Legislation Against Smoking Pollution

Paul Axel-Lute
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I. INTRODUCTION

From the first appearance of the tobacco habit, legislators have tried to restrict smoking in order to prevent immorality, disease, and fire.¹ Legislation specifically addressed to air pollution caused by smoking first appeared during the latter half of the nineteenth and the early part of the twentieth centuries in the form of ordinances prohibiting smoking in streetcars² and subways.³ In the early 1900's, state legislatures began to pass laws restricting smoking in enclosed public places, with the apparent purpose of preventing indoor air pollution.⁴ This initial anti-smoking movement, however, made little headway after World War I, when smoking came to be considered a generally acceptable form of behavior. For some time, nonsmokers bowed to societal pressure and either remained silent or brooked the wrath of smokers who were indignant if anyone questioned their right to smoke when and where they pleased.⁵

² The preamble of a New Orleans ordinance quoted in State v. Heidenheim, 42 La. Ann. 483, 7 So. 621 (1890), indicates that these prohibitions were widespread:
Whereas, the custom of permitting smoking in the street-cars of this city is a most vile and objectionable one to the majority of our citizens, . . . and whereas, this alone, of all the cities of the Union, allows such a discomfort to those of its citizens who ride in the public cars. . . .
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⁵ C. Van Proosdy, SMOKING 37-38 (1960); Speer, Tobacco & The Non-Smoker, 16 ARCH. ENVIRON. HEALTH 443 (1968). For further details of anti-smoking history, see A. Hamilton,
This situation began to change in the 1960's with increased public awareness of air pollution problems and mounting medical evidence concerning the harmfulness of tobacco smoke. By 1971, two nationwide anti-smoking groups, Action for Smoking and Health, and the Group Against Smokers' Pollution, had been formed. From 1973 to 1976, thirteen states passed broad nonsmokers' protection acts, numerous municipalities passed ordinances of similar scope, and federal regulatory agencies restricted smoking on interstate planes, buses, and trains. In 1976, nonsmoking workers won a significant judicial victory in \textit{Shimp v. New Jersey Bell Telephone Company},

\textit{This Smoking World} 201-16 (1927); \textit{E. Corti, History of Smoking} 110-16, 269-71 (1931); \textit{J. Robert, The Story of Tobacco in America} 248-55 (1949); Martin, \textit{A Bill of Rights for Nonsmokers, 3 Student Lawyer} (no. 6) 23 (Feb. 1975); Cobey, \textit{The Resurgence and Validity of Antismoking Legislation}, 7 U.C.D. L. Rev. See also note 1, supra.

4 See notes 16-18, infra, and accompanying text.

7 Founded by John Banzhaf in 1967, this group is "the legal action arm of the antismoking community." Newsletter, Action on Smoking & Health (bimonthly, 1971 to date) (Action on Smoking & Health, P.O. Box 19556, Washington, D.C. 20006). It is interesting to note that this was not the first "nonsmokers' rights" group. In 1910, Dr. Charles Giffin Pease founded the Nonsmokers' Protective League of America. N.Y. Times, Aug. 5, 1933, at 26, col. 3.

8 Information from Group Against Smokers' Pollution, P.O. Box 632, College Park, Md. 20740. Founded by Clara Gowin in 1971.


14 145 N.J. Super 516, 368 A.2d 408 (Ch. Div., 1976); discussed at notes 55-58, infra.
establishing a right to a workplace free of tobacco smoke.

This article examines legal solutions to the problem of air pollution caused by smoking. After discussing the balance between the interests of nonsmokers and smokers, the article analyzes the judicial remedies available to the nonsmoker under both the U.S. Constitution and the common law. Concluding that these remedies are of limited usefulness, the article then considers legislation which might be more broadly effective. While federal, state and local legislation are equally appropriate to the problem, the article concludes that state legislation is the most comprehensive and effective means of dealing with smoking pollution. A basic legislative scheme is suggested (see Appendix) in which smoking is segregated where possible, and prohibited where effective segregation is not possible.

II. THE CONFLICT BETWEEN SMOKERS AND NONSMokers

A. Tobacco Smoke as Air Pollution

Tobacco smoke contains many substances, including carbon monoxide, a known poisonous gas, and other carcinogenic and irritant particulates. The most common effect of tobacco smoke is irritation of the eyes, nose, or throat. Persons who are allergic or sensitive to tobacco smoke may suffer additional symptoms such as headache, cough, wheezing, or nausea. Carbon monoxide can be particularly dangerous to persons suffering from lung or heart diseases. The “sidestream” smoke, which goes directly from the burning end of a cigarette into the air, contains greater concentrations of the pollutants which cause these problems than the “mainstream” smoke, which is filtered by both the cigarette and the smoker’s lungs before being released to the air. The average smoker produces more sidestream than mainstream smoke.

Tobacco smoke generally becomes an air pollution problem only in the indoor situation, since it is readily dispersed and diluted when outdoors. Indoor concentrations of pollutants from tobacco smoke depend primarily on the type and number of tobacco products being smoked, the size of the room, and the quality of ventilation. It is important to note that ventilation cannot be a complete solution.

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18 Id. at 88-89.
Even with good ventilation, indoor smoke concentrations often exceed the limit set by the Environmental Protection Agency to ensure the healthfulness of the outdoor (ambient) air. Further, since concentrations of pollutants in the immediate vicinity of a smoker are greater than those in the room as a whole, no amount of ventilation will prevent irritation of the sensitive person next to the smoker. Indeed, excessive ventilation may even cause an additional air contamination hazard in the form of airborne ashes produced by burning tobacco.

B. The Need To Smoke

Whether smoking is properly labeled an addiction or a mere habit is disputed. The official view, as of 1964, was that smoking is a habit—that is, a psychological rather than physical dependence, with no characteristic withdrawal syndrome, little tendency to increase dosage, and detrimental effects primarily on the individual rather than society. In recent years, a more favored opinion is that most smokers are physically addicted to nicotine. Evidence in support of this view includes the facts that most smokers average at least one cigarette consumed per waking hour; that substantial numbers of smokers experience symptoms such as drowsiness, headaches, and digestive disturbances during withdrawal; and that the habit is very hard to stop permanently. In either case, the average smoker is not merely indulging in an optional pleasure but is satisfying a compelling need to smoke.

