NOTES

SMOKING IN PUBLIC: NONSMOKERS' RIGHTS AND THE PROPOSED IOWA CLEAN INDOOR AIR ACT

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I. INTRODUCTION

> *Smokers and nonsmokers cannot be equally free in the same railway carriage.*
>
> GEORGE BERNARD SHAW

Since the first statement by the Surgeon General in 1964, which implicated smoking as a causative factor in lung cancer, progress has been made in helping Americans quit smoking. Concurrently, there has developed a growing sense among nonsmokers that they deserve freedom from the annoyance and unhealthiness of smoke-polluted air.[1]

The 1986 Surgeon General's Report recognized these concerns and concluded that:

> 1. Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.

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1. AMERICAN HEART ASSOCIATION, PUBLIC POLICY ON SMOKING AND HEALTH; TOWARD A SMOKE-FREE GENERATION BY THE YEAR 2000 (1986) [hereinafter PUBLIC POLICY].

> 2. The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory symptoms, and slightly smaller rates of increase in lung function as the lung matures.
> 3. The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.[2]

Clean indoor air laws are testimony to the social change that has occurred in the attitudes of Americans toward smoking. Smoking is no longer the majority behavior among adult men; it is now a minority behavior among both women and men.[3] The purpose of this note is to analyze the conflict between smokers and nonsmokers. Emphasis will be directed toward analyzing Iowa's proposed Clean Indoor Air Act.[4] In order fully to appreciate the reasons for

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2. CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986) [hereinafter 1986 REPORT].

3. PUBLIC POLICY, *supra* note 1, at 391A.

4. House File No. 79, 72 Gen. Assembly, 1st Sess., (1987) [hereinafter H.F. 79]:

Section 1. Section 98A.1, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

98A.1. DEFINITIONS.

As used in this chapter unless the context otherwise requires:

1. "Smoking" means the carrying of or control over a lighted cigar, cigarette, pipe, or other lighted smoking equipment.

2. "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, all retail stores, offices, including waiting rooms, and other commercial establishments; public conveyances with departures originating in this state; educational facilities, hospitals, clinics, nursing homes, and other health care and medical facilities; and auditoriums, elevators, theaters, libraries, art museums, concert halls, indoor arenas, and meeting rooms. "Public place" does not include a private, enclosed office occupied exclusively by smokers even though the office may be visited by nonsmokers, a room used primarily as the residence of students or other persons at an educational facility, or each resident's room in a health care facility. The person in custody or control of the facility shall provide a sufficient number of rooms in which smoking is not permitted to accommodate all persons who desire such rooms.

3. "Public meeting" means a gathering in person of the members of a governmental body, whether an open or a closed session under chapter 21.

4. "Bar" means an establishment or portion of an establishment where one can purchase and consume alcoholic beverages as defined in section 123.3, subsection 8, but excluding any establishment or portion of the establishment having table and seating facilities for serving of meals to more than thirty-two people at one time and where, in consideration of payment, meals are served at tables to the public.

Sec. 2. Section 98A.2, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

98A.2. PROHIBITION.

1. A person shall not smoke in a public place or in a public meeting except in a designated smoking area. This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under

and benefits of legislation in the area of smoking in public, this note will first survey the history of anti-smoking legislation and the alternative, judicial remedies.

Consider the following situation and the questions which it raises. James is employed by Aesthetics, Inc., as an accountant. A nonsmoker,

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the control of the sponsor of the function and not of the proprietor or person in charge of the place.

2. Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation.

3. Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas. In the case of public places consisting of a single room, the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area. No public place other than a bar shall be designated as a smoking area in its entirety. If a bar is designated as a smoking area in its entirety, this designation shall be posted conspicuously on all entrances normally used by the public.

4. Notwithstanding subsection 1 of this section, smoking is prohibited on elevators.

Sec. 3. Section 98A.3, Code 1987, is amended by striking the section and inserting in lieu thereof the following:

98A.3. RESPONSIBILITIES OF PROPRIETORS.

The person having custody or control of a public place or public meeting shall make reasonable efforts to prevent smoking in the public place or public meeting by:

1. Posting appropriate signs indicating no-smoking or smoking areas.

2. Arranging seating to provide smoke-free areas.

3. Asking smokers to refrain from smoking upon request of a person claiming discomfort from the smoke.

Sec. 4. Section 98A.4, Code 1987, is amended to read as follows:

98A.4. AREAS POSTED.

A person having custody or control of a public place or public meeting shall cause signs to be posted within appropriate areas of the facility advising patrons of smoking and no-smoking areas. In addition the statement "smoking prohibited except in designated areas" shall be conspicuously posted on all major entrances to the public place or public meeting.

Sec. 5. Section 98A.5, Code 1987, is amended to read as follows:

98A.5. ENFORCEMENT OF SMOKING PROHIBITION.

A person in custody or control of a public place or public meeting, or an employee of a public place who is on duty at the public place or public meeting, who observes a person smoking in the public place or public meeting in violation of this chapter shall inform the person that smoking is prohibited by law in that area.

Sec. 6. Section 98A.6, Code 1987, is amended to read as follows:

98A.6. CIVIL PENALTY FOR VIOLATION.

A person who smokes in those areas prohibited in section 98A.2, who violates section 98A.4, shall pay a civil penalty not to exceed fifty dollars for each violation.

Judicial magistrates shall hear and determine violations of this chapter. The civil penalties paid pursuant to this chapter shall be deposited in the county treasury.

