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# CLEAN INDOOR AIR: WHO HAS IT & HOW TO GET IT — A FUNCTIONAL APPROACH TO ENVIRONMENTAL TOBACCO SMOKE

by Christine Hymes

"As early as 1604, King James I ... blasted smoking as 'a custom loathsome to the eye, hateful to the nose, harmful to the brain, and dangerous to the lungs.'<sup>1</sup> Reformers preached during the mid 1800s that smoking undermined morals and led to heavy rum drinking, and during Prohibition there was so much public opinion against smoking that nine states outlawed cigarettes.<sup>2</sup> Contemporary society is not ready to ban cigarettes but is willing to regulate where and when people smoke them. While the detrimental health effects of smoking are no longer in question, the effects of environmental tobacco smoke (ETS)<sup>3</sup> are debatable. The controversy that surrounds ETS has resulted in attention from doctors, scientists, labor leaders, the media, and the tobacco industry. In January, 1993, the Environmental Protection Agency (E.P.A.) released its report declaring ETS as a class

A known (human) carcinogen.<sup>4</sup> Nonsmokers now demand the right to breathe clean air while smokers demand the right to smoke. Smokers, along with the tobacco industry, feel they are the victims in this crusade against their lethal habit and are fighting against restrictions on their right to smoke.

On the other hand, public policy has begun to reflect the sentiment of many nonsmokers who simply do not want the health risk of ETS forced upon them. The Surgeon General, Dr. Joycelyn Elders, and five of her predecessors<sup>5</sup> endorsed smoking restrictions in most non-residential buildings in the nation.<sup>6</sup> In 1986, then Surgeon General Koop stated in the preface of his report, The Health Consequences of Involuntary Smoking,<sup>7</sup> that the right of smokers to smoke ends where their behavior affects the health and well-being of others.<sup>8</sup> Additionally, Koop asserted that it is the smokers'

responsibility to ensure that they do not expose nonsmokers to the potentially harmful effects of tobacco smoke.<sup>9</sup> To this end, smokers must not only consider the wishes of nonsmokers, but to do so must significantly change their behavior. Common courtesy has not prevailed in efforts to control ETS. To effectively accomplish this goal, either federal, state, and local jurisdictions must intervene with forceful legislation, or private entities must respond with self-regulation.

Representative Henry A. Waxman, D-CA,<sup>10</sup> responded to complaints about secondhand smoke by proposing legislation to require owners of non-residential buildings regularly entered by ten or more people to either ban smoking inside the building or restrict it to separately ventilated rooms.<sup>11</sup> Waxman proposed enforcement through citizen lawsuits to avoid the creation of more federal bureaucracy.<sup>12</sup> Federal laws, once proposed, are not likely to go into effect soon, if at all.<sup>13</sup>

Representative Thomas J. Bliley, R-VA, charged the Environmental Protection Agency with politically manipulating its information.<sup>14</sup> Charles O. Whitley, former House member who appeared for the Tobacco Institute called the EPA study "scientifically flawed" contending that EPA based its conclusions on studies of nonsmokers' exposure in the home, not in public buildings.<sup>15</sup> He claimed that the study was an attempt to ban smoking and that it was an example of social engineering on a vast scale.<sup>16</sup> Whitley likened this federal intervention to the extremism of Prohibition.<sup>17</sup>

On the other hand, Waxman pointed out

<sup>1</sup> *No Smoking Sweeps America*, BUSINESS WEEK, July 27, 1987, at 40.

<sup>2</sup> *Id.*

<sup>3</sup> ETS is also referred to as passive smoke, involuntary smoke and secondhand smoke.

<sup>4</sup> *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, Environmental Protection Agency, EPA/600/6-90/006F (1992).

<sup>5</sup> Drs. C. Everett Koop, S. Paul Ehrlich Jr., Antonia C. Novello, Julius B. Richmond, Jesse L. Steinfeld.

<sup>6</sup> *Surgeons General Support Ban on Secondhand Smoke* [hereinafter *Surgeons General*], ST. LOUIS POST DISPATCH, Feb. 8, 1994, at 6A.

<sup>7</sup> *Surgeon General, Citing Risks, Urges Smoke-Free Workplaces*, THE NEW YORK TIMES, Dec. 17, 1986, at A22.

<sup>8</sup> *Id.*

<sup>9</sup> Gregory W. Heath, *When smoke gets in your eyes; Passive smoking as a link to health problems for nonsmokers*, VIBRANT LIFE, Sept. 1993, at 12.

<sup>10</sup> Waxman sits on the Energy and Commerce subcommittee on Health and the Environment.

<sup>11</sup> *Surgeons General*, *supra* note 6.

<sup>12</sup> *Id.*

<sup>13</sup> Edwin Chen, *White House Seeks Wide Smoking Ban*, LOS ANGELES TIMES, March 26, 1994, at 1.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

that the legislation was not an attempt at social engineering, but good public policy and justifiable since government already regulates how people who drink affect other people.<sup>18</sup> Similarly, the anti-smoking legislation regulates how people who smoke affect other people with their ETS. Lonnie R. Bristow, M.D., chair of the board of trustees of the American Medical Association (AMA) reported that the AMA thoroughly reviewed the EPA study on passive smoke including the documentation on the dangers of passive inhalation.<sup>19</sup> Bristow related that the AMA found it to be an excellent, well-documented and credible report and that the claims of "bad science" by the tobacco industry were without foundation.<sup>20</sup> Bristow further stated that an industry [tobacco] which kills 450,000 citizens every year cannot be trusted.<sup>21</sup>

On March 25, 1994, the United States' Labor Secretary, Robert B. Reich, announced that the Clinton Administration was proposing a broad smoking ban.<sup>22</sup> The proposal would ban smoking anywhere people work including bars, restaurants, casinos, stores, bowling alleys,<sup>23</sup> office buildings, and federal, state, and local government buildings.<sup>24</sup> This unprecedented action would affect six million workplaces and protect "more than 20 million working people."<sup>25</sup> The Occupa-

tional Safety and Health Administration (OSHA) will publish the anti-smoking rule, followed by public hearings.<sup>26</sup> The hearings could result in many changes to the original proposal. While congressional approval of the rule is not necessary, it still may not go into effect until 1996.<sup>27</sup>

This Comment reviews the Missouri Clean Indoor Air Act and the legislation of other states as well as suggesting improvements to the Missouri statutes. As a practical aid, this Comment also addresses the issue of clean air in the workplace and presents a plan to implement smoking policies. Finally, this Comment addresses yet another effort to combat ETS, private nuisance suits brought by injured citizens.

#### PHYSICAL EFFECTS OF ETS

Carol M. Browner, administrator of the E.P.A., estimates that 5,000 - 9,000 fewer people would die each year if they were not exposed to ETS and that savings in the medical costs and lost earnings of nonsmokers would be \$1.5 - \$3 billion annually.<sup>28</sup> The economic value of the reduced death rate would total \$22 - \$43 billion per year.<sup>29</sup>

The Canadian Cancer Society, the Heart and Stroke Foundation and the United States National Center for Chronic Disease Prevention state that there are more than 4,000

chemicals present in the gases and particles in cigarette smoke.<sup>30</sup> About 50 of them cause cancer or quicken its spread, while others increase the risks of heart disease and strokes.<sup>31</sup>

ETS includes both sidestream and mainstream smoke. Sidestream smoke comes from the burning tip of cigarettes while mainstream smoke is what the smoker exhales.<sup>32</sup> Most of ETS is sidestream smoke, the more hazardous of the two types because it burns at a higher temperature and is virtually unfiltered.<sup>33</sup> Many chemicals are more concentrated in sidestream smoke than in mainstream smoke.<sup>34</sup> For example, there is forty times more ammonia, ten times more benzene, five times more carbon monoxide and one hundred times more nitrosamines found in secondhand smoke.<sup>35</sup>

The American Health Foundation in Valhalla, NY, led by Dr. Stephen Hecht, conducted a study published in the *New England Journal of Medicine* which provides experimental support for the E.P.A. and Surgeon General's conclusion that ETS causes cancer.<sup>36</sup> Tests on six people exposed to three hours of smoke from a smoldering cigarette (sidestream smoke) revealed that the amount of a cancer-causing substance known as NNAL was four times higher than normal in the urine of the

<sup>18</sup> *Id.*

<sup>19</sup> EPA report on passive smoke supported, *CANCER RESEARCHER WEEKLY*, July 5, 1993, at 8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Chen, *supra* note 13, at 1.

<sup>23</sup> Bars, certain restaurants and parts of others, casinos and bowling alleys are typically excluded from state and municipal regulations.

<sup>24</sup> Chen, *supra* note 13, at 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Surgeons General, *supra* note 6.

<sup>29</sup> *Id.*

<sup>30</sup> Following are some of the toxins in tobacco and tobacco smoke considered tumor-causing: benzene, vinyl chloride, arsenic, chromium, lead, n-nitrosamines, aldehydes, n-terocyclic hydrocarbon, aromatic amines, aza-arenes, various chemicals that make up the tar and polonium-210, a radioactive substance that gives off alpha rays, which are described as 10 times more cancer-causing than x-rays. Walter Stefaniuk, *You Asked Us: Toxins in tobacco smoke*, *THE TORONTO STAR*, Jan. 12, 1993, at A7. See also Heath, *supra* note 9, at 12.