To conclude that smoking is compulsive is not to say that it cannot be legally restricted for a valid purpose such as fire prevention or pollution prevention. Smoking, while compulsive, cannot

19 Id. at 88-90.
20 In Jones v. Eastern Greyhound Lines, Inc., 159 Misc. 662, 288 N.Y.S. 523 (Sup. Ct., 1936), a passenger on a bus which had its windows open was injured when ashes from the lighted cigarette of a fellow passenger, who was smoking in violation of a posted rule, flew into his eyes. Defendant bus company, whose driver had ignored the plaintiff’s protests, was held liable.
23 We may not penalize someone merely for being an addict. Robinson v. California, 370 U.S. 660 (1962). Commentators have suggested that the exculpation of the addict should extend to such addiction-related behavior as “nontrafficking use, possession, and purchase of the drug.” Fingarette, Addiction and Criminal Responsibility, 84 YALE L. J. 413, 415 n.11 (1975). Such extension of the Robinson holding has not been generally accepted by the courts. Annot: Drug Addiction or Related Mental State as Defense to Criminal Charges, 73 A.L.R.3d
be called involuntary. At any particular time, the smoker must be regarded as having the power to choose whether to smoke or not. However, an understanding of the need to smoke is necessary both for a legislative judgment about how, if at all, to protect non-smokers, and for a proper analysis of the enforceability of smoking restrictions and prohibitions.

C. The Right to Breathe Clean Air Versus the Right to Smoke

The "nonsmokers' rights" movement takes the position that the right to breathe clean air should supersede the right to smoke when the two conflict.24 This position seems to be based partly on the premise that the right to indulge in an optional pleasure should be conditioned upon non-interference with the health, safety, and comfort of other persons. Although smoking should not be regarded as mere indulgence in an optional pleasure, nonsmokers would argue, that at any given time and place the smoker has a choice whether to smoke or not, while the nonsmoker has no choice about breathing

16, 35 (1976). Theories of addict exculpation are based upon premises of an overpowering compulsion equivalent to insanity, 73 A.L.R.3d 16, 22 (1976), or on intoxication "severe enough to affect the individual's reception of reality or control over his will." Annot: Effect of Voluntary Drug Intoxication Upon Criminal Responsibility, 73 A.L.R.3d 98, 104 (1976). Neither of these premises is applicable to the tobacco smoker. Some smokers may sometimes light up "absent-mindedly" or "subconsciously." U.S. PUBLIC HEALTH SERVICE, supra note 21, at 352. Smoking in a no-smoking area, however, is malum prohibitum rather than malum in se, and as such would not be excused for lack of criminal intent, anymore than would absent-mindedly exceeding a highway speed limit. Such "subconscious" behavior might, however, be considered an additional reason for making a prior request to stop smoking an element of the smoking offense. See note 98, infra, and accompanying text. The validity of restricting smoking for the prevention of fire has been universally accepted, apparently without challenge. (In Commonwealth v. Thompson, 53 Mass. (12 Metc.) 231 (1847), a prohibition on smoking in the streets and passageways of Boston was held applicable to de facto as well as de jure public ways.) Restriction of smoking for prevention of air pollution has been judicially sustained. See notes 61 and 62, infra, and accompanying text.

24 Schmidt, The U.S. Experience in Nonsmokers' Rights, 61 AMER. LUNG ASS'N BULL. (no. 10) 11, 15 (Dec. 1975); Non-Smoker's Bill of Rights (National Interagency Council on Smoking & Health, 419 Park Ave. So., Rm. 1301, New York, NY 10016). Some support for this position may be found in the legal concepts of personal liberty and privacy. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). "The right of personal privacy could also extend to protect an individual's decision regarding what he will or will not ingest into his body." Minn. St. Bd. of Health v. City of Brainerd, 241 N.W.2d 624, 631 (Minn. 1976). Rights of ingestion or non-ingestion, then, may be considered superior to rights of emission, at least when the two conflict. Even considering that smoking, from the viewpoint of the smoker, is primarily an act of ingestion, it is unavoidably also an act of emission.
the air. Thus, when the smoker wants to smoke, he should remove himself temporarily to a place where his smoking will not cause a pollution problem. On the other hand, the smoker might ask, why should he rather than the nonsmoker be required to move, when both have an equal right to be in the same place? The nonsmoker might respond with two reasons: first, because the pollutant effects of the smoking will last longer than the smoking itself; and second, because the inconvenience to the nonsmoker of moving each time any smoker wants to smoke is greater than the inconvenience to the individual smoker of moving when he wants to smoke. Note that we are now no longer dealing with a question of the rights of one individual vis-a-vis those of another, but rather with the typical social situation of multiple individuals, wherein the temporal and spatial distribution of smoking behavior is more or less random.

What about the situation where it is not merely inconvenient, but practically impossible for the smoker to leave a place in order to smoke—for example, the long-distance airplane trip? How are we to weigh the suffering of the smoker who is not allowed to smoke against that of the nonsmoker who must breathe polluted air? It is fruitless to argue about whose right is superior in such a situation. The only fair solution is one which provides both clean air for the nonsmokers and an opportunity to smoke for the smokers, and this can be done only by modifying the random distribution of smoking behavior; that is, by segregating such behavior (generally spatially but conceivably temporally). Such segregation is essentially a legislative solution.

III. JUDICIAL REMEDIES FOR SMOKING POLLUTION

A. A Constitutional Right to Be Free from Tobacco Smoke?

The arguments for a constitutional right to be free from tobacco smoke are similar to those for constitutional protection of the environment in general. A constitutional guarantee of a decent environment has been sought as a fundamental right under the Ninth Amendment, and as an aspect of the guarantees of "life" and "liberty" under the Fifth and Fourteenth Amendments. These a-

25 The Ninth Amendment to the U.S. Constitution states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

26 See generally Beckman, The Right to a Decent Environment under the Ninth Amendment, 46 LOS ANGELES BAR BULL. 4 (1971); Comment, The Continuing Search for a Constitutionally Protected Environment, 4 ENV. AFF. 515 (1975).
Arguments, however, have fared ill in the courts, and constitutional protection of the environment has not been established. One reason given for the courts' reluctance has been that environmental problems involve complex tradeoffs which are best decided by legislative bodies. Even if constitutional protection were established, a plaintiff seeking to invoke it would still face the hurdle of establishing that there had been state action depriving him of the constitutional right. Failure by the state to regulate smoking might not be considered state action.

In the one case which has specifically considered the question, *Gasper v. Louisiana Stadium and Exposition District,* the existence of a constitutional right to be free from tobacco smoke was denied. The plaintiffs in *Gasper* brought suit under 42 U.S.C. §1983 to enjoin the defendant from allowing smoking in the Louisiana Superdome, a state-owned multipurpose enclosed arena. Plaintiffs alleged three violations of their constitutional rights: (1) a chilling effect on the exercise of peripheral First Amendment rights to receive others' thoughts and ideas; (2) a deprivation of life, liberty, and property without due process of law as guaranteed by the Fifth and Fourteenth Amendments; and (3) a violation of a fundamental right to breathe clean air as protected by the Ninth Amendment.

