

The Resurgence and Validity of Antismoking Legislation

I. INTRODUCTION

Smokers and non-smokers cannot be equally free in the same railway carriage.

—George Bernard Shaw

Concern over unrestricted smoking¹ in public places² has become more vocal in the past few years. No longer are nonsmokers content to sit while smokers fill the air with fumes. Governmental action is being taken to restrict smoking to those places where it cannot injure or irritate those who do not smoke.

This concern stems in large part from medical revelations³ that tobacco smoke is dangerous not only to the smoker's health, but that it can also be a health hazard as well as an irritant to a significant proportion of nonsmoking persons.

The problem has come down to this: Do federal, state, and local governments have the authority to restrict smoking of tobacco products in public places? If the answer is yes, to what extent may they do so?

The questions posed by this problem are treated by first examining the antismoking crusade of the earlier part of this century, determining why that movement failed, and indicating what lessons can be learned from its failure. Next, current evidence on smoking and health is considered. A brief section is devoted to public opinion on the issue of smoking. Legal bases for governmental restrictions of

¹This article is directed primarily at cigarette smoke as it harms nonsmokers, as most research to date on smoking and health has been on cigarettes. What scientific facts are available indicate that cigar and pipe smoke may pose similar if not identical health hazards to nonsmokers. See generally PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, THE HEALTH CONSEQUENCES OF SMOKING 176-179, 229 (1973) [hereinafter cited as 1973 REPORT].

²The term "public places", as used in this article, is generally intended to mean those locations where the public must be (*e.g.*, courts, classrooms, government offices), and where they may be (*e.g.*, auditoriums, retail stores, restaurants). The semantic distinction between a place where a person must be (obligatory) and may be (permissive) is often blurred in reality. Are the occupants of a courtroom entitled to greater protection from the health hazards of tobacco smoke than the customers of a restaurant?

smoking are studied, followed by a summary of existing and proposed government actions to restrict smoking. The article concludes with a comment on the efficacy of restrictions, and further recommendations for additional action.

II. EARLY ANTISMOKING ACTION

The earliest American state regulations of public smoking were founded on the community's concern for the fire hazard posed by smouldering tobacco products. An 1847 Massachusetts case, for example, upheld a Boston city ordinance banning smoking entirely within the public streets because of the danger fuming items such as pipes and cigars posed to the wooden structures of the day.³ (Authority for such restrictions comes from the police power, discussed in section V, *infra*.)

Large-scale production of cigarettes in the United States began in the 1880's with the development of an automatic cigarette-making machine.⁴ The increase in production and consumption met some resistance after a few years. New Orleans, Louisiana, adopted an ordinance forbidding smoking in the city's streetcars. The ordinance was upheld by the Louisiana State Supreme Court on the grounds that the city council possessed the legislative authority to determine what a nuisance was, and to suppress it where necessary.⁵

In 1897, Tennessee passed a statute⁶ which prohibited, *inter alia*, the sale of cigarettes in the state on pain of a \$50 fine. The statute was upheld the next year by the Tennessee Supreme Court.⁷ The state court, in its opinion, asked the rhetorical question, "Are cigarettes legitimate articles of commerce?" Its reply:

We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in

³*Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847). The statute penalized "any person who shall smoke, or have in his possession, any lighted pipe or cigar, in any street, lane, or passageway" in Boston. The decision stated that the statute "was intended to gaurd [*sic*] the city against the damage of fire." *Id.* at 233.

⁴WAGNER, CIGARETTE COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS 36-37 (1971) [hereinafter cited as WAGNER].

⁵*State v. Heidenhain*, 42 La. Ann. 483, 7 So. 621 (1890).

⁶Tenn. Acts 1897, ch. 30, § 1.

⁷*Austin v. State*, 101 Tenn. 563, 48 S.W. 305 (1898), *aff'd sub nom.*, *Austin v. Tennessee*, 179 U.S. 343 (1900).

regard to those facts, which, by human observation and experience, have become well and generally known to be true . . . nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them.⁸

The court went on to add an example of the asserted negative health consequences of cigarette consumption in referring to the

. . . large numbers of men, otherwise capable, [who] had rendered themselves unfit for [military] service by the use of cigarettes, and that, among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps, every other reason.⁹

Upon appeal to the United States Supreme Court, that Court affirmed the state court's decision.¹⁰ The Court declared that a prohibition such as the Tennessee statute imposed was a valid exercise of the police power of the state where the restriction was designed to protect the public health.¹¹ However, the Court declined to endorse the conclusion of the Tennessee Supreme Court that cigarettes "are inherently bad and bad only", saying that it "was not prepared to take judicial notice of any special injury resulting from their [cigarettes] use. . . ." ¹²

During the first decade of the twentieth century, state restrictions on cigarettes increased. By 1901, twelve states had enacted laws restricting or prohibiting the sale or use of cigarettes within their borders.¹³ Wyoming and Louisiana were the only two states which by that time had failed at least to consider legislation to restrict cigarettes, according to a Chicago Tribune survey.¹⁴

⁸Austin v. State, 48 S.W. at 306 (1898).

⁹*Id.*

¹⁰Austin v. Tennessee, 179 U.S. 343 (1900).

¹¹179 U.S. at 349 (1900).

¹²179 U.S. at 348 (1900). Thirteen years later, the North Dakota State Supreme Court, in upholding that state's "Anti-Snuff Act", said that although they noted the U.S. Supreme Court's reluctance in *Austin* to take judicial notice of the deleterious effects of tobacco, the North Dakota court insisted:

The courts can certainly take judicial notice that the use of tobacco in any form is uncleanly and that its excessive use is injurious. They can take judicial notice of the fact that its use by the young is especially so. Tobacco, in short, is under the ban.

State v. Olson, 144 N.W. 661, 667 (N.D. 1913).

¹³Garrison, *Anticigarette Crusades That Failed*, 48 TODAY'S HEALTH 24 (February 1970) [hereinafter cited as *Crusades*]. Among these states were Rhode Island, Tennessee, New Hampshire, Illinois, Ohio, and Indiana.

¹⁴*Id.* All of the restrictive legislation was drafted to apply only to cigarettes, not to cigars or pipes, which were considered more socially acceptable. This attitude was reflected in a New York Times editorial in July 1911:

Anything that may be done to restrict the general and indiscriminate use of tobacco in public places, hotels, restaurants, railroad cars, will receive the approval of everyone whose approval is worth having.

New York Times, July 8, 1911, at 8, col. 3. Assuming that the point was

Though support for anticigarette legislation seemed to be largely unorganized during the 1910's and 1920's, one group did exist to battle for the rights of the nonsmoker: the Non-Smokers Protective League of America. Describing the League's purpose and objectives, its president wrote in a letter to the *New York Times*:

The right of each person to breathe and enjoy fresh and pure air — air uncontaminated by unhealthful or disagreeable odors and fumes — is a constitutional right, and cannot be taken away by Legislatures or courts, much less by individuals pursuing their own thoughtlessness or selfish indulgence. . . .

The league does not seek to abridge the personal rights of anyone, but it does seek to awaken the sense of fairness in those who use tobacco and to impress upon them that they have not the right to inflict discomfort and harm upon others. It is but just that those who wish to indulge in poisonous vapors, and who will not voluntarily refrain from annoying or injuring others with the poison, should be restrained from doing so.¹⁵

In response to the League's letter, a *New York Times* editorial minimized the problem, suggesting that few persons are the "victims of so many and such queer illusions as to the harmful effects of tobacco on those who do not use it,"¹⁶ and added

. . . many non-smokers are not even annoyed by the little smoke that comes their way, many more only pretend to be annoyed, while those who really suffer the dreadful ills enumerated by the President of the league [headache, dizziness, nausea, fainting, eye irritation] must be the victims of an idiosyncrasy about as rare as is the horror of apples. . . .¹⁷

But the tide still rolled in favor of the anticigarette forces. In 1911, the lower house of the Colorado legislature passed a drastic

self-evident, the editorial added that the smoking of "pipes and cigars cannot be suppressed."

¹⁵*New York Times*, November 10, 1911, at 10, col. 6. Later the League developed a constitution which set forth the following goals:

1. Enforcement of laws, ordinances, and rules prohibiting tobacco smoking in all public and semi-public places.
2. To secure enactment of additional laws, etc., necessary for such purpose, or to so restrict that only those who may indulge the habit will be required to inhale tobacco fumes.
3. Creation of wholesome opinion. Encouraging individuals, whose rights and comforts may be disregarded by tobacco users, to insist upon proper respect for such rights, and to protect the same from invasion, to the fullest extent guaranteed by the Constitution and the laws of the land.

New York Times, September 2, 1923, § VII, at 2, col. 7.

¹⁶*New York Times*, November 11, 1911, at 12, col. 5.

¹⁷*Id.* Quotation of *New York Times* editorials from this period should not be taken to suggest that the *Times* was engaged in a one-paper vendetta against the antismoking advocates. Rather, the *Times*' editorials are noted because this newspaper has been an influential observer and commentator of the national scene in twentieth century America.

anticigarette bill "which at the time it was introduced was considered a joke."¹⁸ In 1920, the South Carolina Senate passed a bill to make tobacco smoking illegal "during meal hours in any public eating place in the state."¹⁹ The next year, the United States Senate adopted a rider to an appropriations bill which, had it passed, would have made it unlawful for any person to smoke in any building in the District of Columbia owned by the United States and used by any executive department or independent agency.²⁰

The high water mark of anticigarette legislation was reached in 1921. By that time, fourteen states had invoked legal penalties against the smoking of cigarettes.²¹ Additionally, that year 92 separate bills on the subject were considered without result in 28 state legislatures.²² Yet within six years all fourteen state laws would be wiped off the books.

