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Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco

Osborne M Reynolds, Jr., University of Oklahoma Norman Campus

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EXTINGUISHING BRUSHFIRES: LEGAL LIMITS ON THE SMOKING OF TOBACCO

Osborne M. Reynolds, Jr.*

I. INTRODUCTION

Approximately one third of all adults in the United States smoke cigarettes, cigars, or pipes with some regularity.¹ Much scientific evidence now supports the conclusion that smoking is harmful to the health of these individuals.² The widespread publicity given to the potential hazards of smoking assures that those who continue to pursue this activity have knowingly and voluntarily ‘‘assumed the risks’’—at least in the nontechnical sense of that phrase. What of those persons, however, who do not themselves smoke but who, if they are not to avoid all social contacts, must breathe air contaminated by the smoking of other people? A 1972 report of the

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* Professor of Law, University of Oklahoma. The author expresses sincere appreciation to his research assistant, Mark K. Stonecipher.

1. Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health vii (1979) [hereinafter cited as 1979.REPORT]. The percentage of Americans who smoke has decreased in recent years; in 1966, 42% of the adults in the United States smoked. Id. But sales of cigarettes, in particular, remain high: in 1978, approximately 34 million Americans smoked 615 billion cigarettes. Id. Recent figures show that per capita consumption of cigarettes has dropped since 1974 and that, although 53 million adults continue to smoke, more than 30 million have quit since 1964. Brody, The Growing Militancy of the Nation’s Nonsmokers, N.Y. Times, Jan. 15, 1984, at E6, col. 1. See also American Cancer Soc’y, ’76 Cancer Facts & Figures 20 (1975) (estimating that 50 million Americans were smoking in 1975).

United States Surgeon General concluded that cigarette smoking was harmful not only to the smoker but also to those around him, and this conclusion was reiterated in reports published in 1975 and 1979.

II. THE PERILS OF INHALING TOBACCO SMOKE

Breathing air that contains the tobacco smoke created by another person is variously termed "passive smoking," "second-hand smoking," or "involuntary smoking." The smoke breathed by the nonsmoker is of two types. Mainstream smoke is that which is exhaled by the smoker. Sidestream smoke is that given off directly into the air by either end of the burning cigarette. Because of the lack of filtering, sidestream smoke is more likely to be bothersome to others and is of course dangerous to nonsmokers. Several international organizations, including the World Health Organization, have recognized in recent years the dangers of involuntary smoking. One well-documented article lists seven principal effects of secondary exposure to tobacco smoke. The problem in the United States

3. Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health 117-35 (1972) [hereinafter cited as 1972 REPORT]. Former Surgeon General Jesse Steinfeld was reported as believing that the possibility of harm to nonsmokers from tobacco smoke is serious enough to justify a ban on smoking in public places. Newsweek, Jan. 25, 1971, at 90.


7. A. Brody & B. Brody, supra note 6, at 14 (authors cite statements by the World Health Organization, the American College of Chest Physicians, and the World Conference on Smoking and Health).

8. Comment, The Legal Conflict, supra note 5, at 448-49. The effects are (1) minor eye and throat irritation to most healthy people; (2) slight deterioration in psychomotor
is of serious proportions: it has been estimated that as many as thirty-four million Americans may be physiologically allergic to the smoking of others.9

Smoking releases into the air at least thirty different pollutants that are considered possible health hazards.10 Together, the sidestream and mainstream smoke of the average cigarette put into the atmosphere approximately seventy milligrams of dry particulate matter and twenty-three milligrams of carbon monoxide.11 The carbon monoxide is particularly harmful.12 The dry particulate matter in tobacco smoke can trigger eye and nasal irritation, coughing, wheezing and sore throat to the involuntary smoker—even one who is not allergic to smoke.13 Also, chain reactions may be set in motion

performance of healthy persons; (3) special harm to fetuses, infants, and children; (4) exacerbation of the symptoms of persons with certain heart diseases; see Public Health Service, U.S. Department of Health, Education and Welfare, The Smoking Digest 26 (1977) [hereinafter cited as Smoking Digest]; see also White & Froeb, Small-Airways Dysfunction in Nonsmokers Chronically Exposed to Tobacco Smoke, 302 New Eng. J. Med. 720 (1980) (discussing experiment showing involuntary smoking substantially reduced small airways function in the nonsmoker); (5) special harm to persons with certain lung diseases, such as chronic bronchitis and emphysema; (6) allergic reactions to tobacco smoke on the part of many people; see A. Brody & B. Brody, supra note 6, at 33 (however, 1979 Report concluded that existence of true tobacco allergy had not been established definitely, although it was said to be likely that some persons allergic to other things are allergic to tobacco smoke; see 1979 Report, supra note 1, at 11-31); (7) contribution to the development of disease in some healthy individuals. See Smoking Digest, supra, at 17. See generally Comment, The Resurgence and Validity of Antismoking Legislation, 7 U.C.D. L. Rev. 167 (1974) [hereinafter cited as Antismoking Legislation].

9. A. Brody & B. Brody, supra note 6, at 33; Comment, Where There's Smoke, supra note 6, at 67.


11. Comment, Where There's Smoke, supra note 6, at 67 & n.11 (citing Owens & Rossano, Design Procedures to Control Cigarette Smoke and Other Air Pollutants, 75 American Soc'y Heating, Refrigerating & Air-Conditioning Engineers: Transactions 93, 94 (1969)).


As the body is deprived of needed oxygen, the results may include dizziness, headaches, and lassitude. Comment, Where There's Smoke, supra note 6, at 66 (citing Abelson, A Damaging Source of Air Pollution, 158 Science 1527 (1967)). The carbon monoxide also can reduce the acuity of hearing and eyesight and the ability to distinguish degrees of brightness. Comment, Where There's Smoke, supra note 6, at 67 (citing 1972 Report, supra note 3, at 125-28; Beard & Grandstaff, Carbon Monoxide Exposure and Cerebral Function, 174 Annals N.Y. Acad. Sci. 385 (1970)).

13. Comment, Where There's Smoke, supra note 6, at 67 (citing Speer, Tobacco and the Nonsmoker, 16 Archives Env't. Health 443, 444 (1968)); see also findings reported by the Civil Aeronautics Board, 38 Fed. Reg. 12207, 12209 (1973). See generally 1972 Report, supra note 3, at 128. Allergic individuals, of course, suffer more than others. Comment,
by some of the initial effects of breathing smoke. For instance, the reduction of oxygen to the body's organs may cause accelerated heart beat and a consequent drop in a person's productivity.14

Recent studies have shown that children of parents who smoke at home suffer serious respiratory illnesses more often than children whose parents do not smoke.15 Another study indicates that nonsmokers working in offices where they are exposed to cigarette smoke endure a greater risk of bronchial diseases and infections than otherwise as a result of their exposure to the smoke.16 Perhaps most significant is a study of Amish and non-Amish persons in the same county, revealing that the Amish, who themselves seldom smoke and seldom mingle with the non-Amish population, have a far lower rate of lung cancer than other residents of the area.17

Aside from the serious health problems to which it contributes, tobacco smoke interferes with many nonsmokers' enjoyment of life because of the unpleasant odor and atmosphere it creates.18 The smoker himself gradually becomes impervious to the odor of tobacco smoke because the smoke destroys the inner lining of his nose.19 The person who can detect and who is bothered by the odor, however, may suffer emotional responses to it, including a feeling that the person's well-being is seriously threatened.20 Tobacco smoke in addition increases the workload of ventilation equipment.21

Where There's Smoke, supra note 6, at 67 (citing Speer, supra); see also Bridge & Corn, Contribution to the Assessment of Exposure of Nonsmokers to Air Pollution from Cigarette and Cigar Smoke in Occupied Space, 5 Envtl. Research 192-93 (1972). See generally 1972 Report, supra note 3, at 129. On the effect of tobacco smoke on persons with emphysema, see F. Obley, Emphysema, A Doctor's Advice for Patients and Their Families 103 (1970).

14. Comment, Nonsmokers' Rights, supra note 2, at 613 (citing 4 Clean Air & Water News (CCH) No. 18, at 279 (May 5, 1972) (report on a study conducted by the U.S. Army Research Institute of Environmental Medicine)).


21. Comment, Where There's Smoke, supra note 6, at 68 (citing Yaglon, supra note 19, at 25; Owens & Rossano, supra note 11, at 101). It also has been observed that smoking materials are a source of litter. Comment, Where There's Smoke, supra note 6, at 68.

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NONSMOKERS' RIGHTS

III. PRECEDENTS FOR MODERN REGULATION

In light of all the problems caused or aggravated by tobacco smoke, it is hardly surprising that nonsmokers increasingly have been asserting their "right" to a smoke-free environment and have been seeking legal redress when that right is denied or infringed. Because state and local governments are those politically closest to the people and thus—ideally at least—are the most responsive to public demands, it is not surprising that local bodies in general and municipalities in particular increasingly are being called upon to provide safeguards and remedies for the nonsmoker. Local regulation of cigarettes and smoking, however, is not an entirely new development.