<sup>31</sup> Stefaniuk, *supra* note 30, at A7.

<sup>32</sup> *Id.*

<sup>33</sup> Heath, *supra* note 9.

<sup>34</sup> Stefaniuk, *supra* note 30.

<sup>35</sup> *Id.*

<sup>36</sup> Stephen S. Hecht et al., *A Tobacco-Specific Lung Carcinogen In The Urine of Men Exposed To Cigarette Smoke (Original Articles)*, *NEW ENG. J. MED.*, Nov. 18, 1993, at 1543-1546.

volunteers.<sup>37</sup> Urine levels of a chemical cousin of NNAL were also four times higher after exposure to the same amount of air pollution found in a smoke-filled bar.<sup>38</sup>

### MISSOURI'S EFFORTS TO CONTROL ETS

Considering the current lack of federal action, states, local governments,<sup>39</sup> and private entities must take the reins in eliminating ETS. Many states, including Missouri, have implemented anti-smoking legislation intended to control indoor public airspace in the workplace.<sup>40</sup> While there are similarities in the various statutes, there are subtle and sometimes significant differences within the states' codes.

To be successful when implemented, anti-smoking legislation should include several elements including the following: purpose and/or public policy statement,<sup>41</sup> an explicit statement of the power given to local governments, a reasonable list of places affected<sup>42</sup> and places specifically not covered, ventilation and/or barrier requirements of places with both smoking and nonsmoking sections, enforcement of the statute including how and by whom, and penalties for noncompliance. Incorporation of some of these elements such as the power given to local governments may, and perhaps should be, by reference in the general provisions of each state's code rather than restated in

each section.<sup>43</sup>

Missouri's statutes regarding smoking are contained in the Clean Indoor Air Act.<sup>44</sup> The Missouri requirements are relatively similar to those of some other states.<sup>45</sup> Section 191.765 contains applicable definitions, most significantly the definition of "public places."<sup>46</sup> The definition of public places foreshadows the legislative intent about appropriate places to smoke. Public places and meetings are smoke-free venues by statutory designation.<sup>47</sup> Even where smoking could be permitted, that status disappears if the fire marshal or any other law, ordinance, or regulation does not allow smoking in the location.<sup>48</sup> No public place can designate more than thirty percent of its entire space for smoking.<sup>49</sup> Section 191.767(3), when read along with § 191.767(5)<sup>50</sup> indicates an intent to provide for the comfort of nonsmokers rather than for the smokers' interest in smoking.

Section 191.765 does not fully delineate what is a public place,<sup>51</sup> but § 191.769 lays out areas not considered public places. The one designation in this section that seems out of place is § 191.769(7):

"The following areas are not considered a public place: ... Any enclosed indoor arena, stadium or other facility which may be used for sporting events and which has a seating capacity of more than

15,000 persons." (emphasis added).

Inclusion of this appears to be a blatant inconsistency. Athletes, who probably constitute a majority of nonsmokers and smokers, face exposure to ETS while participating in their sport.

Legislation is only as effective as the strength of its enforcement mechanism. When dealing with a subject as sensitive as ETS, a clear, applicable mechanism is needed. The person in control of a public place under a statutory duty to post appropriate signs, arrange seating and utilize ventilation systems and physical barriers to separate smoking areas, to request that smokers move to a smoking area and only allow smoking in certain areas of theater lobbies. The smoker and/or the person in charge of the public area may be guilty of an infraction for violation of the statutes.<sup>53</sup> The punishment for an infraction is a fine and suspended imposition of the sentence or without probation or suspended execution of the sentence with probation.<sup>54</sup>

On June 15, 1993, Governor Carnahan approved Mo. HB 348 which provides that smoking is not allowed inside any public elementary or secondary school building or facility or any school bus transporting students to and/or from those facilities.<sup>55</sup> It also prohibits smoking in any department of Family Services licensed

<sup>37</sup> *Secondhand Smoke's Effects*, THE WASHINGTON POST, Nov. 18, 1993, at A40. NNAL is an alcohol [4-(methylnitrosamino)-1-(3-pyridyl)-1-(butanol)] which is a potent carcinogen in rats. *Metabolism of the tobacco-specific nitrosamine 4-(methylnitrosamino)-1-(3-pyridyl)-1-butanol in the patas monkey: pharmacokinetics and characteristics of glucuronide metabolites*, CARCINOGENESIS, Feb., 1993, at 229-36.

<sup>38</sup> *Secondhand Smoke's Effects*, *supra* note 37.

<sup>39</sup> While of significant importance to the control of ETS, local ordinances and rules are not discussed in this Comment.

<sup>40</sup> See *infra* notes 132 and 133 and accompanying text.

<sup>41</sup> Whether to protect nonsmokers' rights to breathe clean air or restrict smokers' rights to smoke or both.

<sup>42</sup> Usually evidenced by wording such as "including but not limited to..."

<sup>43</sup> See *infra* note 77 and accompanying text.

<sup>44</sup> MO. REV. STAT. §§ 191.765, 191.767, 191.769, 191.771, 191.773, and 290.145 (1992). All future references made to the Indoor Clean Air Act are from the 1992 version of the Missouri Revised Statutes.

<sup>45</sup> See *infra* note 59.

<sup>46</sup> MO. REV. STAT. § 191.765(5) (1992). Public places are any retail or commercial establishments, health care facilities, public transportation vehicles, rest rooms, elevators, libraries, educational facilities, day care facilities, museums, auditoriums, art galleries, public waiting areas and waiting rooms of public transportation facilities, enclosed indoor places for entertainment or recreation, and other indoor areas used by the general public.

<sup>47</sup> MO. REV. STAT. § 191.767 (1992).

<sup>48</sup> MO. REV. STAT. § 191.767(2) (1992).

<sup>49</sup> MO. REV. STAT. § 191.767(3) (1992).

<sup>50</sup> "A proprietor ... shall designate an area of sufficient size to accommodate usual and customary demand for nonsmoking areas by customers or patrons." MO. REV. STAT. § 191.767(5) (1992).

<sup>51</sup> MO. REV. STAT. § 191.765(5) reads "Public place ... including but not limited to." (emphasis added).

<sup>52</sup> MO. REV. STAT. § 191.771 (1992).

<sup>53</sup> MO. REV. STAT. § 191.773 (1992).

<sup>54</sup> MO. REV. STAT. § 557.011(3)(1-3) (1993). The maximum fine for an infraction is two hundred dollars. *Id.* at § 560.016 (1993).

<sup>55</sup> 1993 Mo. HB 348, 87th General Assembly.

care facility when children cared for under said license are present.<sup>56</sup>

Unlike the Clean Indoor Air Act, Mo. HB 348 expressly provides that local political subdivisions may enact more stringent ordinances or rules.<sup>57</sup> The Missouri Constitution specifically addresses the power of charter cities.<sup>58</sup> The Clean Indoor Air Act does not state the power, or lack thereof, that non-charter cities possess.

Another statute passed at the same time as the Clean Indoor Air Act deals with the prohibition of employers not hiring someone because of tobacco use off the premises of the job and not during working hours.<sup>59</sup> There is an exception with regard to the employees' behavior interfering with the job.<sup>60</sup> Religious organizations, church-operated institutions, and not for profit organizations whose main business is health care are exempt from these provisions.<sup>61</sup> A majority of states have similar, non-discrimination statutes.<sup>62</sup>

## SMOKING LAWS IN OTHER STATES

Many states have taken the initiative in regard to ETS and enacted anti-smoking legislation in an effort to curb the harm to nonsmokers. A few states and the District of

Columbia have clean air statutes very similar to Missouri's with regard to content, intent and desired results.<sup>63</sup>

Most of the states' laws begin with a statement of purpose, intent or public policy. New Jersey goes so far as to begin each section of its smoking regulation with its legislative declaration.<sup>64</sup>

"The Legislature finds and declares that the resolution of the conflict between the right of the smoker to smoke and the right of the nonsmoker to breathe clean air involves a determination of when and where, rather than whether, a smoker may legally smoke. It is not the public policy of this State to deny anyone the right to smoke ... In addition to the deleterious effects upon smokers, tobacco smoke is (1) at least an annoyance and a nuisance to a substantial percentage of the nonsmoking public, and (2) a substantial health hazard to a smaller segment of the nonsmoking public ..."<sup>65</sup>

A common phrase in other statutes is that the purpose is to "protect public health, comfort, and the environment."<sup>66</sup>

Many states utilize definitions similar to Missouri's definition of "public places." Minor differences include the number of persons a restaurant must serve or accommodate for consideration as a public place<sup>67</sup> and whether an indoor arena is a public place.<sup>68</sup> The Baltimore Orioles baseball club banned smoking in all seating areas of the open-air, 48,000 seat Oriole Park at Camden Yards, which applies to all seats and restrooms.<sup>69</sup> The Orioles' management and state officials based the restriction on health concerns of ETS.<sup>70</sup> Similar bans are in effect at the open-air stadiums of the Detroit Tigers, Oakland Athletics, San Diego Padres and Toronto Blue Jays.<sup>71</sup>

A list of public places covered by the statute is a common thread running through the myriad of laws. Michigan specifies additional policy requirements in public places where the proprietor may allow smoking: location of nonsmokers should be closest to the source of fresh air and special consideration is given to people with a hypersensitivity to tobacco smoke.<sup>72</sup> Unlike many statutes which contain the phrase "including but not limited to"<sup>73</sup> when defining "public place," Florida's does not.<sup>74</sup> Still others list exceptions to the general statute.<sup>75</sup> Another com-

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Mo. CONST. art. VI. §19(a) (1971).

