice of employees to nonsmokers.

D. *Enforcement*

It has been claimed that no-smoking laws are basically unenforceable codifications of good manners and common courtesy.[200] While no-smoking laws, like many other statutes, depend for their effect primarily on voluntary compliance,[201] some viable enforcement methods can and should be employed to improve compliance by all smokers.

Since voluntary compliance by the majority of smokers is relied on for the bulk of enforcement, and since under a comprehensive no-smoking statute smoking is prohibited in many places where it previously was not, the primary and most important enforcement device is the no-smoking sign. In addition to simply designating areas in which smoking is prohibited, signs serve to remind forgetful but law-abiding citizens where they may and may not smoke. Signs also serve the purpose of notice to those who do not comply voluntarily. When signs are required to be posted by statute, a violation of the law cannot be prosecuted unless at the time and place of the alleged violation a sign which is legible and visible to an ordinarily observant person is posted.[202]

To function effectively, a proper no-smoking sign will convey a clear and simple meaning, attract the attention and command the respect of the smoker, and adequately alert the smoker to extin-

200. *See* Governor's Message on Senate Bill No. 121, in 1975 Kan. Sess. Laws 1737-38; N.Y. Times, June 15, 1975, at 48, col. 5.

201. Most smokers probably are trying to comply voluntarily. *See, e.g.*, N.Y. Times, Nov. 5, 1975, at 51, col. 3.

202. By analogy to parking signs, when signs are required by statute, the lack of proper signs is a defense to prosecution, even when the existence of the law is brought to the defendant's attention by a series of summonses charging him with violation of the ordinance. *See* People v. Evans, 131 N.Y.S.2d 412, 205 Misc. 886 (Police Ct. Schenectady 1954) (when local no-parking ordinance was defective in that it did not provide for posting of signs which were expressly required by the state enabling statute, the defect could not be cured by actual notice to the defendant). If the statute does not require signs, then notice would not be necessary for enforcement of the law. *See* Cohen v. City of New York, 329 N.Y.S.2d 596, 69 Misc. 2d 189 (Civ. Ct. New York County 1972) (a car may be towed from a restricted parking zone where the city is not required to and does not erect signs reserving the right to tow away violators). *See also* NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS & ORDINANCES, UNIFORM VEHICLE CODE § 11-201(b) (1968):

> No provision of this act for which official traffic-control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official device is not in proper position and sufficiently legible to be seen by an ordinarily observant person. Whenever a particular section does not state that official traffic-control devices are required, such section shall be effective even though no devices are erected or in place.

guish his cigarette before he enters a no-smoking area.[203] A statute may set forth the requirements for a sign to achieve these objectives or it may delegate to a state agency, for instance the state department of health, the duty of establishing the guidelines for proper signs.[204] In either case, establishing guidelines will promote uniformity which will aid recognition and understanding of the law. The guidelines should cover three basic issues: content,[205] size[206] and placement.[207]

Since the comprehensive no-smoking statute prohibits smoking in many public places, it would be very expensive to have state or

203. *See* 17 NYCRR 200.1(b) (1974), which lists five similar requirements for effective traffic-control devices.

204. For example, guidelines for design and placement of all of New York's traffic-control devices are established by the State's Department of Transportation. 17 NYCRR Chapter V (1974). The Minnesota Department of Health has established the sign requirements as part of its general duty to implement the Minnesota statute. Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Oct. 27, 1975, MHD 443(c).

205. Interpreting "no smoking" signs to mean "no puffing," many smokers enter elevators and other places holding their ignited cigarettes, cigars or pipes in their hands. Therefore the additional words "or carrying a lighted cigarette, pipe or cigar" may be necessary to convey the message and protect the nonsmoker. The prohibition in the statute should be worded in the same manner. To command respect, "under penalty of law" should be added to the sign.