A. Legislative Regulation of Cigarette Sales

In the 1930's and 1940's, a number of municipalities restricted the sale of cigarettes. However, these restrictions normally were enacted for purposes unrelated to the need for clean, healthful air. In one case from this period, an ordinance making it a misdemeanor for dispensers of narcotics or poisonous drugs to keep, sell or dispose of cigarettes was upheld. The court relied on the recital in the

22. Ranii, Tobacco’s Legal Road, Nat’l L.J., Apr. 9, 1984, at 1, col. 3.
23. Id. (anti-smoking activists deem state and local laws more efficient than litigation because litigation would overburden judicial system).
24. The early, leading case testing such restrictions was Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898), aff’d, 179 U.S. 343 (1900), in which the state court noted the harmful effects of cigarettes and upheld, against commerce-clause attack, a prohibition on the sale of cigarettes. Id. at 578-79, 48 S.W. at 309. The United States Supreme Court stated that tobacco is a legitimate article of commerce and that the Court could not take judicial notice that cigarettes were more noxious than other forms of tobacco. 179 U.S. at 350. An excellent review of many early authorities is found in State v. Nossaman, 107 Kan. 715, 193 P. 347 (1920) (prohibition on sale, barter or giving away of cigarettes upheld). Many other early cases are on point. See, e.g., Cook v. Marshall County, 196 U.S. 261 (1905), aff’d 119 Iowa 384, 93 N.W. 372 (1903) (statute imposing tax on persons selling cigarettes upheld despite application to retailers but not wholesalers); Alspaugh v. Town of Cadwell, 24 Ga. App. 16, 99 S.E. 707 (1919) (ordinance imposing license tax on sale of cigarettes and tobacco upheld against commerce-clause attack); Ford Hopkins Co. v. Iowa City, 216 Iowa 1286, 248 N.W. 668 (1933) (statute providing that city council could grant permit to sell cigarettes found not to violate commerce clause); Commonwealth ex rel. City of Wilmore v. McCray, 250 Ky. 182, 61 S.W. 2d 1043 (1933) (license tax on vendors of cigarettes held valid exercise of police power); Ploch v. City of St. Louis, 345 Mo. 1069, 138 S.W. 2d 1020 (1940) (upholding occupation tax on sale of cigarettes imposed by city ordinance and qualifying nicotine in cigarettes as harmful); Ex parte Asotsky, 319 Mo. 810, 5 S.W. 2d 22 (1928) (upholding ordinance imposing occupation tax on cigarette dealers); cf State v. Packer Corp., 77 Utah 500, 297 P. 1013 (1931) (upholding statute prohibiting tobacco advertising via billboards or placards). But cf Little v. Smith, 124 Kan. 237, 257 P. 999 (1927) (prohibition on cigarette advertising held undue interference with interstate commerce).
ordinance that contaminated cigarettes containing poisonous drugs were being sold and that handling of cigarettes in places where poisonous drugs were processed made the sale of the poison-containing cigarettes more likely and the danger to public health correspondingly greater.

As early as 1944, at least one court took note of the possibly harmful physical effects of cigarette smoking when it upheld municipal licensing of the sale of cigarettes by wholesalers as well as retailers. However, the court expressed concern principally for the "impressionable minds" of "adolescent boys and girls" and noted that young people might be lured into acquiring the "cigarette habit" in the misguided belief that no physical or moral harm could result from it. In sustaining the entire regulatory plan, the court observed with approval that one section of the ordinance made it an offense to furnish cigarettes to a person under eighteen or to any minor pupil of a school or university.

Courts often have recognized that states and local governmental units have the power to control the conduct of children, a power that extends beyond any comparable power over adults. Not surprisingly, therefore, most of the early cases dealing with control of cigarette sales sustained such regulation on the basis that it protected youth. A leading Michigan case upheld a license fee on vendors of cigarettes by concluding that the regulation could reasonably be regarded as protecting young people because "[t]he tendency of juvenile smoking is toward sneaky behavior and juvenile delinquency." Earlier, on similar grounds, an Illinois court had upheld an ordinance requiring a license for the sale of cigarettes and declaring that no license should be issued for such sale within two hundred feet of a school. Because vending machines respond with equal efficiency to coins inserted by children or adults, a federal

25. Ex parte Nash, 55 Nev. 92, 26 P.2d 353 (1933).
26. Id. at 95-96, 26 P.2d at 353.
27. State v. Crabtree Co., 218 Minn. 36, 15 N.W.2d 98 (1944) (additional justification for regulation of cigarette sales was presence of marijuana cigarettes on the market).
28. Id. at 37, 15 N.W.2d at 98.
29. Id. at 39, 15 N.W.2d at 99.
33. Gundling v. City of Chicago, 176 Ill. 340, 52 N.E. 44 (1898), aff'd, 177 U.S. 183 (1900). The court rejected the argument that the ordinance unjustly discriminated against cigarettes, as opposed to other forms of tobacco, noting that the legislative body reasonably could assume that young persons are most likely to use cigarettes. Id.
court in a later Illinois case sustained an ordinance prohibiting the use of automatic vending machines for the sale of cigarettes against due process and equal protection attacks.\textsuperscript{34} Restrictions aimed solely or primarily at the dispensing of cigarettes, as opposed to other smoking materials, similarly have been justified on the ground that the very mildness of cigarettes makes them particularly usable by, and tempting to, young persons.\textsuperscript{35} One court observed that "[b]efore the day of the cigarette, mastery of the tobacco habit was obstructed by agonies of nausea usually sufficient to postpone it to a period of at least reasonable maturity."\textsuperscript{36} Basing their decisions on this special regard for youth, courts during this early period generally sustained municipal licensing or similar regulation of the sale of cigarettes.\textsuperscript{37}

\textbf{B. Legislative Prohibition of Smoking in Certain Areas}

More directly relevant to modern attempts to control smoking are the older authorities upholding restrictions on or prohibitions of smoking in specified places. As long ago as 1890, the Supreme Court of Louisiana sustained a New Orleans ordinance prohibiting smoking on streetcars.\textsuperscript{38} The court underscored the "material annoyance, inconvenience, and discomfort" that smoking on such vehicles caused a majority of the passengers, particularly in the winter when the cars were closed.\textsuperscript{39} Significantly, the court added that "[t]here is not only discomfort, but positive danger to health, from the contaminated air."\textsuperscript{40} Such ordinances may be considered

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\textsuperscript{34} Illinois Cigarette Serv. Co. v. City of Chicago, 89 F.2d 610 (7th Cir. 1937) (no undue restraint on interstate commerce); cf. Edmonds v. City of St. Louis, 348 Mo. 1063, 156 S.W.2d 619 (1941) (court upheld ordinance levying license tax on automatic slot machines used for delivering goods). \textit{See generally} Annot., 111 A.L.R. 755 (1937).
\textsuperscript{35} Goodrich v. State, 133 Wis. 242, 247, 113 N.W. 388, 390 (1907); \textit{see} Gundling v. City of Chicago, 176 Ill. 340, 32 N.E. 44 (1898). One court observed that "young boys" turn to cigarettes rather than a pipe or cigar because they have read about Tom Sawyer's experience with the "wallop" from a cigar. State v. Crabtree Co., 218 Minn. 36, 38, 15 N.W.2d 98, 99 (1944).
\textsuperscript{36} Goodrich, 133 Wis. at 247, 113 N.W. at 390.
\textsuperscript{37} For modern legislation in this area, see A. \textit{Brody} \& B. \textit{Brody}, supra note 6, at 153-200 (appendix lists 30 states that now prohibit sales of cigarettes to minors).
\textsuperscript{39} 42 La. Ann. at 486, 7 So. at 621.
\textsuperscript{40} Id.
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the ancestors of modern legislation forbidding smoking on buses and similar public vehicles.\textsuperscript{41}

Early cases, however, showed a judicial tendency to require that restrictions on smoking be kept within narrow bounds. When a municipality in the early years of this century tried to ban the smoking of cigarettes within city limits, the Kentucky Court of Appeals stated that the prohibition constituted undue interference with a citizen's right to control his own personal indulgences, noting that the legislation would encompass smoking within private homes and on other private premises.\textsuperscript{42} The law therefore was declared an unreasonable invasion of personal liberty.\textsuperscript{43} A few years later, the Supreme Court of Illinois ruled that a municipal prohibition of smoking in all public places, indoor and outdoor, was void as constituting an unreasonable interference with private rights and personal liberties.\textsuperscript{44} The court, however, did take note that tobacco smoke is "offensive to many persons, and in exceptional cases harmful to some" and stated that municipal power existed to prohibit smoking in certain public places such as street cars and theaters.\textsuperscript{45} The court further observed that such ordinances might be valid if reasonably designed to protect property in the city from damage by fire—for instance, ordinances whose effect would be limited to places where highly combustible materials were collected.\textsuperscript{46} However, the court found the ordinance in the case at bar far too broad to be upheld on a fire prevention basis.\textsuperscript{47}

Some authorities allowed local legislators more leeway than did the Illinois court in restricting smoking in order to prevent fires. A Massachusetts case in 1847, for example, sustained on the basis

\textsuperscript{41} A typical such restriction is discussed in Matter of L.M., 432 A.2d 692 (D.C. 1981), in which a sentence of one-year's probation imposed on a juvenile who had violated the statutory ban against smoking on a bus was upheld, although an adult offender could have been given a sentence of no more than a $50 fine for a first offense.

\textsuperscript{42} Hershberg v. City of Barbourville, 142 Ky. 60, 61, 133 S.W. 985, 986 (1911). It has been pointed out that the language indicating the invalidity of the ordinance is actually dictum: Hershberg had brought suit for damages due to arrest and imprisonment under an allegedly void law; the court held that the city was immune from suit for arrest even if the law were void and affirmed dismissal of the suit. Comment, \textit{Where There's Smoke}, supra note 6, at 69-70 n.44. On the use of substantive due process in some modern cases to protect personal liberties from unjustified interference, see generally Henkin, \textit{Privacy and Autonomy}, 74 \textit{COLUM. L. REV.} 1410 (1974).

