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Snuffing out Tobacco: The City of St. Cloud's Attempt to Ban Tobacco Use in the Name of Healthcare Reform; Can Everything be a Special Need?

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NOTE

SNUFFING OUT TOBACCO: THE CITY OF ST. CLOUD'S ATTEMPT TO BAN TOBACCO USE IN THE NAME OF HEALTHCARE REFORM; CAN EVERYTHING BE A SPECIAL NEED?

Matthew A. Swartz[*]

INTRODUCTION

I believe the ultimate goal should be a smoke-free society by the year 2000. - C. Everett Koop[1]

Smoking is a habit that, until recently, a great number of people indulged[2] as it signified "elegance and sophistication in popular culture."[3] In fact, "throughout its boom period, from the 1920s until the mid-1960s, cigarette smoking was generally regarded as a consumer activity rather than as a medical problem."[4] However, "over the past

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1. JACOB SULLUM, *Preface* to FOR YOUR OWN GOOD (1998) (quoting Surgeon General C. Everett Koop, 1984).

2. Ann H. Zgrodnik, *Smoking Discrimination: Invading an Individual's Right to Privacy in the Home and Outside the Workplace?* 21 OHIO N.U. L. REV. 1227 (1995).

3. Kathleen Sablone, *A Spark in the Battle Between Smokers and Nonsmokers: Johannesen v. New York City Department of Housing Preservation & Development*, 36 B.C. L. REV. 1089, 1227 (1996).

4. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 34 (2000) [hereinafter REPORT OF THE SURGEON GENERAL 2000].

few decades . . . smoking has become less fashionable."[5] The trend against smoking originally started in 1964 when the Surgeon General of the United States declared that smoking could increase a person's risk of cancer, chronic bronchitis, and emphysema.[6] An essential conclusion of this landmark report was "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[7]

The history of tobacco regulation is as long and storied as the research that went into detailing its harmful effects on humans.[8] However, in light of recent Florida Supreme Court decisions, the City of St. Cloud, Florida, (hereinafter St. Cloud) has taken the traditional remedial measures against smoking one step further.

St. Cloud is primarily an agricultural town with a population of approximately 19,000 people[9] located in the backyard of one of the most recognizable theme parks in existence, Walt Disney World.[10] In fact, while some have called St. Cloud "a slice of old Florida,"[11] the reality is that it is a picturesque example of how small-town America has not been able to escape the pressures brought on by the rising costs of healthcare.[12]

Nevertheless, as Donald Breeding, a sewer-plant worker in St. Cloud, "grabbed a pinch [of tobacco] from his can of Copenhagen on March 27, 2002 and carefully packed it against his gum"[13] he was seemingly a world away from worries about the rising healthcare costs that his and his fellow employees' tobacco usage generated. However,

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5. Sablone, *supra* note 3, at 1227.

6. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SMOKING AND HEALTH: *REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE*, 1964 at 31-32. [hereinafter REPORT OF THE SURGEON GENERAL 1964]

7. *Id.* at 33.

8. Zgrodnik, *supra* note 2, at 1231 ("Since the early 1800s, states have grappled with how to protect both an individuals right to smoke and the non-smoker's right to a smoke free environment at the same time."). *See infra* notes 58-67 (detailing the harmful effects of smoking on humans).

9. Kevin Tse & Dean Foust, *At Risk From Smoking: Your Job*, BUS. WK., April 15, 2002, *available at* 2002 WL 9360719.

10. *Marketplace Morning Report* (Minnesota Public Radio broadcast, August 29, 2002)(Kai Ryssdal, anchor).

11. *Id.*

12. *Id.*

13. April Hunt & Susan Jacobson, *Tobacco Users Need Not Apply*, ORLANDO SENTINEL, March 27, 2002, *available at* 2002 WL 3038029.

the freedom of choice that Mr. Breeding so innocently enjoyed that day will no longer be the norm for prospective employees of St. Cloud.

On March 25, 2002, St. Cloud effectively stated, "[A] nicotine habit [will] cost a smoker a job."[14] This decision was based primarily on the Florida Supreme Court case of *City of North Miami v. Kurtz*, in which the court held that smokers have no privacy rights.[15] St. Cloud has applied the dicta of *Kurtz* to its own situation by requiring new employees, hired after the date of the ordinance, to "sign an affidavit swearing they have been tobacco-free for 12 months."[16] The city government, however, has taken its ordinance one step further by "[requiring] new hires to submit to medical tests at management's discretion to prove they aren't sneaking a smoke on the sly after hours."[17]

This Comment focuses on the effect of St. Cloud's ordinance and the degradation of individual privacy that potential employees will be forced to endure through the unwarranted bodily search utilized by St. Cloud. Ultimately, this comment will define the scope of the right to individual privacy within our society. Once the right to privacy has been defined it will be shown that the means chosen by St. Cloud are over-inclusive of the desired end and that tobacco use cannot, and should not, be controlled in the home or outside the workplace by an employer in the way St. Cloud has chosen. Further, whether a privacy right exists to use tobacco will not be analyzed within the context of

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14. Tse & Foust, *supra* note 9.

15. City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995). Petitioner Kurtz challenged the constitutionality of St. Cloud's requirements that all applicants must sign an affidavit stating they had been tobacco free for twelve months prior to their application. At trial, the District Court certified the issue of whether the city could, in fact, maintain such a regulation even though tobacco use was not related to job function. Subsequently, the Florida Supreme Court found the main thrust of the ordinance was to reduce costs and increase productivity while "gradually [reducing] the number of smokers in the City's work force by means of natural attrition." *Id.* at 1026. However, the court restated that the regulation was not enforceable once an employee was hired. In its decision the Supreme Court concluded, "individuals have no reasonable expectation of privacy in the disclosure of [whether they smoked] when applying for a government job." *Id.* at 1028. The court went on to hold that elimination of costs represents a compelling state interest and the City chose the least intrusive means because the regulation did not affect current employees. *Id.* at 1029; *see also* e-mail correspondence with Eric Nieves, Human Resources Director, City of St. Cloud (July 1, 2003, 12:10 EST) (on file with author).

16. Hunt & Jacobson, *supra* note 13.

17. *Id.*

the jurisprudence provided by the Florida Supreme Court in *Kurtz*[18] but generally as the right to be free from unwarranted and unreasonable bodily searches.[19]

In order to define the environment that has spawned St. Cloud's ordinance, Part II of this Comment analyzes the history of tobacco, emphasizing smoking[20] and its regulation and usage. Next, Part III frames the privacy aspects of the decision to prohibit tobacco usage in the context of the applicable Florida and Federal Constitutional

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18. *See Kurtz*, 653 So.2d at 1028-29.

19. This Comment will only address the Fourth Amendment search with emphasis on the application of special needs. The crux of St. Cloud's enforcement program is grounded on the warrantless, unconstitutional invasion of individual privacy. Therefore, the issues of consent, waiver, and equal protection are beyond its scope. *See infra* note 137. Moreover, one is forced to consult the Federal Constitution to define smokers and, more generally, tobacco users' rights. The Florida Supreme Court has already determined that the right to smoke, and, arguably, any other form of tobacco usage, does not exist within the state's constitution. *See Kurtz*, 653 So.2d at 1029.

20. Smoking is emphasized because St. Cloud has explicitly formulated a regulation against tobacco usage in general. City of St. Cloud, Fla., Human Resources Bulletin 2002-2003 (effective March 25, 2002) [hereinafter H.R. Bulletin] is closely drawn from the *Kurtz* decision on smoking and deals with the regulation of all tobacco usage. *See infra* notes 106-107 and accompanying text. *See also* e-mail correspondence with Eric Nieves, Human Resources Director, City of St. Cloud (July 1, 2003, 12:10 EST) (on file with author). Therefore, St. Cloud's attempt to regulate all tobacco usage in general is founded on a principle that all tobacco is equally harmful. *Cf.* SULLUM, *supra* note 1, at 277. Further, in response to the notion that "tobacco is tobacco," Mr. Sullum argues that while "all tobacco products pose some health risks, cigarettes are by far the most hazardous." *Id.* at 277. Further, "cigars and pipes are considerably less dangerous" with cigar users, as researched by the American Cancer Society, showing somewhat higher death rates, while pipe users experience little difference from the death rates of nonsmokers. *Id.* at 278. Sullum has written a number of articles on smoking that are published in such well-documented sources as *Forbes MediaCritic*, *The Wall Street Journal*, and *Reason*. Mr. Sullum has documented the history and percentage of his funding from the tobacco industry to refute the notion that he is "a conservative commentator . . . paid by the tobacco industry . . . ." *See Author's Note*, SULLUM, *supra* note 1, at xi. Currently, Mr. Sullum is a senior editor for *Reason* Magazine who writes about a wide range of issues. Mr. Sullum's work on FOR YOUR OWN GOOD has been widely praised by *The Wall Street Journal*, *The New York Times*, and *The Washington Post*. *See Reasononline, available at* http://reason.com/Bio/sullum. shtml (last visited October 24, 2003).

provisions.[21] Subsequently, Part IV provides a framework for St. Cloud to accomplish its underlying goals of reducing employee smoking in a manner that preserves individual freedom of choice and protects the right to be free from unwarranted, unreasonable searches of the body. In conclusion, Part V applies this formula to legislating in the area of smoking; it argues that legislation in this area creates a slippery slope, ignoring opportunities to use less restrictive means of obtaining the same results.