In the anticipation that matter other than tobacco will be smoked in public, the Florida statute has a broader prohibition: "It is unlawful for any person to ignite any flame or to smoke any type of tobacco product or other substance while entering or occupying an elevator." FLA. STAT. ANN. 823.12 (West 1976). *See also* Axel-Lute, *supra* note 186, § 2: "In this Act 'smoking' means intentionally having in one's possession any substance giving off suspended particulate matter by means of burning."

Either as an alternative or as an additional formulation, the international no-smoking symbol may be used. The design consists of a heavy red circle on a white background. An equally heavy red line runs from the upper left to the lower right of the circle. Inside the circle, and appearing to cross underneath the red line, is the outline of a cigarette and a wisp of smoke. *See* Utah Rules and Regulations, *supra* note 164, § 3.4.3.

206. To ensure that the signs are legible, the minimum size of the lettering should be set forth. *See* H.R. 10748, 94th Cong., 1st Sess., § 224 (1975) which requires that each sign bear the statement "NO SMOKING" in letters at least two inches high and the statements "OR CARRYING A LIGHTED CIGARETTE, PIPE OR CIGAR," "BY ACT OF CONGRESS" and "REPORT VIOLATIONS TO—" in letters three-quarters of an inch high. Connecticut requires lettering at least four inches high. CONN. GEN. STAT. ANN. § 1-21b(b) (West Cum. Supp. 1976).

207. Signs should be placed at the entrance to no-smoking areas to give adequate notice to the smoker and within the smoking restricted area in clearly visible places. A statute may also require that ashtrays be placed at the entrance of every place where smoking is prohibited. Texas has made it a defense to prosecution that a public place where smoking is prohibited is not equipped with facilities for extinguishing smoking materials. TEX. PENAL CODE ANN. § 48.01(c) (Vernon Supp. 1975).

municipal employees responsible for posting and maintaining signs. Rather, the owner, manager or person in charge should have that responsibility.[208] A penalty for failure to post and maintain such signs may ensure that they are posted, and prevent places from becoming smoking or no-smoking areas according to the preferences of the person in charge, rather than the requirements of the law.

Even with proper and adequate signs there will be smokers who refuse to comply voluntarily with the law. With respect to these smokers there is a need for someone to enforce the law. Three classes of persons may be given authority to enforce no-smoking laws. Private citizens may be empowered to enforce the law by being allowed to make a citizen's arrest when they witness violations, provided no disturbance of the peace would result.[209] This remedy may not be too useful since citizen enforcers risk suits for false imprisonment and battery. A possibly more effective remedy, which may be useful if the nonsmoker and smoker meet regularly, is to allow the nonsmoker to obtain an injunction against the smoker's continued violation of the law. Needless to say, many nonsmokers will hesitate to take such extreme action. To overcome reluctance based on the expense of such litigation, recovery of court costs and attorney's fees may be allowed for successful suits.[210]

Since neither citizen's arrest nor injunctions are likely to be used, a statute may provide better protection for nonsmokers if it requires the person in charge or his employees to enforce the

208. This formulation spreads the responsibility far enough to ensure that in any area someone is responsible for posting signs. *See* ALASKA STAT. § 18.35.330 (Cum. Supp. 1975) ("Every owner, manager, proprieter or other person who has control of a place . . ."); OKLA. STAT. ANN. tit. 21, § 1247(D) (West Cum. Supp. 1976) (in privately owned facilities, "the owner or lessee," in corporately and publicly owned facilities, "the manager and/or supervisor"). While Texas makes it a defense to prosecution that a "reasonably sized notice" is not "prominently displayed," it fails to set forth who is responsible for posting signs. TEX. PENAL CODE ANN. § 48.01(b) (Vernon Supp. 1975).

209. N.J. STAT. ANN. § 2A:170-65 (West, Supp. 1976) provides that any person who smokes in a bus or no-smoking car of a train is a disorderly person; another section allows any person who witnesses an offense "to apprehend without warrant or process any disorderly person and take him before any magistrate of the county where apprehended." N.J. STAT. ANN. § 2A:169-3 (West 1971).