\textsuperscript{43} 142 Ky. at 61, 133 S.W. at 986.

\textsuperscript{44} City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914).

\textsuperscript{45} \textit{Id.} at 511-12, 104 N.E. at 837. The court cited, and seems to have been influenced by, information that city streets and ways were wide and that much of the smoking here prohibited therefore would occur in open spaces. \textit{Id.}

\textsuperscript{46} \textit{Id.} at 513, 104 N.E. at 837.

\textsuperscript{47} \textit{Id.}
of fire-prevention a Boston ordinance banning all smoking on the city's streets.\textsuperscript{48} In general, however, the early smoking cases showed considerable deference to the rights of smokers and great judicial readiness to strike down smoking restrictions that were overly broad as to the locations to which they applied.\textsuperscript{49} These cases, however, indicated a recognition by many courts that legitimate safety and health considerations might justify limited bans on smoking.

IV. Modern Legislative Restrictions

In recent times, also, it has been observed that state and local controls on smoking have one or the other of two purposes, sometimes both: prevention of fire and protection of health through maintaining pure food or air.\textsuperscript{50} The health considerations have been predominant in recent years.\textsuperscript{51}

A. State Regulations

At least thirteen states have statutes or administrative regulations prohibiting smoking in areas where food is prepared, served or stored, or where food utensils or equipment are being washed.\textsuperscript{52} Thirty-three states and the District of Columbia have legislation aimed at reducing involuntary smoking.\textsuperscript{53} The statutes vary greatly

\textsuperscript{48} Commonwealth v. Thompson, 53 Mass. (12 Met.) 231 (1847) (no challenge made on constitutional grounds).

\textsuperscript{49} Comment, Antismoking Legislation, supra note 8, at 172-73.

\textsuperscript{50} A. Brody & B. Brody, supra note 6, at 102. See generally id., ch. 5. See also Huffing over All That Puffing, Time, April 24, 1978, at 59.

\textsuperscript{51} See generally Ranit, supra note 22, at 1; Brody, The Growing Militancy of the Nation's Nonsmokers, N.Y. Times, Jan. 15, 1984 at 6E, col. 1; Farrell, The Tobacco Lobby's Uphill Campaign, N.Y. Times, Jan 15, 1984 at 6E, col. 4; Showdown on Smoking, Newsweek, June 6, 1983, at 60.


as to the number of places to which they apply, but twenty-four of them can be called fairly comprehensive in their application to public locations. Several of the statutes declare in their preamble that smoking is a health hazard or a public nuisance. A few specifically recognize the right of the nonsmoker to breathe clean air. Arizona, whose law declares smoking to be both a public nuisance and a danger to public health, has been considered a leader in this area, as its law, passed in 1973, was one of the first and remains one of the most comprehensive, applying to a long list of locations including elevators, theaters and buses. Many of the statutes apply only in specified places, those most often listed being


54. Id. at 103-04 (noting that while Mississippi's statutory ban applies only on passenger buses, Arizona's ban applies in a multitude of places).

55. See Comment, The Legal Conflict, supra note 5, at 451 n.57 (citing statutes of Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, and Utah). Only three states—Alabama, North Carolina, and Wisconsin—have no legislation restricting smoking Id.

56. See id. at 452 n.66 (citing the laws of Arizona, Arkansas, California, Colorado, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, and Washington).

57. Id. at 452 n.67 (citing laws of Alaska, Arizona, Oklahoma, Rhode Island, South Dakota and Idaho).

58. Id. at 452 n.68 (citing laws of Arkansas and Rhode Island).

59. ARIZ. REV. STAT. ANN. § 36-601.01 (1974).

60. Comment, The Legal Conflict, supra note 5, at 452 n.64; see also Hostetler, supra note 18, at 456.
public transportation vehicles, elevators and various portions of health care facilities. A few statutes apply generally to smoking in offices and other workplaces. There is usually an exception for enclosed offices occupied exclusively by smokers. Penalties for violation of the statutes differ considerably, but often they are limited to fines. The penalties invariably apply to the smoker but sometimes are applicable also to the proprietor or person in control of the premises where the forbidden smoking occurred.

B. Local Government Regulations

Many municipalities and other local governments have imposed smoking restrictions in recent years. A number of those restrictions are limited in application, such as the Kansas City ordinance applying to buses and stores and the St. Louis law covering buses, street cars, sports arenas and motion picture projection booths.

61. Comment, The Legal Conflict, supra note 5, at 454 & n.78 (citing laws of Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, and Washington).
62. Id. at 454 n.79 (citing laws of Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, and Washington).
63. Id. at 454 n.80 (citing laws of Alaska, Arizona, Arkansas, Colorado, Connecticut, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington).
64. Id. at 455 & nn. 95-100 (citing laws of Colorado, Minnesota, Montana, Nebraska, Oregon, and Utah). Oregon’s law, Or. Rev. Stat. § 243-350 (1979), applies only to workplaces operated by the state.
65. Comment, The Legal Conflict, supra note 5, at 456 & n.103 (citing as example Minn. Stat. Ann. § 144.413 (West 1980)). Otherwise, it is noted, a law could have the unintended effect of prohibiting smoking in the privacy of one’s own office. Id. One proposed model law would ban smoking even in private offices unless they were designated as “smoking areas,” which could be done only if there were no other equally convenient place in which the occupier of the office could meet clients or customers. See A. Brody & B. Brody, supra note 6, at 113. It has been argued that smoking validly could be banned in all private places, as the state has sufficient interest in protecting the health of its citizens; but such a ban would certainly be very difficult to enforce. Id. at 111.
66. Comment, The Legal Conflict, supra note 5, at 457 (stiffest penalty is Minn. Stat. Ann. § 609.03(3) (West 1980), providing for fine of up to $500 or jail sentence of up to 90 days).
68. Id. at 458 n.123 (citing Kansas City, Mo., Code of General Ordinances §§ 26.43, 26.44 (1967)).
69. Id. at 458 n.124 (citing St. Louis, Mo., Revised Code §§ 716.060(16), 792.010, 811.010 (1960)).
More sweeping restrictions apply in New York City and Cincinnati, and Chicago has a special court to prosecute violators of prohibitions on smoking in public places. San Francisco recently adopted an anti-smoking ordinance applicable to most workplaces. A number of Canadian municipalities also have enacted smoking bans, several of them of recent origin.

C. Applicability of Environmental Legislation

Even when no state or local law specifically covers smoking, it may be argued that general statutes or ordinances aimed at protection of the environment should apply to curtail smoking, at least in public areas and workplaces. It has been suggested, for instance, that the Illinois Environmental Protection Act's definition of "air pollution" is broad enough to bring tobacco smoke within the prescribed restrictions. The author of the suggestion, however, observed that in practice the law has not been so applied and that the regulations promulgated under the Act have tended to limit its application to outdoor air.

D. Desirability of Uniform Regulations

1. Model Statutes

One problem with current anti-smoking legislation is its "patch-
work quality.'" Smoking may be forbidden in certain locations in one municipality but allowed in similar locations in a neighboring municipality. To solve this problem, which aggravates the difficulties of enforcing smoking bans, a model statute has been suggested. This statute would define "smoking" to include any carrying or processing of a lighted tobacco product and reverse the traditional presumption that smoking is permitted unless expressly prohibited by banning indoor and outdoor smoking unless expressly permitted, such authorization to be granted only for specified areas.

2. Federal Legislation

Federal legislation could be another solution to the current problem of lack of uniformity in anti-smoking laws. Several European countries have enacted nationwide restrictions: in 1973, Bulgaria prohibited smoking in the presence of nonsmokers unless the latter consent in writing. Poland forbids smoking in a number of specified locations. In Italy, there is a ban on smoking in all classrooms, hospitals, public vehicles and transit terminals and in all locations determined to be poorly ventilated. France and Finland have the most sweeping laws of all. France's 1976 ban is applicable to all public places, with an exception for well-ventilated restaurants. Finland adopted a similar law in 1977.

76. The authors give this example:
You can smoke in a cafeteria line just about everywhere in Florida except Fort Lauderdale. People standing in Fort Lauderdale cafeteria lines have reason to assume that smoking is permitted; even if they see a NO SMOKING sign, they tend to disbelieve it; if they do believe it, they ignore it, because they have little respect for laws which tell them that passive smoking is irritating and unhealthy to people standing in cafeteria lines in Fort Lauderdale but not to people standing in cafeteria lines in Sarasota.

A. BRODY & B. BRODY, supra note 6, at 106.

77. Id. at 107-16.

78. Id. at 108. There is an exception for "temporarily possessing a tobacco product lighted by another for purposes of immediate extinguishment." Id. at 107. This exception is intended "to prevent the application of criminal sanctions to the good samaritan who picks up a burning cigarette in order to snuff it out," but the exception does not in itself legalize self-help, such as snatching a cigarette from a smoker's hand in order to put out the cigarette. Id. at 108.

79. Renaud, supra note 73, at 39. The same limitation applies to smoking in the presence of pregnant women or breast-feeding mothers, and smoking is prohibited in cafeterias and youth recreation centers. Id.