II. HISTORY OF TOBACCO LEGISLATION

I hope they price them out of my range, because I'm really wanting to stop. - A Kentucky Smoker on the 1990 Tax Increase[22]

A. Tobacco regulation is nothing new to the world

The regulation of smoking, smokers, and other tobacco products is not a program whose lineage began when late twentieth century scientific research quantified the deleterious health effects of smoking. In fact, history is replete with anti-smoking legislation, in one form or another, dating back to the time when smoking was originally brought to the Western World. Coinciding with the ever-present prohibitions

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21. *See generally* FLA. CONST. art. 1 § 23 and Supreme Court case law discussed in Part III.

22. SULLUM, *supra* note 1, at 119. Eventually, the American Government learned what their European counterparts knew quite some time earlier, cigarettes may be taxed. By 1864, cigarette usage had increased to the point where it was profitable enough to subject it to federal tax. *See* REPORT OF THE SURGEON GENERAL (2000), *supra* note 4, at 30. Additionally, regardless of the amount of tax that could be placed on them, the American populous simply enjoyed smoking. In fact, this "lack of enthusiasm for the anti-cigarette cause" could even be found during the highlight of the anti-smoking crusade in 1915, as evidenced by the following poem in *The Penn State Froth*:

> Tobacco is a dirty weed. I like it.
> It satisfies no normal need. I like it.
> It makes you thin, it makes you lean,
> It takes that hair right off your bean,
> It's the worst darn stuff I've ever seen.
> I like it.
>
> (Graham Lee Heminger, "Tobacco" (1915))

SULLUM, *supra* note 1, at 34.

placed on it, "from the 1600's until today, tobacco's popularity has [experienced] . . . its ups and downs."[23]

What most people consider the modern day form of smoking was originally brought to Europe by Christopher Columbus, who was introduced to it by Native Americans in 1492.[24] After Columbus returned to Europe with tobacco seeds from the new world, smoking rapidly became popular throughout the European continent.[25] The surge in Europeans' smoking was not without its opponents. One of the very first, and most formidable, was King James I, who described the habit as "loathsome to the eye, hateful to the nose, harmful to the brain and dangerous to the lung."[26] However, King James I quickly changed his stance on smoking when he learned of the potential tax revenues.[27] In addition to King James I, Johann Michael Moscherosch, for reasons that are arguably more humanitarian, also viewed smoking negatively, proclaiming in 1650:

> They who smoke tobacco can be compared only to men possessed, who are in need of exorcizing. While their throats belch forth the stinking, poisonous fumes, they remain nonetheless thralls to the tobacco fiend to whom they cling with an idolatrous devotion, exalting him as their god above all others, and striving to entice all they meet to imitate their folly. One thing is at least it teaches them, the better to endure the reek of hell.[28]

Moscherosch's view that smoking would accustom its users to the "reek of hell" typified the ideals of "[t]obacco's more fervent detractors [who] identified it as the Devil's weed."[29]

While many people abhorred and still abhor tobacco smoking, it was never completely banned throughout Europe. Moreover, many leaders would not have stood for the habit except for one inexorable fact - they could tax it. This mindset is best exemplified by Napoleon III's proclamation "This vice brings in one hundred million francs in

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23. David B. Ezra, *"Get Your Ashes Out of My Living Room!": Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 143 (2001).

24. Sablone, *supra* note 3, at 1091.

25. See Ezra, *supra* note 23, at 142 (citing RONALD J. TROYER & GERALD E. MARKLE, CIGARETTES: THE BATTLE OVER SMOKING, 31-47).

26. *Id.*

27. *Id.*

28. SULLUM, *supra* note 1, at 15.

29. *Id.* at 19.

taxes every year. I will certainly forbid it at once – as soon as you can name a virtue that brings in as much revenue."[30]

Essentially, the mindset about the deleterious nature of smoking prevailed through much of the European continent for the next several centuries.[31] Ultimately, due to the taxability, and hence wide margins for revenue, smokers were allowed to continue their habit with relatively little persecution or interruption.[32]

B. Tobacco regulation in early America

The popular American anti-smoking movement began in the late 1800s.[33] In fact, by 1890, twenty-six states prohibited the sale of cigarettes to minors,[34] while at the movement's peak in 1909, seventeen states banned the sale of cigarettes altogether.[35] Moreover, in 1898 the Tennessee Supreme Court declared cigarettes to be illegitimate articles

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30. *Id.* at 21; *see also* Harvey M Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH CARE L. & POL'Y 277, 284-85 (1980) (stating that governments can, and have, come to depend on the revenues garnished from cigarette smoking through the use of taxes).

31. In the seventeenth century, Holy Roman Emperor Ferdinand II, without much success, banned "tobacco drinking" under threat of fines. Additionally, Turkish sultan Murad IV forbade smoking under penalty of death and required all places where smoking was found to be demolished with the assets of that place subsequently reverting to the government. *See* SULLUM, *supra* note 1, at 20.

32. "European governments increasingly recognized that so hardy a habit could be a valuable source of revenue." *Id.* at 21. While persecution did exist, it was unenforceable at best due to the large amount of smokers within the European population. Moreover, as Turkish writer Katib Chelebi stated, in response to the Turkish Sultans repression of smoking, "[As the repression continued] so did people's desire to smoke. . . . 'Men desire what is forbidden' . . . ." *Id.*

33. Joseph R. Gusfield, *The Social Symbolism of Smoking and Health, in* SMOKING POLICY: LAW, POLITICS AND CULTURE, 50 (Robert L. Rabin & Stephen D Sugarman, eds., 1993). However, it should be noted that the previously alluded to shift in smoking behavior had little to do with health concerns, which only played a small (if any) roll in the formulation of public opinion before the 1950s. *Id.* at 54; *see also* REPORT OF THE SURGEON GENERAL 2000, *supra* note 4, at 51, Conclusion 1.

34. Gusfield, *supra* note 33, at 50.

35. *Id.*

of commerce based on the assertion that tobacco was "wholly noxious and deleterious to health."[36]

The Tennessee Supreme Court was not the only jurisdiction to comment on the adverse public perception of smoking during this time period. The Kansas Supreme Court embraced the opinion of the Tennessee Court in 1920 by describing its "well-settled opinion that the use of cigarettes especially by persons of immature years was harmful, and the courts recognized that they were deleterious in their effects."[37] At its peak, the anti-smoking movement counted more than twenty-five states and over ninety-two different pieces of legislation among its followers,[38] with ultimately fourteen states invoking some type of legal penalty against smoking in its various forms.[39] Additionally, at the height of the movement cigarettes became known as "coffin nails, little white slavers, dope sticks, paper pills, brain capsules, coffin pills, [and the] Devil's kindling wood."[40]

Nevertheless, the popular anti-smoking movement of the late 1800s and early 1900s[41] was quelled in the mid 1920s due to a variety of factors, not the least of which was World War I.[42] Because the cigarette

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36. Austin v. State, 48 S.W. 305, 306 (Tenn. 1898), *aff'd sub nom.* Austin v. Tennessee, 179 U.S. 343 (1900). However, the Supreme Court of the United States ruled that cigarettes are a legitimate article of commerce. *See Austin*, 179 U.S. at 345. On appeal, the Court ruled that the state could not constitutionally prevent cigarettes bound for other states from crossing its borders but could take control over them once they left their original shipping containers. SULLUM, *supra* note 1, at 31 (citing Austin v. Tennessee, 179 U.S. 343 (1900)).

37. State v. Nossaman, 193 P. 347, 348 (Kan. 1920), *error dismissed sub nom.* Nossaman v. Kansas, 258 U.S. 633 (1922).

38. Zgrodnik, *supra* note 2, at 1232.

39. Christopher E. Cobey, *The Resurgence and Validity of Antismoking Legislation*, 7 U.C. DAVIS L. REV. 167, 171 (1974).

40. SULLUM, *supra* note 1, at 30. The author goes on to show that the early crusade against smoking was not only about social disparity, disgust, and reform, but also about the negative health effects associated with the habit. Smoking was said to cause "stunted growth, weakened immunity, insomnia, shattered nerves, shaky hands, poor motor coordination, heart palpitations, cardiovascular disease, high blood pressure, . . . and impaired ability." *Id.* at 31.