In support of their First Amendment claim, plaintiffs cited *Lamont v. Postmaster General of United States,* which held that the receipt of communist propaganda through the mails could not be made conditional upon a written statement evidencing the recipients' desire for such material. The *Gasper* court responded in these terms:

Unlike the *Lamont* case, the instant case contains no facts even remotely indicating an attempt by the State of Louisiana to restrict anyone's right to receive information or entertainment. Other than making periodic requests that patrons of the Louisiana Superdome voluntarily refrain from smoking, the State has adhered to the tenet of not interfer-
The court thus seems to have distinguished Lamont on the basis of the Postmaster General’s chilling intent to control the receipt of ideas, as opposed to the lack of any such intent on the part of the State of Louisiana. Intent, however, is not a necessary element of a cause of action under 42 U.S.C. §1983.

As to the actual chilling effect of the state’s policy, the Gasper court said:

To say that allowing smoking in the Louisiana Superdome creates a chilling effect upon the exercise of one’s First Amendment rights has no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold. This Court is of the opinion that the State’s permissive attitude toward smoking in the Louisiana Superdome adequately preserves the delicate balance of individual rights without yielding to the temptation to intervene in purely private affairs.

The court’s reasoning here is questionable. Unreasonably high admission fees might create a chilling effect on First Amendment rights. One may ask what is meant by “purely private affairs.” The drinking of beer in moderation has no direct physical effect on persons other than the drinker. Other persons’ moral reactions to such drinking would indeed be their purely private affairs. Uncontrolled smoking in an enclosed arena, in contrast, has a physical effect on the air breathed by all persons present. Just as fees should be kept reasonable, and persons who are obnoxious from excessive drinking should be ushered out, so, too, should smoking be reasonably controlled.

In support of their due process claim, the plaintiffs relied on the Court of Appeals opinion in Pollak v. Public Utilities Commission of District of Columbia, which held that a transit company with a federally-granted monopoly which was forcing passengers on its buses and streetcars to listen to allegedly obnoxious broadcasting was violating their Fifth Amendment right to liberty. The Supreme Court reversed the Court of Appeals on the grounds that the inter-

33 418 F. Supp. at 718.
35 418 F. Supp. at 718.
ference in question was not unreasonable.37

The Gasper court distinguished the Pollak case on two grounds: (1) the transit company’s own broadcasting, rather than its policy toward the playing of radios by individual passengers, was in question; and (2) the passengers had no choice whether to use the transit vehicles, whereas “those who attend events in the Louisiana Superdome are in no way compelled to use the facility.”38 One commentator has criticized this portion of the Gasper opinion as unresponsive to the plaintiffs’ meritorious contention that the right to be free from forced breathing of smoke filled air is analogous to the right to be free from forced listening to radio broadcasts, which was recognized by the Supreme Court in the Pollak case, and that the important question in each case is the reasonableness of the interference with each right.39 However, the Gasper court went on to cite Tanner v. Armco Steel Corporation40 for the proposition that there is no constitutional guarantee of a healthful environment, and that the resolution of environmental problems is better left to the workings of the legislatures.

In dismissing the Ninth Amendment claim the court cited other cases denying constitutional protection for the environment41 and stated that to recognize a fundamental right to be free from cigarette smoke “would be to mock the lofty purposes” of the Constitution.42

In sum, the recurrent thrusts of the Gasper opinion are that tobacco pollution is not a problem of “constitutional proportions,” and that, like other environmental concerns, its solution is best left to legislative fiat.

There is considerable merit in the latter conclusion. Even if a constitutional right to a healthful environment were recognized by the courts, or added by amendment, as it has been in some state constitutions,43 it would be a difficult right to enforce solely by judi-
cial action. Asking a court to remedy a state’s failure to regulate smoking is essentially asking the court to legislate. The multiplicity of situations in which smoking creates an air pollution problem underscores the advantages of a legislative, rather than a judicial, resolution to the problem.

B. Smoking As a Nuisance

It is well settled that a property interest carries with it a right to clean air, a right which can be enforced against a nuisance consisting of smoke alone. The common areas of a condominium, for example, might present an area in which persons with the requisite property interest could utilize the common law action of nuisance to remedy a smoking pollution problem. Suit could be brought against the condominium association if its rules permit a smoking nuisance. To constitute an actionable nuisance, the smoking pollution would have to be annoying to the ordinary person, not just to the hypersensitive, allergic, or ill person; it could, however, be a nuisance even though it occurs only intermittently.

Smoking might also come within certain statutory definitions of public nuisance. For example, the California Penal Code provides that “(a)nything which is injurious to health, or . . . offensive to the senses . . . so as to interfere with the comfortable enjoyment of life . . . by any considerable number of persons . . . is a public nuisance.” Employees of the Los Angeles City Hall Complex have petitioned to have smoking there declared a public nuisance under this statute.

The power of bringing an action to abate a public nuisance lies primarily with the government. Generally, an individual suffering injury which is common to the general public has no cause of ac-
tion. The individual may complain or petition, but there remains an element of the state’s prosecutorial discretion, which may limit the effectiveness of the public nuisance approach to the smoking problem. It might also be hard to establish that the pollution caused by smoking in a particular place was of such degree as to constitute an actionable nuisance, unless there is a statutory prohibition of smoking in that place.

C. Smoking as a Battery

Battery is usually defined as an intended harmful or offensive touching of another person. Indirect as well as direct touching may constitute a battery.

Blowing smoke in another’s face might well be a battery; spitting in someone’s face certainly is. Merely smoking in proximity to a person known by the smoker to be allergic to tobacco smoke, with the intent and result of discomforting that person, could be considered battery. In a pending suit on this theory, an employee is seeking actual and punitive damages from his cigar-smoking supervisor. This remedy, however, would not have widespread application in combatting smoking pollution, since most smoking is done to satisfy the smoker, with no intent to harm others.

D. Common Law Right to a Smoke-Free Workplace

Smoking pollution is an especially acute problem in places of employment because of the long periods of time which persons must spend there. A recent case, Shimp v. New Jersey Bell Telephone Company, placed upon an employer a duty to restrict his employees’ smoking. The plaintiff in this case was an office worker with a severe allergy to cigarette smoke. Smoking by her fellow employees

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51 See Kaufman, supra note 38, at 82-86.


53 Draper v. Baker, 61 Wis. 450, 21 N.W. 527 (1884).


55 For further discussion of this question see Kaufman, supra note 38, at 86-89.

was making her so sick that she frequently had to leave work. She brought an action seeking an injunction to prohibit smoking in her work area. The court granted injunctive relief, basing its decision on the common law right to a safe workplace and on a finding that cigarette smoke was a hazardous substance which was not a necessary by-product of the defendant's business.