80. Id. (restaurants, drug stores, and waiting rooms in health-care facilities).

81. Id.

82. Id. Even the model anti-smoking ordinance would allow restaurants to provide smoking areas. A. BRODY & B. BRODY, supra note 6, at 111 (observing that smokers are particularly compulsive at mealtimes).

83. Renaud, supra note 73, at 39.
In the United States, there is no general anti-smoking legislation. Regulations issued under the Occupational Safety and Health Act of 1970 (OSHA)\(^8\) do control workplace air environments.\(^8\) It has been noted, however, that the OSHA air pollution standards have proven very difficult to enforce.\(^8\) Other federal efforts in this area have consisted chiefly of administrative regulations applicable to vehicles involved in interstate commerce or to federally owned buildings. At one time such restrictions applied to certain areas of trains,\(^8\) and there are still restrictions applicable to buses specifying the areas in which smoking may be allowed.\(^8\) Since 1973, the Civil Aeronautics Board has required commercial airlines to set aside a sufficient number of seats to accommodate all who wish to travel in a non-smoking section.\(^8\) Several federal departments and agencies have restricted smoking in certain areas of their buildings,\(^9\) and Post Office Department regulations forbid that department’s employees to smoke in designated areas.\(^9\)

It has been suggested that the federal bans might be extended to places of public accommodation, all businesses involved in interstate commerce, and all federally financed buildings.\(^9\) One author

\(^8\) 29 C.F.R. §§ 1910.94 (1983) (ventilation in certain occupations: .108(f)(4) (dip tanks); .107(m)(2) (vicinity of organic peroxides); .109(e)(1) (vicinity of explosives); .106(d)(7)(iii) (vicinity of flammable liquids); .107(1)(4)(iii) (vicinity of powder coatings); .107(g)(7), (1)(4)(iii) & (m)(2) (spraying of certain substances)).
\(^8\) Comment, Legislation for Clean Air: An Indoor Front, 82 Yale L.J. 1040, 1048-49 & n.65 (1973) [hereinafter cited as Comment, Legislation for Clean Air].
\(^8\) 14 C.F.R. § 252 (1982); see Comment, Antismoking Legislation, supra note 8, at 186-87. The C.A.B. has not yet taken the major step of completely prohibiting smoking on short flights. Ranii, supra note 22, at 8; see Action on Smoking and Health v. C.A.B., 699 F.2d 1209 (D.C. Cir. 1983) (court vacates C.A.B. regulation relaxing protection of nonsmokers).
\(^9\) A. Brody & B. Brody , supra note 6, at 118 (noting restrictions in buildings of Department of Health, Education and Welfare (now Health and Human Services), Department of Defense and Veterans Administration; in United States Supreme Court, United States Congress and federal museums and libraries; and at presidential press conferences).
\(^9\) Id. at 118 & n.55 (Postal Manual § 462.43, U.S. Post Office, Washington, D.C., Sept., 10, 1974, prohibits smoking by employees working at service windows and counters or while collecting mail from letterboxes, loading or unloading mail, distributing mail into pouches and/or sacks, or when near dropholes or conveyor areas).
even has proposed that Congress enact a Clean Indoor Air Act, paralleling the Clean Air Act of 1970 that applied to outdoor air and limiting the amount of pollutants, including tobacco smoke, that would be allowed in the air in all enclosed spaces.\textsuperscript{93}

\textbf{E. Judicial Treatment of State and Local Legislation}

Thus far, however, most regulations specifically addressing the smoking problem have been enacted under the police power of state and local governments. Such regulations generally have fared well when challenged in the courts. An Oklahoma court upheld a city ordinance prohibiting smoking in specified public places, including elevators.\textsuperscript{94} The ordinance declared smoking in the enumerated places to be a public nuisance and a danger; it required “no smoking” and “smoking permitted” signs to be posted in accordance with its terms and provided penalties for knowing violations.\textsuperscript{95} The court concluded that the law was not unduly vague and that it afforded reasonable notice that smoking in certain areas was a crime.\textsuperscript{96} In Florida, a state trial court’s finding that a sweeping prohibition of smoking in enclosed public places, places of employment and educational or health facilities at least was not invalid in its entirety and hence was the proper subject of a referendum election was upheld.\textsuperscript{97}

In 1979, a Virginia case gave clear warning to advocates of no-smoking laws that any such restrictions must be designed reasonably to achieve their goal of protecting the public health if they are not to be struck down as violative of due process.\textsuperscript{98} City authorities interpreted the ordinance involved in the case as requiring that a

\begin{itemize}
\item \textsuperscript{93} Comment, \textit{Legislation for Clean Air}, supra note 86, at 1050-54; see also Rapace, \textit{Tobacco Smoke: The Double Standard}, 4 Rep. from the Center for Phil. & Pub. Pol’y 6 (1984).
\item \textsuperscript{94} Swanson v. City of Tulsa, 633 P.2d 1256 (Okla. Crim. App. 1981). A dissenting judge found that the ordinance lacked the reasonable specificity required of criminal laws. \textit{Id.} at 1258 (Brett, P.J., dissenting). On the scope of the police power, see generally Noble State Bank v. Haskell, 219 U.S. 104, 111 (1911) (police power extends to “all the great public needs and may be put forth in aid of what is held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare”).
\item \textsuperscript{95} 633 P.2d at 1258.
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} Rivergate Restaurant Corp. v. Metropolitan Dade County, 369 So. 2d 679, 682 (Fla. Dist. Ct. App. 1979) (trial court’s refusal to enjoin referendum election held proper, but court of appeals specifically refrained from considering wisdom or merits of proposed ordinance on ground that such determination was province of electorate not judiciary).
\end{itemize}
restaurant designate some portion of the premises as a non-smoking area, although even a single table so designated would suffice. The court recognized the power of the legislative body to abate conditions it found injurious to the public health but concluded that a requirement so limited in scope would not have any substantial effect on the amount of smoke in the air. The smoke might indeed be toxic, but it was also ambient. Further, the ordinance worked a kind of fraud on the person wishing to avoid tobacco smoke: the law required the restaurant proprietor to post a “no-smoking” sign that would lead the nonsmoker to anticipate a wholly smoke-free environment whereas in fact all the diners in the restaurant would be exposed to the effects of tobacco smoke.

The cases, including the Virginia example, all appear to recognize the power of state and local authorities to restrict smoking—even to impose sweeping bans thereon—based on the reasonable conclusion that smoke is harmful to the health of others. But as in other areas of regulation, any restriction must be calculated reasonably to achieve the desired result.

V. Judicial Action

A. Judicial Remedies Based on Federal and State Constitutions

Before examining possible non-statutory theories of recovery based on common law tort principles or on the common law duty to provide a safe workplace, it is necessary to determine whether the courts may grant relief predicated on the state or federal constitutions. In the absence of legislation specifically addressing the problem, can nonsmokers assert a constitutional right to a smoke-free environment? Such a constitutional right to be free from the hazards of passive smoking unfortunately has not yet been recognized by the courts. Several provisions of the federal Constitution have been

99. Id. at 585, 260 S.E.2d at 242.

100. Id. at 586, 260 S.E.2d at 243.

101. Id.

102. See generally Comment, Nonsmokers' Rights, supra note 2 (discussing problems arising in connection with possible constitutional right to healthful environment).

suggested as possibly supporting such a claim: the ninth amendment, the fifth and fourteenth amendments, and the first amendment.\textsuperscript{104} So far the proponents of these constitutional theories have been unsuccessful.

The ninth amendment, stating that the enumeration of rights in the Constitution shall not be construed as denying other rights retained by the people,\textsuperscript{105} was relied upon by the United States Supreme Court in \textit{Griswold v. Connecticut} in finding unconstitutional as violative of the fundamental right to privacy a statute prohibiting the use of contraceptives.\textsuperscript{106} Several writers have urged recognition of a basic constitutional right to breathe clean air,\textsuperscript{107} but judicial authority thus far takes the view that this "right" is not on a par with the right to privacy in marriage that was recognized in the contraceptive case.\textsuperscript{108} According to those authorities, the ninth amendment does not offer protection against an unclean environment.\textsuperscript{109}

In \textit{Gasper v. Louisiana Stadium and Exposition District}, a group of nonsmokers alleged that smoking in the Louisiana Superdome caused physical harm and discomfort to nonsmokers in the audience and interfered with their enjoyment of events for which they had paid the admission price, violating their rights under the first, fifth, ninth, and fourteenth amendments.\textsuperscript{110} Declaring and later repeating that

the Constitution does not provide a judicial remedy for every social or economic ill, the federal district court dismissed the complaint, finding no protection for nonsmokers under any of the constitutional provisions cited. Consequently, it found that the plaintiffs had no cause of action under the Civil Rights Act of 1871. To hold that the cited amendments to the Constitution allow courts to recognize as fundamental the right to be free from cigarette smoke would, the court said, "mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries." On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, stating that even assuming arguendo that Superdome authorities, the City of New Orleans or the state of Louisiana could prohibit smoking in the Superdome if they chose, the plaintiffs themselves had no constitutional right to enforce against each other a no-smoking policy. The court added that it was "not unaware of what happened when, by express constitutional amendment and congressional enactment, an effort was made to prohibit alcohol for beverage purposes, something fully as physically harmful as tobacco smoke, if not more so." The plaintiffs did manage to obtain the vote of one dissenting judge, who felt their claim was not "obviously frivolous" and should be tried on the merits.