41. In contrast to the anti-smoking movement that occurred later in the 20th Century, this early movement was based more on social stigma and a general public perception of smoking being vile than any concerns about negative health affects. REPORT OF THE SURGEON GENERAL 2000, *supra* note 4.

42. In part, this decline was due to the popularity created by Prohibition and the development of the advertising industry. While these were important, no single entity probably did more to encourage smoking than World War I. In fact,

"[served] as the essential sustainer of morale,"[43] within six years from its legislative anti-smoking heyday, all fourteen state laws regulating tobacco were repealed from the legislative rolls.[44]

In a matter of a few short years, smoking and the stigma associated with it experienced an almost complete turnaround. In the time period after World War I, smoking became a tolerable behavior, with many states largely declining to legislate on the issue.[45] During the 1920s through the mid-1960s smoking actually reached a "boom period."[46] In part, this boom was due to World War II,[47] which guaranteed an increased customer base for cigarette manufacturers in the future.[48] "In the hands and mouths of movie stars like Humphrey Bogart and Bette Davis, the cigarette became a pop culture icon . . . ."[49] Ultimately,

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WWI is credited with making smoking a part of the soldiers' everyday routine, so much so that the New York Times observed, "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." Cobey, *supra* note 39, at 173. Additionally, General John J. Pershing, the leader of the American expeditionary force, cabled his supervisors to inform them of tobacco's hold on the troops. "Tobacco is as indispensable as the daily ration; we must have thousands of tons of it without delay." *See id.* at 173. Pershing went on to state that, in order to win the war, he needed "tobacco as much as bullets." RICHARD KLUGER, ASHES TO ASHES 63 (1996).

43. KLUGER, *supra* note 42, at 63.

44. Cobey, *supra* note 39, at 171.

45. Zgrodnik, *supra* note 2, at 1232.

46. REPORT OF THE SURGEON GENERAL 2000, *supra* note 4, at 34.

47. During WWII the big three leaders (Roosevelt, Churchill and Stalin) of the anti-fascist governments were all smokers, in addition to the supreme Allied commander of the Pacific (Douglas MacArthur). In America, both MacArthur and Roosevelt were staunch supporters of the cigarette. MacArthur's most picturesque moments most often came complete with his corncob pipe clamped between his teeth wading onto some foreign battle ground to rally his troops. Roosevelt declared tobacco a wartime material and granted military exceptions for those who chose to grow it. KLUGER, *supra* note 42, at 44.

48. *Id.*

49. SULLUM, *supra* note 1, at 44. Bogart was best known for his 1942 role in the film "Casablanca" in which he used cigarette smoking as a means for "[making] a moral statement about a world gone awry." *Id.* Additionally, his counterpart, Bette Davis was the "prototypical female screen smoker . . . for whom the cigarette was laden with unspoken sexual language." *Id.* However, Bogart's most moral statement about a world gone awry may have been when he succumbed to the side effects of throat surgery to remove a cancerous growth and died at the age of fifty-seven. *See* Bubbeo, *Biography – Humphrey Bogart: To*

because of the wide spread advertising campaigns and popular support within the media business, by the mid-1950s more than a quarter of women[50] and an incredible sixty-eight percent of men in America smoked.[51]

C. The modern day tobacco regulation movement

The smoking euphoria would not last long. In June of 1954 the American Cancer Society released a study in which lead researcher E. Cuyler Hammond proclaimed, "[C]igarette smokers had so much higher death rates that we didn't think we could withhold the information for another year."[52] Ultimately, this was bad news for the smoker, as this was only the first in a number of studies[53] that documented the negative health effects of smoking.

All of these previous studies were mere precursors to the report that "marked the beginning of a revolution in attitudes and behaviors relating to cigarettes."[54] In 1964 the Surgeon General of the United States released a report that helped to solidify the growing consciousness about the effects of smoking by "consolidat[ing] and legitimiz[ing] 15 years of growing evidence of the dangers of smoking to health."[55]

While the report of the Surgeon General "established causal relationships between cigarette smoking and diseases such as lung

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Have and Have Not, *available at* http://bogart-tribute.net/bio.shtml (last visited Feb. 10, 2003).

50. SULLUM, *supra* note 1, at 114.

51. Ezra, *supra* note 23, at 144.

52. Originally, the 1954 study, which followed 187,766 men between ages fifty and seventy for a two-year period, had planed to release its information in 1955. However, preliminary information showed that lung cancer deaths were three to nine times more common in smokers, while heart disease deaths were one and one-half times as common. In addition, overall death rates for other forms of cancer as well as mortality rates were sharply higher. *See* SULLUM, *supra* note 1, at 46.

53. *See generally* SULLUM, *supra* note 1, at 44 (citing Ernst L. Wynder, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma*, Journal of the American Medical Association). Wynder broke his subject down into groups ranging from non-smokers to heavy ones and found that ninety-seven percent of the patients with lung cancer were at least moderate smokers.

54. REPORT OF THE SURGEON GENERAL 2000, *supra* note 4, at 40.

55. *Id.*

cancer, chronic bronchitis and emphysema,"[56] its effects were much farther reaching. Inasmuch as it raised society's level of consciousness, the study ultimately did something far more important for the popular anti-smoking movement: it focused Congress' attention on the matter. As a result of this new publicity, Congress in 1965 enacted legislation that required warning labels on cigarette packages.[57] Additionally, within just a few short years, Congress passed legislation banning cigarette advertising on both television and radio.[58] As a result, the second phase of the anti-smoking movement became largely due to public awareness.[59]

In the wake of mutual congressional action and public enlightenment, the anti-tobacco movement began to grow, albeit slowly.[60] Then in 1986, the Surgeon General again revitalized anti-smoking fervor with a report that detailed the effects of second-hand smoke.[61] This report found that a nonsmoker inhales the same harmful chemicals as smokers do, albeit in smaller doses.[62] Further, the Surgeon General coined the phrase "Environmental Tobacco Smoke" (ETS) to distinguish between smoke that is directly inhaled by the smoker and smoke that is inhaled by nonsmokers in proximity to smokers.[63] In a follow-up study conducted in 1992, the Environmental Protection Agency (EPA) listed ETS as a "group A" carcinogen, which marks it a known human lung carcinogen.[64]

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56. Sablone, *supra* note 3, at 1091.

57. *Id.* Moreover, this is the quintessential slogan on every pack of cigarettes and other tobacco products which states something to the effect of "CAUTION: Cigarette Smoking is Dangerous to Your Health." *See* Richard W. O'Neal, *Close But No Cigar: A Comparative Analysis of the FDA's Attempt to Regulate Tobacco Use*, 30 GEO. WASH. J. INT'L L. & ECON. 481, 491 (1996-97).

58. REPORT OF THE SURGEON GENERAL 2000, *supra* note 4, at 45. The Public Health Cigarette Smoking Act of 1969 is found in Pub. L. No. 91-222.

59. REPORT OF THE SURGEON GENERAL 2000, *supra* note 4, at 45 (stating, "[T]he impetus for reducing tobacco use was largely medical and social").

60. *Id.* at 40. Here, the Department of Health lists a number of factors that slowed the popular movement. Generally, the report classifies the movement as being "impeded by the entrenched norm of smoking, a widespread practice fueled by the persistent and pervasive marketing of cigarettes."

61. Sablone, *supra* note 3, at 1092.

62. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE SURGEON GENERAL: *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING* 13 (1986).

63. *Id.* at 7.

64. Sablone, *supra* note 3, at 1092.

The initial report of the Surgeon General in 1964 acted as society's wake-up call. No longer could people emulate their on-screen idols by dashingly lighting a cigarette without knowing what they were doing to themselves. Additionally, "[s]mokers could no longer claim that smoking was simply a lifestyle choice for which they alone took the risk."[65] After the 1986 report detailing the effects of ETS, the anti-smoking movement picked up even more fervor.

While the 1986 report only confirmed what was considered a social irritation,[66] it also provided an impetus for further legislation affecting smokers. Finally, in 1986 the General Accounting Office promulgated a ruling for federal office buildings which required "smoking . . . to be held to an absolute minimum in areas where there are non-smokers."[67]

The latest blows to smokers have come on the heels of several studies relating to productivity and costs.[68] Moreover, studies show that workplace smoking leads to an increase in sick days and illnesses

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65. Ezra, *supra* note 23, at 912. The author alludes to the fact that in 1984, cigarette companies attempted to show that "passive smoking is a political issue, not a health concern." *Id.* at 912 n.44 (citing Tom Post, *Preserving Endangered Products*, FORTUNE, Mar. 5, 1984, at 70, 71).