210. The proposed federal statute allows a nonsmoker to seek an injunction against either the smoker or the lax enforcer. It also allows recovery of court costs and reasonable attorney's fees. H.R. 10748, 94th Cong., 1st Sess. § 218 (1975).

law.[211] Since such a person would have a certain degree of authority within the place where smoking is being regulated, his efforts to enforce the law may be effective. The duty of the person in charge should be to ask for voluntary compliance by the smoker. In case that request fails, he should have the power to remove the offender by the use of a reasonable amount of force.[212] To encourage persons in charge to take their enforcement responsibilities seriously, state and local boards of health should have the power to fine and seek injunctions against failures to enforce the law. The individual nonsmoker may also be empowered to seek an injunction against a lax enforcer.[213]

The most effective means of enforcement is by police or health inspectors, since their authority to enforce the law will be respected by most smokers. Obviously, the resources are not available for extensive enforcement efforts by these government officers. However, one thing which can be done is to impress on these officers the need to enforce the law whenever they witness a violation.[214] Since smoking causes significant discomfort to many

211. *See, e.g.*, MINN. STAT. ANN. § 144.416 (West Cum. Supp. 1976):

> The proprietor or other person in charge of a public place shall make reasonable efforts to prevent smoking in the public place by
>
> (a) posting appropriate signs;
>
> (b) arranging seating to provide a smoke-free area;
>
> (c) asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or
>
> (d) any other means which may be appropriate.

The proposed federal statute also charges the executive head or the chief administrative officer of each federal instrumentality with enforcing the law in the facility in which the instrumentality has offices. The responsibility includes making yearly reports on enforcement efforts. H.R. 10748, 94th Cong., 1st Sess. §§ 216, 217 (1975).

212. A Mississippi statute prohibiting smoking of cigars and pipes on buses allows the bus driver to eject the smoker by "using only such force as may be necessary to accomplish the removal . . . ." He may also cause the person to be detained for the proper authorities. MISS. CODE ANN. § 97-35-1(6) (1972). A Maryland law forbidding spitting on trains allows arrest by the conductors and brakemen. As an inducement to enforcement the statute also allows recovery of half the fine by the arresting person. MD. ANN. CODE. art. 27, § 320 (1976).

213. The Minnesota statute allows the state or local board of health or "any affected party" to seek an injunction against the repeated failure of the person in charge to make reasonable efforts to prevent smoking. MINN. STAT. ANN. § 144.417(3) (West Cum. Supp. 1976). Such broad language would seem to permit the proprietor of a business complying with the law to seek an injunction against his competitor who is not enforcing the statute and thereby drawing off some business.

214. For the most part, the police have treated the statutes lightly, issuing very few summonses. Only two smokers were fined in nine months under the San Diego no-smoking law. In New York City, after ten months, only 145 summonses were

nonsmokers, yet most nonsmokers do not speak out, the no-smoking law should be enforced whenever a violation is witnessed. Issuing summonses does not seriously detract from the ability of the police to deter or handle major crimes. Other enforcement officers such as health and air pollution inspectors should also enforce the law when they witness a violation. If it is recognized that the law will be enforced, or at least may be enforced at any given time, voluntary compliance will improve.

A more effective way of creating public awareness that the law will be enforced is to wage enforcement drives: concentrated publicized efforts in selected areas. Such tactics have been used in the past to gain compliance with no-smoking laws,[215] and they are still used today to reduce violations of certain other laws.[216] Enforcement drives are usually of short duration and do not put severe strain on limited law enforcement manpower. This short term use

issued, 110 of which resulted in fines. *See* U.S. NEWS & WORLD REP., Oct. 20, 1975, at 45; N.Y. Times, Sept. 14, 1975, at 29, col. 1; NEWSWEEK, Dec. 8, 1975, at 35. Utah's legislature passed a resolution in 1975 directing law enforcement agencies to enforce Utah statutes and ordinances concerning restrictions on smoking. 1975 Utah Laws 1115-16. Pursuant to the resolution, the Salt Lake City-County Health Department has issued citations to restaurant proprietors who did not post no-smoking signs. The persons pleaded guilty and were fined twenty-five dollars. In the future, the Health Department intends to enforce its law every time a "sanitarian" is in a public building and to "evaluate complaints of buildings not routinely inspected by sanitarians." Letter from Harry L. Gibbons, Director of Health, Salt Lake City-County Health Department, to the *Columbia Journal of Environmental Law*, Dec. 6, 1976.