EXPLANATION

This bill prohibits smoking in a public place or public meeting except in a designated area or at a private social function. "Public place" is defined and persons having control of a public place may designate smoking areas. Responsibilities of proprietors are specified. A civil penalty for violations not to exceed fifty dollars is provided.

James is critically aware of those who smoke around him at work. Although there are designated smoking areas in the office, his co-workers disregard the notice and smoke at their desks. James is annoyed, as well as physically bothered, by the smoking, but he is reluctant to assert his rights. Actually, he is unsure if he has any rights under any law.

Then, on his way home from work, James stops at Mary's SuperMart for groceries. A white-haired gentleman enters before him, puffing vigorously on a pipe. James tolerates the smoking, again not knowing whether he has any rights to assert.

James is a typical nonsmoker who encounters involuntary smoke throughout his day. His situation raises numerous questions. Does James have any rights against smokers in public? If he is afforded rights, how can they be enforced? May he expect his employer to provide a smoke-free environment? Will his employment be in jeopardy if he complains? Is the store manager responsible for providing clean indoor air for his customers? What alternatives does James have in enforcing his rights?

It is the objective of this note to answer these questions. Keeping James' situation in mind will help the reader transfer the developing law into real experiences.

II. A Historical Perspective of Anti-Smoking Legislation

The problem—how to protect the individual's right to smoke and at the same time protect the nonsmoker's right to a smoke-free environment—is not new. Statutes and ordinances restricting or prohibiting the sale or use of cigarettes appeared as early as the 1800s.[5] At the zenith of these early laws, twelve states had statutes restricting or forbidding the sale or use of cigarettes.[6] These early statutes were promulgated for varying purposes, from fire[7] and disease[8] protection to enforcement of morality[9] and the belief that smoking was reprehensible.[10] It was the end of the nineteenth century before legislation specifically dealt with air pollution.[11] Although anti-smoking legislation became prevalent during the late nineteenth century, these statutes did not remain on the books for long. There was strong public sentiment against any absolute prohibition.[12] The early laws sought to ban

5. Comment, *The Resurgence and Validity of Antismoking Legislation*, U.C. Davis L. Rev. 167 (1974) [hereinafter *Antismoking Legislation*].

6. *Id.* at 169.

7. *The Proposed Illinois Clean Indoor Air Act: The Right of Non-Smokers to Smoke-Free Environment*, 18 J. Marshall L. Rev. 177, 185 (1984-85) [hereinafter *Smoke Free Environment*].

8. *Id.*

9. Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 San. Fern. V.L. Rev. 141, 148 (1979) [hereinafter *Non-Smoker in Public*].

10. *Id.*

11. *Smoke-Free Environment*, *supra* note 7, at 185.

12. *Antismoking Legislation*, *supra* note 5, at 174.

smoking entirely; consequently, all anti-smoking statutes were repealed by 1927.[13]

The early anti-smoking movement ceased after World War I when the public's perception of smoking changed. Smoking became acceptable, and it was no longer considered morally reprehensible to smoke.[14] Consequently, very few smoking laws appeared on the books between 1927 and 1964.[15] However, beginning with the release of the 1964 Surgeon General's Report on Smoking, coupled with more scientific studies concerning the dangers of smoke to nonsmokers, nonsmokers began asserting their rights.[16] In response, anti-smoking statutes began appearing again in the 1970s.[17]

Modern statutes significantly differ from their predecessors. As previously noted, early statutes were not primarily concerned with the health dangers of smoke *per se*,[18] since smoke had not been proven to be dangerous to humans.[19] In contrast, modern statutes recognize the health hazards and seek to secure nonsmokers' rights to a healthful environment.[20]

To a large extent, modern anti-smoking legislation is a result of public pressure groups, local anti-smoking groups, groups to protect rights, national and medical groups, and disease associations which take stands against smoking.[21] Much of this pressure has developed as a direct result of the series of eighteen reports on the health consequences of smoking issued by the United States Public Health Service.[22]

Modern anti-smoking legislation began with the 1964 Surgeon General's Report. After reviewing hundreds of scientific studies, the report concluded that smoking is "a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[23] Subsequent to this report,

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13. *Id.*

14. *Smoke-Free Environment*, *supra* note 7, at 185.

15. *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 Mo. L. Rev. 444, 445 (1980) [hereinafter *Majestic Vice*].

16. *Id.*

17. *Id.* at 452. Arizona was the first state to enact a modern statute prohibiting smoking in a public place. *Id.*

18. *See supra* notes 6-10 and accompanying text.

19. Comment, *Smoking in Public: This Air Is My Air, This Air Is Your Air*, 4 So. Ill. U.L.J. 665, 665 (1984).

20. *Antismoking Legislation*, *supra* note 5, at 194. As of this writing, all but eight states have laws restricting smoking in public places. U.S. Dep't of Health and Human Services, Smoking and Health: A National Status Report 64 (1986) [hereinafter Smoking and Health]. The states which do not have laws imposing any limits on smoking in public places are Alabama, Illinois, Louisiana, Missouri, North Carolina, Tennessee, Virginia, and Wyoming. *Id.*

21. *Smoke-Free Environment*, *supra* note 7, at 188.

22. 1986 Report, *supra* note 2.

23. U.S. Public Health Service, U.S. Dept. of Health, Education, & Welfare, 1946 United States Surgeon General's Report on Smoking and Public Health 33 (1964) [hereinafter 1964 Report].