<sup>59</sup> Mo. REV. STAT. § 290.145. This section also deals with legal alcoholic beverage consumption.

<sup>60</sup> "It shall be an improper employment practice for an employer to refuse to hire, or to discharge, any individual, or to otherwise disadvantage any individual, with respect to compensation, terms or conditions of employment because the individual uses lawful alcohol or tobacco products off the premises of the employer during hours such individual is not working for the employer, unless such use interferes with the duties and performance of the employee, his coworkers, or the overall operation of the employer's business."

<sup>61</sup> *Id.*

<sup>62</sup> Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming. Lynn Pulliam, *Smoking in the workplace: developing a policy that works for your company*, EMPLOYEE RELATIONS L.J., Dec. 22, 1993, at 79.

<sup>63</sup> Illinois, Maryland, Nebraska and New Jersey.

<sup>64</sup> N.J. REV. STAT. §§ 26:3D-1 through -48, 26:3E-7 (1993).

<sup>65</sup> *Id.*

<sup>66</sup> See, e.g., FLA. STAT. § 386.202 (1993), IDAHO CODE § 39-5501 (1994), and MONT. CODE ANN. § 50-40-102 (1993) ("to protect the health of nonsmokers").

<sup>67</sup> Missouri, Iowa and North Carolina require fifty seating capacity to constitute a public place. Mo. REV. STAT. § 191.769 (1993), IOWA CODE § 142B.1 (1993), N.C. GEN. STAT. § 143-596 (1993). Idaho and Oregon require only thirty people to constitute a public place. IDAHO CODE § 39-5502 (1985) and OR. REV. STAT. § 433.850 (1993).

<sup>68</sup> Mo. REV. STAT. § 191.769(7) states indoor arenas which hold more than 15,000 people are not public places. Many other states consider any size arena a place in which to restrict smoking. See, e.g., FLA. STAT. ch. 386.203(1)(n) (1993), ILL. REV. STAT. ch. 410, para. 80/3 (1993), MONT. CODE ANN. § 50-40-103 (1993), NEB. REV. STAT. § 71-5704 (1993), KAN. STAT. ANN. § 21-4009 (1993), IOWA CODE § 14213.1(3) (1993). New York provides an exemption from the no smoking rule in arenas with regard to private boxes. N.Y. PUB HEALTH LAW § 1399-q (1990). In the Louisiana Superdome, smoking is allowed everywhere but the arena. LA. REV. STAT. ANN. § 40:1261 (West 1992).

<sup>69</sup> *Orioles Ban Smoking From Ballpark Seating Areas*, BUS. PUBLISHERS, INC.; TOXIC MATERIALS NEWS, Jan. 20, 1993.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> MICH. COMP. LAWS § 333.12605(3)(a) & (b) (1989).

<sup>73</sup> The following statutes use the language "including but not limited to:" HAW. REV. STAT. § 328K-1 (1993), NEB. REV. STAT. § 71-5704 (1992), N.Y. PUB HEALTH LAW § 1399-o(2) (Consol. 1990), and MINN. STAT. § 144.413 (1993).

<sup>74</sup> FLA. STAT. ch. 386.203 (1992).

<sup>75</sup> D.C. CODE ANN. § 6-918 (1993), IDAHO CODE § 39-5503 (1985), MONT. CODE ANN. § 50-40-107 (1991), N.H. REV. STAT. ANN. § 155:60 (1988).

mon aspect of anti-smoking legislation is the sign posting requirement,<sup>76</sup> which often dictates the size, content, and placement of signs.<sup>77</sup>

Where designated smoking areas exist within public places, many states provide for physical barriers and/or ventilation systems that will separate the smoking and non-smoking sections to the greatest extent possible. California's legislation states that the "simple separation of smokers and non-smokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke."<sup>78</sup> Virginia's version encompasses most of the barrier/ventilation elements found in other states' codes.<sup>79</sup> The statutes that do encourage use of barriers and ventilation systems do not require proprietors to expend extra money for renovations.<sup>80</sup>

Many states specifically designate if or how local governments may regulate smoking in light of the statute.<sup>81</sup> Statutes that preempt any local ordinance or rule are

found in the codes of Florida<sup>82</sup> and Illinois.<sup>83</sup> New Mexico,<sup>84</sup> California,<sup>85</sup> and Oregon<sup>86</sup> allow local governments to enact their own anti-smoking requirements though they cannot be inconsistent with the statute. Virginia's statute does not preempt any existing local rules, but those enacted after the statute cannot exceed the standards in the statute.<sup>87</sup> Virginia is unique in that within its Indoor Clean Air Act, there are mandatory<sup>88</sup> and optional<sup>89</sup> provisions for incorporation in local ordinances.

As stated above, for ease of application the legislatures should include an enforcement mechanism within any statute that deals with restricting actions of people. Most anti-smoking rules target public places, and therefore, enforcement typically falls to the proprietor.<sup>90</sup> If the proprietor does not enforce the statute, a harmed member or members of the public can take action against the proprietor.<sup>91</sup> In California, any person may apply for a writ of mandate to compel compliance by any public entity

which has not complied with the regulations.<sup>92</sup> This section also allows for recovery of all reasonable costs of the suit for the successful applicant.<sup>93</sup> In the District of Columbia, an aggrieved person may bring an action for injunctive relief.<sup>94</sup> Supervision and enforcement of Montana's regulation is by local boards of health.<sup>95</sup>

Virtually all statute violations result in a fine.<sup>96</sup> In Montana, a proprietor who fails to designate a smoking or nonsmoking area is guilty of a misdemeanor and subject to a fine.<sup>97</sup> Montana,<sup>98</sup> South Carolina<sup>99</sup> and Minnesota<sup>100</sup> are unique in that the charge for violating the statute by smoking in a non-smoking area is a misdemeanor. The charge in other states is usually an infraction.<sup>101</sup> Infractions carry a lighter punishment, lesser fine and no permanent criminal record.<sup>102</sup> By making a violation a misdemeanor, Montana, South Carolina and Minnesota have demonstrated their intent to treat violations more seriously.

In Florida, the Department of Health and

<sup>76</sup> See, e.g., N.M. STAT. ANN. § 24-16-9 (Michie 1985), D.C. CODE ANN. § 6-915 (1988), Fla.Stat. § 386.206 (1992), IDAHO CODE § 39-5506 (1985), IND. CODE ANN. § 16-41-37-6 (Burns 1993).

<sup>77</sup> See, e.g., FLA. STAT. § 386.206 (1992), IND. CODE ANN. § 16-41-27-6 (Burns 1993), ME. REV. STAT. ANN. tit. 22 § 1579-A(2)(B) (West 1993), N.M. STAT. ANN. § 24-168 (Michie 1985), N.Y. PUB HEALTH LAW § 1399-p (Consol. 1990).

<sup>78</sup> CAL. HEALTH & SAFETY CODE § 25948 (Deering 1987).

<sup>79</sup> VA. CODE ANN. § 15.1-291.3 (Michie 1990). "(1) Designated smoking areas shall not encompass so much . . . that reasonable no-smoking areas . . . are not provided; (2) Designated smoking areas shall be separate to the extent reasonably practicable from those rooms or areas entered by the public in the normal use of the particular business or institution; and (3) In designated smoking areas, ventilation systems and existing physical barriers shall be used when reasonably practicable to minimize the permeation of smoke into no smoking areas."

<sup>80</sup> *Id.*; MICH. COMP. LAWS § 333.12605 (1989), N.M. STAT. ANN. § 24-16-9 (Michie 1985).

<sup>81</sup> California, Florida, Illinois, New Mexico, Oregon and Virginia all consider the power of local governments in their anti-smoking statutes.

<sup>82</sup> FLA. STAT. ch. 386.209 (1992).

<sup>83</sup> ILL. REV. STAT. ch. 410, para. 80/11 (1993).

<sup>84</sup> N.M. STAT. ANN. § 24-16-2 (Michie 1988).

<sup>85</sup> CAL. HEALTH & SAFETY CODE § 25946 (Deering 1977).

<sup>86</sup> OR. REV. STAT. § 433.870 (1981).

<sup>87</sup> VA. CODE ANN. § 15.1-291.4 (Michie 1990).

<sup>88</sup> Mandatory provisions make it unlawful for any person to smoke in elevators, common areas in educational facilities, restaurants designated as no-smoking by statute, indoor service lines and cashier areas and school buses and public conveyances. VA. CODE ANN. § 15.1-291.5 (Michie 1990).

<sup>89</sup> Optional provisions may provide for no-smoking areas in retail and service establishments, rooms where a public meeting or hearing is held, places of entertainment and cultural facilities, indoor recreational facilities, other public places and restaurants. VA. CODE ANN. § 15.1-291.6 (Michie 1990).

<sup>90</sup> Statutes which dictate proprietor enforcement are D.C. CODE ANN. § 6-915(a) (1988), IDAHO CODE § 39-5506 (1985), ILL. REV. STAT. ch. 410, para. 80/6 (1993), IND. CODE ANN. § 16-41-37-6 (Burns 1993), NEB. REV. STAT. § 71-5709 (1979), N.H. REV. STAT. ANN. § 155:69 (Butterworth 1991), UTAH CODE ANN. § 76-10-109 (1986).