Plaintiffs also assert that forcing a nonsmoker to choose between remaining in a smoke-filled place where he has a right to be and leaving that location deprives the nonsmoker of life and liberty under the due process clauses of the fifth and fourteenth amendments. In one case involving harm to the environment, there is dictum to support this argument. However, when deprivation of life and liberty was raised by the plaintiffs in the Gasper case, the federal district court rejected the argument on the ground that the plaintiffs were not compelled to use the Superdome and could stay home instead. The court's reasoning is clearly subject to criticism,

111. Id. at 722.
112. Id.
113. Id. at 721.
115. Id. at 899 (Ainsworth, J., dissenting).
116. See A. Brody & B. Brody, supra note 6, at 88-90; Comment, The Legal Conflict, supra note 5, at 462-63; Comment, The Non-Smoker in Public, supra note 6, at 143, 165-70.
because to live a full life a person will find it necessary to frequent public places.\textsuperscript{119}

The first amendment arguably is violated when nonsmokers effectively are prevented by pervasive tobacco smoke from using such public facilities as libraries, museums, and other places where ideas and information are disseminated.\textsuperscript{120} So far the courts have paid scant attention to this argument.\textsuperscript{121}

With respect to similar factual situations, one writer has urged the equal protection clause as a possible basis for relief to nonsmokers: the state, it is asserted, by allowing smoking in public buildings, prevents sensitive persons from enjoying equal access to governmental services and consequently denies them equal treatment under the law.\textsuperscript{122} In rebuttal, it has been pointed out that because nonsmokers are unlikely to be considered a suspect class, and because the right to clean air has not been classified as fundamental, the equal protection test applied to governmental action in this area will be the rational basis test—i.e., the government's regulatory measures will be upheld if supported by any rational foundation.\textsuperscript{123} Equal protection, therefore, like the first amendment, seems an unlikely source of relief for nonsmokers.

One court has summarized the chief obstacles to recognizing a constitutional right to a clean environment: (1) the lack of any historical basis for recognizing such a right under the ninth or fourteenth amendments; (2) the lack of "decisional standards" in the due process clause to aid a court in determining whether environmental rights have been infringed; and (3) judicial lack of expertise needed for the balancing required in deciding environmental

\begin{thebibliography}{9}
\bibitem{119} See A. Brody & B. Brody, supra note 6, at 86-87; Comment, \textit{The Legal Conflict}, supra note 5, at 463.
\bibitem{120} See A. Brody & B. Brody, supra note 6, at 86-87; Comment, \textit{The Legal Conflict}, supra note 5, at 464.
\bibitem{122} Comment, \textit{The Non-Smoker in Public}, supra note 6, at 166.
\bibitem{123} Comment, \textit{The Legal Conflict}, supra note 5, at 464.
\end{thebibliography}
issues. Given these obstacles, it has been predicted realistically that if a constitutional right to a healthful environment is ever recognized, the recognition first will come in a case involving pollution more widespread than that caused by cigarette smoking. It also has been noted that state action is essential to a claim based on alleged violation of the Bill of Rights or the fourteenth amendment, whereas in nonsmokers' cases state inaction is the issue. This inaction by the state is all the more unlikely to satisfy current requirements for relief based on the Constitution because judicial intervention is being sought to force the government to act rather than to test the validity of affirmative state conduct.

One possible solution to the lack of relief provided by present constitutional doctrine would be a state constitutional amendment specifically recognizing the right to a healthy environment. Several states now have adopted provisions to that effect. An amendment to the United State Constitution that would recognize an inalienable right to a decent environment also has been proposed. But it has been noted that even under the Illinois Constitution's broad language, which creates in individuals standing to sue to enforce the right to a healthful environment, there is little assurance of help

125. Id. at 74-75; see Note, Toward a Constitutionally Protected Environment, 56 VA. L. REV. 458, 473 (1970) (advocating constitutional right to clean environment while stating that pollution from cigarette smoking should not be included because insufficiently unreasonable to qualify for constitutional consideration).
126. Comment, Where There's Smoke, supra note 6, at 75 n.72 (requirement of state action was established in The Civil Rights Cases, 109 U.S. 3 (1883)). In Environmental Defense Fund v. Hoerner Waldorf Corp., 1 ENV'T REP. (BNA) 1640, 3 ENVTL. L. REP. (ENVT.
L. INST.) 20,794 (D.C. Mont. 1970), state licensing and the failure of the state to abate the alleged pollution were held insufficient to constitute state action. Comment, Where There's Smoke, supra note 6, at 75 n.73; cf. Hughes v. Superior Court, 339 U.S. 460, 468 (1950) (state is free to deem it wiser to regulate or not to regulate). See generally Henken, Privacy and Autonomy, 74 COLUM. L. REV. 1410, 1419 (1974); Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 COLUM. L. REV. 656 (1974).
127. Comment, Where There's Smoke, supra note 6, at 75-76. It has been suggested, however, that the equal protection argument might have a chance of success in the rare instances in which state statutes specifically allow smoking in certain places. Comment, The Legal Conflict, supra note 5, at 464-65 (examples from Arkansas and Pennsylvania).
129. Comment, The Non-Smoker in Public, supra note 6, at 169-70. The amendment was introduced by then-Senator Gaylord Nelson of Wisconsin. Id.
to the nonsmoker since proof that any particular smoker’s pollution caused harm to the plaintiff’s health may be difficult to establish.\textsuperscript{130}

B. Judicial Remedies Derived from Other State and Federal Legislation Not Directly Related to Smoking

No plaintiff appears to have been successful in obtaining a broad no-smoking rule from a court in the absence of specific legislative or administrative action. Therefore, nonsmoker litigants in imaginative efforts to obtain relief have turned to legislation only peripherally affecting the realm of public health and nuisance. In a North Carolina case, the plaintiffs brought an action based on a state law providing that “handicapped persons” were to have full and free use of public facilities.\textsuperscript{131} The plaintiffs alleged that because they suffered discomfort and harm from smoke inhalation, they qualified as “handicapped” under the state statute, and that because the defendant county allowed smoking in its public buildings and facilities, they were denied access to those buildings and participation in the activities held therein in violation of the statute.\textsuperscript{132} The plaintiffs, therefore, sought to compel prohibition of smoking in county buildings. In amending their complaint, the plaintiffs also alleged violation of their rights under the first and fourteenth amendments and claimed to have a cause of action under the Federal Civil Rights Act.\textsuperscript{133} The North Carolina Court of Appeals denied relief, finding that in protecting “handicapped persons” the legislature did not intend to cover all persons harmed or irritated by tobacco smoke and that the statute cited was irrelevant to the case at bar.\textsuperscript{134} The constitutional claim was denied also, largely in reliance on the Gasper case from Louisiana.\textsuperscript{135} In an Iowa case in which an airline passenger alleged violation of his right not to be annoyed by tobacco smoke, the court upheld a finding that if the airline followed Civil Aeronautics Board regulations and set aside seats for nonsmokers, the airline could not be found to have breached its duty to the nonsmoker plaintiff merely because it did not request that other passengers refrain from smoking.\textsuperscript{136}

\textsuperscript{130} Leahy, Individual Legal Remedies Against Pollution in Illinois, 3 Loy. U. Chi. L.J. 1, 6 (1972); see Comment, Nonsmokers’ Rights, supra note 2, at 618.

\textsuperscript{131} GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979).

\textsuperscript{132} Id., 256 S.E.2d at 478.

\textsuperscript{133} Id., 256 S.E.2d at 478.

\textsuperscript{134} Id. at 226, 256 S.E.2d at 478.

\textsuperscript{135} Id. at 228, 256 S.E.2d at 479.

\textsuperscript{136} Raverby v. United Airlines, Inc., 293 N.W.2d 260, 265-67 (Iowa 1980).
Plaintiffs in such cases would seem to be harmed by the very rule of construction that aids them in cases involving an extant legislative ban on smoking. When the legislature has imposed an anti-smoking rule, the validity of the rule will be assumed and the court will not look to its wisdom but will consider only whether the regulation is reasonably tailored to a valid legislative purpose. When the legislature has not acted, its wisdom in remaining silent will not be considered either. Under such circumstances, relief could be based only on the constitution, and, as noted, a constitutional right not to be bothered by tobacco smoke has yet to be recognized.