Congress enacted the Cigarette Labeling and Advertising Act of 1966.[24] Cigarette advertising was banned on radio and television in 1971.[25] In addition, the federal government used its powers to tax and regulate commerce as a means of discouraging smoking.[26] The Public Health Cigarette Smoking Act of 1970 established a comprehensive federal program to deal with cigarette labeling and advertising regarding smoking and health.[27] Various federal agencies have promulgated regulations dealing with specific instances in which smoking in public should be restricted,[28] but Congress has enacted no federal legislation restricting smoking in public places, despite the fact that such legislation has been introduced in Congress several times since 1973.[29]

Anti-smoking statutes vary greatly in scope and effect. They range from comprehensive, detailed statutes entitled "Clean Indoor Air Acts"[30] to laws which prohibit smoking only in a limited number of public places, state facilities, or meeting rooms.[31] The most comprehensive legislation has been adopted by Alaska, Florida, Minnesota, Montana, Nebraska, Utah, and Washington.[32] These states restrict or prohibit smoking in public meetings, government buildings, educational facilities, offices, workplaces, restaurants, retail stores, cultural and recreational facilities, passenger elevators, offices

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24. 15 U.S.C. § 1333 (Supp. 1985). This act requires warnings on packs of cigarettes.

25. 15 U.S.C. § 1335 (1983).

26. *Antismoking Legislation*, *supra* note 5, at 186.

27. 15 U.S.C. §§ 1331-40 (1983).

28. Smoking is restricted in buildings controlled by the General Services Administration. Agency heads have the responsibility to determine which areas are to be smoking areas and which nonsmoking. FPMR Amendment D-85, 51 Fed. Reg. 44,258 (1986) (to be codified at 41 C.F.R. §§ 101-20.105-3 (1987). The Department of Defense (DOD) recognizes the health hazard of tobacco smoke and bans smoking in auditoriums, eating facilities, elevators, shuttle vehicles, medical care facilities, conference and classrooms, and work areas unless specific exceptions apply. Smoking in DOD Occupied Buildings and Facilities, 32 C.F.R. §§ 203.1-203.7 (1986). In addition, two special regulations cover common carriers (interstate passenger carrier vehicles and aircraft). Limitation of Smoking on Interstate Passenger Carrier Vehicles, 49 C.F.R. § 1061.1 (1986); Smoking Aboard Aircraft, 14 C.F.R. §§ 252.1-252.7 (1986).

29. 1986 REPORT, *supra* note 2, at 264. As of December, 1985, over sixty bills addressing smoking, tobacco use, or both were introduced during the 98th and 99th sessions of Congress. SMOKING AND HEALTH, *supra* note 20, at 61. Five of these bills introduced in the House of Representatives, applied primarily to smoking on board passenger-carrying aircraft and other forms of transportation within interstate commerce. *Id.* None of these passed. *Id.* During the 99th session, three bills pertaining to smoking limitations were introduced. *Id.* During the 99th session, three bills pertaining to smoking limitations were introduced. *Id.* Again, none passed. *Id.*

30. *See* MINN. STAT. ANN. §§ 144.411-144.417 (West 1987); ALASKA STAT. §§ 18.35.300-18.35.360 (1985); FLA. STAT. §§ 386.201-386.209 (1985).

31. *See* KAN. STAT. ANN. § 21-4008 (1981); ME. REV. STAT. ANN. tit. 22, §§ 1578, 1825, 1681-1689 (1985).

32. *See supra* note 30 and accompanying text. *See also* MONT. CODE ANN. § 50-40-101 - 50-40-109 (1985); NEB. REV. STAT. § 71-5701 - 71-5713 (1981); UTAH CODE ANN. §§ 76-10-101, 76-10-106 (1986), 76-10-108, 109, 110 (1978); WASH. REV. CODE §§ 70.160.010-70.160.040 (Supp. 1986).

of health care facilities, and vehicles of public transportation.[33] Smoking is most commonly prohibited or restricted in transport vehicles, health care facilities, and elevators.[34] Many states attempt to curtail smoking in indoor cultural or recreational facilities such as libraries, museums and theaters, while allowing smoking in designated areas.[35] The greatest weaknesses in the laws are in retail stores, supermarkets, and restaurants.[36] Only seventeen jurisdictions have legislation governing smoking in offices and other workplaces.[37] Some of this legislation applies only to workplaces controlled by the state or other governmental agencies.[38]

Not only do states differ dramatically as to the areas that are regulated, but they also differ in forms of punishment. Small fines are by far the most common form of punishment.[39] In addition to fines, injunctive relief is available in a few states.[40] Michigan and Massachusetts can imprison violators of smoking laws.[41] The rest of the states may combine some of these penalties; in the alternative they may characterize the violation as either a petty offense or misdemeanor.[42]

Although the majority of states have at least one statute which restricts public smoking, the lack of comprehensive prohibitions coupled with limited state enforcement has forced passive smokers to seek judicial relief.