<sup>91</sup> See D.C. Code Ann. § 6-915(d) (1988).

<sup>92</sup> CAL. HEALTH & SAFETY CODE § 25945 (Deering 1977).

<sup>93</sup> *Id.*

<sup>94</sup> D.C. CODE ANN. § 6-915(d) (1988).

<sup>95</sup> MONT. CODE ANN. § 50-40-108 (1979).

<sup>96</sup> FLA. STAT. ch. 386.207(2), 386.208 (1993), ME. REV. STAT. ANN. tit. 22 § 1579-A(3) (1993), MD. CODE ANN., HEALTH-GEN. § 24-504(b) (1988), N.Y. PUB HEALTH LAW § 1399-v (Consol. 1990), R.I. GEN. LAWS § 23-17.5-26 and 23-20.6-2 (1993), VA. CODE ANN. § 15.1-291.10(A) (Michie 1990).

<sup>97</sup> MONT. CODE ANN. § 50-40-109 (1981).

<sup>98</sup> *Id.*

<sup>99</sup> S.C. CODE ANN. § 44-95-50 (1990).

<sup>100</sup> MINN. STAT. § 144.417(2) (1992).

<sup>101</sup> MO. REV. STAT. § 191.773 (1992), WASH. REV. CODE § 70.160.070 (1985), IND. CODE § 16-41-37-4 (1993).

<sup>102</sup> See, e.g., MD. CODE ANN., § 13C (1985), MD. REV. STAT. § 556.021 (1979), and R.I. GEN. LAWS, § 6-13.2-8 (1992).

Rehabilitation Services or the Division of Hotels and Restaurants of the Department of Business Regulation issues a notice to comply to proprietors who violate the statute.<sup>103</sup> If the proprietor does not correct the violation within 30 days a civil penalty is assessed.<sup>104</sup> The fine does not exceed \$100 for the first violation and \$500 for each subsequent violation.<sup>105</sup> All money collected from this go to the children's medical services programs.<sup>106</sup> Any person who smokes in a no-smoking area is subject to a fine of the same amount as proprietors who do not comply with the statute.<sup>107</sup>

Starting July 1, 1995, only businesses in Vermont with a cabaret license may designate a smoking area.<sup>108</sup> A cabaret license is available to a business devoted primarily to providing entertainment, dancing and the sale of alcoholic beverages to the public and not the service of food.<sup>109</sup>

The legislatures of each state must determine the goals of the anti-smoking statutes they enact. Presumably, each state discussed in this Comment drafted its anti-smoking statutes in light of its goals, content of other statutes that have an effect on air quality and perhaps mechanisms already in place in municipalities or political subdivisions within the state.

### PROPOSED CHANGES IN MISSOURI STATUTES

While Missouri deserves commendation for its legislation in the area of indoor air quality, there are changes that could make the Clean Indoor Air Act more comprehensive. Considering the intent presented in the statutes as they now stand, suggestions for changes follow.<sup>110</sup>

### PURPOSE (Entirely new)

The purpose of this part is to protect the health of nonsmokers in public places and to provide for reserved areas in some public places for those who choose to smoke.<sup>111</sup>

The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke. Nonsmokers have no adequate means to protect themselves from the damage inflicted upon them when they involuntarily inhale tobacco smoke. Regulation of smoking in public places is necessary to protect the health, safety, welfare, comfort, and environment of nonsmokers.<sup>112</sup>

The legislature further declares its intention to protect the public health from such hazards in public places and places of employment without imposing exorbitant costs on persons in management and control of the places subject to the Clean Indoor Air Act.<sup>113</sup>

### GENERAL PROVISIONS (Entirely new)

Nothing in this chapter shall be construed to deny the owner, operator or manager of a place covered by this article the right to designate the entire place, or any part thereof, as a nonsmoking area. The provisions of this chapter shall apply to the legislative, executive and judicial branches of state government and any political subdivision of the state. Smoking

may not be permitted where prohibited by any other law, rule, or regulation of any state agency or any political subdivision of the state. Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce additional local law, ordinances, or regulations which comply with at least the minimum applicable standards set forth in this chapter.<sup>114</sup>

### Explanation

There are two primary reasons for the addition of the purpose and general provision statutes. First, these sections give the reader an idea of why the Clean Indoor Air Act exists. Second, when ambiguities arise in lawsuits over the Clean Indoor Air Act, the courts will have more direction in interpreting legislative intent.

### Section 191.765. Definitions

As used in sections 191.765 to 191.773 and section 290.145, RSMo, the following terms mean:

(1) "Bar" or "tavern", any licensed establishment which serves liquor on the premises for which not more than ten percent of the gross sales receipts of the business are supplied by food purchases, either for consumption on the premises or elsewhere;

"Common area", any hallway, corridor, lobby, aisle, water fountain area, stairwell, entryway, or conference room in any public place;

<sup>103</sup> FLA. STAT. ch. 386.207 (1992).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at (4).

<sup>107</sup> FLA. STAT. ch. 386.208 (1992).

<sup>108</sup> VT. STAT. ANN. tit. 18 § 1744 (1993).

<sup>109</sup> VT. STAT. ANN. tit. 7 § 2 (1993).

<sup>110</sup> Sections within { } are proposed deletions to the Clean Indoor Air Act. Sections which are in bold print are proposed additions.

<sup>111</sup> MONT. CODE ANN. § 50-40-102 (1979).

<sup>112</sup> CAL. HEALTH & SAFETY CODE § 25948 (Deering 1987).

<sup>113</sup> N.M. STAT. ANN. § 24-16-2 (Michie 1985).

<sup>114</sup> N.Y. PUB HEALTH LAW § 1399-r (Consol. 1990).

(2) "Other person in charge", the agent of the proprietor authorized to give administrative directions to and general supervision of the activities within the public place, work place or public meeting at any given time;

(3) "Proprietor", the party who ultimately controls, governs or directs the activities within the public place, work place or public meeting, regardless of whether he is the owner or lessor of such place or site. The term does not mean the owner of the property unless he ultimately controls, governs or directs the activities within the public place or public meeting. The term "proprietor" shall apply to a corporation as well as an individual;

(4) "Public meeting", a gathering in person of members of a governmental body, whether an open or closed session, as defined in chapter 610, RSMo;

(5) "Public place", any enclosed indoor area used by the general public or serving as a place of work including, but not limited to:

(a) Any retail or commercial establishments;

(b) Health care facilities, health clinics or ambulatory care facilities including, but not limited to, laboratories associated with health care treatment, hospitals, nursing homes, physicians' offices and dentists' offices;

(c) Any vehicle used for public transportation including, but not limited to, buses, taxicabs and limousines for hire;

(d) Rest rooms;

(e) Elevators;

(f) Libraries, educational facilities, day care facilities, museums, auditoriums and art galleries;

(g) All public areas and waiting rooms of public transportation facilities including, but not limited to, bus and airport facilities;

(h) Any enclosed indoor place used for entertainment or recreation including, but not limited to, gymnasiums, theater lobbies, concert halls, arenas and swimming pools;

(i) Any other enclosed indoor areas used

by the general public including, but not limited to, corridors and shopping malls;

(j) courtrooms;

(k) jury waiting rooms and deliberation rooms;

(l) grocery stores;

(m) places of employment;

(n) retirement homes;

(o) banks and other financial institutions;

(6) "Restaurant", any building, structure or area used, maintained or advertised as or held out to the public to be an enclosure where meals for consideration of payment are made available to be consumed on the premises;

(7) "Smoking", possession of burning tobacco in the form of a cigarette, cigar, pipe or other smoking equipment.

#### Explanation

The definition of "common areas" in § 191.765 and its inclusion in § 191.767 is for one practical purpose. Pushing smokers to those areas happens when main areas become smoke-free places. However, allowing smoking in common areas is counterproductive to disallowing it in other places that do not have separate ventilation. The smoke will not only filter into those smoke-free areas, but anyone who uses the water fountain, stairwells or walks through a common area will breathe unnecessary ETS.

#### Section 191.767.

Persons not to smoke in public places or meetings, except in designated smoking areas—designation of space, for smoking area, requirements

1. A person shall not smoke in a public place, common area or in a public meeting except in a designated smoking area.

2. A smoking area may be designated by persons having custody or control of public

places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance or regulation.

3. No public place shall have more than thirty percent of its entire space designated as a smoking area.

Designated smoking areas shall not encompass so much of the building, structure, space, place, or area open to the general public that reasonable no-smoking areas, considering the nature of the use and the size of the building, are not provided.<sup>115</sup>

Designated smoking areas shall be separate to the extent reasonably practicable from those rooms or areas entered by the public in the normal use of the particular business or institution.<sup>116</sup>

4. A designated smoking area where state employees may smoke during the work day shall be provided by each state executive department and institution of higher education, provided such area can be adequately ventilated at minimum cost, within the physical confines of each facility.

5. A proprietor or other person in charge of a restaurant shall designate an area of sufficient size to accommodate usual and customary demand for nonsmoking areas by customers or patrons.

#### Explanation

The additions to § 191.767 provide more specific guidance in the establishment of smoking areas.