66. Long before the 1986 report a number of businesses had already begun to limit smoking when it was under their control. In fact, a popular development that epitomizes this was underway in the airline industry in the late 1970s and early 1980s. The airline industry's first step was to separate smokers and non-smokers on flights. However, complaints were numerous and enforcement was lax as the airlines were not about to alienate their tobacco-addicted clientele. KLUGER, *supra* note 42, at 373-4. Ultimately, as the number of passenger complaints grew, an overall increase in tobacco awareness led both the airline industry and the federal government to mandate no smoking on flights by 1990. *Id.* at 706-7. Additionally, the Occupational Safety and Health Administration (OSHA) proposed a ban on all indoor smoking unless a designated smoking area specifically designed to keep smoke out of other areas of the workplace was implemented. Jennifer Costello, The FDA's Struggle to Regulate Tobacco, 49 ADMIN. L. REV. 671, 689 n.5 (1997) (citing Indoor Air Quality Regulation, 59 Fed. Reg. 15, 968 (1994)); *see also* 49 U.S.C. § 137(d)(1)(A) (1988) (banning smoking on domestic flights except to Alaska and Hawaii), and H.R. 4495, 103d Cong. (2d Sess. 1994) (banning smoking on all international flights).

67. O'Neal, *supra* note 57, at 492 (citing 41 C.F.R. § 101-20.105-3(a)(1)(1996)).

68. *See* Ezra, *supra* note 23, at 909-10. Higher insurance costs and maintenance costs are attributable to smokers. Additionally, studies have shown that smoking can lead to lower productivity and takes time away from work as employees venture to designated smoking areas in order to smoke. Ultimately, it is estimated that the annual cost, in both lost productivity and health care, exceeds $27 billion with upward limits approaching $61 billion. *Id.*

for smokers as well as passive inhalers and directly impacts productivity and efficiency.[69] Ultimately, with every new development in the anti-smoking crusade, smokers have had to endure progressively more intrusive regulation into their private lives.

III. PRIVACY

I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional [provision].- Justice Black, U.S. Supreme Court[70]

Anti-smoking sentiment is nothing new to the state of Florida. In fact, it was one of the first states to actively pursue tobacco companies in the second wave of the anti-smoking/tobacco movement.[71] Even local ordinances against tobacco users have been commonplace since the 1990s.[72] In fact, the Florida Clean Indoor Air Act (FCIAA)[73] was enacted to require the designation of areas for smokers and non-smokers in public places, which includes hospitals, government buildings, public mass transit, schools, libraries, courtrooms, theatres, recreational facilities, and workplaces where the two groups are intermingled.[74] Finaly, it was the seminal decision by the Florida Supreme Court in *City of North Miami v. Kurtz*[75] that solidified the

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69. *Id.*

70. Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

71. SULLUM, *supra* note 1, at 181. Florida's Governor, Lawton Chiles, was one of the first in the nation to proudly proclaim that he was going after the Marlboro Man in what is commonly called the tobacco settlements in 1994 with the words "We're going to take the Marlboro Man to court." This was closely followed by many of the larger tobacco companies making deals with a group of state attorneys general. *Id.* at 182-183.

72. Chad Scheer, *Smoke Screening*, ENTREPRENEUR MAGAZINE, Sept. 2, 2002, *available at* 2002 WL 23027925. It was in 1990 that the City of North Miami set an example by being the first to exclude smokers from the possibility of obtaining a job.

73. FLA. STAT. ANN. § 386.201-.2125 (West Supp. 2004).

74. Renee M. Szobonya, *City of North Miami v. Kurtz: Is Sacrificing Employee Privacy Rights the Cost of Health Care Reform?*, 27 U. TOL. L. REV. 545, 554 (1996).

75. City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995). *See supra* text accompanying note 15.

state government's right to discriminate against tobacco users in an employment context.[76]

In *Kurtz,* the Florida Supreme Court relied on specific findings of fact from the trial court that "each smoking employee costs North Miami as much as $4,611 per year in 1981 dollars over what it incurs for non-smoking employees."[77] The court also determined that because the city of North Miami was a self-insurer, taxpayers were responsible for one hundred percent of these costs, which were mostly in the form of medical expenses.[78] At trial, the judge found Kurtz had a fundamental right to smoke under the Florida Constitution, specifically by the terms of Article 1, Section 23.[79] The Supreme Court went on to state that while the scope of the Florida Constitution "provides greater protection than the federal constitution, it was not intended to be a guarantee against all intrusion into the life of an individual."[80]

The court held that a determination of whether an individual has a legitimate expectation of privacy should include examining the totality of the circumstances.[81] Ultimately, the Florida court decided that "the City's action does not intrude into an aspect of Kurtz' life in which she has a legitimate expectation of privacy . . . [because] in today's society, smokers are constantly required to reveal whether they smoke."[82]

What is more startling than the court's interpretation of privacy is its willingness to conclude "the City has established a compelling interest

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76. City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995). *See supra* text accompanying note 15. It was ultimately this decision that the City of St. Cloud used as a benchmark for formulating its regulation. *See also* e-mail correspondence with Eric Nieves, Human Resources Director, to Matthew Swartz (Nov. 5, 2002) (on file with author.)

77. *Kurtz*, 653 So.2d at 1027.

78. *Id.*

79. *Id.* ("[E]very natural person has the right to be let alone and free from governmental intrusion into private life except as otherwise provided herein. This section shall not be construed as limiting the public's right of access to public records and meetings as provided by law.") (citing FLA. CONST. art. 1 § 23 (2002)).

80. *Id.*

81. *Id.* at 1028.

82. *Id.* In sum, it was concluded that because whether an individual smokes is a question that he or she gets asked when attempting to rent a hotel room, car, or even before dining, this information is revealed so often that there can be no legitimate expectation of privacy about disclosing this information when applying for a job. *Id. See also* Katz v. United States, 389 U.S. 347 (1967), and accompanying text *infra* note 105.

to support implementation of the regulation."[83] By adhering to this conclusion of law, the court indirectly validates the premise that elimination of costs constitutes a compelling interest. Further, this interest in controlling costs justifies the practice of eliminating smokers through attrition. Additionally, because current employees were exempt from the regulation, it was the least intrusive means of accomplishing the state's cost objectives.[84]

The problem with St. Cloud's decision within the framework established by *Kurtz* is not that it refuses to hire smokers, but that it has taken the reasoning of *Kurtz* and extended it to include random medical testing. This policy has created furor in both the media and the workers' rights communities, both of which focus on how far St. Cloud actually goes to ensure that its rules are enforced.[85] Because many believe that St. Cloud has taken the proverbial high ground in its stance against tobacco users, due largely to the requirements that prospective employees sign an affidavit and submit to medical testing, the action has triggered a conflict between smokers and nonsmokers.[86]

Ultimately, this conflict over the St. Cloud ordinance centers on whether tobacco users have a federally protected constitutional right to use tobacco, an activity that is currently legal, and maintain a job at the same time. According to smokers and civil rights activists, at the heart of the issue is the privacy debate. In fact, both of these groups have adopted the premise that "[b]y allowing an employer to regulate off-duty lawful activity which is unrelated to job performance, the Florida Supreme Court has significantly curtailed the right 'to be let alone' in one's own home."[87]

This premise is based on the belief that the right "to be let alone" in one's own home should be unfettered. As such, even if it is assumed that St. Cloud could regulate smoking at work, the issue is not a

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83. *Kurtz,* 653 So.2d at 1029.

84. *Id.*

85. Scheer, *supra* note 72. The article continues with an interview of Eric A. Nieves, the human resources director for St. Cloud, who states that St. Cloud does not plan on using the random medical testing provision except in cases where an employee's "cheating becomes a problem." *See also* H.R. Bulletin, *supra* note 20, at § C(2)(b) (in possession of the author) (emphasizing "the City's right to conduct any form of medical examination or test" to determine whether he/she is in compliance with this policy).

86. Scheer, *supra* note 72.

87. Szobonya, *supra* note 74, at 545. The author goes on to state that most Americans do not want employers to have a say about what happens in their living rooms unless it relates to on the job performance. *Id.* at 547.

smoking ban on individuals in the workplace but a smoking ban on individuals wherever they go, including their homes. Further, it is a ban enforced by required submission to medical testing.

A. Defining the Scope of the Right to Privacy

The privacy debate can be split into two distinct areas. The first of these is the general right to privacy, including the home. The second centers on the Fourth Amendment and the right to be free from unreasonable searches and seizures. The main premise of this second privacy argument is that while St. Cloud could control smoking on the job, it is powerless to implement its planned medical testing because the right to bodily privacy exceeds St. Cloud's right to conduct medical testing.

First, the U.S. Supreme Court has spoken on the scope and application of the general right to privacy, albeit not in the same context. While a general right to privacy is not explicitly stated in the Constitution, many of its provisions have suggested that such a right exists.[88] In fact, in the early half on the 20th century, Justice Brandeis defined the scope of privacy in his dissent in *Olmstead v. United States*:[89]

> The protection guaranteed by the [Bill of Rights] is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[90]

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88. *Id.* at 550.