VI. Common Law Theories of Recovery

If the courts were to impose a no-smoking ban in the absence of legislative or administrative action, the judiciary might be invading the sphere of legislative activity. Courts may be unwilling to go this far, but occasionally they may be able to grant limited relief to the nonsmoker on a tort theory or on the basis of an employer's duty to provide reasonably safe and healthful working conditions or on some other common law ground. A. Battery

Battery is one tort theory that might be used by the nonsmoker. It seems that at a minimum liability for battery could be found if a smoker intentionally caused discomfort to someone, by blowing smoke into the victim's face, for instance. It has been suggested that exhaled smoke is an instrumentality sufficient to effectuate the required element of "contact," because particles of smoke touch the plaintiff. Also, the second requirement that the contact be harmful or offensive is satisfied. With respect to harm, at least

137. See Comment, Nonsmokers' Rights, supra note 2, at 161 (citing Goldblatt v. Town of Hempstead, 369 U.S. 591 (1962)).
138. See Comment, Antismoking Legislation, supra note 8, at 183.
139. On smokers' conduct as intentional tort, see generally A. Brody & B. Brody, supra note 6, at 75-98 (Chapter 4 bears title "Suing for Clean Air: A Tortuous Path—Protecting the Health of the General Population by Lawsuits").
140. See Comment, Where There's Smoke, supra note 6, at 86; Comment, The Legal Conflict, supra note 5, at 470.
141. See Comment, The Legal Conflict, supra note 5, at 470 (in 1976 Florida incident, smoker was prosecuted under state law for such conduct).
142. See Comment, Where There's Smoke, supra note 6, at 87; Comment, The Legal Conflict, supra note 5, at 470. For the elements of battery, see Restatement (Second) of Torts, §§ 13 & 18 (1965). Indeed, studies have shown that smoke actually is attracted to human bodies "like metal shavings to a magnet." Comment, The Legal Conflict, supra note 5, at 470; see A. Brody & B. Brody, supra note 6, at 32.
143. Comment, Non-Smokers' Rights, supra note 2, at 170. It has been stated that when "offensiveness" is relied on to satisfy this requirement, the alleged "offensiveness" must
one case has recognized the dangers from involuntary smoking, and a study has established that seventy-five percent of nonsmokers find tobacco smoke annoying. The third element of battery—intent—is easily satisfied if, as under the majority view, intent to cause contact is deemed sufficient. Even if intent to cause harm is required, it is well settled that such intent is found whenever there is substantial certainty that the harmful result will follow from the defendant's act. Therefore, a defendant smoker could be held liable whenever the smoker has been warned that the plaintiff finds the smoke bothersome. A serious problem in actions for battery by smoke is that consent to customary and reasonable social contacts is presumed. However, while consent to smoking might be alleged in defense, express non-consent should serve to rebut the presumption. It even has been suggested that, in fairness, a nonsmoker should not be required to object in order to establish a battery action because "[o]nce a smoker 'lights up,' nonsmokers must endure the very smoke they find objectionable, to communicate their objection to the smoker." meet the test of reasonableness—i.e., must be such that the reasonable person would suffer under the circumstances. W. PROSSER, The Law of Torts 32 (4th ed. 1971). It thus has been doubted that a person could erect a "glass cage" around himself and declare that (s)he finds all contact offensive. Id.


145. Comment, The Legal Conflict, supra note 5, at 449-50 & nn.51-52 (information obtained from the American Lung Association of Western Missouri; the one-hundred-call random telephone survey of adults 18 years and older was conducted in 1978 in St. Joseph, Missouri).

146. See, e.g., Lambertson v. United States, 528 F.2d 441, 444 (2d Cir. 1976) (calling this "hornbook law in New York, as in most other jurisdictions"); Masters v. Becker, 22 A.D.2d 118, 120, 254 N.Y.S.2d 633, 635 (1964); Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), aff'd, 49 Wash. 2d 499, 304 P.2d 681 (1956) (intent to injure or embarrass not necessary if defendant was substantially certain that pulling chair as plaintiff was about to sit down would cause plaintiff to come into contact with ground). The Restatement definition would seem to require the intent to cause harm or offense. See Baldinger v. Banks, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (Sup. Ct. 1960) (applying similar language from the First Restatement). Some cases say that if the contact is unlawful, then the intent to cause that contact suffices. See, e.g., Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).

147. RESTATEMENT (SECOND) OF TORTS § 8A comment b (1965); see W. PROSSER, supra note 143, at 32.

148. Comment, The Legal Conflict, supra note 5, at 471.

149. Comment, Where There's Smoke, supra note 6, at 88; see W. PROSSER, supra note 143, at 37.

150. Comment, Where There's Smoke, supra note 6, at 88 (increasing complaints about tobacco smoke argue against presumption of consent to such contact, but it is questionable whether courts will find smokers liable in battery simply because nonsmoker considers smoking an affront to his personal dignity).

151. A. BRODY & B. BRODY, supra note 6, at 77. If there is possible liability in tort for battery, there is also possible liability for assault, because assault involves apprehen-
There have been only a few cases involving this theory. In a situation that arose in Sydney, Australia, a smoker was found guilty of criminal assault for intentionally blowing smoke into the face of a nonsmoker and was fined $298.¹⁵²

In a North Carolina case, a postal employee complained that his superior smoked a cigar at a meeting with the plaintiff in the superior's office, making the plaintiff ill.¹⁵³

The court denied recovery on the ground that there was no competent evidence that any physical injury had been caused by the smoke.¹⁵⁴

One commentator has argued that the court's decision was wrong for two reasons: aggravation of a proven allergy is treated by the court as insignificant when in fact it may cause serious harm—and in this case apparently did cause severe respiratory problems; also, physical injury is not required for the tort of battery because an offensive touching will suffice.¹⁵⁵

The harmful nature of smoking occasionally may be recognized in an oblique way as relevant to a defense against tort or criminal allegations of battery. In one Connecticut case, a nonsmoker aimed a non-toxic air sanitizer at an offending cigarette. Arrested and charged with the crimes of recklessness and endangerment, the defendant was acquitted on the ground that his action constituted self-defense against the smoker's assault and battery.¹⁵⁶

Even if successful, tort suits based on assault or battery generally would produce only minimal damages.¹⁵⁷ However, it has been suggested that the real significance of assault and battery suits against smokers is that they open the door to actions against proprietors of places of public accommodation to enjoin them from permitting smoking on the ground that such places have a duty of reasonable care to protect patrons from the risk of assault and battery.¹⁵⁸

¹⁵² Comment, The Legal Conflict, supra note 5, at 471 (citing American Lung Association of Western Missouri, Smoking and Health Report (Oct. 1978)). The elements of criminal assault are thoroughly discussed in Perkins, An Analysis of Assault and Attempts to Assault, 47 Minn. L. Rev. 71 (1962).


¹⁵⁴ Id. at 217, 252 S.E.2d at 252.

¹⁵⁵ Comment, The Legal Conflict, supra note 5, at 472.

¹⁵⁶ A. Brody & B. Brody, supra note 6, at 78-79 (citing Matchan, The Case for the Nonsmoker, Let's Live, July, 1974, at 81). The authors comment that although "[n]ot many of us are so brazen as to squirt at stogies with water guns . . . we may be more prone to sue hotels, restaurants, and taverns for allowing guests to be battered with cigarette smoke." Id. at 79.

¹⁵⁷ Id.

¹⁵⁸ Id. at 79-80.
B. Intentional Infliction of Emotional Distress

A relatively recent tort, intentional infliction of emotional distress, may provide the nonsmoker another possibility for relief. The main difficulty with this cause of action is that it is not enough that the defendant's conduct be inconsiderate and unkind: it must be extreme and outrageous. Cases of sufficiently outrageous conduct on the smoker's part may be rare. If a person is made ill by the smoke at his place of employment, however, and consequently has to go to the hospital where his supervisor visits him and blows smoke in his face, the supervisor's conduct might be found sufficiently horrendous, according to one commentator.

C. Nuisance

Nuisance has been mentioned as another possible cause of action for the nonsmoker. Public nuisance has been used extensively to combat air pollution caused by smoke from factories or slag piles. A private nuisance action may be of little use, however, because it requires an interference with the plaintiff's use and enjoyment of his land. It has been suggested that a potential plaintiff's interest

159. Comment, Where There's Smoke, supra note 6, at 89; Comment, The Legal Conflict, supra note 5, at 472. The requirements for the tort of intentional infliction of emotional distress are outlined in Restatement (Second) of Torts § 46 (1965). See generally Magruder, Mental and Emotional Distress in the Law of Torts, 49 Harv. L. Rev. 1033 (1936).

160. Restatement (Second) of Torts §§ 46-47 (1965). If defendant owes plaintiff a higher-than-normal duty, such as the duty owed by a common carrier to a passenger, by an innkeeper to a guest, or by a public utility to a customer, grossly insulting or highly offensive conduct, even if not considered "outrageous," will suffice. Prosser, Insult and Outrage, 44 Calif. L. Rev. 40 (1956).

161. Comment, The Legal Conflict, supra note 5, at 473 & n.262 (citing Restatement (Second) of Torts § 46 comment f, illustration 12 (1965) and similar facts presented by McCracken v. Sloan, 40 N.C. App. 214, 253 S.E.2d 250 (1979)).

162. A. Brody & B. Brody, supra note 6, at 83-86; Comment, Where There's Smoke, supra note 6, at 81-86; Comment, The Legal Conflict, supra note 5, at 467-70; Comment, The Non-Smoker in Public, supra note 6, at 155-57; see also Renaud, supra note 73, at 37-38. See generally Comment, Nonsmokers' Rights, supra note 2, at 619 & n.58 (concluding that these cases are not applicable in the tobacco-smoke situations).