III. Judicial Response to Nonsmokers' Claims

In response to state laws that are ineffective in protecting nonsmokers in public, the nonsmoker has taken his case to the courts. Theoretically, but not practically, nonsmokers are protected from passive smoking in public places under various legal theories. In reality, these theories have done little for the passive smoker; the only protection has come from state statutes, local ordinances, and federal and state administrative regulations.[43]

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33. *See supra* notes 30 and 32 and accompanying text.
34. Smoking and Health, *supra* note 20, at 64.
35. *Id.*
36. *Id.* at 64-66.
37. *Id.* at 64.
38. *Id.* States restricting smoking only in government-controlled office buildings are Alaska, California, New Hampshire, North Dakota, and Ohio. *Id.* at 67. Florida, Maine, Minnesota, Montana, Nebraska, New Jersey, New Mexico, Oregon, Utah, Washington, and Wisconsin restrict smoking in both government and private offices. *Id.* Interestingly, Connecticut restricts smoking only in relation to private employers. *Id.*
39. *Id.* at 67. West Virginia imposes the lowest fine of $1-$5 for smoking on school grounds or buildings. *Id.* Iowa, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, and Rhode Island impose fines of up to $100 for violating their laws. *Id.* A few jurisdictions, including Alaska, Maryland, New Jersey, and the District of Columbia, impose fines of $100-$300. *Id.*
40. *Id.* The states are Alaska, Minnesota, Nebraska, New Hampshire, and Wisconsin. *Id.*
41. *Id.*
42. *Id.*
43. *See supra* notes 30-42 and accompanying text.

A few courts have recognized a right to a smoke-free environment.[44] The landmark decision was *Shimp v. New Jersey Bell Telephone Co.*[45] The theory in this case was the traditional common law duty of an employer to provide a "safe and healthful" working environment.[46] In *Shimp*, the plaintiff, a nonsmoking employee, brought an action for injunctive relief against his employer for failing to provide him a smoke-free work environment.[47] In *Shimp*, the court judicially noticed the hazards of cigarette smoke and held the company had wrongfully subjected the employee to an unsafe working environment by compelling the employee to inhale sidestream smoke.[48]

One federal court seized upon the opportunity to address nonsmoker's constitutional rights in *Federal Employees for Non-Smokers' Rights v. United States* [hereinafter *FENSR*].[49] In that case, several anti-smoking organizations joined nonsmoking federal employees in opposing the United States' practice of permitting smoking in federal buildings.[50] The plaintiffs asserted causes of action based on: (1) the Occupational Safety and Health Act of 1970;[51] (2) the first amendment to the Constitution;[52] (3) the fifth amendment to the Constitution;[53] and (4) the common law duty of an employer to provide a safe and healthful workplace for employees.[54] The district court deferred ruling on the common law count until further briefing,[55] but held that "the OSH Act does not create a private right of action against federal agencies."[56] Further, the court found that the plaintiffs failed to

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44. *See* Parodi v. Merit Sys. Protection Bd., 690 F.2d 731 (9th Cir. 1982); Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982); Alexander v. California Unemployment Ins. Appeal Bd., 104 Cal. App. 3d 97, 163 Cal. Rptr. 411 (1980).

45. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 515, 368 A.2d 408 (1976).

46. *Id.* at ____, 368 A.2d at 410.

47. *Id.*

48. *Id.* at ____, 368 A.2d at 416. Mainstream smoke is the smoke drawn through the tobacco and then into the smoker's lungs. Sidestream smoke is that smoke emitted by the burning tobacco between puffs. 1986 REPORT, *supra* note 2, at 7.

49. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. 181 (D.D.C. 1978), *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 444 U.S. 926 (1979).

50. *Id.* at 182.

51. *Id.* (referring to the Act at 29 U.S.C. § 668(a) (1970)).

52. *Id.* The first amendment provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

53. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. at 182. "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

54. Federal Employees for Non-Smokers' Rights v. United States, 446 F. Supp. at 182.

55. *Id.*

56. *Id.* at 183.

state causes of action sufficient to grant relief under the first and fifth amendments.[57] In denying the injunctive relief sought by the plaintiffs, the court noted that "such matters are better left to the legislative or administrative process, where a proper balancing of interests can be made in a forum where such social decisions can more appropriately be made."[58]

The court in *FENSR* was persuaded by the "well reasoned opinion of the court in *Gasper v. Louisiana Stadium and Exposition District* . . . ."[59] In *Gasper*,[60] plaintiff nonsmokers claimed that the defendant's "permissive attitude" toward smoking in the Louisiana Superdome violated their constitutional right "to breathe smoke-free air while in a State building."[61] The district court was of the opinion "that there clearly has been no violation of plaintiffs' constitutional rights."[62] The court continued its discussion of the existence of a constitutional right to a healthful environment by noting that "one individuals' right to be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of Government."[63] The court in *Gasper* reiterated that "courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments."[64] Further, the court stated that the "Constitution does not provide judicial remedies for every social and economic ill."[65] The court was reluctant to read the Constitution as protecting nonsmokers from inhaling tobacco smoke. It was hesitant to "broaden the rights of the Constitution to limits heretofore unheard of,"[66] and stated that "to engage in that type of adjustment of individual liberties [is] better left to the peo-

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57. *Id.* at 183-84.

58. *Id.* at 185.

59. *Id.* at 184.

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

61. *Id.* at 717.

62. *Id.* The action was brought on a violation of Title 42 § 1983 of the United States Code. *Id.* That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1983).

63. Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. at 720.

64. *Id.* at 720-21. The court cited at great length Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972). *See also* Hagedorn v. Union Carbide Corp., 363 F. Supp. 1061 (N.D.W. Va. 1973) (foul smelling air did not present controversy arising under fifth, ninth, or fourteenth amendments).

65. Gasper v. Louisiana Stadium & Exposition Dist., 418 F. Supp. at 721.

66. *Id.* at 722.

ple acting through the legislative process."[67]

The court's analysis in *Gasper* has been the predominant reasoning against the assertion of a constitutional right to a pollution-free environment. Courts have repeatedly denied nonsmokers' claims of violation of their rights under the first, fifth, ninth, and fourteenth amendments.[68] They have maintained the long-held belief that a nonsmoker is not deprived of life, liberty, or property by being subjected to environmental smoke.[69] It is apparent from this line of cases that the courts are not willing to elevate the desire for a smoke-free environment to the level of a fundamental right protected by the Constitution. Such constitutional arguments have consistently failed.