The counterattack against the anticigarette forces was first heard as early as 1911. In that year, the Kentucky Court of Appeals struck down a city antismoking ordinance as an unreasonable invasion of personal liberty (*Hershberg v. Barbourville*).²³ Though the city

¹⁸New York Times, April 23, 1911, at 1, col. 3.

¹⁹New York Times, January 24, 1920, at 11, col. 2.

²⁰60 CONG. REC. 2629-2635 (1921). Judging from the debate during the Senate's consideration of this amendment, the proposal was designed to prevent the occurrence of additional fires in government buildings caused by smoking, and also to protect female government workers from inconsiderate "tobacco fiends". Reference was also made to the work time lost by smokers who would cease their labors to indulge in their habit.

In the course of debate, one comment was made that demonstrated the then-contemporary association of smoking and masculinity:

... [O]n a certain occasion when a Senator in the room of the Committee on Foreign Relations was asked if he would have a cigar, he said he did not smoke, he never chewed, and he had never taken a drink of whiskey in his life. Another member of this committee, one of the most distinguished men in this country, turned to him, calling him by name, and said, "What do you do to smell like a man?"

60 CONG. REC. 2031 (1921).

Smokers were described by one Senator as "harmless to other people and harmless to themselves." *Id.*

Presiding over this unique exchange was Vice President Thomas Riley Marshall, author of the comment: "What this country needs is a good five-cent cigar."!

The amendment, though it passed the Senate in an emasculated version, was deleted from the bill later in the legislative process.

²¹R. BRECHER *et al.*, THE CONSUMERS UNION REPORT ON SMOKING AND THE PUBLIC INTEREST 176 (1963).

²²*Crusades*, *supra* note 13, at 25.

²³142 Ky. 60, 133 S.W. 985 (1911). The ordinance challenged read as follows:

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

Id. Note that the ordinance applied only to cigarettes — not to cigars and pipes.

argued that the ordinance was a valid exercise of the police power, the court responded:

The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen's own home or on other private premises is an invasion of his right to control his own personal indulgences.²⁴

The decision denied that the police power of the state as delegated to the city council allowed the council to "unreasonably interfere with the right of the citizen to determine for himself such personal matters."²⁵ The court added that if the ordinance had only prohibited cigarette smoking "on the *streets* of the city, a different question would be presented."²⁶

In 1914, three years after the Kentucky decision, the Supreme Court of Illinois, in *Zion v. Behrens*,²⁷ invalidated a city ordinance prohibiting the use or possession of tobacco smoking products in the streets, parks, or public buildings of the town. The court began its opinion by analyzing cases which purported to uphold the police power as used in similar municipal ordinances. Its evaluation:

None of the cases heretofore decided by this court go to the extent of sustaining the power of a city to pass an ordinance forbidding an act under all circumstances which can only be offensive or harmful to others under certain conditions. *Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places where large numbers of persons are crowded together in a small space.* But this is quite a different matter from prohibiting smoking on the open streets and in parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare.²⁸

The ordinance was not drafted with sufficient precision to be valid

²⁴ 133 S.W. at 986 (1911).

²⁵ *Id.*

²⁶ *Id.* Emphasis added.

²⁷ 262 Ill. 510, 104 N.E. 836, 836-837 (1914). The ordinance challenged read as follows:

"Section 1. That it shall be and hereby is declared to be unlawful for any person to smoke tobacco in any form, whether in a pipe or by the use of a cigarette, cigar or otherwise, in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, post office, or other public building or public place within the said city of Zion.

"Section 2. That it shall be and hereby is declared to be unlawful for any person to have in his or her possession at any time" in any place named in section 1 "any lighted pipe, lighted cigar, or lighted cigarette." A fine of from three to \$100 could be imposed for violation of the ordinance.

²⁸ 104 N.E. at 837 (1914). Emphasis added.

as a fire prevention measure, said the court, and it refused to follow the unique rationale of the *Thompson*²⁹ case.³⁰

Summing up, the judges declared:

In the broad language in which the ordinance is enacted it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing.³¹

The court concluded that the ordinance was an “unreasonable interference with the private rights of the citizens.”³²

The First World War, Prohibition, and the development of the American advertising industry all hastened the demise of the first antismoking movement. America’s entry into World War I had the significant side effect of establishing tobacco as a part of the soldier’s everyday life. In an article on antitobacco efforts, the New York Times pointed out:

The war dealt a staggering blow to the cause of tobacco prohibition. Tobacco was included in the Army rations. It was sold or given away by war relief organizations . . . The doughboy and his cigarette became traditionally inseparable.³³

During the conflict, General John J. Pershing, leader of American forces overseas, cabled his superiors in Washington, D.C.: “Tobacco is as indispensable as the daily ration; we must have thousands of tons of it without delay.”³⁴

In the postwar period, America underwent the tension of Prohibition, and activities of the anticigarette forces were linked in some minds to the elimination of liquor from national life. “[A]gainst tobacco,” huffed the New York Times, “would-be prohibitionists have a case not a hundredth part as good as they had against alco-

²⁹*Supra* note 3.

³⁰*Zion v. Behrens*, 104 N.E. 836, 837 (1914).

³¹104 N.E. at 837-838 (1914).

³²104 N.E. at 838 (1914). In reporting this decision, the New York Times noted that “[a]ttempts to enforce the ordinance have kept Zion City in the throes [sic] of intermittent rioting for several years.” New York Times, February 22, 1914, § 2, at 12, col. 1.

Both these early cases (*Hershberg* and *Zion*) striking down antismoking legislation did so primarily because the courts testing the ordinances believed: (1) that the ordinances in question were too broadly drafted, and did not restrict their effect to places where smoke would prove to be a serious irritant (*i.e.*, indoors), and (2) that the police power did not extend so far as to cover what was perceived only as a minor irritant by the courts, if that.

With the accumulation of medical evidence citing cigarette smoke as a health hazard to nonsmokers in enclosed space (*see infra*, § 3), and the more careful and accurate drafting of antismoking ordinances so that they apply primarily to enclosed public places, the continued validity of *Hershberg* and *Zion* is doubtful.

³³New York Times, September 2, 1923, § 7, at 2, col. 7.

³⁴WAGNER, *supra* note 4, at 44.

hol."³⁵ When the Eighteenth Amendment³⁶ began to sour, further prohibitions (*e.g.*, against smoking) were looked upon unfavorably.³⁷

In addition to the war and Prohibition, the infant American advertising industry was beginning its postwar development, and cigarettes were one of Madison Avenue's vanguard products. "More than any other product, the cigarette established Madison Avenue as the symbol of the advertising age."³⁸ On radio, there were calls for Philip Morris; in pictorial advertising, sylph-like young flappers urged their swains to "Blow some my way."³⁹

Finally, the demise of the anticigarette crusade was hastened by the states' discovery of tobacco as a taxation revenue source. Though the federal government had imposed an excise tax on cigarettes during the Civil War,⁴⁰ the first tax by a state was not imposed until 1921.⁴¹ Once the states had made tobacco a major source of revenue efforts to restrict its sale and use were bound to meet with unenthusiastic responses from legislators hard-pressed to find new tax income.

The cumulative effect of the aforementioned social phenomena totally defeated the first major antismoking crusade in America. By 1927, all restrictive legislation by the states had been repealed.⁴² A few years later, one legal writer delivered a eulogy to the movement.

The penumbra of malediction once surrounding the use of tobacco has considerably faded in recent years. Whether tobacco prohibition originates in the reformist's 'lingering desire to persecute' or in earnest hope of furthering the public welfare, there is reason to suggest that further experiments with this type of legislation would result in

³⁵New York Times, October 11, 1919, at 8, col. 5. The Times freely spoofed antitobacco efforts in the Prohibition era, saying of their legislative efforts that "[t]he slaves of the holy herb nicotine must be freed." The editorial speculated as to how long it would be before a bill would be introduced in Congress to ban cigarette advertising from the mails — a ban which arrived, in modified form, 54 years later, as 15 U.S.C. §§ 1331-1339 (1970), the Public Health Cigarette Smoking Act of 1969. New York Times, January 18, 1917, at 10, col. 2. See also New York Times, November 16, 1920, at 14, col. 3 (satirizing by editorial the Kansas Anti-Cigarette League).

³⁶U.S. CONST. amend. XVIII.

³⁷In his 1925 inaugural address, North Dakota Governor Arthur G. Sorlie deplored the growing disrespect for the liquor prohibition laws, saying:

. . . the fault lies very largely at the door of mistaken moral reformers, who are continually asking for the passage of laws regulating the lives and habits of our citizens and imposing penalties for the doing of acts which in themselves are not morally wrong.

New York Times, January 8, 1925 at 44, col. 1.

³⁸*Crusades*, *supra* note 13, at 25.