163. Comment, Nonsmokers' Rights, supra note 2, at 619 & n.58 (citing Comment, Where There's Smoke, supra note 6, at 82. It has been suggested that there are occasional cases in which the use or enjoyment of real property might be harmed by cigarette smoking, as where a tenant in an apartment house is bothered by his neighbor's smoke. Id. at 82 n.97. However, it has been noted that even in such a case the plaintiff could recover only if he showed that the quantity and probability of harm outweighed the utility of the conduct. Comment, The Legal Conflict, supra note 5, at 467 n.204 (citing Restatement (Second)
in a seat at a sporting or theatrical event might provide the required property interest.\textsuperscript{165} It also has been noted that in one state, Missouri, an interference with use of land is \textit{not} required to maintain an action for private nuisance.\textsuperscript{166}

Private nuisance actions are likely to remain few and far between in tobacco-related situations because the average nonsmoker can protect himself from tobacco smoke on his own property and because more damage must be shown to support a nuisance claim than any individual ordinarily could show in a single case against a smoker or group of smokers.\textsuperscript{167} Also, in private nuisance actions, a plaintiff's abnormal sensitivities are ignored in determining whether the alleged interference is unreasonable.\textsuperscript{168}

These limitations may render of little use a cause of action for private nuisance, but a public or "common" nuisance—i.e., one annoying the public generally—\textsuperscript{169} might conceivably be found to arise from smoking.\textsuperscript{170} Some states have statutes specifically declaring smoking, at least in certain public areas, to be a public nuisance\textsuperscript{171} or a health hazard.\textsuperscript{172} Even in the absence of a specific declaration, there is usually a general public nuisance statute that prohibits conduct harmful to the health or comfort of the public.\textsuperscript{173} Under these general statutes, a plaintiff might establish a public nuisance by showing that tobacco smoke was a substantial and unreasonable health hazard.\textsuperscript{174} The plaintiff, however, has a further problem in

\textsuperscript{165} A. Brody & B. Brody, supra note 6, at 83.

\textsuperscript{166} Comment, \textit{The Legal Conflict}, supra note 5, at 468 (citing Comment, \textit{The Law of Private Nuisance in Missouri}, 44 Mo. L. Rev. 20 (1979)).

\textsuperscript{167} Comment, \textit{Nonsmokers' Rights}, supra note 2, at 620 (indicating that same problem arises in many potential nuisance actions based on air pollution, not just those in which tobacco smoke is involved, and citing Lanzillotti & Blair, \textit{Some Economic and Legal Aspects of the Pollution Problem—The Automobile; A Case in Point}, 24 U. Fla. L. Rev. 399, 404 (1972); Rice, \textit{Pollution as a Nuisance: Problems, Prospects, and Proposals}, 34 Atl. L. J. 202, 213 (1972)).

\textsuperscript{168} A. Brody & B. Brody, supra note 6, at 84; Renaud, supra note 73, at 37.


\textsuperscript{170} Comment, \textit{Where There's Smoke}, supra note 6, at 82; Comment, \textit{The Legal Conflict}, supra note 5, at 468; Comment, \textit{The Non-Smoker in Public}, supra note 6, at 156.

\textsuperscript{171} See laws cited supra note 53 from Alaska, Arizona, Idaho, Oklahoma, Rhode Island, and South Dakota.

\textsuperscript{172} See laws cited supra note 53 from Arizona, Arkansas, California, Colorado, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, and Rhode Island.

\textsuperscript{173} Comment, \textit{Where There's Smoke}, supra note 6, at 82.

\textsuperscript{174} Id. at 81-83; Comment, \textit{The Legal Conflict}, supra note 5, at 468. It has been stated that if the smoking were done in a place where it is prohibited by statute, the statutory
public nuisance tort cases: he must show harm peculiar to himself, differing in kind and not just in degree from that suffered by the general public. If a plaintiff can show actual personal injury, that injury may well suffice to meet the requirement of special harm. Certainly that should be true if heart or lung disease is shown to have been aggravated by the smoke or if a severe allergic reaction occurs.

Although damages in a public nuisance suit might be minimal, as often would be the case with battery, there exists the further possibility in nuisance actions of obtaining an injunction against the nuisance. In one case in which the plaintiff claimed that smoking in a stadium amounted to a public nuisance, the court issued a writ of mandamus ordering the city to abate the nuisance by prohibiting smoking and the sale of cigarettes within the facility. It has been observed, however, that an injunction is not very effective in many smoking situations, because injunctions are granted principally against stationary nuisances that come from one principal source and for which one person or a small group can be held responsible.

D. Strict Liability

Strict liability in tort traditionally furnishes redress for harm resulting from abnormally dangerous activities. The suggestion has been made that strict liability in tort might apply to involuntary smoking because it meets the oft-stated test of creating a risk prohibition would be persuasive evidence of the unreasonableness of the conduct. Comment, Where There's Smoke, supra note 6, at 83.

175. W. Prosser, supra note 143, at 586; O. Reynolds, LOCAL GOVERNMENT LAW 353 (1982); Renaud, supra note 73, at 38; Comment, The Legal Conflict, supra note 5, at 468.

176. Restatement (Second) of Torts § 821C comment d & illustration 2 (1979).

177. Comment, Where There's Smoke, supra note 6 at 85; Comment, The Legal Conflict, supra note 5, at 469.

178. Comment, Where There's Smoke, supra note 6, at 85-86.

179. Comment, The Legal Conflict, supra note 5, at 469-70 (citing Stockler v. City of Pontiac, No. 75-131479 (Cir. Ct. Oakland County, Mich. Dec. 17, 1975)). The city obtained a stay of the writ, and the suit was eventually settled out-of-court, the settlement providing for a ban on smoking in the stands but allowing smoking in concourse areas, restrooms, and private boxes. Id.

180. Comment, Nonsmokers' Rights, supra note 2, at 621.

181. See Restatement (Second) of Torts § 520 (1977) for a list of the factors to be weighed in determining such strict liability; see generally Harris, Liability Without Fault, 6 Tul. L. Rev. 337 (1932); James, Some Reflections on the Bases of Strict Liability, 18 La. L. Rev. 293 (1958); Ognall, Some Facets of Strict Tortious Liability in the United States and Their Implications, 33 Notre Dame Law. 239 (1958); Peck, Negligence and Liability Without Fault in Tort Law, 46 Wash. L. Rev. 225 (1971); Note, Liability Without Fault: Logic and Potential of a Developing Concept, 1970 Wis. L. Rev. 1201.
of harm to others that cannot be eliminated by the exercise of even
the utmost care. The doubt arises, however, as to whether the
further requirement of a high degree of risk of great harm to others
is met. Those elements might be found if the smoking occurs in
certain surroundings such as the intensive care unit of a hospital
or in situations in which there is likelihood of harm to particularly
sensitive persons such as children or those suffering from heart or
lung disease. Still another problem, however, is that strict liability
normally is not applied to activities that constitute common usage,
and smoking continues to be a prime example of such customary
social practices.

E. Product Liability

A final possibility for nonsmoker tort plaintiffs is a product liability
suit against a tobacco company. Smokers themselves brought a few
suits in the 1950's and 1960's, but these suits invariably failed. During
that period there was insufficient proof of the causal connection
between smoking and cancer or other illnesses allegedly produced
by smoking. Even after the causal connection had been established
more or less persuasively, however, product liability suits
seldom were attempted because the assumption-of-the-risk defense
seemed insurmountable. If active smokers do indeed assume a
risk of which they continually are being made aware, passive smokers

182. A. Brody & B. Brody, supra note 6, at 94.
183. Comment, The Legal Conflict, supra note 5, at 474. The Restatement mentions
nuclear explosions as an example of an occurrence to which strict liability should apply. Restatement (Second) of Torts § 520 comment g (1977).
184. A. Brody & B. Brody, supra note 6, at 94. The trend in determining whether
an activity is abnormally dangerous, and thus subject to strict liability, is toward
emphasizing the locale in which the activity is performed. See W. Prosser, supra note
143, at 511-12.
185. A. Brody & B. Brody, supra note 6, at 94; Comment, The Legal Conflict, supra note
5, at 474.
186. See A. Brody & B. Brody, supra note 6, at 95. The authors argue that the common-
ness of an activity normally precludes strict liability because it indicates social utility and
because it means that other people must be aware of the activity and thus able to take
precautions against it. Id. Smoking, they contend, has no social utility, and nonsmokers
ordinarily cannot avoid it. Id.
187. W. Prosser, supra note 143, at 660 & nn.82-83; Comment, The Legal Conflict, supra note
5, at 474.
188. Comment, The Legal Conflict, supra note 5, at 474.
189. Id. (citing Wegman, Cigarettes and Health: A Legal Analysis, 51 Cornell L.Q. 678,
719-21 (1966); Comment, Can Cigarettes Be Merchantable Though They Cause Cancer?, 6 Ariz.
L. Rev. 82, 91 (1964)). Assumption of the risk may be more difficult to establish today
than formerly, because increasingly the risk must be unreasonable as well as knowingly and
voluntarily assumed.
cannot be said to have assumed the risk. Successful product liability suits, therefore, may be brought by “bystanders” forced to inhale the tobacco smoke of others. The greatest difficulty with respect to a product liability action in this area is that the plaintiff-bystander, at least under a strict product liability theory, would have to show that the smoking material was unreasonably dangerous or defective.

One commentator adequately summarizes the three drawbacks to the use of any of the preceding tort theories: (1) the theoretical uncertainty of ultimately prevailing under any of the theories practically may be lessened by judicial reluctance to impose liability on a smoker for what has been a socially acceptable act, at least for most of our recent history; (2) tort suits are expensive and protracted; (3) the action would afford relief only to the person or persons bringing it, and only the defendant(s) in that particular action would be bound by an eventual injunction or court order.

F. Breach of Employer’s Duty to Provide a Safe Working Environment

One who is annoyed by tobacco smoke at his or her workplace yet may find an adequate nonstatutory remedy: a suit against the employer for breach of the employer’s duty under the common law to provide a safe working environment. In a landmark New Jersey case, Shimp v. New Jersey Bell Telephone Co., the plaintiff-employee had suffered for some time from the cigarette smoking that occurred at her place of employment and sued to enjoin smoking in the

190. Id. at 475.
191. Comment, The Legal Conflict, supra note 5, at 475; see A. Brody & B. Brody, supra note 6, at 92 (citing Prosser who suggested that tobacco products might well be classified as unavoidably unsafe and therefore not subject to strict liability); W. Prosser, supra note 143, at 660; cf. Restatement (Second) of Torts § 402A comment o (1965) (products incapable of being made safe for their intended and ordinary use are not unreasonably dangerous if properly prepared and accompanied by proper warnings); see also Garner, Cigarettes and Welfare Reform, 26 Emory L.J. 269 (1977) (making cigarette manufacturers pay welfare costs occasioned by smoking gives them incentive to make less harmful product).