#### Section 191.769.

Areas not considered public places

The following areas are not considered a public place:

(1) An entire room or hall which is used for private social functions, provided that the seating arrangements are under the control

<sup>115</sup> VA. CODE ANN. § 15.1-291.3(1) (Michie 1990).

<sup>116</sup> *Id.*



of the sponsor of the function and not of the proprietor or other person in charge;

(2) Limousines for hire and taxicabs, where the driver and all passengers agree to smoking in such vehicle;

(3) Performers on the stage, provided that the smoking is part of the production;

(4) A place where more than fifty percent of the volume of trade or business carried on is that of the blending of tobaccos or sale of tobaccos, cigarettes, pipes, cigars or smoking sundries;

(5) Bars, taverns, restaurants that seat less than {fifty} thirty people, bowling alleys and billiard parlors, which conspicuously post signs stating that "Nonsmoking Areas are Unavailable";

(6) Private homes, residences, and private automobiles; and

(7) {Any enclosed indoor arena, stadium or other facility which may be used for sporting events and which has a seating capacity of more than fifteen thousand persons.} Any wholly or partially enclosed private boxes in an indoor arena.<sup>117</sup>

## Explanation

The change in the maximum number of persons seated in a restaurant to designate it a public place was lowered from 50 to 30 simply to include virtually all public eating establishments where people might encounter ETS. The addition of homes and automobiles was to provide specificity for ease of interpretation of "residences." Changing "any enclosed indoor arena ... with a seating capacity of more than fifteen thousand persons," to "private boxes" puts Missouri more in line with other states' regulations regarding arenas. With the large numbers of

people in attendance at arenas, this change protects a more significant percentage of the public.

## Section 191.771.

Person in control of public places or public meetings, duties

The person having custody or control of a public place or public meeting shall:

Develop, or oversee the development of, written procedures to achieve compliance with the Clean Indoor Air Act.<sup>118</sup>

(1) Make reasonable efforts to prevent smoking in the public place or public meeting by posting appropriate signs indicating no-smoking or smoking area and arrange seating accordingly. These signs shall be placed at a height and location easily seen by a person entering the public place or public meeting and not obscured in any way;

Advise persons of the existence of nonsmoking areas or smoking-permitted areas by posting signs as follows:

(a) in public places where the person in charge prohibits smoking in the entire establishment, a sign using the words "No Smoking" or the international no-smoking symbol or both shall be conspicuously posted either on all public entrances or in a position where the sign is clearly visible on entry into the establishment;<sup>119</sup>

(b) in public places where certain areas are designated as smoking-permitted areas pursuant to the provisions of the Clean Indoor Air Act, the statement "No Smoking Except in Designated Areas" shall be conspicuously posted on all public

entrances or in a position where it is clearly visible on entry into the establishment; and<sup>120</sup>

(c) in public places where smoking is permitted in the entire establishment, a sign using the words "Smoking Permitted" or the international smoking symbol or both shall be conspicuously posted either on all public entrances or in a position where it is clearly visible on entry into the establishment.<sup>121</sup>

(2) Arrange seating and utilize available ventilation systems and physical barriers to isolate designated smoking areas;

(a) nonsmokers are to be located closest to the source of fresh air; and<sup>122</sup>

(b) special consideration is to be given to individuals with a hypersensitivity to tobacco smoke.<sup>123</sup>

In designated smoking areas, ventilation systems and existing physical barriers shall be used when reasonably practicable to minimize the permeation of smoke into no smoking areas. However, this chapter shall not be construed as requiring physical modifications or alterations to any structure.<sup>124</sup>

{(3) Make a reasonable request of persons smoking to move to a designated smoking area};

Instruct security officers, ushers, receptionists, clerks, and other appropriate personnel to assist in ensuring compliance with this chapter by asking those who smoke in designated "no smoking" areas to refrain from doing so, and to direct smokers to a smoking-permitted area, if appropriate.<sup>125</sup>

Remove person(s) smoking in violation of this chapter and fails to refrain from smoking after being requested to do so.<sup>126</sup>

<sup>117</sup> N.Y. PUB HEALTH LAW § 1399-q(7) (Consol. 1990).

<sup>118</sup> N.H. REV. STAT. ANN. § 155:71 (1991).

<sup>119</sup> N.M. STAT. ANN. § 24-16-8 (Michie 1985).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> MICH. COMP. LAWS § 333.12605(3)(A) (1989).

<sup>123</sup> *Id.* at (3)(B).

<sup>124</sup> VA. CODE ANN. § 15.1-291.3(3) (Michie 1990).

<sup>125</sup> N.H. REV. STAT. ANN. § 155:69(v) (1991).

<sup>126</sup> IND. CODE ANN. § 16-41-37-6(3) (Burns 1993).

(4) Allow smoking in designated areas of theater lobbies only.

An aggrieved person or class of persons may bring an action in any court with jurisdiction for injunctive relief to prevent any owner, lessee, manager, operator or person otherwise in charge of a facility or vehicle where smoking is prohibited pursuant to this subchapter from violating, or continuing to violate, any provision of this subchapter.<sup>127</sup>

Any person may apply for a writ of mandate to compel compliance by any public entity which has not complied with the requirements of this chapter for the designating or posting or nonsmoking areas or areas where the smoking of tobacco is prohibited. If judgment is given for the applicant, he may recover all reasonable costs of suit, including reasonable attorney fees, reasonableness to be determined by the court.<sup>128</sup>

Any law enforcement officer may issue a summons regarding a violation of this chapter.<sup>129</sup>

**Explanation**

All of the changes made in § 191.771 were to make proprietors more effective in instituting and enforcing smoking policies. The changes also provide better guidelines for who can bring an action against someone who violates the statutes.

**Section 191.773.**

Violators, guilty of infraction, misdemeanor

The following persons shall be guilty of an infraction:

- (1) A person who smokes in those areas

where smoking is prohibited pursuant to the provisions of sections 191.765 to 191.773 and section 290.145, RSMo;

(2) A proprietor or other person in charge of a public place or public meeting who permits, causes, suffers or allows a person to smoke in those areas where smoking is prohibited pursuant to Sections 191.765 to 191.773 and section 290.145, RSMo.

(3) Each infraction numbered up to and including five (5) shall be fined as follows:

First offense	\$ 50.00
Second offense	\$ 100.00
Third offense	\$ 200.00
Fourth offense	\$ 200.00
Fifth offense	\$ 200.00

(4) Any violation beyond the fifth offense shall be grounds for a finding of guilty of a class C misdemeanor and fined a maximum of \$ 300.00, pursuant to § 560.016 RSMo.

**Explanation**

Enhancement of the punishment section was to support the significance of controlling ETS. By setting specific amounts for fines, it eliminates prosecutorial discretion in amending them to lower amounts. Making the sixth and beyond offenses grounds for a class C misdemeanor ensures that repeat offenders will eventually acquire a criminal record based upon their violations.

There are no proposed changes at this time for § 290.145 RSMo and Mo. HB 348.

**WORKPLACE REGULATIONS**

Besides public places, logical targets for anti-smoking regulation are workplaces, especially government employers, including public schools. One reason for eliminating

ETS in workplaces is climate control. Many modern buildings are airtight, therefore, air quality and its regulation become extremely important. Washington-based trade organization, Building Owners and Managers Association International (BOMA)'s approach to indoor air quality is to remove contaminants which include secondhand smoke.<sup>130</sup> BOMA has supported a federal ban on smoking in the workplace since 1992.<sup>131</sup>

Two important federal laws indirectly address ETS. These are the Rehabilitation Act and The American with Disabilities Act (ADA).<sup>132</sup> Both require employers to reasonably accommodate the special needs of qualified disabled workers, and both broadly define disability.<sup>133</sup> Several federal courts applying the Rehabilitation Act have held that a nonsmoking employee's hyper-sensitivity to tobacco smoke qualifies as a handicap.<sup>134</sup> Thus, implementation of smoking restrictions may be required to "reasonably accommodate" the needs of qualified individuals with disabilities such as emphysema, asthma or related respiratory problems.<sup>135</sup> As noted above, the federal government is perhaps within two years of implementing a nationwide ban on smoking in public places.

In contrast with other states examined, Louisiana's primary targets are the workplace<sup>136</sup> and public schools.<sup>137</sup> All states except Delaware, Georgia, Kentucky, Mississippi, North Carolina, Texas, West Virginia and Wyoming regulate smoking in public workplaces.<sup>138</sup> The states that regulate smoking in private workplaces include Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington and Wisconsin.<sup>139</sup> OSHA has estimated

<sup>127</sup> D.C. CODE ANN. § 6-915(d) (1988).

<sup>128</sup> CAL. HEALTH & SAFETY CODE § 25945 (Deering 1977).

<sup>129</sup> VA. CODE ANN. § 15.1-291.2(a) (Michie 1992).

<sup>130</sup> Tracy W. Williams, *More Office Building Managers Create Smoke-Free Environments*, NEW ORLEANS CITY BUS., Dec. 6, 1993, at 11. BOMA was founded in 1907 and is the oldest and largest trade association exclusively representing the office building industry. Its members own or manage over 5 billion square feet of North American space.