89. Olmstead v. United States, 277 U.S. 438 (1928).

90. *Id.* at 478 (Brandeis, J., dissenting). Justice Brandeis developed his ideas about the right to privacy, albeit in the context of tort, in a joint article with Samuel Warren in the Harvard Law Review. Ultimately, it was stated that "[t]he common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door

This right is not absolute.[91] As Justice Douglas explained in *Griswold v. Connecticut,*[92] "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."[93]

As such, the challenge for smokers becomes enumerating a penumbra within a specific constitutional provision as a prerequisite to surmounting St. Cloud's regulation of tobacco users. This challenge is faced in light of the suggestion that important governmental interests, which outweigh those of the individual, may limit the right of privacy.[94]

In the end, the distinction between various levels of privacy hinges on whether the right in question is deemed to be fundamental.[95] As such, Justice Cardozo likely provides the most appropriate definition for a fundamental right in *Palko v. Connecticut.*[96] Cardozo asserts that

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to idle or prurient curiosity?" Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890).

91. The challenge as Justice Black put it, is to find a specific constitutional provision that will uphold a smoker's claim to privacy. *See Griswold*, 381 U.S. at 508 (Black, J., dissenting).

92. Griswold v. Connecticut, 381 U.S. 479 (1965) (In *Griswold*, the defendants were convicted of violating Connecticut's birth control law, which forbade both the use of contraceptives and the prescription of such. Subsequently, the petitioners, who were charged as accessories, brought a constitutional challenge. The Court held that the law forbidding the use of contraceptives unconstitutionally intrudes on the right to marital privacy.).

93. *Id.* at 484.

94. *See* Szobonya, *supra* note 74, at 549.

95. *Id.*

> Yet, this right is not absolute, which means it may be abridged by important governmental interests that outweigh the individual privacy interest. If the privacy right is deemed fundamental, however, state action infringing upon this right is held to a higher level of scrutiny, requiring the state to have a compelling interest before the right of privacy may be abridged. Additionally, to protect this fundamental privacy right, the governmental interest must be accomplished through a means that least restricts that right.

Id.

96. Palko v. Connecticut, 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969). *Palko* was convicted of second-degree murder, but at the time, Connecticut permitted the State to take appeals in criminal cases. Subsequently, the Supreme Court of Connecticut set *Palko's* conviction aside and he was retried and found guilty of first-degree murder in lieu of second. *Palko* appealed to the Supreme Court claiming that his retrial amounted to double

a fundamental right is one that implicates a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . ."[97] The Supreme Court further clarified this distinction by setting guidelines for what is involved when dealing with a violation of a fundamental privacy right.[98]

On the other hand, in *Carey v. Population Services International*,[99] the Court recognized that the "outer limits of this aspect of privacy have not been marked . . . ."[100] Fundamental rights are now recognized to encompass such things as marriage, procreation, contraception, family relationships, child rearing and education.[101] When faced with

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jeopardy. Moreover, he attempted to plead that he was entitled to Fourteenth Amendment relief because his Fifth Amendment rights were infringed. However, the Supreme Court refused to extend specific Bill of Rights guarantees to the states.

97. *Id.* at 325 (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1937)). Justice Cardozo continued his analysis of whether a right is fundamental by suggesting that "[abolishing] them [would] not violate a 'principle of justice so rooted in the traditions and conscience of our people . . . .'" *Palko,* 302 U.S. at 325 (quoting *Snyder*, 291 U.S. at 105). Therefore, "if the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed." *Id.* at 326. In conclusion, Justice Cardozo recognized that "it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged . . . to include liberty of the mind as well as liberty of action." *Id. at 327.*

98. *See* Szobonya, *supra* note 74, at 550.

99. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). In *Carey*, the Court struck down a New York prohibition on the sale or distribution of contraceptives to minors under 16. In the plurality opinion, Justice Brennan stated that strict scrutiny was required in dealing with restrictions to the access of contraceptives "because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing . . . ." *Id.* at 688.

100. *Id.* at 684.

101. *See* Bowers v. Hardwick, 478 U.S. 186, 190-191 (1986). *Bowers* was a case in which Respondent was charged with homosexual sodomy in violation of a Georgia statute. Subsequently, an action was brought by the Respondent to challenge the constitutionality of the law. Although the actions happened within the privacy of Respondent's room the Court refused to extend a right to privacy in this case. The Court said:

> [P]rior cases have construed the Constitution to confer a right of privacy that extends to . . . *Pierce v. Society of Sisters* and *Meyer v. Nebraska* . . . [describing] child rearing and education; . . . *Skinner v. Oklahoma ex rel. Williamson* with procreation; *Loving v. Virginia* with marriage; . . . *Griswold v. Connecticut* and *Eisenstadt v. Baird* with contraception; and *Roe v. Wade* with abortion.

the opportunity to include other rights within the privacy concept, the Court has generally refused to expand that list. In affirming their position, the Supreme Court has declared: "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights . . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental."[102]

Id. at 190 (citations omitted). However, the Court also recognized that, despite the act occurring within the privacy of Respondent's own room, proscriptions against this specific type of conduct have ancient roots. *Id.* at 192. Moreover, an attempt to claim that the right to engage in homosexual activity could not be considered "deeply rooted in the Nation's history and tradition." *Id.* at 192 (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1977)). Further, "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." *Bowers*, 478 U.S. at 191. *But cf.* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). *Lawrence* expressly overrules *Bowers* and makes two conclusions: "First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not sufficient reason for upholding a law prohibiting the practice . . . . Second, individual decisions by married persons [relating to intimacy] are a form of 'liberty' . . . ." *Lawrence,* 123 S. Ct. at 2483 (citing *Bowers,* 478 U.S. at 216, Stephens, J., dissenting).

102. *Bowers*, 478 U.S. at 194-95. The Court had previously expressed fear over Justice Cardozo's language in *Palko* by claiming a right to engage in conduct by merely asserting that it is "deeply rooted in this Nation's history and tradition . . . is, at best, facetious." *Id.* Additionally, the Court found that if the Judiciary took on these matters itself, it would be relegated to the realm of super-legislator. Specifically, it was announced that if these matters were in fact pursued, "the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority." *Id.* at 195 (as was "so painfully demonstrated by the face-off between the Executive and the Court in the 1930's . . . ."). *Id. But cf.* Lawrence v. Texas, 123 S. Ct. 2472 (2003). However, simply because *Lawrence* overruled the *Bowers* decision does not necessarily mean that the Rehnquist Court has engaged in the expansion of fundamental rights. In writing for the majority, Justice Kennedy seems to concentrate more on the fact that the *Bowers* Court embraced the history of prohibitions on homosexual conduct, citing specifically to *Bowers* and the finding that "decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western Civiliztion." *Lawrence*, 123 S. Ct. at 2480 (citing *Bowers*, 478 U.S. at 196). However, the *Lawerence* Court found "no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . [P]rohibitions of sodomy derived from the English criminal laws . . . . The English prohibition was understood to include relations between men and women as well as relations between men and men." *Lawrence*, 123 S. Ct. at 2478 (2003). After recognizing

If smoking is deemed not to be a fundamental right, the state police power would authorize its regulation.[103] This authorization would be valid as long as the regulation in issue is not "so irrational that it may be branded 'arbitrary', and, therefore, a deprivation of [one's] 'liberty' interest in freedom to choose [in personal matters]."[104] In fact, this is the very position that the Florida Supreme Court endorsed in *Kurtz*.

By opening the door to increasingly inclusive regulation of smokers, through finding no constitutional deprivation of individual privacy interests in either the Florida or Federal Constitutions, the Florida Supreme Court has ensured that these types of policies will be permissible throughout the state.[105]

B. The regulation in Kurtz is distinguishable from that of St. Cloud based on both the nature and the degree of intrusiveness

The Florida Supreme Court's holding in *Kurtz* is distinguishable from the right to privacy in St. Cloud's case, as it is obvious that smokers have no right within the context of when and where they

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that "'[h]istory and tradition are the starting point . . . of the substantive due process inquiry,'" *id.* at 2480 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)), the Court noted a sweeping change in the number of States with laws that prohibited the same type of sexual conduct at issue when *Bowers* was decided with the number currently prohibiting such conduct. *See id.* at 2481. Justice Kennedy concluded, "The foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*." *Id.* at 2482. Ultimately, Justice Scalia phrases it best when he states:

> [N]owhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause . . . . Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do."

Lawrence, 123 S. Ct. at 2488 (Scalia, J., dissenting).

103. Szobonya, *supra* note 74, at 550 (citing Kelley v. Johnson, 425 U.S. 238, 247 (1976). In *Kelley*, a police officer brought suit under a civil rights statute to challenge the validity of a rule that required him to groom his hair. The Supreme Court determined that a rule of this nature was not so arbitrary as to be a deprivation of the officer's liberty interests.).