In taking judicial notice of the toxic nature of tobacco smoke, the court used language indicating that the severity of the plaintiff's allergy may not have been a necessary factor in reaching its decision. To the extent this proves true, the Shimp doctrine may have broad application. The court stated:

Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs. The portion of the population which is especially sensitive to cigarette smoke is so significant that it is reasonable to expect an employer to foresee health consequences and to impose upon him a duty to abate the hazard which causes discomfort.57

The common law duty of the employer to exercise reasonable care in providing a safe place of work is a basic and well recognized one which includes a corollary duty to make and enforce rules for the conduct of employees designed to make the workplace safe.58 The Shimp case establishes in New Jersey a right to a workplace free of tobacco smoke based upon this duty, though it is conceivable that further decisions might limit the Shimp holding to office workers or to persons with severe allergic reaction to tobacco smoke. For the Shimp doctrine to be extended beyond New Jersey, however, other courts not only will need to agree that tobacco smoke is an unnecessary hazard,59 but also will need to be willing to exercise equitable

57 145 N.J. Super. at 529-30, 368 A.2d at 415-16.
58 W. Prosser, Law of Torts 526 (4th ed. 1971); Restatement (Second) of Agency § 492.
59 The question whether smoking is properly considered part of an employee's work has been answered affirmatively in cases holding that employees injured through smoking are entitled to workmen's compensation. See Annot: Workmen's Compensation: Compensation to Workmen Injured through Smoking, 5 A.L.R. 1521 (1920). To quote one such case: "We have the tobacco habit with us, and we must deal with it as it is . . . . Tobacco is universally recognized to be a solace to him who uses it, and it may be that such a one, unless he finally shakes off the habit, cannot perform the labors of his life as well without it as with it." Whiting-Mead Commercial Company v. Industrial Accident Comm'n, 178 Cal. 505-08, 173 P. 1105-06, 5 A.L.R. 1518, 1520-21 (1918). The status of smoking in employment has also
powers to enjoin such hazards. Eliminating smoking pollution in workplaces by lawsuits alone would be an interminable and costly endeavor. Legislation, by comparison, could take giant steps toward an equitable solution.

IV. EFFECTIVE LEGISLATION AS A SOLUTION

A. Appropriate and Validity of Smoking Pollution Legislation

Legislative enactments offer more comprehensive protection and more effective enforcement than do judicial remedies for nonsmokers. Indeed, a legislative solution seems particularly appropriate since the problem of pollution due to smoking goes beyond the bounds of a conflict between smokers and nonsmokers: air pollution hurts everyone. Even smokers, although accepting the ill effects of their own mainstream smoke, may not bargain on additional harm from the sidestream smoke of others. In fact, a significant number of smokers agree that it is annoying to be near someone who is smoking, and a significant number of smokers favor further restrictions on smoking.80

Anti-smoking statutes are designed to keep the air clean for people to breathe, and are therefore a valid exercise of the state's police power.81 For example, a Louisiana prohibition of smoking in streetcars was upheld on this ground in State v. Heidenhaim,82 where the court found that "smoking in the streetcars . . . caused to a great majority of the people using them material annoyance, inconvenience and discomfort. This is particularly so in the winter season, when the cars are closed. There is not only discomfort, but positive danger to health, from the contaminated air."83 The extent of the restriction on smoking, however, must bear some reasonable relation to the statute's purpose. An ordinance forbidding cigarette smoking within corporate limits was struck down as an unreasonable invasion of personal liberty in Hershberg v. City of...
An ordinance prohibiting all public smoking was voided in *City of Zion v. Behrens*, because the streets were so wide and the parks so large that the prohibition could not be justified on the grounds of either prevention of fire or prevention of annoyance to other persons, even though the court recognized that "tobacco smoke is offensive to many persons and in exceptional cases harmful to some," and, that "power exists to prohibit smoking in certain public places . . . where large numbers of persons are crowded together in a small place." Because of the toxic nature of tobacco smoke it is likely that regulation of smoking would be valid in almost any enclosed public place (and perhaps in some outdoor situations where people must stand in line or sit near one another).

**B. The Segregation of Smoking**

Smoking regulation need not consist of total smoking prohibition. In many places it is possible to keep the nonsmokers' air clean by establishing smoking and no-smoking areas. A statute which flatly prohibits smoking in a wide range of enclosed public places without making any provision for the establishment of smoking and no-smoking areas where feasible might be attacked as an unnecessary restriction of personal liberty. Conversely, since concentration of smokers in certain areas would increase their exposure to pollutants, a legislative decision favoring total prohibition as the lesser evil might be sustained, especially if the declared purpose of the statute was the prevention of air pollution rather than the protection of nonsmokers only. Still, the segregation method seems preferable: it allows smokers to carry out the behavior so important to them; it cares for the interests of nonsmokers; and it will be easier to enforce than a total ban.

Given the general concept of smoking and no-smoking areas, questions arise concerning the quantitative and qualitative equality of facilities. To establish physically separate smoking areas which allow no seepage of smoke into the no-smoking area, the fairest provision seems to be that the sizes of the areas should, as nearly as practical, be in the same ratio as are the numbers of smokers to nonsmokers. When the areas are not physically separated, the

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44 142 Ky. 60, 133 S.W. 985 (1911).
45 262 Ill. 510, 104 N.E. 836 (1914).
46 262 Ill. at 511, 104 N.E. at 837.
47 262 Ill. at 512, 104 N.E. at 837.
smokers pollute a larger area than they occupy, and so the no-smoking area must be large enough that the most sensitive non-smokers can occupy portions remote from the smoking area while the least sensitive nonsmokers can occupy a buffer zone along the boundary of the smoking area. Many places will be too small to be effectively divided into smoking and no-smoking areas. A smoking area should not include unique portions of a place which all persons may need to visit or pass through—for example, bookstack areas of a library, display areas of a museum, exit and entrance areas, and toilet facilities.

Several recent state statutes fail to place any upper limit on the permissible size of a smoking area, thus leaving open the possibility that the no-smoking area will be inadequate.\footnote{E.g., ARIZ. REV. STAT. § 36-601.01 (1974); 1975 Kan. Sess. Laws ch. 310; MASS. ANN. LAWS ch. 470, § 21 (1975); NEB. REV. STAT. § 28-1031, as amended, 1975 Neb. Laws ch. 75; S. D. COMPIL. LAWS ANN. § 22-36-2 (Supp. 1975); TEXAS PENAL CODE ANN. tit. 10, § 48.01 (Vernon Supp. 1975).} Other regulatory schemes have addressed the question of the relative size of these areas. For example, the regulations implementing the Minnesota Clean Indoor Air Act\footnote{MINN. STAT. ANN. §§ 144.411-.417 (1975).} provide that “the size of the designated smoking-permitted area shall not be more than proportionate to the preference of users of that location.”\footnote{MINN. DEPT. OF HEALTH RULES ch. 26, MHD 443(b)(4) (Apr. 2, 1976). Cf., MINN. DEPT. OF LABOR AND INDUSTRY RULES GOVERNING SMOKING IN FACTORIES, WAREHOUSES & SIMILAR PLACES OF WORK, LIC A 4(a) (Apr. 2, 1976), which make a similar provision for employee eating and rest areas.} Similarly, Civil Aeronautics Board (CAB) regulations require no-smoking areas on passenger aircraft to be large enough to accommodate the demand for them.\footnote{14 C.F.R. § 252.2 (1976).}

Both the Minnesota and the CAB regulations leave open the possibility of a smoking area inadequate to accommodate all those who wish to smoke, thus reflecting either a judgment that it is more important to protect nonsmokers than to provide for the needs of smokers, a concern for allowing a buffer zone, or a judgment that the proprietor of a place should not be required to allow smoking to a greater degree than he might desire.