<sup>131</sup> *Id.*

<sup>132</sup> *Supervisor's Dilemma: Workplace Smoking* [hereinafter *Supervisor's Dilemma*], SUPERVISION, Sept. 1993, at 7.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> LA. REV. STAT. § 40:1300.24-.25 (West 1992).

<sup>137</sup> LA. REV. STAT. § 17:240 (1994). The only other place in which Louisiana regulates smoking is the Louisiana Superdome. LA. REV. STAT. § 40:126 (West 1992).

<sup>138</sup> Pulliam, *supra* note 62.

<sup>139</sup> *Id.*

that up to 77% of the nonsmoking workforce, approximately 75 million people, inhale passive tobacco smoke while at work.<sup>140</sup>

Except for government buildings and those designated as public places by the state, regulation in the workplace is most effective if carried out internally. This enables employers to enforce their individual policy personally and efficiently; therefore, saving time, money and energy.

Implementation of workplace restrictions is not, however, without its dangers. There were three incidents in California in the last year at public/work places that demonstrate the hostility surrounding smoking restrictions. On January 12, 1993, a customer stabbed a Sacramento waiter to death in a restaurant after the waiter asked him to extinguish his cigarette.<sup>141</sup> The stabbing led to a conviction of the customer for second degree murder in a second trial.<sup>142</sup> In San Pablo, in September of 1993, a group of women asked a 22 year-old mother of four to put out her cigarette in a San Pablo Denny's restaurant.<sup>143</sup> The mother left, returned with a 12 gauge shotgun, and fatally shot one of the women as she tried to drive away.<sup>144</sup> In Citrus Heights, a Regional Tran-

sit bus driver asked a passenger to put out a cigarette on Christmas Eve.<sup>145</sup> The passenger yelled at the driver who forced the passenger off the bus.<sup>146</sup> The man got back on the bus and stabbed the driver in the forearm.<sup>147</sup>

An incentive for restaurants to restrict smoking is that one study found that restaurants required by law to ban smoking did not suffer financially.<sup>148</sup> By implementing smoking bans, restaurants are responding to the wishes of their customers, many of whom prefer to dine free of tobacco smells.<sup>149</sup> In a 1993 National Restaurant Association poll, 56% of Americans said that they would be more likely to go to a no-smoking restaurant and 26% said they would be less likely to do so.<sup>150</sup> On September 1, 1993, all 29 Burger Kings in Rhode Island, along with 26 in nearby states, prohibited smoking.<sup>151</sup> At the time some 80 cities, towns or counties passed laws banning smoking in restaurants.<sup>152</sup> Los Angeles eliminated ETS in 7,000 restaurants.<sup>153</sup> Fort Lauderdale, Florida-based fast-food chain Arby's, Inc. will ban smoking in its 257 corporate-owned restaurants by the summer of 1994 to help eliminate "environmental hazards" for its

employees and customers.<sup>154</sup> McDonald's, Taco Bell and Jack in the Box have recently announced smoking bans in their establishments.<sup>155</sup> Vermont is the only state to prohibit smoking in restaurants.<sup>156</sup>

At the start of the year Sears, Roebuck & Co., the nation's third largest merchant, banned smoking throughout its 799 stores.<sup>157</sup> Retailers are going smoke-free for many reasons, which include customer preference, fear of liability under clean air legislation and under protections of the ADA.<sup>158</sup> Shopping center chains which are smoke-free include San Diego based-Ernest Hahn Co., with 48 shopping centers nationwide.<sup>159</sup> About two thirds of Chicago-based Homart Development Corporation's 31 shopping centers across the country will soon be smoke free.<sup>160</sup>

An article published in the Journal of the American Medical Association (JAMA)<sup>161</sup> reviewed several studies which found that restaurant and bar employees are at an even higher health risk than other workers for ETS related illnesses.<sup>162</sup> Levels of ETS in restaurants were approximately 1.6 - 2.0 times higher than in office workplaces of other businesses and 1.5 times higher than

<sup>140</sup> *Office Building Industry Supports Smoking Ban*, PR NEWSWIRE FINANCIAL NEWS, Oct. 29, 1993.

<sup>141</sup> Ramon Coronado, *Man Is Convicted of Slaying Waiter in Smoking Dispute*, SACRAMENTO BEE, Mar. 12, 1994, at B1. The first trial resulted in a hung jury. The jury was deadlocked between a verdict of second degree murder and involuntary manslaughter.

<sup>142</sup> *Id.*  
<sup>143</sup> Maria E. Camposeco, *Lives Snuffed Out In Smoking Confrontations*, SACRAMENTO BEE, Jan. 16, 1994, at B1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *All Rhode Island Burger Kings snuff out smoking starting tomorrow [hereinafter Burger King]*, THE PROVIDENCE JOURNAL-BULLETIN, Aug. 31, 1993, at D1.

<sup>149</sup> *Id.* See also, Chen, *supra* note 13.

<sup>150</sup> Chen, *supra* note 13.

<sup>151</sup> Kirstin Downey Grimsley, *More Malls, Stores Curb Smoking; Health, Legal Issues Spur Retailers to Act*, THE WASHINGTON POST, Jan. 26, 1994, at A1.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Chen, *supra* note 13.

<sup>156</sup> See *supra* notes 102 and 103 and accompanying text.

<sup>157</sup> Grimsley, *supra* note 151.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Michael Siegel, *Involuntary Smoking in the Restaurant Workplace: a review of employee exposure and health effects; review article*, JAMA, July 28, 1993, at 490.

<sup>162</sup> *California Occupational Mortality 1979-81*. Sacramento: California Dep't of Health Services; 1987. Doebbert G, Riedmiller KR, Kizer KW. *Occupational Mortality of California Women, 1979-1981*. WEST J. MED. 1988;149:734-740. Singleton JA, Beaumont JJ. COMS II: *California Occupational Mortality 1979-1981: Adjusted for Smoking, Alcohol, and Socioeconomic Status*. Sacramento: California Dep't of Health Services; 1989. Beaumont JJ, Singleton JA, Doebbert G, Riedmiller KR, Brackbill RM, Kizer KW. *Adjustment For Smoking, Alcohol Consumption, and Socioeconomic Status in the California Occupational Mortality Study*. AM. J. IND. MED. 1992;21:491-506. Williams RR, Stegens NL, Goldsmith JR. *Associations of cancer site and type with occupation and industry from the Third National Cancer Survey interview*. J. NAT'L CANCER INST. 1977;59:1147-1185. Lerchen ML, Wiggins CL, Samet JM. *Lung Cancer and Occupation in New Mexico*. J. NAT'L CANCER INST. 1987;79:639-645. Schoenberg JB, Stenmagen A, Mason TJ, Patterson J, Bill J, Altman R. *Occupation and lung cancer risk among New Jersey white males*. J. NAT'L CANCER INST. 1987;79:13-21. Zahn SH, Brownson RC, Chang JC, Davis JR. *Study of lung cancer histologic types, occupation, and smoking in Missouri*. AM. J. IND. MED. 1989;15:565-578. Keller JE, Howe HL. *Risk factors for lung cancer among nonsmoking Illinois residents*. ENVTL. RES. 1993;60:1-11.

in residences with at least one smoker.<sup>163</sup> Levels in bars were 3.9 - 6.1 times higher than in offices and 4.4 - 4.5 times higher than in residences.<sup>164</sup> The epidemiologic evidence suggested that food-service workers may suffer a 50% increase in the risk of lung cancer that is in part attributable to tobacco smoke exposure in the workplace.<sup>165</sup>

## HOW TO DEVELOP A POLICY

The Office of Disease Prevention and Health Promotion, under the Public Health Service at the Department of Health and Human Services surveyed 1,507 worksites with 50 or more employees in the winter and spring of 1992.<sup>166</sup> The survey revealed a substantial rise in the number of worksites with formal policies that prohibit or severely restrict smoking.<sup>167</sup> In 1992, about 59% of employers had a formal smoking policy, up from 27% in 1985.<sup>168</sup> About 34% of worksites did not allow smoking anywhere inside, while 25% allowed smoking only in a separately ventilated area.<sup>169</sup>

While there are beneficial aspects of smoking policies such as a cleaner work environment and higher morale among nonsmokers, some problems persist.<sup>170</sup> Twenty-seven percent of the companies that responded to the latest survey conducted by the Society for Human Resource Management cited declines in morale among smoking employees, and 19 percent reported lower productivity among smokers following adoption of

the policy.<sup>171</sup> Smokers' breaks from work have increased in frequency and duration in half of the companies that restrict smoking.<sup>172</sup> Nonsmoking employees, in turn, often demanded equal time away from their work stations.<sup>173</sup> Some employers report an increase of friction between smokers and nonsmokers or a decrease of interaction between the two groups.<sup>174</sup> Employers also received complaints from smokers about restrictions and protests from nonsmokers about areas not covered by the policy.<sup>175</sup>

The dilemma for supervisors is that the law currently gives them little guidance on exactly how to respond to employee complaints about secondhand smoke. An employer imposed policy would be a relief to most supervisors. They would then simply become responsible for administering a uniform policy with articulated consequences for breaches of the policy.<sup>176</sup>

Supervisors must remain closely aware of state laws and local ordinances that regulate workplace smoking. Because workplace smoking is subject to a great deal of debate, the laws and ordinances are likely to change — most likely in the direction of greater strictness — as new laws and ordinances pass.<sup>177</sup>

Employers should develop a smoking policy based on concern about exposing employees to a known carcinogen, employee complaints, state laws requiring workplace smoking policies, threatened lawsuits

from employees, and increased costs attributed to allowing smoking at work.<sup>178</sup> The influence of the growing number of corporations with successful policies is also a motivating factor. Hospitals, health care facilities and insurance companies were the first to announce workplace smoking policies in the early 1980s.<sup>179</sup>

Employers who want to take action but hesitate because they mistakenly believe they need to ban employee smoking altogether should reconsider. The issue is not whether employees choose to smoke, but rather where and when they can smoke. It is important to distinguish between personal and public health. Lifestyle changes like quitting smoking cannot be dictated, but protection of the public airspace when an individual's actions can harm the health of others can.<sup>180</sup>

When developing and implementing a smoking policy, employers should begin with the following:<sup>181</sup>

(1) Research the smoking issue; review the literature; survey employees to find out what they think about the issue; examine other employers' policies; consult with occupational health experts.