Other laws of this type in New York City are laws requiring dog-curbing and prohibiting street peddling. Police usually ignore dog-curbing violations. *See* N.Y. Times, Feb. 1, 1976, § 8, at 6, cols. 4-6; *id.*, Mar. 3, 1976, at 24, col. 5. Mayor Beame's wife joined a march on Gracie Mansion, the Mayor's official home, to protest against the non-enforcement of dog-curbing statutes. *Id.*, Mar. 15, 1976, at 1, col. 1. Street peddlers are periodically issued summonses by police. *Id.*, Jan. 4, 1976, § 8, at 1, col. 1. Police manpower is used to enforce various traffic and parking ordinances as well. The relative value of each of these laws can be debated, but the City Council has passed each one and the police should not ignore violations unless they are occupied with higher enforcement priorities.

215. Many enforcement drives were waged against smoking and spitting on New York City subways. *See, e.g.*, N.Y. Times, Feb. 19, 1920, at 26, col. 2; *id.*, Nov. 24, 1922, at 19, col. 7; *id.*, Apr. 24, 1934, at 1, col. 4; *id.*, Apr. 25, 1934, at 9, col. 8; *id.*, Apr. 26, 1934, at 2, col. 6. When the Utah anti-smoking legislation first went into effect in 1923, enforcement drives were also waged and several prominent men were arrested. *Id.*, Feb. 21, 1923, at 2, col. 5.

216. Parking and speeding violators are still ticketed regularly in most jurisdictions to ensure compliance with the law. An extensive enforcement effort in New York City against subway fare evaders produced excellent results, although it should be noted that violators were arrested rather than merely issued summonses. *Id.*, Jan. 26, 1976, at 27, col. 1.

of manpower is justified by the long term voluntary compliance which it may induce.[217]

If the enforcement efforts are to be effective, the courts must impose realistic fines rather than merely nominal sums. Although some statutes to date have provisions for fines ranging from between five and five hundred dollars plus jail sentences of up to thirty days, most statutes provide either a civil or criminal penalty of ten to twenty-five dollars. While most judges would probably be reluctant to impose a fine greater than that in any case, a fine within that range should suffice to act as a deterrent to the violator and other smokers.[218]

V. CONCLUSION

Although a majority of citizens do not smoke, a substantial minority have chosen to do so despite the clear danger to their health. The harmful effects of tobacco smoke, however, are not confined to the smokers themselves. Since smoke mixes with air and spreads, even those who have chosen not to smoke must inhale tobacco fumes. In addition to being harmful, the smoke is annoying to millions of nonsmokers. Smokers and nonsmokers must spend a significant portion of their lives with each other in public places. Although society has an interest in allowing each individual to indulge his own tastes, it also has an interest in protecting the freedom and health of all its citizens. As John Stuart Mill has put it:

> [T]he individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. . . . [But] for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.[219]

Legislation is necessary to protect the health, safety and welfare of the nonsmoking majority most effectively, and to this end a state may and should exercise its police power to regulate smoking.

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217. *See id. See also*, with regard to street peddlers, *id.*, Jan. 4, 1976, § 8, at 4, col. 2.

218. In the Bronx, where the average fine imposed by judges was 99 cents, 21% of the fare evaders arrested were repeat violators. In Queens, where the average fine imposed was $10.49, only 4% of those arrested were repeat violators. *Id.*, Mar. 3, 1976, at 73, cols. 7-8.

219. J.S. MILL, ON LIBERTY 87 (Spitz ed. 1975).