C. Federal Power to Regulate Smoking

The power of Congress to regulate interstate commerce includes the power to regulate intrastate activity if the activity in question
has a substantial effect on interstate commerce.\textsuperscript{72} For example, Congress could regulate smoking in hotels and motels\textsuperscript{73} and most restaurants\textsuperscript{74} on the grounds that smoking pollution could have a tendency to deter interstate travelers from using such places.

It has been suggested\textsuperscript{75} that we need a federal "clean indoor air act," modeled after the Clean Air Act,\textsuperscript{78} to prevent indoor pollution from smoking, heating and cooking. Federal standards promulgated under this act could be reached through state implementation plans stressing solutions through building design.

However, the intergovernmental complexities and delays associated with the Clean Air Act are neither appropriate nor necessary to deal with that portion of indoor air pollution which results from smoking. The primary responsibility for the control of localized air pollution rests with the states.\textsuperscript{77} The federal government lacks the enforcement machinery to deal with behavior as widespread yet localized as smoking, and would have to depend on state and local enforcement. Moreover, doubt has recently been cast upon the power of the federal government to require specific state implementation action.\textsuperscript{78} For these reasons federal regulation of smoking should be confined to federal facilities and interstate passenger carrier facilities.\textsuperscript{79}

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\item United States v. Darby, 312 U.S. 100 (1941); Perez v. United States, 402 U.S. 146 (1971).
\item See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
\item Doggett & Friedman, Legislation for Clean Air: An Indoor Front, 82 Yale L.J. 1040, 1050 (1973).
\item The Clean Air Act was held not to authorize the imposition of sanctions on a state or its officials for failure to comply with federal regulations directing the state to adopt certain pollution control plans in Brown v. Environmental Protection Agency, 521 F.2d 827, 31 A.L.R. Fed. 57, 63 (9th Cir. 1975); District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975); and Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975). All three cases were vacated in Environmental Protection Agency v. Brown, 97 S. Ct. 1635 (1977), because of a statement by the government that the requirements for state promulgation of regulations would be eliminated from the proposed pollution control plans. However, the Third Circuit has upheld the application of these sanctions on a state as a valid exercise of the commerce power. Pennsylvania v. Environmental Protection Agency, 500 F.2d 246, 259 (3d Cir. 1974).
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D. Elements of a Smoking Pollution Prevention Act

1. Effective Segregation of Smoking

As already noted, a no-smoking area, to be effective, must either be physically separated from the smoking area or be of sufficient size to provide a buffer zone. It is possible to set forth detailed criteria as to what constitutes physical separation, maximum acceptable pollutant levels, minimum acceptable sizes of no-smoking areas, and adequate ventilation. It is also possible to require simply that any smoking area be of such size and location that the drift of smoke into the no-smoking area is minimized, or, more strictly, that designation of a smoking area be allowed only where it is possible to prevent any pollutant effects in the no-smoking area.

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80 Minn. Dept. of Health Rules ch. 26, MHD 442 (a)(2) (Apr. 2, 1976), states four criteria, any one of which will suffice to make a no-smoking area into an "acceptable smoke-free area": (1) separation from the smoking area by a wall at least 56 inches high, (2) separation from the smoking area by a space at least 4 ft. wide, (3) ventilation providing at least six air changes per hour, or (4) CO concentration not to exceed that of outside air by more than 9 ppm. Although these criteria are phrased in the alternative, MHD 445(b)(2) provides that the CO standard shall not be exceeded even when application of the Act is otherwise stated.

San Diego County, Calif. Code of Regulatory Ordinances § 32.808 (Ordinance 4556 n.s., Aug. 19, 1975), provides that smoking areas can be established in rooms with ventilation providing an outdoor air change of at least 25 cu. ft. per minute per occupant or 80% efficient filtration of the whole air content of the room at least every 15 minutes; smoking areas in such rooms are not to exceed 50% of seating capacity. The provision does not apply to certain kinds of places where smoking is absolutely prohibited.

One study of the irritant effects of tobacco smoke found that 4.7 mg/m\(^3\) of particulates was a threshold value for unpleasantness for nonsmokers, that 9 mg/m\(^3\) caused eye irritation on both smokers and nonsmokers, and that a ventilation rate of 12 m\(^3\)/hr per cigarette was required to avoid eye irritation, while the prevention of unpleasant odors required a ventilation rate of 50 m\(^3\)/hr per cigarette. U.S. Center for Disease Control, The Health Consequences of Smoking 99 (1975).

81 H.R. Rep. No. 862, 95th Cong., 1st Sess. (1976), would require the separation of smoking and no-smoking areas "in a manner which minimizes, to the extent practicable, the drift of smoke from the smoking area into the nonsmoking area." Minn. Stat. Ann. § 144.415 (West 1975), provides that "where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke on adjacent non-smoking areas."

82 Nev. Rev. Stat. § 202.249 (1975) allows designated smoking areas "where it is possible to confine the smoke to such areas." Ft. Lauderdale, Fla. Code § 28-80 (Ordinance C-75-6, Mar. 4, 1975) provides that smoking areas must be approved by the county health director as creating "no substantial health hazard to nonsmokers." Wash. Admin. Code § 248-152 (1975) requires that smoking areas in public conveyances and libraries be "of such size and location as will insure the provision of a substantially smoke-free atmosphere" in the conveyance or library as a whole.
2. Extent of Coverage

The types of enclosed places in which the restriction of smoking is desirable are so diverse that statutory enumeration of them seems advisable. The places in which it is most important to establish smoking and no-smoking areas are those where people must remain for relatively long periods of time; for example, long-distance public transportation, public meeting or hearing rooms, welfare offices, courtrooms, legislative chambers, hospitals, prisons, and workplaces. In places where people generally make short visits, such as post offices and polling places, smoking should be flatly prohibited, on the theory that the immediate pollutant effects are a worse evil than the short delay in satisfaction of the smoking urge. Health care waiting rooms are a particularly important place in which to prohibit smoking, due to the substantial likelihood that some persons present will be suffering from a respiratory or other ailment rendering them especially susceptible to the harmful effects of smoke. In hospitals, prisons, and similar institutions, it should be possible to avoid putting smokers and nonsmokers together in the same room, cell, or end of a ward, except in short-term emergency situations. In common areas of such facilities, such as hallways, eating areas, lounges, and waiting rooms, smoking should be prohibited except where it can be effectively segregated.