³⁹On tobacco's postwar development through advertising, see *The Ad Man: Tobacco Road to Madison Avenue*, in WAGNER, *supra* note 4, at 45-62.

⁴⁰WAGNER, *supra* note 4, at 46.

⁴¹By Iowa. WAGNER, *supra* note 4, at 119.

⁴²*Id.* at 44.

but little progress. If the preservation of youth is the paramount aim, can state legislation succeed where parental legislation has failed? It would seem by far to be the more practical course for lawmakers to regard tobacco in the light of a source of revenue only.⁴³

Yet the antismoking movement was not dead, only dormant. The advent of medical evidence on smoking and health was to provide the antismoking forces with their most potent weapon.

III. CURRENT EVIDENCE ON SMOKING AND HEALTH

[T]obacco smoke has become the foremost preventable cause of disease, disability, and death in [the United States].⁴⁴

Research into the effects of tobacco on the human body was conducted as long ago as 1671.⁴⁵ However, recent concern with the effects of smoking on health can be traced from 1938 with the publication of findings that smokers appeared to have a lower life expectancy than nonsmokers.⁴⁶ In 1954, an American Cancer Society survey sent to the American Medical Association (A.M.A.) confirmed the findings of the 1938 survey.⁴⁷

The bombshell in smoking and health research came on January 11, 1964, with the release of the Report of the U.S. Surgeon General's Advisory Committee on Smoking and Health.⁴⁸ The committee gave the following statement as its "judgment in brief": "Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."⁴⁹ After reviewing hundreds of medical studies bearing on smoking and health, the committee concluded that cigarette smoking

⁴³35 LAW NOTES 206 (February 1932).

⁴⁴Jacobs, *Smoking: Insidious Suicide and Personal Air Pollution*, 135 MIL. MED. 678 (August 1970).

⁴⁵WAGNER, *supra* note 4, at 64 *et seq.*

⁴⁶Pearl, SCIENCE 216-217 (March 4, 1938).

⁴⁷WAGNER, *supra* note 4, at 78.

⁴⁸*Id.* at 130. Four health organizations (American Cancer Society, American Heart Association, American Public Health Association, and the National Tuberculosis and Respiratory Disease Association) had requested President Kennedy to form this study group in 1961. The President agreed, and ordered the Surgeon General to appoint ten members, selected from a panel of experts submitted to and approved by the tobacco industry. NATIONAL CLEARINGHOUSE FOR SMOKING AND HEALTH, HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, CHART BOOK ON SMOKING, TOBACCO, & HEALTH (P.H.S. Pub. No. 1937) 8 (June 1969).

The Surgeon General instructed the committee "to review and evaluate both . . . new and older data [from all pertinent scientific disciplines] and, if possible, to reach some definitive conclusions on the relationship between smoking and health in general." Terry, *Foreword* to PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SMOKING AND HEALTH (P.H.S.B. No. 1103), at v (1964) [hereinafter cited as 1964 REPORT].

⁴⁹1964 REPORT, *supra* note 48, at 33.

... was not only a major cause of lung cancer and chronic bronchitis, but was associated with illness and death from chronic bronchopulmonary disease, cardiovascular disease, and other diseases.⁵⁰

Since 1964, the Surgeon General and the Department of Health, Education, and Welfare (H.E.W.)⁵¹ have released six supplementary reports⁵² on the health consequences of smoking. The latest one (1973) confirmed the findings of the 1964 Report.⁵³

The supplemental reports have surveyed the relevant evidence from medicine and related fields on smoking.⁵⁴ These reports represent some of the most comprehensive bibliographic and analytical studies ever conducted on a topic of public interest in the United States.

The 1972 Report was the first of the series to present evidence on the effect of tobacco smoke on nonsmokers, a phenomenon known as "passive smoking."⁵⁵ It noted that the

... actual amount of materials to which individuals are exposed in the presence of smokers depends upon the amount of smoke produced, the depth of inhalation on the part of the smoker, the ventilation available for the removal or dispersion of the smoke, and the proximity of the individual to the smoker.⁵⁶

Smoke not inhaled (sidestream smoke) has been found to contain significantly higher levels of "tar"⁵⁷ and nicotine than mainstream smoke.⁵⁸ Such smoke, produced by idling cigarettes, may be harmful to the nonsmoker.⁵⁹ "Sidestream smoke of one cigarette contains

⁵⁰Duval, *Preface to 1973 REPORT*, *supra* note 1, at iii.

⁵¹Under the requirements of 15 U.S.C. § 1337(a) (1970).

⁵²PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* (1967); PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* (1968); PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* (1969); PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* (1971); HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING* (1972) [hereinafter cited as 1972 REPORT]; 1973 REPORT, *supra* note 1.

⁵³DuVal, *Preface to 1973 REPORT*, *supra* note 1, at iii.

⁵⁴The association of the following conditions with smoking have been studied: peptic ulcer disease (1967, 1971, 1972, 1973), tobacco amblyopia (1971), allergy (1972), harmful constituents of cigarette smoke (1972), non-cancerous oral disease (1969); pipe and cigar smoking (1973), and exercise performance (1973).

⁵⁵1972 REPORT, *supra* note 52, at 117-135.

⁵⁶1972 REPORT, *supra* note 52, at 122.

⁵⁷"Tobacco 'tar' is the name given to the aggregate of particulate matter in cigarette smoke after subtracting nicotine and moisture." 1972 REPORT, *supra* note 52, at 142.

⁵⁸Mainstream smoke is smoke generated during puffing when air is being drawn through the cigarette. 1964 REPORT, *supra* note 48, at 50.

⁵⁹1972 REPORT, *supra* note 52, at 123.

75.5 ml. of [carbon monoxide], a quantity 4.7 times greater than that present in the mainstream smoke of one cigarette."⁶⁰

Another danger to "passively smoking" nonsmokers is the amount of carbon monoxide (CO) in a tobacco smoke atmosphere.⁶¹ The 1972 Report points out that small amounts of inhaled CO will increase the blood's carboxyhemoglobin (COHb).⁶² This increase can produce adverse health effects as manifested by impaired time interval discrimination.⁶³ The Report's conclusion:

2. The level of carbon monoxide attained in experiments using rooms filled with tobacco smoke has been shown to equal, and at times to exceed, the legal limits for maximum air pollution permitted for ambient air quality in several localities and can also exceed the occupational Threshold Limit Value for a normal work period presently in effect for the United States as a whole. The presence of such levels indicates that the effect of exposure to carbon monoxide may on occasion, depending on the length of exposure, be sufficient to be harmful to the health of an exposed person. This would be particularly significant for people who are already suffering from chronic bronchopulmonary disease and coronary heart disease.⁶⁴

Further, the 1972 Report found surveys indicating that "a signifi-

⁶⁰Hoegg, *Cigarette Smoking in Closed Spaces*, 2 ENVIRON. HEALTH PERSPECT. 117, 126 (October 1972).

⁶¹See 1964 REPORT, *supra* note 48, at 60; 1972 REPORT, *supra* note 52, at 143.

⁶²[Carbon monoxide] combines with the red blood cells very rapidly, and when these cells are occupied by carbon monoxide they cannot perform their normal duty of carrying oxygen. Since carbon monoxide combines with red cells two hundred times more easily than oxygen does, the inhalation of a very low concentration of carbon monoxide can quickly displace all oxygen from the cells. Hypoxia — [lack of oxygen, affecting all parts of the body but primarily the brain], . . . is the result of this occupation of the oxygen transport system by undesirable passengers.

Thomas, D.M., *Health Hazards of Smoke Inhalation*, INTERNATIONAL FIRE FIGHTER 8, 9 (August 1971).

⁶³One study found that drivers subjected to two hours in the smoky interior of a car had COHb levels of between seven and fifteen percent. These subjects took longer to respond to changes in cars' taillight intensity, to judge relative velocities, and had difficulty in maintaining a 200-foot separation distance. Ray and Rockwell, *An exploratory study of automobile driving performance under the influence of low levels of carboxyhemoglobin*, 174 ANN. N.Y. ACADEMY OF SCIENCE 396, 405-406 (1970).

⁶⁴1972 REPORT, *supra* note 52, at 131. The Environmental Protection Agency has established primary and secondary ambient air standards for carbon monoxide as follows:

(1) 9 parts per million (ppm): maximum eight-hour concentration not to be exceeded more than once per year.

(2) 35 ppm: maximum one-hour concentration not to be exceeded more than once per year.

Environmental Protection Agency, *National primary and secondary ambient air quality standards*, 36 FED. REG. 8186-8201 (1971).