192. Comment, Where There’s Smoke, supra note 6, at 93.
193. Id. However, it has been suggested that an additional remedy under tort theory might be an action brought in negligence against a government entity for failure to control the pollution of smokers by enforcing or enacting the necessary statutes, which action, if successful, might spur the government to action. See Rheingold, Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere, 33 Brooklyn L. Rev. 17, 28-29 (1966).

workplace. She had a severe allergy to such smoke that could be triggered by even one nearby smoker, and seven of the thirteen employees in her department smoked heavily. When she sought relief through the company grievance procedure, she succeeded only in obtaining the installation of an ineffective exhaust fan. Her suit for injunctive relief resulted in the court’s recognizing a common law duty on the part of the employer to provide a safe workplace. Noting that federal legislation such as the OSHA does not preempt the field of occupational safety and that cigarette smoke is dangerous to the health of both smokers and nonsmokers, the court granted an injunction and ordered the employer to restrict smoking to the nonwork area. Because the smoke was not a necessary result of the business’s operation, the court found that the plaintiff had not assumed the risk of breathing the smoke when she accepted employment. The state workers’ compensation law was said to be a possible bar to monetary damages but not to injunctive relief.

The Shimp case has been called “probably the single most significant legal stride in the nonsmokers’ movement,” especially because the court recognized the danger of tobacco smoke to nonsmokers generally, not just to nonsmokers with allergies. It has been observed that injunctive relief such as that granted by the New Jersey court may provide the nonsmoker with the only realistic alternative to quitting the job, because state anti-smoking laws generally do not apply to work areas. Although this area of the law is so new that the extent to which other courts will follow the New Jersey precedent remains unclear, a Missouri case has recently reached the same conclusion.

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196. 145 N.J. Super. at 521, 368 A.2d at 410.
197. Id.
198. Id. at 531, 368 A.2d at 416.
199. Id., 368 A.2d at 416.
200. Id. at 523, 368 A.2d at 411.
201. Id. at 524, 368 A.2d at 412.
203. Id. at 467 (citing Shimp, 145 N.J. Super. at 526, 368 A.2d at 413).
205. See D. Shimp, supra note 195, at 45 (successful lawyer in the Shimp case notes importance of bringing such an action before “innovative and fearless” judge).
on an employer to provide a smoke-free workplace to an employee particularly sensitive to tobacco smoke.\textsuperscript{207}

Several possible roadblocks have been noted that might hamper a plaintiff-employee's suit on the ground of breach of duty to provide a safe workplace.\textsuperscript{208} First, in some situations, assumption of the risk might be found more readily than in the New Jersey case.\textsuperscript{209} The New Jersey court never spoke to the defendant's contention that the plaintiff employee had assumed the risk by remaining at work after complaining to the employer with no result.\textsuperscript{210} Arguably, of course, this acquiescence was not voluntary. Furthermore, the presence of tobacco smoke may not suffice to convince all courts that the work environment is unsafe.\textsuperscript{211} Also, some jurisdictions may not grant an injunction under such circumstances.\textsuperscript{212} Assuming an injunction might issue, it is unclear just how severe the plaintiff’s symptoms would have to be in order to justify relief.\textsuperscript{213} Finally, in some states, legislation may be found to preclude common law relief.\textsuperscript{214} It has been observed that the duty of the employer to provide a safe workplace really is part of the general duty of a person who controls premises to protect those lawfully thereon, and that this general duty is comparable to a business establishment's duty to protect its patrons.\textsuperscript{215} Eventually, if the hazards of involuntary

\textsuperscript{207} Gordon v. Raven Systems, 462 A.2d 10 (D.C. 1983). Unlike the plaintiff in \textit{Shimp}, Gordon offered no evidence of the deleterious effects of smoke on all workers. \textit{Id.} at 15. The court found that the days of the sweat shop are over and that because employees enjoy a wide range of legislative protective devices, both physical and financial, the common law does not require that employers conform the workplace to "the sensitivities of an individual employee." \textit{Id.}

\textsuperscript{208} Comment, \textit{Where There's Smoke}, supra note 6, at 91-93.

\textsuperscript{209} \textit{Id.} at 92.

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{Id.}

\textsuperscript{214} \textit{Id.} But it would seem that the employee usually is entitled to pursue common law remedies, at least after he has exhausted any administrative remedies provided by the state statutes. See Blumrosen, Ackerman, Kligerman, Van Schaick & Sheehy, \textit{Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions}, 64 \textit{Calif. L. Rev.} 702 (1976) (although federal or other legislation may provide means for eliminating hazards at workplace, employee still can enforce employer's common law duty after exhausting administrative remedies). Employers increasingly are promulgating rules with respect to smoking in their workplaces, and organizations such as the American Lung Association and the American Cancer Society distribute copies of those regulations to serve as guidelines for employers similarly inclined.

\textsuperscript{215} A. \textsc{Brody} & B. \textsc{Brody}, supra note 6, at 82-83. The authors suggest two reasons behind this "premises liability": (1) the employee or patron conveniently cannot go elsewhere, and (2) the person in charge of the premises has greater ability to protect the
smoking come to be appreciated better by society and the courts, all proprietors may be found to have a duty of reasonable care in protecting their employees and customers from harm caused by such smoke.\textsuperscript{216}

As the New Jersey court noted in \textit{Shimp}, OSHA (the Act) does not preempt the field of worker safety.\textsuperscript{217} This interpretation does not mean, of course, that a plaintiff-employee could not base a claim on the Act when suing for harm caused by a smoky work environment. In fact, however, the Act thus far has not proven helpful to such plaintiffs. The legislation envisions protection of healthy workers, not those with serious allergies or impairments, and the Act’s standards are difficult to enforce.\textsuperscript{218} Furthermore, there is authority to the effect that the Act does not create private civil remedies against those who violate its provisions.\textsuperscript{219}

\textbf{VII. Conclusion}

Various grounds for judicial relief for the nonsmoker can be urged.\textsuperscript{220} For instance, it has been argued persuasively that the federal government should be held liable for injuries caused by cigarette smoking because the government, although advising through the Surgeon General’s office that smoking is harmful, continues to support the tobacco industry through various programs of the Department of Agriculture.\textsuperscript{221} But as has been shown above, any avenues of judicial relief present formidable obstacles: lack of precedent, the courts’ unwillingness to force governmental action, and the courts’ reluctance to overturn governmental action as

employee or patron from dangers caused by a third party than such employee or patron has to protect himself. \textit{Id.} at 82. \textit{See also} Raverby v. United Airlines, Inc., 293 N.W.2d 260 (Iowa 1980) (airline owes passengers common law duty to provide safe environment for travel, but evidence of airline’s compliance with applicable administrative regulations sustained determination that airline had not breached its duty).

\textsuperscript{216} A. Brody & B. Brody, \textit{supra} note 6, at 82-83.

\textsuperscript{217} 145 N.J. Super. at 522, 368 A.2d at 410-11.

\textsuperscript{218} Comment, \textit{Legislation for Clean Air}, \textit{supra} note 86, at 1048-49.


\textsuperscript{220} A. Brody & B. Brody, \textit{supra} note 6, at 125-37 (Chapter 6 bears title ‘‘There’s More Than One Way to Skin a Cat’—Protecting the Health of the General Population by Nonlegislative Means’’).

\textsuperscript{221} Sigmon, \textit{Cigarette Smoking Injuries: A Theory for Recovery Against the Federal Government}, \textit{Trial}, April, 1983, at 64. The Sigmon article was the winning entry in the American Trial Lawyer’s 1982 Environmental Law Essay Contest. The second- and third-place essays that appear in the same issue of \textit{Trial} also propose theories under which the federal government could be held liable for smoking injuries. \textit{Id.} at 67-72.
unreasonable. The nonsmoker’s position is greatly strengthened if the burden can be shifted—that is, if legislative or administrative action to curb smoking can be obtained so that the burden of challenging and overturning it is placed on the other side. Courts have shown considerable willingness to uphold restrictions on smoking once they are enacted. The future may hold increased recognition of the right to a smoke-free environment as fundamental and perhaps constitutionally protected. But for the present, it seems, the nonsmoker’s best hope lies with the legislative bodies.\footnote{222} Increased emphasis should be placed not only on obtaining enactments but on publicizing and enforcing them\footnote{223} and on achieving uniform and comprehensive restrictions throughout the nation.\footnote{224}

\footnote{222} Ranii reaches essentially the same conclusion in a recent article. Ranii, supra note 22, at 8, col. 2 (citing Comment, Warning: California Antismoking Laws May Be Dangerous to Your Health—An Analysis of Nonsmokers’ Rights in the Workplace, 14 Pac. L.J. 1145 (1983)).

\footnote{223} Comment, Where There’s Smoke, supra note 6, at 106-11.

\footnote{224} The need for comprehensive federal anti-smoking legislation is presented persuasively in Comment, Legislation for Clean Air, supra note 86.