Places of work present particularly difficult areas for smoking regulation. Only the Minnesota and Utah Clean Indoor Air Acts, the broadest of such laws to date, attempt to restrict it. The general prohibition in the Minnesota Act is that “No person shall smoke in a public place or at public meeting except in designated smoking areas,” and “public place” is defined as “any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to . . . offices and other commercial establishments, . . . but excluding private, enclosed offices occupied exclusively by smokers even though such offices may be visited by nonsmokers.”

This general prohibition, however, “shall not apply to factories, warehouses and similar places of work not usually frequented by the general public, except that the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the

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84 Id. at §144.413, sub. 2 (1975).
close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees. 85 The Department of Labor and Industry rules promulgated under the Minnesota Act require no-smoking space in employee eating and rest areas and segregation of smoking in work areas "to the extent possible without unreasonable interference with the business operation." 86 According to the Association for Nonsmokers' Rights, "[m]ost employers have resisted implementation of the law." 87

Certain places will require exceptions to the general statutory scheme requiring segregation or prohibition of smoking. For example, in small public conveyances such as taxis, limousines, and jitneys, the rule could be that smoking would be permitted only when the operator and all the passengers consent. 88 Further, it is neither necessary nor desirable to legislate concerning smoking in places of religious meeting. Tradition and religious authority are usually sufficient to restrict smoking in those places, and a smoking prohibition in this context might be considered an interference with the exercise of religion. 89

Restaurants and other public eating places present a special area for conflict between smokers and nonsmokers. Many smokers find mealtime a desirable time to smoke, while many nonsmokers find that tobacco smoke spoils their enjoyment of a meal. Restaurant owners have resisted smoking restrictions, 90 presumably from fear of losing their smoking customers (many bars and small diners have a

85 Id. at §144.414 (1975). The Utah statute is somewhat more strongly worded: This prohibition shall apply also to offices, shops, warehouses, factories, mines, and similar places of employment not usually frequented by the general public; for such places local boards of health shall establish rules to restrict or prohibit smoking in those places of work where the proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health or comfort of nonsmoking employees.

UTAH CODE ANN. §76-10-106 (1976) (emphasis added).

86 MINN. DEPT. OF LABOR & INDUSTRY RULES GOVERNING SMOKING IN FACTORIES, WAREHOUSES, & SIMILAR PLACES OF WORK, LICA 1-5 (Apr. 2, 1976).

87 Information from Association for Nonsmokers Rights, 61 Portland Ave., St. Paul, Minn. 55102.

88 MINN. DEPT. OF HEALTH RULES ch. 26, MHD 444(e) (Apr. 2, 1976) provides that a public conveyance with a capacity of fewer than ten persons may be entirely a smoking area if everyone expressly consents.


90 The original Utah law requiring segregation of smoking in eating places (1921 Utah Sess. Laws ch. 145) was amended two years later to allow eating places to be declared smoking rooms in their entirety. 1923 Utah Sess. Laws ch. 52. The provision covering restaurants in the Minnesota Clean Indoor Air Act, MINN. STAT. ANN. § 144.413 (West 1975), has encountered organized resistance. Newsweek, Dec. 8, 1975, at 35.
high percentage of smoking patrons). For these establishments, a clean indoor air act might contain a provision that, in eating places which are too small to have effective smoking segregation, the proprietor shall have the option of allowing smoking entirely or banning it entirely. This approach would be an exception from the general statutory requirement that smoking be prohibited entirely in places where it cannot be effectively segregated. The rationale for this exception is that restaurants are relatively competitive, non-unique places, and that, for most people patronage is largely a matter of choice rather than necessity.

A large class of nonsmokers exist who daily suffer from smokers' pollution yet have little or no power to speak up for their right to clean air. These are the young children of smoking parents. It has been found that the “children of parents who smoke are more likely to have bronchitis and pneumonia during the first year of life, and this is probably at least partly due to their being exposed to cigarette smoke in the atmosphere.” As a practical matter, it is unlikely that this sort of parental behavior can be controlled by legislation. A state or federally-funded education effort aimed at getting smoking parents to restrict their smoking while near their children would be of more effect.

3. Definition of the Smoking Offense

Some statutory smoking restrictions mention cigarettes, cigars, and pipes without specifying that they contain tobacco. Others specify “tobacco in any form.” In order to anticipate the legalization of marihuana, the smoke of which contains some of the same toxic substances as those in tobacco smoke, and possible fads for smoking other substances, the offense should be defined so that it clearly includes the smoking of any substance. The possibility of

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91 Minn. Stat. Ann. § 144.415 (West 1975) provides that “no public place other than a bar shall be designated as a smoking area in its entirety.”


93 San Diego County, Calif. Code of Regulatory Ordinances § 32.811 (Ordinance 4556 n.s., Aug. 19, 1975) provides for “an annual program of educational activities emphasizing the social ramifications as well as the health-degrading aspects of smoking.”


96 See note 1, supra, at 19.

new types of smoking devices can also be anticipated, as in the following definition from the Culver City, California ordinance: "‘Smoke’ and ‘smoking’ are used here in the sense ordinarily associated with the use of smoking tobacco and in addition shall mean the lighting of, or carrying lighted, tobacco or any other substance in a pipe, cigar, cigarette or other device used for smoking." Since smokers spend more time holding lighted cigarettes in their hands or in ashtrays than they do actually smoking them, the definition should also include that behavior.

In some circumstances it may be reasonable to discriminate between different forms of tobacco. For example, cigar-smoking could be prohibited entirely while cigarette smoking could be merely restricted to a smoking area. In the alternative, a higher penalty might be attached to cigar and pipe smoking since cigars and pipes emit a larger volume of smoke than do cigarettes. Many people find the smell of cigars more objectionable than that of cigarettes or pipes, and cigar smoke has been found to contain a greater concentration of carbon monoxide than does cigarette smoke.

In some state statutes, the presence of a no-smoking sign or a request not to smoke by the person in charge is made a condition precedent of the smoking offense. The apparent philosophy behind such a provision is that it is not reasonable to assume public knowledge of the smoking prohibition in particular places. Signs, however, can disappear and persons in charge can be absent; thus, a personal request not to smoke should be a sufficient alternative to the presence of a sign. Moreover, in some classes of places, such as elevators, for which the prohibition would be absolute (because

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County, Calif. Code of Regulatory Ordinances §§ 32.801-.811 (Ordinance 4556 n.s., Aug. 19, 1975) restrict the smoking of "tobacco or any other weed or plant."