But see five studies which have found no impairment of psychomotor ability on exposure to high levels of carbon monoxide. 1972 REPORT, *supra* note 52, at 126.

cant proportion of nonsmoking individuals report discomfort and respiratory symptoms on exposure to tobacco smoke."⁶⁵

The deleterious effects of tobacco smoke on the nonsmoker have been reported by several medical researchers and writers. Former U.S. Surgeon General Jesse Steinfeld summarized the significance of the 1972 Report on passive smoking:

Although we cannot say with certainty that exposure to tobacco smoke is causing serious illness in non-smokers — the long-term research necessary for such a conclusion has not yet been done — our 1972 review makes perfectly clear that such exposure can contribute to the discomfort of the non-smoking individual and can produce exacerbation of allergic symptoms in those who are suffering from allergies of various other causes.⁶⁶

IV. PUBLIC OPINION ON SMOKING

Estimates vary on the number of Americans who smoke, depending on whether just cigarettes are considered or all tobacco products. Figures from 1970 suggest that 43 per cent of all men and 31 per cent of all women seventeen and older currently smoke cigarettes.⁶⁷

⁶⁵1972 REPORT, *supra* note 52, at 128. In one of the more comprehensive studies of the effects of passive smoking, 441 nonsmokers, divided into allergic and non-allergic groups, were exposed to tobacco smoke and their reactions were recorded. The results:

<i>Number reporting</i>	<i>Allergic</i>	<i>Non-allergic</i>
Eye irritation	73%	70%
Nasal symptoms	67	29
Headache	46	31
Cough	46	25
Wheezing	22	4

Speer, F., *Tobacco and the nonsmoker*, 16 ARCH. ENVIRON. HEALTH 443-446 (1968).

Another study estimated that approximately eight million people in the U.S. are "clinically sensitive" to tobacco smoke. Zussman, *Tobacco sensitivity in allergic patient*, 28 ANN. ALLERGY 371, 372 (1970).

⁶⁶Steinfeld, *The Public's Responsibility: A Bill of Rights For The Non-Smoker*, 55 R.I. MED. J. 124, 125 (1972). A similar conclusion was reached by another medical researcher on the subject: "Thus, tobacco smoke endangers not only the smoker himself, but also those who inhale tobacco smoke in a smoky room. This applies to an increased measure [*sic*] for the working staff." Galuskina, *3,4-Benzpyrene determination in the smoky atmosphere of social meeting rooms and restaurants: A contribution to the problem of the noxiousness of so-called passive smoking*, 11 NEOPLASMA 465, 467 (1964).

⁶⁷U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973 (94th ed.), Table No. 129 [hereinafter cited as 1973 ABSTRACT]. Available statistics on cigarette smoking over time indicate that the proportion of smoking Americans has been decreasing since the 1920's. In 1923, one expert estimated that as much as 75 per cent of the male adult U.S. population were smokers. New York Times, September 2, 1923, § 7 at 2, col. 7. In 1935, 37 per cent of persons asked in a Roper public opinion poll indicated that they smoked cigarettes. In 1947, 47 per cent of those responding to a Gallup poll said that they smoked cigarettes. 30 PUB. OPINION Q. 140, 142 (1966). A 1965 Harris poll reported that 47 per cent of Americans over 21 years

Based on 1972 population figures,⁶⁸ the cigarette smoking population of the United States is currently between 50 and 55 million persons.

Many medical groups and associations have taken public stands on the issue of smoking and health. The American Cancer Society has urged the end of all cigarette advertising.⁶⁹ The A.M.A. has passed resolutions to discourage smoking during sessions of the Association's House of Delegates.⁷⁰

In California, the 25,000-member California Medical Association (C.M.A.) has adopted strict resolutions against smoking.⁷¹ A 1971 resolution, for example, opposed tobacco smoking in all public places, and recommended that "indulgence in tobacco smoking be confined to designated areas in public buildings and conveyances."

In 1972, the C.M.A. cited inhalation of tobacco smoke as a "serious health hazard," and proposed establishment of no-smoking areas in hospitals.⁷² A year later, in 1973, the C.M.A.'s House of Delegates called cigarettes "an annoyance and a serious health hazard" and called for the C.M.A. to "urge legislation to ban all forms of cigarette advertising." Finally, in Resolution No. 68-73, the Association discouraged smoking in public places, public transportation, C.M.A. offices and meetings, and in all health care delivery facilities.

Outside the medical profession, advocates for smoking restrictions have long been active. John F. Banzhaf III has been a major leader of the antismoking forces. Banzhaf was the prime mover behind the 1967 Federal Communications Commission (F.C.C.) decision to re-

of age smoked; the comparable survey figure for 1969 was 42 per cent. *TIME*, April 25, 1969, at 98.

Government figures on the proportion of smokers in the 1960's have shown a steady decline. In 1959-1960, the number of smokers was estimated to be about 43 per cent of the population. (Of this survey's members, better than 80 per cent smoked cigarettes only.) U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1964 (85th ed.), Table No. 1127 [hereinafter cited as 1964 ABSTRACT]. For 1970, the proportion of cigarette smokers was about 38 per cent of the adult population. 1973 ABSTRACT, adapted from Table 129.

⁶⁸1973 ABSTRACT, *supra* note 67, Table 31.

⁶⁹"The Society hopes this can be achieved voluntarily, but is not wildly optimistic on the point." Read, *Why Do We Advertise the Chief Cause of Lung Cancer?*, OCCUP. HEALTH NURS. (N.Y.) 9, 10-11 (July 1971).

⁷⁰File copy of House of Delegates Resolution 1, from the proceedings of the A.M.A. House of Delegates meeting held in San Francisco, California, June 1972, sent with a letter from Dr. William H. Carlyon, Assistant Director, Department of Health Education, American Medical Association, January 14, 1974.

⁷¹This and the following information on the California Medical Association's stand on this matter was provided in a letter and accompanying material from Ms. Heather McFarlane, Administrative Assistant, C.M.A. (San Francisco), December 3, 1973.

⁷²The District of Columbia Medical Society has also urged the segregation of smoking and nonsmoking patients in hospitals. *Wall Street Journal*, January 29, 1970, at 1, col. 1.

quire radio and television stations which carried cigarette advertising to devote significant amounts of broadcast time to presenting the case against cigarette smoking.⁷³ That same year, Banzhaf founded ASH (Action on Smoking and Health), an organization devoted to securing protection of the rights of the nonsmoker to clean air in public places. He and ASH have lobbied vigorously for segregated seating for smokers and nonsmokers on airplanes — a goal which was realized in May 1973, when a Civil Aeronautics Board (C.A.B.) regulation to that effect was promulgated.⁷⁴

Ralph Nader has urged banning or restricting tobacco smoking in hospitals, and railroad and bus station waiting rooms.⁷⁵ Former U.S. Surgeon General Steinfeld has called for smoking bans in all public places such as restaurants, theaters, trains, and buses.⁷⁶

Antismoking efforts have been made in the business world. A St. Louis printing company gives its employees a \$500 bonus if they give up smoking for two months — but the workers must repay the bonus if they take up the habit again.⁷⁷ Other companies have segregated smokers from nonsmokers, urged employees to quit smoking, or have made it a policy not to hire smokers.⁷⁸

For administrators, legislators, and anyone else in authority who is reluctant to undertake reforms in this area because of uncertainty as to public opinion, three surveys, conducted in 1964, 1966, and 1970, provide the requisite “hard” public opinion data.⁷⁹ The surveys included statements which were read to respondents, who indicated whether they agreed or disagreed with the statement. Follow-

⁷³See *Banzhaf v. F.C.C.*, 405 F.2d 1082, 132 U.S. App. 14 (D.C. 1968), *cert. denied*, 396 U.S. 842 (1969), *aff'g* 8 F.C.C.2d 381 (1967), 9 F.C.C.2d 921 (1967), 10 F.C.C.2d 16 (1967).

⁷⁴14 C.F.R. 252 (1974).

⁷⁵Wall Street Journal, January 29, 1970, at 1, col. 1.

⁷⁶Steinfeld, *The Public's Responsibility: A Bill of Rights For The Non-Smoker*, 55 R.I. MED. J. 124, 125 (1972); NEWSWEEK, January 25, 1971, at 90-91.

⁷⁷Wall Street Journal, October 9, 1973, at 1, col. 5.

⁷⁸Wall Street Journal, January 26, 1971, at 1, col. 5. Some antismoking citizens advocate militant measures against smokers who refuse to cease and desist on request. One true believer carries a small bottle of ammonia with him which he uncorks whenever such an impasse is reached. The odor ruins the flavor of the cigarette being smoked nearby, and “quickly the message gets across.” Letter to the New York Times, August 19, 1973, § X, at 23, col. 1.

⁷⁹The results of the fall, 1964 (conducted after the release of the 1964 REPORT, *supra* note 48) and spring, 1966, surveys are contained in the NATIONAL CLEARINGHOUSE FOR SMOKING AND HEALTH, HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, USE OF TOBACCO (July 1969) [hereinafter cited as 1969 TOBACCO USE STUDY]. The spring, 1970, survey is reported in NATIONAL CLEARINGHOUSE FOR SMOKING AND HEALTH, CENTER FOR DISEASE CONTROL, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ADULT USE OF TOBACCO (July 1973) [hereinafter cited as 1973 TOBACCO USE STUDY].

ing are the key questions and responses in the three surveys:⁸⁰

A. "Smoking cigarettes is harmful to health."⁸¹

	1964	1966	1970
Agree	80.8%	81.5%	87.5%
Disagree	13.6	13.0	7.3

This sentiment is the basic premise of any antismoking legislation. A majority of those polled, current smokers as well as nonsmokers, agreed with this statement. People *know* smoking is a health hazard. This proposition has been established in the American citizen's mind by a better than twelve-to-one ratio.