104. *Id.*

105. *Kurtz*, 653 So.2d at 1028 (concluding that individuals have no expectation of privacy in disclosing if they are smokers. Further, it was determined that the City had a compelling interest to support implementation of the program and that it chose the least intrusive means in reaching its end.). *Id.* at 1028-1029.

reveal their habit. In fact, this is not the issue at hand.[106] The fundamental difference is how far St. Cloud is willing to go to ensure that its policy will be an effective deterrent. Under *Kurtz*, individuals could still smoke within the privacy of their own homes, regardless of the costs associated with their subsequent medical care. Conversely, St. Cloud is using the requirement of medical testing to deter choice even within the privacy of one's own home.[107] Therefore, because a major part of the program deals with enforcement and control efforts by mandating submission to medical testing, the regulation sweeps too broadly: it infringes on the Fourth Amendment's prohibition against illegal searches and seizures.[108]

1. The Fourth Amendment Test

As the Court in *Norwood v. Bain*[109] reiterated, "The guarantee of privacy and security from unreasonable governmental intrusion provided by the Fourth Amendment long has been recognized as fundamental to the maintenance of a free society."[110] The Fourth Amendment is divided into two distinct categories, the more widely

106. The Supreme Court has already reaffirmed, "[W]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. Unites States, 389 U.S. 347, 351 (1967).

107. H.R. Bulletin, *supra* note 20, at I (on file with author). Although the bulletin makes no mention of deterring smoking, when employees who smoke have to worry about being tested and fired, the effect is essentially the same.

108. *Id.* at C(2)(b). Mandating that, effective March 25, 2002, new applicants shall be a non-user of tobacco or tobacco products for twelve months. Further, upon hiring, the individual must remain a non-user as a condition of continuing employment. Additionally, St. Cloud is insuring employee participation by mandating the execution of an affidavit acknowledging both compliance with the regulation and submission to random medical testing, in any form, to determine compliance.

109. Norwood v. Bain, 166 F.3d 243 (4th Cir. 1999). In *Norwood,* a class of petitioners, all motorcycle enthusiasts, brought an action under 42 U.S.C. § 1983 alleging violations of their Fourth and Fifth Amendment rights when they were subjected to warrantless stops and searches at a police checkpoint instituted to deter weapons at a motorcycle rally.

110. *Id.* at 246. In fact, the specific charge of the Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Id.* at 246-47 (citing U.S. CONST. amend. IV.).

known of which deals specifically with searches arising within the criminal setting.[111] Moreover, the Fourth Amendment mandates that government intrusion into privacy through searches and seizures must be reasonable.[112]

Recently, however, the Fourth Amendment has also been implicated in the context of civil matters "when such 'special needs'[113] – concerns other than crime detection – are alleged in justification of a Fourth Amendment intrusion . . . ."[114] Chief Justice Rehnquist recently

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111. In the context of criminal search and seizure, courts have generally determined that in order for a search to be considered valid it must ordinarily be "based on individualized *suspicion* of wrongdoing." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

112. *Norwood*, 166 F.3d at 247. The Court went on to say that the mandate for reasonableness should act as a constraint on governmental authority to qualify searches absent individualized suspicion. *Id.* Moreover, there must be some type of link to state action in order to invoke Fourth Amendment privileges, and in situations where the governmental link is tenuous, courts will look into whether the requisite amount of state action is, in fact, present. *See* Ferguson v City of Charleston, 532 U.S. 67, 77 (2001) (stating that government actors are subject to the strictures of the Fourth Amendment). However, in this case, because we are dealing with the City of St. Cloud, the link to state action is apparent and will not be dealt with in any length. Most importantly, "[t]he collection and subsequent analysis of the biological samples required or authorized by the regulations constitute searches of the person subject to the Fourth Amendment." Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 603 (1989).

113. The term "special needs" originated with Justice Blackmun in his concurrence in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). It was Blackmun's opinion that there could be limited exceptions to the probable-cause requirement. However, those needs should only be applied where the circumstance were beyond the need for regular law enforcement which would make the warrant and probable cause clauses "impractical." *Id.* (Blackmun, J., concurring).

114. Chandler *v.* Miller, 520 U.S. 305, 314 (1997). In *Chandler*, candidates for certain political offices were subject to drug testing in order to qualify for nomination or election. Subsequently, an action was brought claiming that the mandatory drug testing requirements violated the First, Fourth, and Fourteenth Amendments to the Constitution. The Supreme Court held that the drug testing requirement does not fit within the category of suspicionless searches. *See also* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-666 (1989). In *Von Raab* a union brought action against the Treasury Department claiming that a program mandating drug testing for individuals who applied for a promotion was unconstitutional. The Court held that the drug testing required was subject to the reasonableness requirement but that the Agency did not need a warrant in order to conduct the tests. Further, after balancing, it was found that the government had a rational basis for the requirement. The Court thus suggests that

described the special needs doctrine as "an exception to the general rule that a search must be based on individualized suspicion of wrongdoing."[115] Hence, the traditional warrant and probable-cause requirements are waived if the evidence to be obtained is not going to be used in furtherance of a law enforcement purpose.[116] While the special-needs doctrine should apply only in "exceptional circumstances,"[117] it is generally accepted as an "exception to the warrant and probable cause requirements."[118]

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there are different levels of searches under the Fourth Amendment depending on whether the search is for criminal or civil purposes. Specifically, it is provided that "the probable-cause standard 'is peculiarly related to criminal investigations.'" *Id.* at 667 (citing Coloroado v. Bertine, 479 U.S. 367, 371 (1987), quoting South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976)).

115. Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting).

116. Ferguson v. City of Charleston, 532 U.S. 67, 88 (2001). In *Ferguson,* pre-natal state hospital patients were arrested under a program implemented by the hospital to reduce drug use. In the program, any expectant mother who tested positive for drugs, specifically cocaine, was arrested and forced to successfully attend drug rehabilitation.

117. Henderson v. City of Simi Valley, 305 F.3d 1052, 1056 (9th Cir. 2002) (quoting New Jersey v. T.L.O., 469 U.S. at 351). In short, because it is the lower federal courts that end up applying the law set forth by the Supreme Court, any analysis of application should begin with the direction set forth at that level. In *Henderson,* the most recent case since the Supreme Court has last spoken about special needs with Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), the Court had the opportunity and availability of over ten years of Supreme Court holdings and dicta to back up its special-needs analysis. Additionally, in Norwood v. Bain, 166 F.3d 243 (4th Cir. 1999), the Fourth Circuit had ten years of guidance upon which to base its holding. Moreover, when the Supreme Court denied Norwood's application for certiorari, it effectively validated, albeit indirectly, the *Norwood* court's logic.

118. Roe v. Texas Department of Protective and Regulatory Services, 299 F.3d 395, 404 (5th Cir. 2002). In *Roe*, parents sued the Texas Department and a social worker under 42 U.S.C. § 1983 after the social worker performed a visual search of a child's body cavity without a court order. The Court held that the special need proffered by the state did not justify the search, but extended qualified immunity to the social worker because the rights violated were not established at the time of the incident.

2. *The Application of the Fourth Amendment in a Civil Context*

The application of special needs involves a number of factors. First, the government must show a special need outside the scope of law enforcement.[119] Of course, testing employees for the presence of nicotine is inherently outside the scope of law enforcement because tobacco use is a legal activity. Realistically, it should be the very legality of the activity in question that makes this type of regulation suspect in terms of a special-needs justification. Rarely have federal courts held that prohibition of a legal activity could be supported in a special-needs context.[120]

Next, even if St. Cloud could supply a justification for the prohibition of a legal activity, regulating in this manner would not survive the second prong of special-needs analysis. Here, the court determines the government's interest in regulating in the manner it chose.[121] In other words, one "must now assess the constitutionality of the search by balancing the need to search against the intrusiveness of the search."[122]

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119. The nature of the special need asserted must be divorced from the State's general interest in law enforcement. *Ferguson*, 532 U.S. at 79.

120. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (affirming the government's claimed special need to drug test railroad employees after accidents in order to protect public safety); *Von Raab*, 489 U.S. 656 (1989) (affirming another government special need in drug testing customs agents for promotion based on the need for them to carry firearms and handle sensitive information); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), and Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) (both affirming a special need to test school students for drugs in after school programs); Henderson v. City of Simi Valley, 305 F.3d 1052 (9th Cir. 2002) (affirming a special-needs search for a entry without warrant when the need outweighs the intrusiveness of the search); Norwood v. Bain, 166 F.3d 243 (4th Cir. 1999) (affirming a search of motorcycle enthusiasts where the presence for violence was great).

121. *Skinner*, 489 U.S. at 603.