An example of a poor definition is the following: "smoking' means the igniting of any tobacco product followed by the drawing of the smoke caused by that ignition into the mouth of the person to be charged." N.D. Century Code 48-05-07 (Supp. 1975).

U.S. Dept of H.E.W., The Health Consequences of Smoking 98 (1975); Miss. Code § 97-35-1 (1972) prohibits only cigar and pipe smoking on buses; the Civil Aeronautics Board has proposed a ban on cigar and pipe smoking in aircraft. 41 Fed. Reg. 44427 (1976).

of the impossibility of segregating smoking within them), public knowledge of the law should be presumed.\textsuperscript{102}

4. Requirement of No-Smoking Signs and Extinguishment Facilities

Most laws prohibiting smoking in certain places require the posting of no-smoking signs.\textsuperscript{103} Some specify the size of the lettering\textsuperscript{104} or other characteristics of the sign.\textsuperscript{105} Since a broad smoking pollution prevention act deals with places which range in size from elevators to arenas, a convenient and reasonable criterion for the number and size of no-smoking signs would be that they be legible to persons of average vision throughout the no-smoking area and at all entrances thereto.\textsuperscript{106} The requirement to post signs should carry with it the existence of a distinct offense for failure to post signs. Indeed, for purposes of determining a penalty, this offense might be considered more serious than the actual smoking offense, since it could lead to uncontrolled smoking.\textsuperscript{107} The unauthorized removal or defacement of signs should also be defined as a punishable offense.

Facilities for the extinguishment of smoking substances should be required to be located at all entrances to a no-smoking area. Michi-

\textsuperscript{102} SAN DIEGO COUNTY, CALIF. CODE OF REGULATORY ORDINANCES § 32.808 (b) (Ordinance 4556 n.s., Aug. 19, 1975) prohibits smoking absolutely in elevators, indoor service lines, public transport facilities, and public restrooms.

\textsuperscript{103} The Minnesota regulations provide for a mechanism in lieu of posting signs, whereby all persons entering a place are asked their preference for a smoking or no-smoking area and are directed to the appropriate one. MINN. DEPT. OF HEALTH RULES ch. 26, MHD 443(d)(8) (Apr. 2, 1976).

\textsuperscript{104} CONN. GEN. STAT. ANN. § 1-21b (Supp. 1976) (4" high, strokes \(\frac{1}{2}\)" thick); OKLA. STAT. ANN. tit. 21, § 1247 (West Supp. 1975) (1"); MINN. DEPT. OF HEALTH RULES ch. 26, MHD 443(d) (45) (1 \(\frac{1}{2}\)" except \(\frac{1}{2}\)" on tables or seats); id., MHD 443(d)(6) ("smoking permitted" signs shall not be larger than "no-smoking" signs in the same place).

\textsuperscript{105} Md. DEPT. OF LICENSING & REGULATION, DIV. OF LABOR & INDUSTRY, RULES & REGULATIONS PROHIBITING SMOKING ON ELEVATORS, 2 Md. Reg. No. 26 (Nov. 12, 1975) reprinted in ACTION ON SMOKING & HEALTH, DIGEST OF STATE NONSMOokers' RIGHTS LEGISLATION 25 (1976), specify that signs shall be red on white, made of wood, plastic or metal, and specify particular wording.

\textsuperscript{106} SAN DIEGO COUNTY, CALIF. CODE OF REGULATORY ORDINANCES § 32.806 (Ordinance 4556 n.s., Aug. 19, 1975) provides that the manner of posting signs "including the wording, size, color, design, and place of posting" shall be at the discretion of the person in charge of the premises, "so long as clarity, sufficiency, and conspicuousness are apparent in communicating the intent" of the ordinance.

\textsuperscript{107} ALASKA STAT. § 18.35.350 (1975) provides a penalty of $10 to $100 for willful failure to display signs, compared with $5 to $25 for the smoking offense itself.

\textsuperscript{108} ME. REV. STAT. ANN. tit. 25, § 2433 (1974) provides a penalty of $10 for removal or defacement of signs, compared with a penalty of $5 for the smoking offense.
gan requires such receptacles outside elevators, and Texas makes the presence of extinguishment facilities an element of the smoking offense.

5. Enforcement and Penalties

Enforcement of a no-smoking rule often presents a considerable problem, especially after personal requests to the offender to cease smoking or to leave the no-smoking area are ignored. It should be made unlawful for the person in authority to permit smoking in a prohibited area. Since the meaning of the word "permit" may not be clear, a statute should state the duties of the person in charge explicitly. These should include the duty to personally request offenders to stop smoking, the duty to notify police if an offender persists in spite of such a request and perhaps the duty to refuse service to the offender until he stops smoking.

The smoking offense is most commonly classified as a misdemeanor. A penalty common to several states is a fine between ten dollars and one hundred dollars. It might be preferable to make

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109 MIICH. STAT. ANN. § 17.495(20) (1975).
111 DAVIS, CALIF. CITY CODE § 11-26 (Ordinance 657, Apr. 16, 1973); NORFOLK, VA. CODE § 28-30.
112 MINN. STAT. ANN. § 144-416 (West Supp. 1976) requires the person in charge of a public place to "make reasonable efforts to prevent smoking in the public place by (a) posting appropriate signs; (b) arranging seating to provide a smoke-free area; (c) asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or (d) any other means which may be appropriate." This duty of the person in charge can be enforced by injunction in an action brought by a board of health, or by any affected party.
113 SAN DIEGO COUNTY, CALIF. CODE OF REGULATORY ORDINANCES § 32.810 (Ordinance 4556 n.s., Aug. 19, 1975) makes it unlawful to serve a smoking offender. Other enforcement measures which might be appropriate in certain circumstances include eviction, citizen arrest, an actual extinguishment of the substance being smoked.
114 MISS. CODE ANN. § 97-35-1(6) (1972) provides that a busdriver may evict a smoking passenger, "using only such force as may be necessary," may "command the assistance of passengers" for the eviction, and may cause the violator "to be detained and delivered to the proper authorities." In McQuerry v. Metropolitan St. Ry. Co., 117 Mo. App. 255, 92 S.W. 912 (1906), it was said that a streetcar passenger who persists in disregarding a smoking prohibition "after his attention is called to it, deserves expulsion from the car." 117 Mo. App. at 262, 92 S.W. at 914. In New Jersey, a person smoking in a bus or in the no-smoking area of a train is a disorderly person (N.J. STAT. ANN. § 2A:170-65 (West Supp. 1974), and as such is subject to citizen's arrest. N.J. STAT. ANN. § 2A:169-3 (West 1953).
the smoking offense a civil violation enforceable through the issuance of summonses and payment of fines by mail.\textsuperscript{115}

6. Relation to Other State Legislation

To avoid conflict with laws which restrict smoking for other purposes, such as fire prevention, a state smoking pollution prevention act should disclaim any intent to allow smoking where it is otherwise prohibited and should declare void any provision of any other law which would allow smoking in conflict with the smoking pollution prevention act. Further, the state statute should not prevent municipalities from adopting clean indoor air ordinances which take into account local circumstances, such as the desirability of restricting smoking in specific buildings.\textsuperscript{116}

V. CONCLUSION

Tobacco smoke is air pollution. The right to be free from this pollution is judicially enforceable only in some situations; legislatures, on the contrary, can deal comprehensively with the problem. Federal legislation restricting smoking in government buildings and in facilities directly serving interstate and foreign commerce is advisable. Nevertheless, state smoking pollution prevention acts will provide a more comprehensive and enforceable solution.