(2) Educate employees; educate smokers by reviewing scientific studies showing that substances unique to tobacco smoke appear in body fluids of nonsmokers who are around people who smoked and tell smokers about the harm they force on people around them;

<sup>163</sup> Siegel, *supra* note 161.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *HHS Agency Survey Shows Employers Expanding Workplace Health Programs*, 71 D.L.R. (BNA) A-7 (Apr. 15, 1993).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Majority of Employers Have Instituted Workplace Smoking Policies, Survey Shows*, 171 D.L.R. (BNA) A-11 (Sept. 4, 1991).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Supervisor's Dilemma*, *supra* note 132.

<sup>177</sup> *Id.*

<sup>178</sup> Robert A. Rosner, *Avoiding secondhand smoke; includes related article on a successful smoking control policy; The Workplace and Your Health*, EXECUTIVE HEALTH'S GOOD HEALTH REPORT, Feb. 1993, at 1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> This policy is adapted from policies quoted in Pulliam, *supra* note 62 and *Supervisor's Dilemma*, *supra* note 132.

educate nonsmokers about nicotine addiction and the importance of being supportive of smokers during the transition to a smoke-free workplace; provide information to employees regarding the health hazards of smoking and the employer's objectives in providing a safe workplace.

(3) Get employees involved, either by including them on the committee responsible for establishing the policy or by seeking their input through surveys; invite feedback on various policy alternatives; involving the employees in the planning stages of the policy may minimize complaints received after the policy is in place.

(4) Decide on a plan that will best accommodate the employer's objectives, which may include increasing employee health and productivity, minimizing absenteeism and cutting the costs of doing business, improving employee morale, eliminating employee complaints about smoke in the workplace, or complying with state or local legislation; considering the objective(s), each employer should create a policy that will best enable the employer to reach the goal; explain the plan to employees and encourage discussion of implementation problems.

(5) Conduct meetings with employees to explain the plan's implementation; if possible, implement the plan gradually - this will allow smokers to become accustomed to the policy; the implementation should allow for a transition time between the policy announcement and policy implementation.

(6) Offer incentives to reward those employees who do not smoke and to encourage smokers to stop; make free stop-smoking

programs available to all employees.

(7) Encourage employees to provide feedback regarding the effectiveness of the program and to voice their concerns; revise the smoking policy as necessary; monitor the effectiveness of the program by tracking employee health care costs: rates of absenteeism, illness, and accidents among smokers and nonsmokers, and cleaning and maintenance expenses.

The most common smoking policy adopted by employers is to institute restrictions, rather than an outright ban, on smoking in the workplace and to establish penalties for smoking violations.<sup>182</sup> Common restrictions adopted by employers include allowing employees to smoke only on their breaks or at lunch, staggering break times of smokers and nonsmokers in order to reduce ETS exposure, segregating smokers from nonsmokers, using existing physical barriers or ventilation and air filtration devices to control ETS, restricting smoking to specific areas such as an employee lounge, or banning smoking everywhere except designated areas, permitting job transfers or other accommodations for smoke-sensitive employees.<sup>183</sup>

Opinions differ on whether to allow indoor smoking and how to accommodate it. Indoor smoking may cause ventilation and productivity problems and encourages smokers to linger.<sup>184</sup> There are high compliance rates with policies that prohibit smoking indoors.<sup>185</sup> Many consider those policies the best in terms of health and safety, financial reasons, employee morale, and productivity.<sup>186</sup> Vicki Calcote, assistant property man-

ager for Trammell Crow Co., reports that the policies at Causeway Plaza in New Orleans pushed the smokers outside and in front of the main doors.<sup>187</sup> The buildings were nonsmoking in common areas and smokers were smoking outside the front doors, so entering the buildings required walking through clouds of smoke.<sup>188</sup> When a group of allergists moved into the building, management created a designated smoking area away from the entrance.<sup>189</sup>

Typical disciplinary action for violating smoking restrictions is progressive punishment. The first offense results in an oral warning; the second offense results in a written warning; the third offense results in a choice of a 3-day suspension or enrollment in a stop-smoking program; and the fourth offense results in discharge.<sup>190</sup>

Conservative estimates place the annual cost of smoking in the workplace at \$1,000 per employed smoker.<sup>191</sup> By going smoke free, an organization saves in cleaning costs, building management, fire insurance, life insurance, health insurance, lost productivity and absenteeism.<sup>192</sup> There is also potential savings of legal fees as nonsmokers have successfully sued employers.<sup>193</sup>

## PRIVATE NUISANCE AS A REMEDY

In the absence of effective ETS regulations, nonsmokers still have other avenues of recourse. Statutes describe ETS as hazardous,<sup>194</sup> harmful,<sup>195</sup> and annoying.<sup>196</sup> In short, ETS is a nuisance.<sup>197</sup> Though the common usage definition of nuisance is different from the legal definition, it is logical to apply the law of nuisance to fashion a

<sup>182</sup> Pulliam, *supra* note 62.

<sup>183</sup> *Id.*

<sup>184</sup> Rosner, *supra* note 178.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Williams, *supra* note 130.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> D.L.R. No. 171, *supra* note 170.

<sup>191</sup> Rosner, *supra* note 178.

<sup>192</sup> *Id.*

<sup>193</sup> See *Smith v. Western Electric Co.*, 643 S.W.2d 10 (Mo. Ct. App. 1982), *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408 (N.J. Super. Ct. App. Div. 1976).

<sup>194</sup> CAL. HEALTH & SAFETY CODE § 25940.5 (Deering 1977), MONT. CODE ANN. § 50-40-202 (1991), N.M. STAT. ANN. § 24-16-2 (Michie 1985).

<sup>195</sup> ILL. REV. STAT. ch. 410, para. 80/2 (1993).

<sup>196</sup> *Id.*, and N.J. REV. STAT. §§ 26:3D-1 through -23 (1993).

<sup>197</sup> N.J. REV. STAT. §§ 26:3D-1 through -23 (1993).

remedy.

Public nuisance had been the remedy of choice for most who considered nuisance law an option. However, almost every state now regulates smoking in some way in public places, rendering public nuisance virtually obsolete as a cause of action for ETS sufferers. The statutory directives mandate enforcement and penalties, thereby providing a more efficient remedy for the violation. If a plaintiff would attempt a public nuisance suit, he/she may find it practically difficult to succeed. A private citizen cannot easily bring a public nuisance suit as it requires that the private complainant be harmed in a way different from the rest of the public.<sup>198</sup> With ETS, the harm to a particular person would have to be severe, since the E.P.A. announced that secondhand smoke is a class A carcinogen. Differentiating one person's harm from ETS from the harm to the general public would be a practical struggle. ETS contains cancer-causing agents;<sup>199</sup> therefore, the complainant would almost have to suffer an unusually severe reaction to ETS. A severe reaction is not unusual in persons who have asthma, emphysema or other lung ailments, but there are many non-sufferers who need an effective remedy. If the plaintiff can not prove a different harm, a public official must bring the suit on behalf of the public.<sup>200</sup> If the official will not bring the suit, then maybe the individual can bring the suit.<sup>201</sup>

While untried, the theory of private nuisance provides a possible legal remedy for persons offended by ETS. At least two com-

mentators believe private nuisance might be a viable option to combat ETS.<sup>202</sup> A private nuisance action by a nonsmoker against a smoker would be a case of first impression and though the outcome is highly uncertain,<sup>203</sup> the broad categories within which previous cases fit illustrate ways to prove unreasonable land use are not exclusive.<sup>204</sup> It may be beneficial for plaintiffs to attempt to plead their cases into recognized categories but the law of nuisance, which is based on a balancing of interests, must remain uniquely receptive to new ways of demonstrating unreasonable use.<sup>205</sup> There is no exact rule or formula by which a person may determine the existence of a nuisance or the nonexistence of a nuisance.<sup>206</sup> "Watery eyes, irritated nasal passages, smoke-filled air — the bane of the nonsmokers' existence — are annoyances closely akin to the substance of many a nuisance claim."<sup>207</sup>

Private nuisance is the "unreasonable ... use of one's property so that it substantially impairs the right of another to peacefully enjoy his property."<sup>208</sup> According to the Second Restatement of Torts, a private nuisance is a non-trespassory invasion of another's interest in the private use and enjoyment of land;<sup>209</sup> an unreasonable use element of nuisance balances the rights of adjoining property owners.<sup>210</sup> Each case must stand upon its own special circumstances; no definite rule is applicable in all cases, but when an appreciable physical interference with the ordinary enjoyment of property is the result of a nuisance, a court of equity will not refuse to

interfere.<sup>211</sup> The most challenging hurdle in asserting a private nuisance claim against a smoker or proprietor is the requirement of possession of land.<sup>212</sup> One commentator suggested that there is no requirement of an interference with use of land to maintain a private nuisance suit in Missouri.<sup>213</sup> With each suggestion expanding the requirements of a private nuisance claim, the courts should become more receptive to private nuisance as a remedy for ETS.