A year after *FENSR*, a different, non-constitutional theory was used to assert nonsmokers' rights, again, without success.[70] In *McCracken v. Sloan*,[71] the North Carolina Court of Appeals denied relief to a postal employee who alleged assault and battery when a co-worker smoked cigars.[72] The court rejected plaintiff's theory that fear of smelling tobacco smoke or actual inhalation of the smoke constituted assault or battery.[73]

Not until 1981 did the courts again begin to recognize a nonsmoker's rights. In *Smith v. Western Electric*,[74] the Missouri Court of Appeals held that an injunction was an appropriate remedy to prevent an employer from exposing an employee to cigarette smoke in the workplace.[75] The court adopted the *Shimp* rationale in finding that an employer owes a duty to his employee to provide a safe workplace.[76] Seeking injunctive relief, the employee alleged breach of the employer's duty to provide a safe workplace.[77] Noting that cigarette smoke constitutes a serious health hazard to all employees, the court concluded that Western Electric breached its duty by failing to eliminate that hazard in the workplace.[78]

Courts continued to hear cases from employees concerning workplace environment. In *Parodi v. Merit Systems Protection Board*,[79] the court entertained a new theory of recovery—that an employee's allergic reaction to

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67. *Id. See also* GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979) ("GASP" stands for Group Against Smokers Pollution).

68. *See supra* notes 49-67 and accompanying text; Kensell v. Oklahoma, 716 F.2d 1350 (10th Cir. 1983).

69. *See supra* notes 49-68 and accompanying text.

70. *See supra* notes 44-48.

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

72. *Id.* at ____, 252 S.E.2d at 251.

73. *Id.* at ____, 252 S.E.2d at 252.

74. Smith v. Western Elec., 643 S.W.2d 10 (Mo. Ct. App. 1982).

75. *Id.* at 13.

76. *Id.* at 12.

77. *Id.* at 11-12.

78. *Id.* at 13.

79. Parodi v. Merit Sys. Protection Bd., 690 F.2d 731 (9th Cir. 1982).

cigarette smoke constituted an environmental disability.[80] The plaintiff asserted that this disability entitled him to receive disability benefits.[81] Notwithstanding evidence of disability substantiated by independent physicians' reports, the agency contended that the plaintiff did not fall within the meaning of "disabled" as defined by the Civil Service Retirement Regulations.[82] The Court of Appeals determined that plaintiff had established a prima facie case for disability benefits.[83] Acknowledging that disability entitlements usually concern physical or mental limitations, the court nevertheless concluded that hypersensitivity to smoke in the workplace constituted an environmental disability.[84] The court ordered the employer to either provide a smoke-free environment with comparable employment or pay disability benefits.[85]

In the same year that *Parodi* was decided, one district court confronted the question whether hypersensitivity to cigarette smoke entitled an employee to classification and relief as a handicapped person under the Rehabilitation Act of 1973.[86] In *Vickers v. Veterans Administration*,[87] an employee of the Veterans Administration Medical Center requested a smoke-free environment from his employer.[88] The court reasoned that even though the plaintiff was handicapped by cigarette smoke, the burden of proving discrimination by the employer was on the plaintiff.[89] Since the Veterans Administration had taken steps to accommodate the employee, the court concluded there was no discrimination.[90]

Among these decisions, *Hentzel v. Singer Co.*[91] appeared to be an anomaly—the court sustained the validity of a passive smoker's claim without requiring a showing of adverse health effects caused by cigarette smoke.[92] A patent attorney had sued his former employer for terminating his employment in retaliation for his protest against hazardous working conditions caused by the smoking of other employees.[93] In addition, the plaintiff attempted to recover under the tort theory of intentional infliction of emotional distress.[94] He alleged that moving him to an office with a greater concentration of smokers, after he had requested a smoke-free environment,

80. *Id.* at 733.
81. *Id.*
82. *Id.*
83. *Id.* at 738.
84. *Id.*
85. *Id.* at 739.
86. 29 U.S.C. § 794 (1983).
87. Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982).
88. *Id.* at 88.
89. *Id.* at 87-89.
90. *Id.* at 89.
91. Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).
92. *Id.* at 293, 188 Cal. Rptr. at 160.
93. *Id.*
94. *Id.*

caused him severe emotional distress and resulting physical symptoms.[95] Commenting on the tort claim, the court concluded that since the Workers' Compensation Act did not provide a remedy for passive smokers, the attorney could sue for damages under the tort theory.[96]

As the preceding discussion reveals, the majority of cases brought by nonsmokers who experience adverse effects from tobacco smoke originate in the workplace.[97] One case in Iowa which involved a non-work situation was *Ravreby v. United Airlines*.[98] The bases of recovery in this action were breach of a common carrier's duty of care, and breach of contract.[99] The plaintiff, Dr. Mark Ravreby, had requested and was given a nonsmoking seat in the first-class section of an airplane.[100] The complaint alleged that the first-class section was "completely filled with smoke" which caused the plaintiff "extreme nausea, hoarseness, and irritation to the eyes and throat."[101] Although Dr. Ravreby complained to the stewardess and other passengers, he was told there was nothing that could be done.[102] After being denied a ticket refund, the plaintiff sought damages for the discomfort he sustained during his flight; he did not seek, however, recovery for any long-term effects on his health.[103]