122. *Henderson*, 305 F.3d at 1059 (citing *Ferguson*, 532 U.S. at 78). The Court further recognized that "the touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* From this, the Court concluded that the reasonableness of a situation depends on the context in which the search takes place. *Id. (citing* New Jersy v. TLO, 469 U.S. at 337)

Ultimately, the Court in *Skinner v. Railway Labor Executives' Association* summarized it best: "[P]hysical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."[123] The Court continued by explaining that a determination that the Fourth Amendment is applicable to drug testing is only the beginning of the inquiry, because the "Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable."[124] Thus, the crux of the Fourth Amendment analysis turns on what is reasonable.

The Court has established that reasonableness should be determined by examining all of the circumstances surrounding the search and the nature of the search itself.[125] Therefore, in order for a search to be valid without individualized suspicion, courts must undergo a context-specific inquiry whereby they balance the competing private and public interests.[126] It is this balancing, struck by exploring the reasonableness of the situation, that becomes the second prong of special-needs justification.[127]

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123. *Skinner*, 489 U.S. at 616. Moreover, for those who say there are ways other than blood testing to collect these types of samples for medical analysis:

> "There are few activities in our society more personal or private than the passing of urine. . . ." Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . we agree . . . that these intrusions must be deemed searches under the Fourth Amendment.

Id. at 617 (quoting *Von Raab*, 816 F.2d at 175).

124. *Id.* at 619.

125. *Id.* (stating, "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

126. *Chandler*, 520 U.S. at 314. Further, in the language the *Skinner* Court chose, "[T]he permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.'" *Skinner*, 489 U.S. at 619 (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)). The *Skinner* Court continued by reiterating that, generally, the balancing of competing interests is struck in favor of requiring a warrant. *See id.*

127. Although the court will engage in the context-specific search, the standard for government interest is significantly less than the probable-cause standard in a criminal case. *See Von Raab*, 489 U.S. at 667 (stating that the probable cause standard is "peculiarly related to criminal investigations") (internal quotations and citations omitted). In fact, "'[t]he Fourth Amendment's proper function is to

Eventually, the reasonableness of anyone's expectation of privacy differs according to the situation.[128] Yet, the Court has recognized that the expectation of privacy at work is one that is "based upon societal expectations that have deep roots in the history of the [Fourth] Amendment."[129]

Because one's reasonable expectation to privacy must be addressed on a case-by-case basis,[130] the situation that initiated St. Cloud's action must be examined. In its regulation, St. Cloud made specific findings that tobacco users caused increased losses to St. Cloud by costing more money in health care premiums and through the use of more sick days than non-smoking employees.[131] In comparing St. Cloud's regulation to ones existing in previous cases of drug testing,[132] the Court looked to "'the Government's need to discover such latent or hidden conditions . . . to justify the intrusion on privacy . . . .'"[133] The Court determined that in the context of safety or administrative regulations the intrusion

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constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.'" *Henderson,* 305 F.3d at 1060 (quoting Schmerber v. California, 384 U.S. 757, 768 (1966)). Or, as Justice Scalia put it:

> [I]t is a mistake . . . to think that the phrase "compelling state interest," . . . describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.

Vernonia, 515 U.S. at 661.

128. O'Connor v. Ortega, 480 U.S. 709, 716 (1987). In *O'Connor*, petitioner, an employee at a state hospital, claimed a search of his office without consent to be an unreasonable search and seizure in the context of the Fourth Amendment. Further, it was claimed that petitioner had a constitutionally protected privacy interest in certain work-related activities.

129. *Id.* (citing Oliver v. U.S., 466 U.S. 170, 178 (1984)).

130. O'Connor v. Ortega, 480 U.S. at 716.

131. *See* H.R. Bulletin, *supra* note 20, at I(A)-(B).

132. For the purposes of this analysis the cases dealing with special needs drug testing is the closest analogous situation to St. Cloud's regulation. Because nicotine is considered a drug it makes the most sense to analyze the present situation in the context of other similar situations.

133. *Earls*, 536 U.S. at 829 (quoting *Von Raab*, 489 U.S. at 668).

on privacy would be reasonable to protect the public welfare.[134] All of these cases were premised on the *specific need* to protect the public from the harms of illegal drugs.

St. Cloud's regulation will fail in the context-specific inquiry phase, where the court measures the competing needs of both the public and private interests involved.[135] The regulation must fail at this stage because the private interest involved, the unreasonable Fourth Amendment search, outweighs the public interest of saving money in healthcare premiums. In reality, the public pays for smokers every day, either through Medicare, Medicaid, Social Security, or a number of other government sponsored or controlled plans whereby people who use tobacco are able to obtain benefits despite their habit.

The United States Supreme Court has addressed the degree of government interest required before a personal search is conducted. It is clear that the Court has limited the personal search to instances "where the risk to public safety is substantial and real, [although] blanket searches calibrated to the risk may rank as 'reasonable' . . . . [W]here . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."[136]

Furthermore, because smoking in public places is already banned in Florida, the regulations promulgated by St. Cloud do not genuinely protect public safety.[137] Because individuals are free to use tobacco while working elsewhere, St. Cloud is merely curtailing personal freedom of choice by utilizing the suspicionless search as a tool to foster an anti-smoking campaign that provides an incentive: quit or lose a job.[138]

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134. *Id.* The Court also cites the other cases dealing with suspicionless drug testing including *Skinner*, *Von Raab*, and *Vernonia*.

135. *Chandler*, 520 U.S. at 314.

136. *Id.* at 323 (internal citations omitted).

137. *See* Florida Clean Indoor Air Act, FLA. STAT. ANN. § 386.201-.2125 (West Supp. 2004). For a discussion on the Florida Clean Indoor Air Act, see generally Szobonya, *supra* note 74.

138. Whether employees of St. Cloud have made a knowing and voluntary waiver of their Fourth Amendment rights by accepting employment is beyond the scope of this comment. In order to address this issue any analysis would have to encompass consent, a recognized exception to the unwarranted Fourth Amendment search. *See* Schnekloth v. Bustamonte, 412 U.S. 218, 219 (1973). Further, any arguments about waiver and consent would necessarily entail an equal protection analysis, based on the fact that the government would be denying employment to a specific group. *See* Massachusetts Board of Retirement v.

D. There is no need for St. Cloud to take a tougher stance on smoking than government agencies, which have declined to promulgate rulings on the matter

The Occupational Safety and Health Administration (OSHA)[139], 29 U.S.C. § 651 et seq., the sole agency vested with the responsibility for regulating workplace air, has yet to adopt a regulation to ban or prohibit smoking in the workplace.[140] In fact, OSHA disseminated a proposed ruling in 1994 for public comment addressing indoor air quality with a specific emphasis on workplace smoking.[141] OSHA

Murgia, 427 U.S. 307 (1976). In *Murgia*, plaintiff filed a suit based on his forced retirement from the police force per a Massachusetts statute that mandated retirement at age fifty. The Court first looked at the nature of the statute and subsequently determined that government employment is not a per se fundamental right requiring strict scrutiny, but that the rational basis standard is much more appropriate for the type of regulation because "a standard less than strict scrutiny has consistently been applied to state legislation restricting the availability of employment opportunities." *Id.* at 307. The Court then found that the state's classification rationally furthered the purpose identified by the State, namely, public protection. *Id.* at 314. However, the purpose of the St. Cloud regulation is to "improve, increase and enhance the health of City employees, and potentially reduce health insurance costs." H.R. Bulletin, *supra* note 20 at I(A). While the regulation may rationally further the stated purpose, the means chosen to enforce the regulation, the random warrantless search, is the issue at hand. Therefore, one does not have to conduct an equal protection analysis to determine if this regulation would first fail under the Fourth Amendment.

139. Occupational Saftey and Health Act (OSHA) or 1970, 29 USC § 651 (2003).

140. OSHA has restricted smoking in the workplace, however, not in the manner proposed by St. Cloud. To date, all of the OSHA regulations on the books deal with smoking and its potential impact in highly dangerous environments. *See generally* 29 C.F.R. 1926.151(a)(3) (2002) (relating to the prohibition of smoking in operations where it would constitute a fire hazard); 29 C.F.R. 1910.107(g)(7) (2002) (relating to smoking and paint spraying); 29 C.F.R. 103(b)(1)(v) (2002) (relating to smoking near hydrogen storage); 29 C.F.R. 110(h)(12) (2002) (relating to smoking at gasoline service stations). Of course, all of these statutes relate directly to smoking and do not sweep into the realm of smokeless tobacco like the mandate proffered by St. Cloud.