If the drafters of the Restatement had used the word "property" rather than "land," overcoming the hurdle by interpreting "air" as "property" might be easier. In essence, the air belongs to no one, or it belongs to everyone. Thus, in a theoretical sense, everyone has a property interest in the air each person breathes. Air is free and unconfined, and the common property of all.<sup>214</sup> In reference to spite fence cases, courts have recognized a right to breathe clean air.<sup>215</sup> "The air and light no matter from which direction they come are God-given, and are essential to the life, comfort, and happiness of everyone."<sup>216</sup> One court held that the right to breathe the air is a natural one.<sup>217</sup> While the direct application of these quotes was to sunlight,<sup>218</sup> the courts clearly considered clean air as much a right as sunshine.

Perhaps a more realistic approach is to expand the definition of interest in property to include licensees and invitees.<sup>219</sup> A licensee may enter or remain on land only by virtue of the possessor's consent.<sup>220</sup> An invitee is

<sup>198</sup> RESTATEMENT (SECOND) OF TORTS § 821C (1977).

<sup>199</sup> See *supra* note 30.

<sup>200</sup> RESTATEMENT (SECOND) OF TORTS § 198 (1977).

<sup>201</sup> *Id.*

<sup>202</sup> Russell Weaver, Comment, *The Law of Private Nuisance in Missouri*, 44 Mo. L. Rev. 20, 36 (1979). See also, David B. Ezra, Note, *Smoker Battery: An Antidote to Secondhand Smoke*, 63 CAL. L. REV. 1061, 1082 (1990).

<sup>203</sup> Morley Swingle, Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 Mo. L. Rev. 444, 468 (1980).

<sup>204</sup> *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876, 880 (Mo. banc 1985).

<sup>205</sup> *Id.*

<sup>206</sup> *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801, 805 (Mo. 1943), citing Wood, NUISANCES § 801.

<sup>207</sup> Robert L. Rabin, *Review Essay: Some Thoughts on Smoking Regulations, No Smoking: The Ethical Issues* by Robert E. Goodin, 43 STAN. L. REV. 475, 488 (1991).

<sup>208</sup> *Crutcher*, 174 S.W.2d at 805.

<sup>209</sup> RESTATEMENT (SECOND) OF TORTS § 821D (1977).

<sup>210</sup> *Looney v. Hindman*, 649 S.W.2d 207 (Mo. banc 1983).

<sup>211</sup> *Crutcher*, 174 S.W.2d at 805, citing Wood, NUISANCES § 801.

<sup>212</sup> RESTATEMENT (SECOND) OF TORTS § 821E (1977).

<sup>213</sup> Swingle, *supra* note 203, at 468 (citing Weaver, *supra* note 147).

<sup>214</sup> *Burke v. Smith*, 37 N.W. 838, 840 (Mich. 1888).

<sup>215</sup> *Prah v. Maretti*, 321 N.W.2d 182, 189 (Wis. 1982).

<sup>216</sup> *Hornsby v. Smith*, 13 S.E.2d 20, 25 (Ga. 1941).

<sup>217</sup> *Burke*, 37 N.W. at 842.

<sup>218</sup> An interest in sunlight has been protected by private nuisance at least in the narrow context of invalidating spite fences. *Prah*, 321 N.W.2d at 189.

<sup>219</sup> See W. Rodgers, HANDBOOK ON ENVIRONMENTAL LAWS, §2.3 (1977); W. Prosser, HANDBOOK ON THE LAW OF TORTS §89 (4th ed. 1971).

<sup>220</sup> RESTATEMENT (SECOND) OF TORTS § 330 (1977).

either a public invitee or a business visitor.<sup>221</sup> Status as either a licensee or an invitee gives a person legal outlets and remedies within established tort law. With the extension of liability to these classes of persons, the law of private nuisance becomes available to those who do not, and might not ever, own property. As a licensee or invitee, the only interest in property that may exist is their continued presence in that place. That interest should be enough to sustain an action, especially when there is not a non-judicial remedy in place that would produce timely, effective results.

One commentator argues that "a university professor would be a licensee in the use of his office and therefore have no rights under private nuisance theory" as it stands today.<sup>222</sup> "If a loudspeaker from a nearby commercial establishment substantially interfered with the use and enjoyment of his office, he would effectively be without remedy."<sup>223</sup> Proceeding "through university channels to seek abatement of the nuisance would be impracticable."<sup>224</sup> "It would be much more practical to allow the professor to pursue, in his own right, a private nuisance action against the commercial establishment."<sup>225</sup> Liability for this type of behavior is analogous to a liability for an invasion by dust, noxious factory fumes or ETS.

There is liability for a private nuisance only for those to whom it causes a significant kind of harm suffered by a normal person in the community<sup>226</sup> and "to those who have property rights and privileges in respect to the use and enjoyment of the land affected."<sup>227</sup> Those with property rights and privileges include possessors of land, owners of easements and profits, and owners of non-trespassory estates detrimentally affected by interference

with the land's use and enjoyment.<sup>228</sup> Once a private complainant establishes a legal property interest he/she can sustain a private nuisance suit based on personal harm, whether or not that harm is unique to that person.

Previous cases<sup>229</sup> construe the interest in land requirement rather loosely, and courts satisfied it by showing the ownership of an easement,<sup>230</sup> periodic tenancy,<sup>231</sup> or tenancy at will.<sup>232</sup> A ticket holder at a sporting or theatrical event,<sup>233</sup> a movie, or someone eating at a restaurant might equally qualify for the protections under private nuisance law.

One is subject to liability for a private nuisance if "his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land."<sup>234</sup> The invasion must be either intentional and unreasonable, or unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.<sup>235</sup> Courts should make the determination of liability and the type of invasion on a case by case basis. Realistically, the invasion by ETS could be intentional, unintentional or abnormally dangerous depending upon the intent of the actor and the situation in which it occurs.<sup>236</sup>

The conduct necessary to make the actor liable for a private nuisance may consist of an act or a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the invasion of a private interest.<sup>237</sup> Actionable behavior for ETS exposure could be either an act or a failure to act depending upon any particular law, ordinance or rule in effect in that jurisdiction and the physical condition of the victim.

In an attempt to provide the best remedy

for a private citizen to combat exposure to ETS, private nuisance may be one of the most effective and efficient remedies available. The viability of private nuisance is even greater when there is no statutory mandate or local rule that fashions an expedited remedy. Of course, the determination of its applicability lies in the court decisions of the future. The courts that consider private nuisance as a practical approach will be those that recognize the significance of the harm caused by ETS and the importance of controlling it.

## CONCLUSION

While this Comment is far from an exhaustive discussion of the issue of ETS, the information within should be of help to those with practical questions about controlling it. Dealing with ETS requires a conscious effort on the part of legislators, employers and private citizens to make a positive change. The federal government took a monumental step toward combating ETS with the Labor Department's rule to ban smoking everywhere people work. That rule would effectively eliminate ETS in every enclosed space except private residences and automobiles. Until a federal rule is in place, utilization of other methods can control the exposure to ETS. While government cannot control either the decision of any private person to smoke or the promulgation of ETS in private places, it can, and should, make a contribution to effect change in public places. In the meantime, owners, managers and supervisors can implement smoking policies in workplaces which would presumptively, and perhaps actually, limit ETS in virtually all public places. ETS is one of the most significant environmental health hazards of this generation. It is time to clear the air.

<sup>221</sup> "A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." RESTATEMENT (SECOND) OF TORTS § 332 (1977).

<sup>222</sup> Weaver, *supra* note 202, at 36.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> RESTATEMENT (SECOND) OF TORTS § 821F (1977).

<sup>227</sup> RESTATEMENT (SECOND) OF TORTS § 821E (1977).

<sup>228</sup> *Id.*

<sup>229</sup> As cited in Weaver, *supra* note 202.

<sup>230</sup> *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 74 S.W. 474, 479 (Mo. App. 1903).

<sup>231</sup> *Ellis v. Kansas City, St.J. & C.B.R.R. Co.*, 63 Mo. 131, 136 (1876); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211, 216 (Mo. Ct. App. 1955).

<sup>232</sup> See *Newman v. City of El Dorado Springs*, 292 S.W.2d 314, 320 (Mo. Ct. App. 1956).

<sup>233</sup> A. Brody & B. Brody, *THE LEGAL RIGHTS OF NONSMOKERS* 21, at 83 (1977).

<sup>234</sup> RESTATEMENT (SECOND) OF TORTS § 822 (1977).

<sup>235</sup> *Id.*

<sup>236</sup> "An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct." RESTATEMENT (SECOND) OF TORTS § 825 (1977).

<sup>237</sup> RESTATEMENT (SECOND) OF TORTS § 824 (1977).