The court concluded that since "carriers must reasonably take notice of the habits of their passengers . . . United had to foresee that some of its passengers would smoke during their flight."[104] However, United's conduct was not found to "constitute a breach of its duty of care."[105]

Dr. Ravreby also contended that United breached its duty to protect him from "harmful or offensive conduct of fellow passengers."[106] This theory, too, was rejected by the court. While "[a] carrier is required to take reasonably appropriate steps to minimize likely harm from fellow passengers,"[107] the court determined that in this case a reasonable fact-finder would conclude that United had not been negligent with respect to either provision of a safe environment or protection from harm caused by fellow passengers.[108]

Dr. Ravreby's contract theory of recovery was based on an implied con-

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95. *Id.* at 293-94, 188 Cal. Rptr. at 161.
96. *Id.* at 305, 188 Cal. Rptr. at 169.
97. *See supra* notes 45-96 and accompanying text.
98. Ravreby v. United Airlines, 293 N.W.2d 260 (Iowa 1980).
99. *Id.* at 262.
100. *Id.* at 261.
101. *Id.*
102. *Id.*
103. *Id.* at 261-62.
104. *Id.* at 264.
105. *Id.* at 265.
106. *Id.* at 266.
107. *Id.*
108. *Id.*

tract generated when Dr. Ravreby was asked whether he preferred a smoking or nonsmoking seat.[109] Since United is controlled by the Civil Aeronautics Board and is required to file tariffs with rules and rates, it is " 'conclusively and exclusively' governed by provisions of [49 U.S.C. § 1373(b)(1)]."[110] The court concluded that no portion of United's tariff supported such a contract theory.[111]

The final theory of recovery was based on Restatement (Second) of Torts section 323.[112] Assuming that this section is recognized by the court and that the section gives rise to a contractual obligation, "parties who have undertaken to render services cannot be held liable under it unless they fail to exercise reasonable care in performing the undertaking."[113] The court had already concluded that a rational fact-finder could find United not negligent in the manner in which it transported the plaintiff.[114]

IV. The Iowa Law

Preceding sections have reviewed the unprecedented spread of nonsmokers' rights laws, or clean indoor air acts, at the local and state level.[115] Where judicial remedies have failed, legislatures have attempted to meet the needs of nonsmokers. What a clean indoor act should be, however, is not crystal clear. Certainly it is not enough merely to have a law; the law must be comprehensive and effective. A comprehensive anti-smoking statute can be analyzed as to its constitutionality, scope, enforcement provisions, methods of implementation, and penalties. The remaining sections of this Note will examine in detail Iowa's proposed law in terms of these considerations.

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109. *Id.*

110. *Id.* "Every air carrier . . . shall file with the Board and print, and keep open to public inspection, tariffs showing all rates, fares, and charges . . . and . . . all classifications, rules, regulations, practices . . . ." 49 U.S.C. § 1373(a) (1983).

111. Ravreby v. United Airlines, 293 N.W.2d at 266.

112. *Id.* The Restatement provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

113. Ravreby v. United Airlines, 293 N.W.2d at 266.

114. *Id.*

115. *See supra* notes 5-42 and accompanying text.

See also San Francisco's Proposition P (1983). After this law was passed, highly restrictive laws were put into effect in other cities, including San Diego, Los Angeles, and Fort Collins, Colorado.

A. *Constitutionality*

Iowa has the authority to regulate personal activity in the exercise of its police power to protect the public's health, safety, and welfare. "A citizen has a right to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways . . . ."[116] In *Green v. Shama*,[117] the Iowa Supreme Court held that this right is "subject to the police power of the state to enact laws essential to the public safety, health, or morals."[118] The court concluded that it was a "fundamental precept of constitutional law that matters within the police power of the state relating to public health may be regulated by the legislature."[119] Given the incontrovertible evidence that secondary smoke is a health hazard, the state would have little difficulty in sustaining its authority to regulate under its police powers.[120] It would seem appropriate, however, for the Iowa statute clearly to state its purpose: to protect the public health.[121] States have traditionally had little difficulty in expressing a constitutionally permissible intent, but clarity in the statute would serve to further its acceptance.

Assuming that the state has constitutional police power to promulgate legislation to restrict smoking in public, the next constitutional test which must be passed is that the legislation must be reasonably necessary to accomplish its legislative purpose.[122] Before a state or local government can promulgate a regulation on 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."[123] The basic issue of the reasonableness of a statute turns on an "analysis of 'such things as the . . . effectiveness of other less drastic protective steps . . . .' "[124] Use of any police power "must be reasonable and not arbitrary and capricious."[125] Considering the unlikelihood that all smokers would voluntarily refrain from smoking and that all proprietors would voluntarily create no-smoking areas, enactment of a law governing smoking in public places appears reasonable and necessary. The statute would be oppressive if it legislated beyond what was reasonably necessary for the protection of nonsmokers. If the statute prohibited all smoking in public places, regardless of contact between smok-

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116. Green v. Shama, 217 N.W.2d 547, 554 (Iowa 1974).
117. *Id.* at 547.
118. *Id.* at 554.
119. *Id.*
120. 1986 REPORT, *supra* note 2.
121. *See* FLA. STAT. ANN. § 386.202 (West Supp. 1986).
122. Lawton v. Steele, 152 U.S. 133, 137 (1894) (established test for states justifying imposing their authority on the public's behalf).
123. Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 517 (Iowa 1980) (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962)).
124. *Id.* (quoting Goldblatt v. Town of Hempstead, 369 U.S. at 595).
125. Green v. Shama, 217 N.W.2d at 555.

ers and nonsmokers, it would probably be held oppressive and unconstitutional.[126] Smoking prohibitions should be limited to places where smokers have contact with nonsmokers and it is not feasible to segregate them to protect the rights of both.