B. "It is annoying to be near a person who is smoking cigarettes."⁸²

	1964	1966	1970
Agree	44.8%	47.9%	58.5%
Disagree	51.7	48.6	38.3

This question measures a subjective reaction of the respondents. Tobacco smoke has not become more irritating since 1964. The reversal of opinion on this question is attributable to an increased awareness of people that smoking is an avoidable irritant — a health hazard that need not be suffered in silence. The increasing amount of agreement with this statement indicates the effect of the antismoking forces in sensitizing consciences on this issue.⁸³

C. "The smoking of cigarettes should be allowed in fewer places than it is now."⁸⁴

	1964	1966	1970
Agree	51.2%	51.8%	56.8%
Disagree	38.8	36.8	36.3

This statement represents the theme of this article. The responses indicate that there is a solid plurality of Americans who favor restricting smoking. Reactions to this statement, along with statements A and B, *supra*, provide the basic popular support for such restric-

⁸⁰For simplicity, responses are given as "agree" or "disagree". The original tables break down responses by degree of intensity (strongly agree, mildly agree, no opinion, mildly disagree, strongly disagree). The citations to each question provide much more detailed breakdowns of responses by respondents (*i.e.*, current smoker, former smoker, male, female, etc.).

Percentages have been averaged between male-female statistics, which gives slightly more weight to male responses, since men represent a 49-51 per cent minority compared to women in the United States.

⁸¹1969 TOBACCO USE STUDY, *supra* note 79, at 155-156; 1973 TOBACCO USE STUDY, *supra* note 79, at II-9.

⁸²1969 TOBACCO USE STUDY, *supra* note 79, at 159-160; 1973 TOBACCO USE STUDY, *supra* note 79, at II-20.

⁸³It should be added that one-third of current smokers in the 1970 survey agreed with statement B! *Id.* at II-20.

⁸⁴1969 TOBACCO USE STUDY, *supra* note 79, at 435-436; 1973 TOBACCO USE STUDY, *supra* note 79, at II-17.

tions.⁸⁵ The next section describes the legal bases and authority for such action by the government.

V. LEGAL BASES FOR SMOKING RESTRICTIONS

A. STATE RESTRICTIONS

The police power⁸⁶ of the states (and of the local governments, as delegated to them by the states⁸⁷) as applied to health regulations provides a sufficient basis on which to promulgate restrictions on smoking in public places. Protection of the public health, the public morals, and the public safety has long been recognized as the essence of the police power.⁸⁸

Two major examples, one a single case and the other a line of cases, have approved health regulations as a proper subject of the state's police power. *Jacobson v. Massachusetts*⁸⁹ upheld a state law requiring smallpox vaccinations of all citizens. The U.S. Supreme Court reasoned that when the legislature of a state acted to produce such a statute, it must have considered the various theories as to the efficacy (or lack thereof) of vaccination, and that such a decision based upon all possible information had to be, of necessity, a legislative choice. The Court would not second-guess the legislators' decision on such a matter.⁹⁰

The fluoridation of public drinking water supplies by local governments to aid in the control of dental caries has been uniformly

⁸⁵Though all three of these surveys pre-date the 1972 REPORT, *supra* note 52, on hazards of tobacco smoke to nonsmokers, the results show the support for further restrictions on smoking — even *before* it became known that passive smoking could be dangerous.

⁸⁶The police power has been described as “simply the power of sovereignty, or the power to govern — the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare.” WITKIN, 3 SUMMARY OF CALIFORNIA LAW, Constit. Law § 158, at 1968 (7th ed. 1960), citing *Western Ind. Co. v. Pillsbury*, 170 Cal. 686, 151 P. 398 (1915), *Nebbia v. New York*, 291 U.S. 502 (1934), *Berman v. Parker*, 348 U.S. 26 (1954). It is one of the least limited powers of government, *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915), and is characterized by its flexibility. WITKIN, 3 SUMMARY OF CALIFORNIA LAW, Constit. Law § 158, at 1968 (7th ed. 1960); *see also* 11 CAL. JUR. 2d, Constit. Law § 157, at 542 (1953);

... whenever a thing or act is of such a nature that it may become . . . , injurious to the public health if not suppressed or regulated, the legislative body, . . . may make and enforce ordinances to regulate or prohibit such act or thing, although it may never have been offensive or injurious in the past nor declared to be a nuisance by the judgment of the court [cites].

⁸⁷*See e.g.*, CAL. CONSTIT. art. XI, § 7 (West Supp. 1974): “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”

⁸⁸*Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

⁸⁹197 U.S. 11 (1905).

⁹⁰197 U.S. at 30, 35 (1905).

upheld in court challenges.⁹¹ For example, California's two fluoridation cases⁹² have established the proposition that it is within the authority of a city to adopt regulations designed to promote the health and welfare of the people, and that the addition of fluoride to the public water supply is a valid exercise of the local government's police power, "so long as it [is] not unreasonable or an abuse of power to do so."⁹³

The United States Supreme Court has set a standard by which courts are to measure the validity of proposed police power-based laws:

To justify the state in . . . interposing its authority in behalf of the public, it must appear — First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.⁹⁴

Whether the interest of the public requires interference is a legislative determination. This determination cannot be invalidated simply because a court considers the determination unwise or improvident.⁹⁵ Hence, when a state legislature or local body has passed a carefully drawn no-smoking law, the courts cannot void the restriction on the grounds that they, the judges, do not believe that such a nuisance deserves to be specially classified and singled out legislatively.⁹⁶

Once the problem has been identified legislatively, a second question arises as to the type of remedies specified for the nuisance by the legislature. The earlier cases show that overly broad and loosely drafted ordinances will be invalidated.⁹⁷ However, where the legislatively-prescribed solution to the offensive conduct is both appropriate and reasonable,⁹⁸ the courts will uphold the proscription. As applied to smoking, the remedy of requiring smokers not to smoke

⁹¹See Note, *Medication of Public Drinking Water*, 3 WILLAMETTE L.J. 367 (1965); see also 43 A.L.R.2d 453, 454 (1955).

⁹²*DeAryan v. Butler*, 119 Cal. App. 2d 674, 260 P.2d 98 (1953), *cert. denied*, 347 U.S. 1012 (1953); *Beck v. City Council of Beverly Hills*, 30 Cal. App. 3d 112, 106 Cal. Rptr. 163 (1973).

⁹³*DeAryan v. Butler*, 119 Cal. App. 2d 674, 681, 682; 260 P.2d 98, 102 (1953).

⁹⁴*Lawton v. Steele*, 152 U.S. 133, 137 (1894). This test was affirmed in *Goldblatt v. Town of Hempstead*, 360 U.S. 590, 594-595 (1962). For a California statute to come within the police power, the regulation must (1) be reasonable, (2) not be for the annoyance of a particular class, (3) not be unduly oppressive, and (4) have means reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. *Paraco, Inc. v. Dept. of Agri.*, 118 Cal. App. 2d 348, 352; 257 P.2d 981, 884 (1953).

⁹⁵*Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁹⁶*Goesaert v. Cleary*, 335 U.S. 464 (1948); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 (1949).

⁹⁷See *Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914), *supra* note 27 and accompanying text; *Hershberg v. Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911), *supra* note 23 and accompanying text.

⁹⁸*Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

while they are in specified public places is not a serious infringement on their personal conduct, nor is it inappropriate. Such regulations are not directed against the smokers, but *in favor of* the innocent nonsmoker's right to breathe air unpolluted with tobacco smoke. The regulations do not attempt to "impose" protection on the smoker from the deleterious effects of his habit. The remedy prescribed by antismoking ordinances (abstinence in designated public places) is certainly appropriate. The nonsmokers who are bothered or even allergic to smoke cannot reasonably be told that if they don't like the smoke, they don't have to be there — especially, for example, when "there" is a public bus, or a government building.

Two provisions of the U.S. Constitution — the Fourteenth Amendment's due process⁹⁹ and equal protection¹⁰⁰ clauses — present two additional factors to be considered when determining the validity of antismoking legislation, though both pose standards similar to the basic requirements of a police power statute (that is, to be appropriate and reasonable). As regards due process, the U.S. Supreme Court has declared that:

If the laws passed [based on the police power] are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*.¹⁰¹

The equal protection clause will be violated where the legislature makes impermissibly discriminatory or arbitrary classifications under a police power statute.¹⁰² It seems unlikely that a valid substantive argument can be made that restrictions on smoking in public places deny to the smoker the equal protection of the laws, or that singling out smokers for regulation to minimize the health hazard of tobacco smoke is an invalid legislative classification. An example of an invalid classification under an antismoking statute would be one that restricted the public places in which cigarette smokers might indulge, but allowed cigar and pipe smokers to puff on unmolested.

Finally, it should be noted that, as with the purported problem itself (see *supra*, note 96, and accompanying text), the court indulges the presumption that legislative classifications made in the exercise

⁹⁹U.S. CONST. amend. XIV, § 1.

¹⁰⁰*Id.*

¹⁰¹*Nebbia v. New York*, 291 U.S. 502, 537 (1934). This due process limitation is more often a problem in eminent domain and zoning cases (see *generally*, 16 AM. JUR. 2d, Constit. Law § 296), where a property right is involved, than in a case where personal conduct is sought to be regulated.