State smoking pollution statutes should require effective segregation of smoking, where possible, in waiting lines, workplaces, health care institutions, correctional facilities, and enclosed public places (including conveyances, waiting rooms, eating places, retail stores, service establishments, places of culture and entertainment, and places serving governmental functions). Where such segregation of smoking is not possible, the act would require prohibition of smoking, except in eating places, where the proprietor would have the option of prohibiting or allowing smoking. The act would impose on those persons in charge of public places the duties to post no-smoking signs, to provide extinguishment facilities, to request of-

\textsuperscript{115} ALASKA STAT. § 18.35.350 (1975) (civil fine from $5 to $25); MD. ANN. CODE tit. 78, § 35A, and tit. 89, § 64 (Supp. 1975) (civil fine of $25).

\textsuperscript{116} JACKSONVILLE, FLA. ORDINANCE CODE § 330.128 (Ordinance 73-180-91, Apr. 2, 1973) restricts smoking in the Jacksonville Coliseum.
fenders to cease smoking, and to notify the police if offenders disregard such requests. Smokers themselves would be subject to civil or criminal penalties.

**APPENDIX:**

**A MODEL STATE SMOKING POLLUTION PREVENTION ACT**

Sec. 1. The purpose of this Act is to prevent harm, discomfort, and annoyance due to smoking in enclosed public places, waiting lines, workplaces, and institutions.

Sec. 2. In this Act,

(a) "Smoking" means intentionally having in one's possession a lighted cigarette, cigar, pipe, or other object containing any substance giving off smoke.

(b) "Enclosed public places" include but are not limited to elevators, buses, streetcars, railroad passenger cars, taxis, limousines, jitneys, airplanes, passenger boats, common carrier waiting rooms, libraries, theaters, concert halls, lecture halls, auditoriums, classrooms, museums, art galleries, planetariums, historic sites, dance halls, sports arenas, skating rinks, gymnasiums, swimming pools, bowling alleys, eating places, retail stores, banks, barber shops, beauty parlors, laundromats, telegraph offices, telephone business offices, polling places, voter registration places, welfare offices, rooms in which public meetings, public hearings, or other official proceedings open to the public are in progress, and health care waiting rooms.

(c) "Eating place" means restaurant, cafe, diner, cafeteria, bar, night-club, or other place where food or drink is sold for consumption on the premises.

(d) "Workplace" means any indoor place where two or more persons are gainfully employed.

(e) "Institutions" include but are not limited to hospitals, nursing homes, sanitariums, homes for the aged, reformatories and prisons.

(f) To "effectively segregate smoking" means to designate areas where smoking is permitted and prohibited such that smoke from the smoking areas does not cause harm, discomfort, or annoyance to persons in the no-smoking area.

Sec. 3. In all enclosed public places, institutions, and workplaces where it is possible to effectively segregate smoking without constructing new partitions, the person in charge shall either prohibit smoking entirely or effectively segregate smoking.
Sec. 4. In all institutions, workplaces, and enclosed public places, except as provided in sections 5, 6, and 7, where it is not possible to effectively segregate smoking without constructing new partitions, the person in charge shall either prohibit smoking entirely or construct partitions to effectively segregate smoking.

Sec. 5. Smoking is prohibited in all elevators.

Sec. 6. In taxis, limousines, jitneys, and other public conveyances which are too small for smoking to be effectively segregated, smoking shall be allowed only when the driver and all passengers expressly consent.

Sec. 7. In eating places where it is not possible to effectively segregate smoking without constructing new partitions, the person in charge may allow smoking entirely, prohibit smoking entirely, or construct partitions to effectively segregate smoking.

Sec. 8. In any place where smoking is segregated under this Act, the size of the smoking area shall not be more than proportional to the demand of users of that place for a smoking area, and shall not include areas which all persons need to enter.

Sec. 9. In any place, whether indoors or outdoors, where members of the public, workers, or institutional inmates must wait in line for any purpose, smoking shall be prohibited unless it is possible to have effectively segregated no-smoking and smoking lines.

Sec. 10. In any place or area where smoking is permitted under this Act, the person in charge may prohibit cigar or pipe smoking or both.

Sec. 11. In any place where smoking is prohibited under this Act, the person in charge shall post conspicuous no-smoking signs and shall provide at the entrances to such no-smoking area facilities for the extinguishment of substances which persons have been smoking.

Sec. 12. Anyone who smokes in a place or area where smoking is prohibited under this Act shall be subject to a civil fine of $25.

Sec. 13. Anyone who removes or defaces any sign posted in accordance with this Act shall be subject to a fine of $50.

Sec. 14. When anyone is smoking in a place where smoking is prohibited under this Act, it shall be the duty of the person in charge of that place to request the offender to cease smoking there. If the offender continues to smoke there after such a request, it shall be the duty of the person in charge to notify law enforcement authorities.

Sec. 15. Any person in charge of a place who willfully fails to comply with the provisions of sections 3, 4, 5, 6, 8, 9, 11, or 14 of
this Act shall be subject to a fine of $100 for each day of such failure to comply. These provisions shall also be enforceable by injunction, in an action brought by any affected party or by the State Department of Health.

Sec. 16. The State Department of Health shall have the power to promulgate regulations to facilitate implementation of this Act. The non-existence of regulations relating to particular applications of this Act shall not be a defense to a charge of noncompliance herewith.

Sec. 17. This Act shall not be construed to prohibit smoking which is part of a theatrical performance or smoking at a privately sponsored social gathering not open to the general public.

Sec. 18. This Act shall not be construed to allow smoking in any place where smoking is prohibited by any statute, ordinance, rule, or regulation.

Sec. 19. Any current statute or any current or future ordinance, rule, or regulation which would allow smoking in any place where smoking is prohibited under this Act is to that extent void.

Sec. 20. This Act shall not be construed to limit any common law rights to clean air.

Sec. 21. If any portion or application of this Act should be declared unconstitutional, the remaining portions or applications shall continue in effect.