The proposed Iowa law is not an unreasonable infringement on smokers' rights, as it provides for effective segregation of smoking and nonsmoking areas to protect the rights of both smokers and nonsmokers.[127] Except for elevators, no public area has a blanket prohibition on smoking.[128] Complete prohibition is appropriate in such places as elevators, where no effective separation is possible.[129]

The statute should not discriminate against one class of smokers, or against one smoking substance. The proposed Iowa law includes cigars, pipes, and "other" smoking materials, in addition to cigarettes, in its definition of "smoking."[130] A statute may require that large areas, where smoking can be effectively segregated, be divided into designated smoking and nonsmoking areas.[131] The most effective statute would limit the size of the room that can include designated smoking areas. Without a size limit, there is great likelihood that a nonsmoking area will be insufficient to protect nonsmokers.[132] The proposed Iowa law does not have such a provision; in fact, in the case of a single room, designation of one side of the room as a nonsmoking area would meet the requirements of the statute.[133] An improvement would include a provision which states that a "smoking area shall not be more than proportionate to the demand of users of that place for a smoking area and should not include areas which all persons need enter."[134] Florida includes these provisions, and also provides that no more than "one-half of the total square footage in any public place within a single enclosed indoor area used for a common purpose shall be . . . designated . . . a smoking area . . . ."[135] A similar provision would help effectuate the purpose of the Iowa law.[136] In addition, local governments should be granted specific

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126. *See* City of Zion v. Behrens, 262 Ill. 510, 104 N.E. 836 (1914); State v. Heidenhain, 42 La. Ann. 483, 7 So. 621 (1890) (upholding a city ordinance prohibiting smoking in city street cars, as necessary to protect health of passengers in small enclosed places).

127. H.F. 79, *supra* note 4, at 98A.

128. *Id.* at 98A.2.4.

129. Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 95 (1976) [hereinafter *Legal Paths*].

130. H.F. 79, *supra* note 4, at 98A.1.1.

131. *Legal Paths*, *supra* note 129, at 95.

132. Axel-Lute, *Legislation Against Smoking Pollution*, 6 ENVTL. AFF. 345, 359 (1977-78) [hereinafter *Smoking Legislation*].

133. H.F. 79, *supra* note 4, at 98A.2.3.

134. *Smoking Legislation*, *supra* note 132, at 359.

135. FLA. STAT. § 386.205(4) (1985).

136. *See* Alford v. City of Newport News, 220 Va. 584, 260 S.E.2d 241 (1979) (no smoking ordinance which required designation of one of several dining tables in the same room as a nonsmoking area was unconstitutional since the means were not reasonably suited to achieve

authority to adopt their own clean indoor air acts to account for local considerations, as long as local ordinances do not conflict with Iowa law.[137] The proposed law should also provide for severability so that, if any section is found to be unconstitutional, the remaining sections will remain in force.[138]

B. *Scope of Protection*

A comprehensive statute regulates smoking in all public places, privately and publicly owned, to which the general public has free access.[139] Any area where smokers and nonsmokers are forced to be together for long periods of time, and where food is sold or consumed, should be regulated.[140] The greater the number of places that are listed in the statute, the less confusion proprietors will have as to whether their establishments are covered. In addition, the constitutionality of the statute may be at issue if the regulation of public places is too broad or vague. Iowa's proposed law is quite specific in listing nineteen examples of "public places," with the qualification that the list is not exclusive.[141] By including the phrase "not limited to," Iowa has allowed expansion of the definition of "public places" without revision of the law. In addition, by listing as many places as possible, the legislature made the law more clear to the general public. Iowa's law does include "place of work," a significant improvement over many other statutes.[142]

Under the proposed law, all places of work would be included in "public places."[143] The only exception to this prohibition applies where an entire room or facility is used for a private function, with the sponsor controlling the seating.[144]

An important provision in such a statute is the coverage of "public meetings." Iowa's statute defines "public meeting" as "a gathering in person of the members of a governmental body, whether an open or closed session . . . ."[145] This specific definition is important in light of the exception to Iowa's law: "public place" does not include private, enclosed offices exclusively used by smokers even if visited by nonsmokers.[146] The public is thus ensured access to governmental meetings, regardless of the meeting place, without risk of subjection to environmental smoke.

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the legislative goal).

137. *See* COLO. REV. STAT. § 25-14-105 (1982) ("Nothing in this article shall prevent any town, city, or city and county . . . from regulating smoking . . . .").

138. *See* R.I. GEN. LAWS § 23-20.6-3 (1985).

139. *Legal Paths*, *supra* note 129, at 99-105.

140. *Id.*

141. H.F. 79, *supra* note 4, at 98A.1.2.

142. *Id.*

143. *Id.* at 98A.1.2.

144. *Id.* at 98A.2.1.

145. *Id.* at 98A.1.3.

146. *Id.* at 98A.1.2.