¹⁰²*Gulf, Colo. & Santa Fe Railway v. Ellis*, 165 U.S. 150, 155 (1896). Here again, as with the due process standard, equal protection has been applied to negate alleged police power statutes dealing with, for example, labor laws (*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)), and economic regulation (*Morey v. Doud*, 354 U.S. 457 (1957)).

of the police power are valid.¹⁰³

Considering, then, these parameters of the police power, a strong case exists for the validation of antismoking restrictions under the health-police power rationale. In *Jacobson*,¹⁰⁴ the state was allowed to inoculate its citizens to prevent the spread of smallpox. The fluoridation cases allow a city to add chemicals to its water supply to prevent dental disease. Sufficient medical evidence exists to indicate a probable correlation between impaired health and the inhalation of tobacco smoke. Though the harm to be avoided is not contagious as smallpox is, nor as obvious as dental caries, the burden placed on the smoker is light compared to, for example, submission to inoculation. In essence, it is not too much to ask that smokers not smoke in public places where their smoke endangers the health and comfort of those around them — not to mention themselves.

The public nuisance concept, which is an outgrowth of the police power, could prove useful in supporting smoking restrictions.¹⁰⁵ “Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”¹⁰⁶

Some antismoking leaders have put forth the contention that smoking is an invasion of a nonsmoker’s right to privacy.¹⁰⁷ As the phrasing of this argument indicates, the application of a right to privacy to restrict smoking in public places would represent a monumental expansion of the right-to-privacy theory: “On the public street, or in any other public place, the plaintiff [here, the nonsmoker] has no legal right to be let alone;”¹⁰⁸

Finally, the related police power purpose of insuring the safety of citizens can be recognized in antismoking statutes as they reflect a legislative determination to reduce the hazards of fire — the original purpose of antismoking ordinances.¹⁰⁹ The validity of this rationale is substantiated by some insurance companies which offer lower rates to nonsmoking property owners.¹¹⁰

¹⁰³ *Borden’s Farm Products v. Baldwin*, 293 U.S. 194, 209 (1934), *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961).

¹⁰⁴ *Supra* note 89 and accompanying text.

¹⁰⁵ See WITKIN, *supra* note 86, at § 188.

¹⁰⁶ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960). For an example of a state nuisance statute which could be used as a basis for anti-smoking ordinances, see CAL. PENAL CODE §§ 370, 375 (West 1970).

¹⁰⁷ Kennedy, *Invasion of Privacy: New Angle on Smoking*, 11 J. MISS. ST. MED. ASSN. 117, 118 (1970) [hereinafter cited as Kennedy].

¹⁰⁸ W. PROSSER, TORTS 808 (4th ed. 1971). *But cf.* the dissent of Douglas, J., in *Public Utilities Commission v. Pollack*, 343 U.S. 451, 468 (1951), arguing in favor of a right of privacy from radio broadcasts in municipal streetcars.

¹⁰⁹ See *supra* note 2 and accompanying text; see also SAN FRANCISCO, CALIFORNIA, FIRE CODE §§ 20.10, 24.05 (1971).

¹¹⁰ *New York Times*, November 1, 1973, at 63, col. 2.

B. FEDERAL RESTRICTIONS

Though the federal government does not possess by name authority similar to the police power of the individual states, it can accomplish some of the same goals by its use of the powers, among others, to tax and to regulate commerce.¹¹¹ Further, the federal government has the authority to ban or restrict smoking within its own buildings.¹¹²

Provided with this medical evidence and legal support, what action have governments taken to restrict smoking in public places? In the last four years, quite a lot.

VI. CURRENT GOVERNMENTAL RESTRICTIONS ON SMOKING

A. FEDERAL LEGISLATION

In the first session of the 93d Congress, legislation was introduced to require interstate passenger carriers to segregate smokers and nonsmokers.¹¹³ To date, no legislative action has been taken on these proposals. Senator Richard Schweicker explained the reason for such legislation:

... [M]edical evidence indicates the matter goes beyond a question of convenience. It is a matter of the health of both smokers and nonsmokers. People who smoke voluntarily choose to do so, but nonsmokers sitting in public transportation facilities do not have the opportunity to choose whether or not to breathe air containing smoke. I think it is time for us to act to protect the right of nonsmokers to breathe clean air, and regulations by the various Federal agencies have not gone far enough in doing this.¹¹⁴

B. FEDERAL REGULATORY ACTION

Some restrictions of smoking in interstate carriers have already been promulgated. The Interstate Commerce Commission (I.C.C.) in November 1971, acting on a petition by Ralph Nader, ordered smokers in buses under its jurisdiction to sit in the rear twenty per cent of the seats in a bus.¹¹⁵ The Civil Aeronautics Board (C.A.B.) in May 1973 ordered all airlines to set aside sufficient seats to accom-

¹¹¹ C. H. PRITCHETT, *THE AMERICAN CONSTITUTION* 660 (2d ed. 1968); U.S. CONSTIT. art. I, § 8 (1), (3).

¹¹² See, e.g., February 2, 1972 Manual Circular — General Administration (HEW-72.1), *Policy on Smoking in DHEW-Occupied Buildings*, received in a letter from Rhode Island State Senator Guido Canulla, December 23, 1973.

¹¹³ S. 2219, H.R. 1309, H.R. 5279, 93d Cong., 1st sess. (1973).

¹¹⁴ Letter from U.S. Senator Richard Schweicker of Pennsylvania, October 24, 1973.

¹¹⁵ *National Ass'n of Motor Bus Owners v. United States*, 370 F. Supp. 408 (D.D.C. 1974), *aff'g* 114 M.C.C. 256 (1971).

modate all nonsmokers in a separate section of each plane.¹¹⁶ This regulation, another backed by Nader, was instituted in part because an F.A.A.-H.E.W. study found that 60 per cent of nonsmokers on planes were bothered by cigarette smoke.¹¹⁷ Though some airlines had been voluntarily segregating smokers and nonsmokers in 1970,¹¹⁸ the C.A.B. received enough citizen complaints to warrant taking administrative action.¹¹⁹

In some instances, government agencies have responded to internal requests for nonsmoking areas. H.E.W.'s main cafeteria in Washington, D.C., was segregated at the order of then-Secretary Elliot Richardson, himself a cigar and pipe smoker.¹²⁰ The Air Force Surgeon General has forbidden smoking by any hospitalized patients under his jurisdiction, and no U.S. Air Force hospital or base exchange in a hospital complex sells cigarettes.¹²¹

More recently, the chairman of the newly-formed Federal Consumer Product Safety Commission indicated that he would consider seeking authority to ban the sale of all or some cigarettes, pending an examination of information in the U.S. Surgeon General's smoking and health reports.¹²² However, tobacco state Congressmen quickly brought to the chairman's attention that the legislation establishing the Commission excluded cigarettes from the agency's intended scope of authority.¹²³

¹¹⁶ 14 C.F.R. 252 (1974).

¹¹⁷ Wall Street Journal, September 19, 1972, at 21, col. 3; NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, HEALTH SERVICES AND MENTAL HEALTH ADMINISTRATION, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, HEALTH ASPECTS OF SMOKING IN TRANSPORT AIRCRAFT (December 1971).

¹¹⁸ NEWSWEEK, January 25, 1971, at 90-91.

¹¹⁹ However, an earlier effort by Nader to have the courts order the F.A.A. to use its emergency power to force smoker segregation on planes failed. *Nader v. F.A.A.*, 440 F.2d 292 (D.C. Cir. 1971).

¹²⁰ The memorandum order explained: ". . . nothing in our new policy directive infringes upon the rights of those who wish to continue to smoke, provided their smoking does not cause discomfort or unreasonable annoyance to others." *Phoenix Gazette*, March 21, 1972.

¹²¹ Kennedy, *supra* note 107, at 117.

¹²² New York Times, August 23, 1973, at 1, col. 6.

¹²³ Remarks of Rep. David Henderson of North Carolina, 119 CONG. REC. H7648 (daily ed., September 6, 1973); remarks of U.S. Senator Jesse Helms, 119 CONG. REC. S16402-16404 (daily ed., September 12, 1973). Helms' remarks contained statements such as "it is not Government policy to discourage smoking" (*Id.* at S16403), and "How far should the Government intervene to impose upon its citizens an official party-line view of the good life? . . . This is not a health question. It is an ethical question, . . ." (*Id.*), and finally, ". . . after decades of scientific investigations the question of smoking and health is still a question. The causes of dread diseases, such as cancer and heart disease, are still unknown." (*Id.* at S16404).

Cf. the comment of the Fourth Circuit of the U.S. Court of Appeals when it decided that the F.C.C. could validly allow antismoking commercials to be aired under the so-called "fairness doctrine":

The Commission [F.C.C.] was justified in reaching the conclusion

C. STATE LEGISLATION

As of 1974, five states had enacted statutes to restrict smoking in public places: Arizona,¹²⁴ California,¹²⁵ Nebraska,¹²⁶ Oregon,¹²⁷ and Utah.¹²⁸ While the Utah law has been on the books in different forms since the anticigarette crusade of the 1920's,¹²⁹ the other four laws

that, regardless of its former views on the controversy over cigarettes, it is now reasonable for a licensee to assume that the detrimental effects of cigarette smoking on health are beyond controversy.

Larus & Brother Co. v. F.C.C., 447 F.2d 876, 880 (4th Cir. 1971).

¹²⁴ ARIZ. REV. STAT. ANN. § 36-601.01 (West Supp. 1973) (Smoking in certain public places; violation; penalty.):

"A. Smoking tobacco in any form is a public nuisance and dangerous to public health if done in any elevator, indoor theater, library, art museum, concert hall or bus which is used by or open to the public.