The definition of smoking properly should include "carrying" lighted tobacco products as well as "puffing" on them. According to the 1986 Surgeon General's Report, the smoke emitted from the end of the smoking substance is the most harmful smoke to nonsmokers.[147] Protection from "sidestream" smoke is provided in Iowa law by definition.[148] This places Iowa in the category of states with the most comprehensive laws: nonsmoking becomes the norm.[149]

C. *Implementation*

A comprehensive anti-smoking statute delegates authority to implement smoking restrictions.[150] Iowa's act delegates authority to proprietors: persons having custody or control of the covered public place.[151] These persons are responsible for posting "appropriate" signs indicating no-smoking areas and asking smokers to comply with the nonsmoking law.[152] The proposed law also instructs proprietors to post signs bearing the words "smoking prohibited except in designated areas" conspicuously at major entrances.[153] Posting of signs does serve to notify smokers that smoking is prohibited in certain areas, but that section of the Code does not go far enough. It is essential for effective enforcement that there be adequate notice.[154] Iowa's statute should require specific guidelines as to content, size, and placement of signs.[155] These signs could read "Smoking Prohibited by State Law," or "Smoking in Designated Areas Only," and include provisions for a fine, if any apply.[156] Iowa's law should also specify the minimum size of lettering and the content of the message to avoid confusion and provide adequate notice.[157] The law would be more effective if it required the signs to be conspicuously posted at all entrances to nonsmoking areas. In addition, it would facilitate implementation of the law if proprietors were required to provide facilities for extinguishing smoking substances at entrances to all public places.[158]

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147. 1986 REPORT, *supra* note 2, at 7.

148. H.F. 79, *supra* note 4, at 98A.1.1.

149. 1986 REPORT, *supra* note 2, at 321. *See also* MINN. STAT. ANN. §§ 144.413(2)-144.414 (West Supp. 1988); FLA. STAT. §§ 386.203-.204 (1985).

150. *Smoking Legislation*, *supra* note 132, at 367.

151. H.F. 79, *supra* note 4, at 98A.3.

152. *Id.*

153. *Id.* at 98A.4.

154. United States v. Harriss, 347 U.S. 612, 617 (1954) (statute is unconstitutionally indefinite if it fails to give person fair notice that contemplated conduct is forbidden).

155. *See Legal Paths*, *supra* note 129, at 107.

156. *Id.* at 106.

157. *See, e.g.*, ALASKA STAT. § 18.35.330 (1986).

158. *Smoking Legislation*, *supra* note 132, at 366.

D. *Enforcement*

Since some proprietors may fail to implement the act, there must be a provision for enforcement. Primary authority to enforce the statute should be given to the governing agency.[159] Additional authority could be given to proprietors who witness a person smoking. Iowa's proposed law is severely deficient in this area. The only provision for enforcement lies with the proprietor.[160] There is no governing body which is responsible for the enforcement. There is no power given the proprietor to remove offenders, and no direction to the proprietor if an offender refuses to stop smoking.[161] The law should identify the governing body which the proprietor must contact, allow the proprietor to use reasonable force to stop the infraction, and authorize the proprietor to remove offenders if they refuse to stop.[162] To be more effective, the statute could provide for injunctive relief at the request of private citizens and proprietors.[163] This is especially important when there are violations in the work environment and a proprietor refuses to enforce the law. The statute must be easily interpreted by the private citizen, and members of the public must be informed of appropriate methods they may use to enforce the statute. Granting powers to more than one agency or person provides greater enforcement opportunities. Finally, to keep potential plaintiffs from being deterred by the cost of litigation, the proposed act could provide for recovery of court costs and attorney's fees in successful suits. A provision similar to this would encourage compliance after an initial infraction.

E. *Penalties*

Realistic fines rather than nominal sums are required to make the statute effective.[164] The fine must be large enough to act as a deterrent to violators and other smokers, yet reasonable enough that the law can be enforced. Iowa's proposed law would provide a fine of no more than $50 for each violation.[165] A graduated fine, increasing with successive infractions, would seem to be a better alternative. The proposed law sets no minimum, allowing the court almost unlimited discretion.[166] Iowa law does, however, appear to impose the fine on both smokers and proprietors who violate the law.[167] In addition, a hefty fine for proprietors would serve as a strong incentive to comply in the future.[168]

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159. *Majestic Vice*, *supra* note 15, at 456.
160. H.F. 79, *supra* note 4, at 98A.5.
161. *Id.*
162. *Smoking Legislation*, *supra* note 132, at 367.
163. *See* ALASKA STAT. § 18.35.343 (1986).
164. *Legal Paths*, *supra* note 129, at 108.
165. H.F. 79, *supra* note 4, at 98A.6.
166. *Id.*
167. *Id.*
168. ALASKA STAT. § 18.35.341 (1986); FLA. STAT. § 386.208 (1985).

V. Conclusion

Since the early 1970s the accumulation of evidence on the health risks of involuntary smoking has been accompanied by a surge of initiatives to regulate smoking in public places. Legislation has been the most common vehicle to protect individuals from exposure to involuntary smoke. Judicial remedies, limited in number, have focused almost entirely on restrictions in the workplace.

Iowa's approach to legislation has paralleled this trend. The proposed Iowa law seeks to strengthen the nonsmoker's rights. Examination of the proposed law reveals, however, that there are a number of areas which continue to require modification if Iowa's Clean Indoor Air Act is to be a comprehensive, understandable, and effective law.

In conclusion, it is clear from the case law that James, our typical nonsmoker, has some rights against smokers, but that they are clearly limited in scope. Under the proposed Clean Indoor Air Act, James would have significant rights to clean air, but might have difficulty enforcing these rights if a proprietor refused to comply. He and other nonsmokers also might have difficulty in getting notice or knowledge of their rights. As a whole, however, Iowa's proposed Clean Air Act is a significant step toward clean air in public and the protection of both smokers' and nonsmokers' rights.

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