B. A person who violates this section is guilty of a misdemeanor punishable by a fine of not less than ten dollars nor more than one hundred dollars.

C. This section does not prohibit smoking in the areas listed in subsection A if the smoking is confined to areas designed as smoking areas."

¹²⁵ CAL. PUB. UTIL. CODE § 561 (West Supp. 1974) (Nonsmoking passenger space; notice; passenger air carrier defined):

"(a) Every railroad corporation, passenger stage corporation, passenger air carrier, and street railroad corporation providing departures originating in this state shall provide designated space for their nonsmoking passengers."

(b) [Requires signs notifying patrons of this provision to be posted in appropriate places.]

¹²⁶ Legislative Bill 600 was signed by the Governor of Nebraska on March 1, 1974, and will become law three months after the Nebraska Legislature adjourns *sine die* in 1974. The text of the bill as introduced follows:

"Be it enacted by the people of the state of Nebraska:

Section 1. Whereas smoking of tobacco in any form is dangerous to the health and welfare of each person, and whereas such smoking if done in any elevator, indoor theater, library, art museum, concert hall, or bus which is used by or open to the public is harmful to the public health, smoking of tobacco in any form in any area specified in this section is prohibited, except that such prohibition shall not apply in any area designated as a smoking area.

Section 2. Any person who shall violate the provisions of section 1 of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than ten dollars nor more than one hundred dollars."

¹²⁷ Oregon Laws 1973, ch. 168 (Oregon Legislative Assembly, 1973):

"Section 1. (1) No person shall smoke any cigar, cigarette or tobacco in any form at any meeting of any public body."

Statute defines "meeting", "public body", and imposes a ten dollar fine for violations.

¹²⁸ UTAH ANN. CODE 76-11-3 (1953):

"It is a misdemeanor for any person to smoke cigars, cigarettes or other tobacco in any form in any inclosed public place, except in extra rooms, compartments, or coaches specially provided for smoking purposes. . . ."

Defines "inclosed public place", lists minor exceptions.

¹²⁹ Utah Laws 1921, ch. 145, § 3, 4; 1923, ch. 52, § 1; 1943 93-3-2.

are of recent vintage.

The Arizona statute,¹³⁰ passed by the state legislature in May 1973, provides a good example of the legislative evolution of a contemporary antismoking proposal. It is one of the most recent comprehensive smoking restrictions yet enacted by a state. Introduced in February 1973 as S. 1313, the bill declared tobacco smoking to be "a public nuisance and dangerous to public health" if done in public places. In the course of deliberation, application of the ban (which applied where segregated smoking areas were not provided as required) to restaurants and cafeterias was eliminated by strong pressure from representatives of these establishments.¹³¹

One sponsor summarized the arguments used for the bill by saying, "it is a person's right to breathe air not contaminated by the smoking habits of another."¹³² He related that

... opponents of the bill attempted to make it appear that there really was no problem to the public in general, that since it had been a more or less acceptable practice over many years, there was no need to change it.¹³³

On a more pragmatic level, opponents of the Arizona bill argued that the measure, if passed, would be unenforceable and "purely symbolic."¹³⁴

Both citizen and legislative backers of the ban have made plans to expand the coverage of the statute to hospitals, doctors' waiting rooms,¹³⁵ restaurants, bars, and "other places where smoking could cause health problems for nonsmokers."¹³⁶

Neither of the sponsoring legislators nor an Assistant Arizona Attorney General foresee any possibility of valid constitutional challenges to the statute.¹³⁷

Of the other four states' legislation, California provides segregation of smokers and nonsmokers on public carriers (*e.g.*, planes, buses) providing departures originating in the state.¹³⁸ Utah prohibits to-

¹³⁰ *Supra* note 124.

¹³¹ Wisconsin State Journal, August 21, 1973, § 4 at 4; Phoenix Gazette, May 5, 1973; Wall Street Journal, August 9, 1974 at 14, col. 2. The sponsor of the bill amended the document himself to delete restaurants and cafeterias from its coverage because he did not believe the bill would pass if those establishments were included. Tucson Daily Citizen, March 16, 1973.

¹³² Letter from Arizona State Senator Stanley Turley, October 23, 1973 [hereinafter cited as Turley letter].

¹³³ *Id.* One Senate opponent said of the bill: "This hits pretty low. It invades a person's right to privacy." Tucson Daily Citizen, March 16, 1973. Apparently both sides in the antismoking controversy are trying to lay claim to the legal argument of a right to privacy. See *supra* note 108 and accompanying text.

¹³⁴ Tucson Daily Citizen, March 16, 1973.

¹³⁵ Turley letter, *supra* note 132.

¹³⁶ Statement of Mrs. Betty Carnes, Phoenix Gazette, May 5, 1973.

¹³⁷ Turley letter, *supra* note 132; letter from Arizona State Senator Douglas S. Holsclaw, October 31, 1973; Arizona Republic, March 8, 1973.

¹³⁸ See *supra* note 125 and accompanying text.

bacco smoking altogether in theaters, elevators, common public carriers, and railway station waiting rooms, and bans unsegregated smoking in dining establishments and government buildings.¹³⁹ Oregon in 1973 enacted S.B. 508 which prohibits smoking at any public meeting of any public body.¹⁴⁰ The Nebraska legislature in early 1974 passed and sent to the Governor Legislative Bill 600, which prohibits smoking in specified public places unless a designated smoking area is provided.¹⁴¹

At least seven state legislatures (in addition to California, Arizona, and Oregon) in 1973 gave consideration to antismoking bills, though efforts to pass the measures were unsuccessful.

— Bills were submitted in the 1973-74 session of the California State Legislature by Assemblyman John V. Briggs which would: require the Regents of the University of California to adopt rules and regulations prohibiting the smoking of tobacco or tobacco products in school buildings and enclosed facilities (Assembly Bill 1891); increase the state tax on cigarettes for one year, with the additional revenues to be earmarked for cancer and cigarette smoke research (A.B. 2580); and restrict smoking in hospitals, restaurants, bars, places of public assembly, and theaters (A.B. 2755, 2756).¹⁴²

— The Idaho House passed House Bill 32 which would have prohibited smoking at public meetings in the state, but the measure died in a Senate committee.¹⁴³

— In Illinois, State Rep. Dr. Bruce P. Douglas saw his "Public Places Smoking Regulation Act" (House Bill 350) pass that state's General Assembly but fail in the full Senate. The sponsor attributed the defeat of the bill to "the enormous lobbying pressure of the tobacco industry."¹⁴⁴ The measure would have required government agencies in the state to take action to segregate smokers and non-smokers in public places.

¹³⁹ *Supra* note 128.

¹⁴⁰ *Supra* note 127.

¹⁴¹ *Supra* note 127.

¹⁴² The latter two bills, A.B. 2755 and 2756 (1973-1974 Reg. Sess.), still have a chance of consideration in 1974; the other two bills have been defeated for the 1973-1974 Regular Session of the California Legislature.

¹⁴³ Letter from Idaho State Rep. Percival A. Wesche, December 20, 1973.

¹⁴⁴ Letter from Illinois State Rep. Dr. Bruce L. Douglas, October 24, 1973. Though this bill did not clear one of the last legislative barriers, it did come close to enactment containing the following language in § 3 ("Declaration of Policy"):

It is the policy of this State to recognize the right of the nonsmoking public to be free from the discomfort of second hand smoke in all places where people are required to be by law in order to carry out their responsibilities as citizens or public officials and to protect the nonsmoking public from the hazards to health which may be caused by the inhalation of second hand smoke fumes in all public places where the nonsmoking public may reasonably be expected to be for such purposes.

— In Massachusetts, House Bill 6547 also aimed to segregate smokers and nonsmokers in specified public places. Though the bill was favorably reported from the House committee, no further action was taken.¹⁴⁵

— Segregation of smokers and nonsmokers was the goal of a bill, S.F. 917, proposed by a Minnesota state senator. Actual consideration of the bill has been postponed until the 1974 session of the legislature.¹⁴⁶

— The Rhode Island State Senate is scheduled to consider in 1974 a bill which would ban smoking “in all places of public gatherings within buildings, all state-owned buildings, or in any public transportation” except where segregation is established for this purpose.¹⁴⁷

— Wyoming legislators proposed a ban on the sale and use of tobacco products in public buildings, but the measure did not receive a hearing in committee (due in part to the bill’s strict \$100-fine-per-violation penalty). One of the bill’s authors explained why he had submitted this legislation:

The non-smokers clearly are the majority in America and for some guilt-ridden reason unknown to me they choose not to stand for their rights as non-smokers. I would never interfere with a man’s right to smoke in his home or car or personal surroundings, but when he inflicts this grievance on the public at large in a public building, supported by tax monies, then I think there is an infringement upon the rights of the majority.¹⁴⁸

D. LOCAL GOVERNMENTS

Local governments have also responded to demands for protection by nonsmokers. After extended and often heated debate, the city council of Sacramento, California, in January 1974 passed a strong antismoking measure.¹⁴⁹ Though opposed by the city’s mayor, who,

¹⁴⁵ Letter from legislative aide of Massachusetts State Rep. Lois G. Pines, November 20, 1973.

¹⁴⁶ Letter from Minnesota State Senator Mel Hansen, November 15, 1973. Sponsor Hansen predicted that the bill had “a good chance of passage” in 1974.

¹⁴⁷ Letter from Rhode Island State Senator Guido Canulla, December 28, 1973, referring to Senate Bill 73S-323.

¹⁴⁸ Letter from Wyoming State Rep. Alan K. Simpson, November 5, 1973, referring to House Bill 113.

¹⁴⁹ The Ordinance adds Chapter 37 to the Sacramento City Code. It finds and declares that “tobacco smoke is a hazard to the health of the general public”, and prohibits smoking in the following “public places”:

- (a) elevators in buildings generally open to the public;
- (b) waiting rooms or public hallways of every private or public health care facility including, but not limited to, hospitals; provided further, however, that this prohibition shall not prevent the establishment of a separate waiting room in a facility in which smoking is permitted as long as there also exists a waiting room in the same facility in which smoking is prohibited;
- (c) chambers of the city council;

blowing cigarette smoke into his microphone during the session at which the ordinance was adopted, called it "ridiculous," "inane," "irrational," and "damned near unconstitutional,"¹⁵⁰ the measure as passed generally bans smoking in retail stores, theaters, lecture halls, libraries, buses, and public meetings. Restaurants covered by the ordinance must assign at least ten per cent of their seats to a no-smoking area. The Sacramento County Board of Supervisors adopted an identical ordinance this year for the county.¹⁵¹

Other California cities have acted, too. Davis, California, in 1973 passed an ordinance prohibiting smoking in specified public places.¹⁵² San Diego's City Council is considering prohibiting smoking in city council chambers and in some retail stores, and establishing no-smoking sections in the city's restaurants.¹⁵³ Oakland, California, now prohibits smoking in large retail department stores, primarily

(d) within every room, chamber, place of meeting or public assembly under the control of the city or any political subdivision of the state during such time as a public meeting is in progress conducted (1) by the City Council or any city board, committee or commission, or committee thereof, or (2) by any city-county board, committee or commission, or committee thereof, or (3) by the Sacramento Redevelopment Agency or City of Sacramento Housing Authority or any committee or commission thereof;

(e) within any building not open to the sky which is primarily used for, or designed for the primary purpose of exhibiting any motion picture, stage drama, lecture, musical recital or other similar performance, (except when the smoking is a part of a stage production) whenever open to the public, except that smoking is not prohibited in restrooms, or in any area commonly referred to as a lobby if physically separated from the spectator area;

(f) within every restaurant serving food to the general public in rooms having an occupied capacity of fifty or more persons, provided further, however, that this prohibition against smoking in restaurants shall not apply to restaurants wherein a "no smoking" area is maintained consisting of not less than ten percent of the seats at which customers are served;

(g) in the halls, reading and viewing rooms of museums and libraries when open to the public;

(h) on city buses;

(i) within retail stores doing business with the general public, except areas in said stores devoted exclusively to the sale of tobacco products, areas in said store not open to the public and all areas within retail tobacco shops.

The ordinance prescribes a maximum \$25 penalty for violations. It was passed January 24, 1974.

¹⁵⁰ Sacramento Bee, February 22, 1974, § B, at 1, col. 5.

¹⁵¹ County of Sacramento, California, SCC No. 166, passed March 20, 1974, adding Chapter 6.84 to the Sacramento County Code.

¹⁵² DAVIS, CALIFORNIA, ORDINANCE NO. 657, April 16, 1973. The Davis City Council, in Resolution No. 1250, Series 1973, urged city businesses to control their premises so that customers may visit establishments "in an atmosphere as free from cigarette, cigar or pipe smoke as is reasonably consistent with continued economic operation of such business or profession."

¹⁵³ Letter from San Diego City Councilman Jim Bates, October 26, 1973.

because it poses a fire hazard.¹⁵⁴ San Francisco prohibits smoking in public elevators, large retail stores, and in theaters, motion picture theaters, and places of public assembly.¹⁵⁵ At this writing, a resolution is pending before the Los Angeles City Council which would ban smoking in enumerated public places, including bars, restaurants, and theaters.¹⁵⁶

Local governments across the nation have manifested an interest in restricting smoking to protect the public's health. For example, in Jacksonville, Florida, smoking is prohibited in that city's Coliseum and public library, with certain exceptions.¹⁵⁷ In New York City, during the summer of 1973, then-Mayor John V. Lindsay vetoed a city council-passed bill making it a criminal offense to smoke in any of the city's 54,000 passenger elevators.¹⁵⁸

In sum, legislating bodies on all levels of government have become more sensitive to the protection of the nonsmoker. Since 1971, five states have passed smoking restrictions, and many more states and municipalities are considering such measures.

VII. RECOMMENDATIONS

State and local governments have the power, under the public health and safety rationale of the police power, to ban (or at least restrict) smoking in enclosed public places. As section III, *supra*, has shown, tobacco smoke is most dangerous to the health of non-smokers in enclosed places (*e.g.*, meeting rooms, theaters, museums, elevators, offices, hospitals, classrooms, etc.). Therefore, state and local governments should recognize (as many already have) that tobacco smoke is a hazard to the health of the general public, and ban smoking in such enclosed places.

It is difficult to delineate with precision which enclosed areas should be free of tobacco smoke. Generally, those areas where the public has a right or duty to be (*e.g.*, state, federal, and local government buildings, and offices and meetings therein) in order to transact business should be smoke-free.¹⁵⁹

Moreover, smoking should not be allowed on public carriers (*e.g.*, airplanes, trains, buses, even elevators). State and local governments

¹⁵⁴ Letter from Robert C. Jacobsen, City Clerk, Oakland, California, October 24, 1973.

¹⁵⁵ SAN FRANCISCO, CALIFORNIA, FIRE CODE §§ 20.10, 24.05 (1971).

¹⁵⁶ Los Angeles Times, December 28, 1973, § 2, at 1, col. 1.

¹⁵⁷ JACKSONVILLE, FLORIDA, ORDINANCE NO. 73-448-117, April 10, 1973.

¹⁵⁸ Lindsay opposed the strict penalties (maximum of 30 days imprisonment and a \$300 fine), adding that he was not opposed to a fine by itself as a penalty. New York Times, August 9, 1973, § 1, at 39, col. 7.

¹⁵⁹ See, for example, *supra* note 127. See generally note 144, *supra* (the declaration of purpose of the Illinois bill).

can also act to ban smoking in retail stores¹⁶⁰ and restaurants.¹⁶¹

The compromise measure of segregating smokers from nonsmokers within a given airspace is of little help in keeping the smoke from the nonsmoking public, which has the right to be free of tobacco fumes. Restricting smokers to, for example, one-third of the floor space of a theater or restaurant hardly ameliorates the problem of a smoky atmosphere. The same amount of smoke will still be produced within the same number of cubic feet of airspace. Segregation of smokers and nonsmokers within the same airspace is of no use, practically speaking. There must be a physical separation such that the tobacco smoke affects *only* those who choose to indulge.

VIII. CONCLUSIONS

Prohibition of tobacco products (as opposed to restrictions on use), though suspected by some tobacco product manufacturers to be the ultimate goal of the antismoking groups, is not the nonsmoker's answer to the health dangers such products pose. The Eighteenth Amendment to the U.S. Constitution demonstrated that prohibition is impossible to enforce in some cases. Difficulties are to be expected with an issue on which some proponents are accused of attempting to legislate morality. But current debate involves morality less and less. It is the *health* consequences of smoking which must be faced.¹⁶² It is not just that smoking is an irritant — it also hastens the death of the smoker and injures the nonsmoker. "Habit dies hard, regrettably, but why should the smoker, headed for his early grave, drag the non-smoker down with him?"¹⁶³

Enforcement of antismoking laws presents the final hurdle to the solution of the problem. In most cases, the sanctions, where imposed, are not serious. But at the very least, these statutes and ordinances can be seen as an effort on the part of nonsmokers to make smokers aware once again that their conduct is harming others besides themselves. Like air pollution on a larger scale, the antismoking laws seek to secure the individual's right to clean air, free of tobacco smoke.

... I'm not suggesting that smoking itself be made illegal. Prohibition proved that you can't legislate people into protecting their

¹⁶⁰*E.g.*, the SAN FRANCISCO FIRE CODE, *supra* note 155.

¹⁶¹*E.g.*, the SACRAMENTO CITY ORDINANCE, *supra* note 149 at § (f).

¹⁶²Steinfeld, *The Public's Responsibility: A Bill of Rights For The Non-Smoker*, 55 R.I. MED. J. 124, 125 (1972):

... nonsmokers, at least until now, have been a very silent majority, probably because they were afraid to speak out in defense of their right to breathe unpolluted air for fear of being taken for cranks or neurotics.

¹⁶³New York Times, June 11, 1973, § 1, at 35, col. 6.

health. People who want to smoke should be allowed to do so, just as other people have an equally important right — that of knowing what harm smoking can do to them. But, we can demand that smokers don't inflict their foolishness on the rest of us.¹⁶⁴

Christopher Cobey

¹⁶⁴ Banzhaf, *Please put out your cigarette; the smoke is killing me!*, 50 TODAY'S HEALTH 38, 40 (April 1972).