141. Melissa Vallone, *Employer Liability for Workplace Environmental Tobacco Smoke: Get Out of the Fog*, 30 VAL. U. L. REV. 811, 818 (1996). This ruling followed on the heels of a request for information sent out by OSHA in 1991 to solicit public comment on indoor air quality. Moreover, OSHA has discretion to regulate only in situations where a toxic substance is shown to

proposed this rule based on its conclusion that the workplace is a major location of ETS-exposure to non-smokers due to the high person densities typically found in the office environment.[142] The proposed ruling attempted to require non-industrial employers to design and implement plans to protect employees from indoor air contaminants.[143] In response to the proposed ruling, OSHA received over 110,000 comments,[144] many of which voiced strong opposition to the proposal based on cost.[145]

In addition to the comment responses, OSHA has been sued at least six times in an effort to force it to regulate tobacco smoke in the workplace.[146] The most recent suit came in 2001 with *Action on Smoking and Health v. OSHA*.[147] Ultimately, OSHA's position was strengthened when the court held that OSHA's timetable for implementation was discretionary.[148] Moreover, while more litigation for a workplace ban on smoking is still pending, the prospects of a definitive ruling in the near future are unlikely. Thus, the twelve-year odyssey to institute a ban on workplace smoking will continue into the foreseeable future.[149]

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establish a grave danger or significant risk to the employee. John C. Fox, *An Assessment of the Current Legal Climate Concerning Smoking in the Workplace*, 13 ST. LOUIS U. PUB. L. REV. 591, 633 (1993). However, standing in the light of the previous directive, OSHA has stated that "there is uncertainty associated with quantification of any kind of risk [related to smoking]." Diane Threlkeld, *OSHA Indoor Air Quality Regulations Would Increase Health Care Facilities' Compliance Burden*, No. 11 HEALTHSPAN 15, 17 (1994) (hereinafter HEALTHSPAN).

142. *See* HEALTHSPAN , *supra* note 141, at 17.

143. Vallone, *supra* note 141, at 819; *see also* 59 Fed. Reg. 15,964 (Apr. 5, 1994).

144. Phillip Morris, one of the tobacco juggernauts, filed 5,000 pages of text with OSHA on the last day of the official comment period. *Id.* at 819.

145. In fact, OSHA itself estimates that costs of compliance could reach $1.4 billion dollars (1994 currency) and costs to eliminate ETS altogether could run as high as $68 million. However, these figures are slightly deceptive in that the proposed standard would require buildings in which smoking was permitted to have separate ventilation that exhausts directly outside. *See* HEALTHSPAN, *supra* note 141, at 18.

146. Arnold W. Reitze & Sheryl-Lynn Carof, *The Legal Control of Indoor Air Pollution*, 25 B.C. ENVTL. AFF. L. REV. 247, 273 (1998).

147. *See id.* at 273.

148. *Id.* (citing Action on Smoking and Health v. Department of Labor, 100 F.3d 991, 994 (D.C. Cir. 1996)).

149. Joseph Fleming & Greenberg Traurig, *Don't Be "Misinformed" About Humanitarian and Civil Rights and Labor and Employment Laws Affecting the Restaurant Industry*, *in* REPRESENTING THE RESTAURANT INDUSTRY: ALI-ABA

In conclusion, the sole federal agency responsible for regulating on-the-job indoor air quality has rejected demands to establish criteria for general smoking restrictions within the private sector.[150] Therefore, there is no reason for St. Cloud to create more restrictive regulations by choosing to promulgate legislation that is far more sweeping than is reasonable to protect a class of individuals that has not received protection from the federal government.

IV. THE PROPOSAL

Regulation is not the issue here because tobacco use today remains legal.
-Justice Kogan, Florida Supreme Court[151]

Recently, smokers have been enjoying the effects of a legislative backlash against the outright banning of smoking and other types of tobacco use in the private context. Moreover, what opponents of anti-smoking legislation have generally referred to as a state sponsored "jihad"[152] is starting to lessen. Yet, some proffer "It is our custom to claim areas of our lives as private, [where w]e draw the line between the self and the world [and mean], '[s]tand clear, . . . because I am entitled to keep some information and parts of my life to myself.'"[153] Regardless of how one describes it, twenty-six states have agreed with

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COURSE OF STUDY MATERIALS: MAY 9-10, 2002, WASHINGTON, D.C. 747 (2002). Of course, simply because OSHA has not, and does not, appear to be any closer to formulating a standard for the control of workplace smoking does not mean that standards for the control of ETS cannot be incorporated into an indoor air quality standard.

150. Fox, *supra* note 139, at 663.

151. *Kurtz*, 653 So.2d at 1029 (Kogan, J., dissenting).

152. *See* Editorial, *Butting In*, WASH. TIMES, August 14, 2002, at A16, *available at* 2002 WL 2916000 (The author refers specifically to the similarities between today's anti-smoking legislation and "the 1600s, [when] witches were burned for the glory of God." Further, the author continues to expand on his metaphor by illuminating "the jihad" against smokers in the light of "'sin' taxes," established by "anti-smoking zealots who have anointed themselves protectors of other people's health, whether those other[s] . . . are interested in being saved or not.").

153. Terry Morehead Dworkin, *It's MyLife - Leave Me Alone: Off-the-Job Employee Association Privacy Rights*, 35 AM. BUS. L.J. 47, 94 (1997).

these sentiments by enacting, or currently sponsoring, legislation that protects the rights of smokers within the privacy of their own homes.[154]

Generally, states have insured smokers' rights by enacting three distinct types of regulations.[155] These regulations prohibit employers from discriminating against employees or potential employees based on their off-duty habits[156] (often called "lifestyle discrimination"[157]), unless those habits specifically affect on-duty performance.[158] While there are three basic types of protections that have been put in place, each is unique in the degree of protection it provides and the overall scheme employed. The first type of legislation is the general statute expressly stating that employers should accommodate both smokers and non-smokers.[159] Secondly, several states have promulgated legislation that specifically regulates the activities of employers with respect to discriminating against employees because they smoke off

154. Scheer, *supra* note 72. Additionally, Arizona, Colorado, Illinois, Louisiana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia and Wisconsin have already protected smokers as a class in one form or another. *See* Lisa L. Frye, *You've Come a Long Way, Smokers: North Carolina Preserves The Employee's Right to Smoke Off the Job in General Statutes Section 95-28.3*, 71 N.C. L. REV. 1963, 1995 n.10 (1993); *see also Synopsis of State Case and Statutory Law*, 3 YALE J. HEALTH POL'Y, L. & ETHICS 157 (2002), providing information on recent trends and developments in both case law and statutes for all fifty states relating to public smoking and other tobacco usage.

155. Frye, *supra* note 154, at 1978.

156. *Id.*

157. Mark W. Pugsley, *Nonsmoking Hiring Policies: Examining the Status of Smokers Under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L.J. 1089, 1099 (1994).

158. The Supreme Court has reaffirmed these remarks in *Skinner*, 489 U.S. at 604 (stating that the Government has an interest in regulating the conduct of railroad employees for the safety and benefit of the traveling public); *see also* Frye, *supra* note 154, at 1978.

159. *See generally* ARK. CODE. ANN. § 25-1-102(b) (Michie 2000). Section 102(b) specifically provides that state agencies promulgate regulations that consider both the rights of smokers and non-smokers. *See also* R.I. GEN. LAWS § 23.20.7-3 (2002) (mandating employers to adopt policies that accommodate both the smoker and the nonsmoker), and § 23.20.7-5 (2002) (instructing employers to reach "reasonable accommodation[s]" between the classes). Adapted from Frye, *supra* note 154, at 1995.

the job.[160] Finally, the third type of legislation is the statute which reserves the rights of employees to engage in conduct that constitutes lawful activity.[161]

It is the third point, as annunciated by Justice Kogan, that St. Cloud and the State of Florida should consider. By implementing legislation that protects the legal activities of employees outside the workplace, states are insuring protection for both classes of employees by eliminating non-smokers' exposure to the effects of tobacco smoke while insuring that smokers can keep their legal habit. Further, legislation of this type makes sense both because of the current climate toward smokers and the far-reaching implications that regulations similar to St. Cloud's (which sweep too broadly into personal freedoms) have on personal privacy.

Additionally, because smoking is still a legal activity, St. Cloud should not be allowed to deprive an individual of employment while benefiting, through taxes, from tobacco sales to that very individual. While many businesses have eliminated smoking in their building, they still permit it outside or provide designated areas for employees who smoke.[162]

St. Cloud's overly broad regulations have opened the door for potential legislation curtailing the off-duty conduct of an individual in a broad array of behavior. For example, while many would not hesitate to agree that smoking is dangerous and that all levels of government should take steps to insure the health of its people, not many of those same people would be as amenable if the government

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160. *See* ARIZ. REV. STAT. § 36-601.02(F) (1993). Section 36-601.02(f) specifically states that no state employer may discriminate against any employee or other person based on his or her use or non-use of tobacco.

161. Frye, *supra* note 154, at 1978. Generally, these statutes do so without mentioning the smokers. *See generally* N.C. GEN. STAT. § 95-28.2 (2001). Most notably, the North Carolina statue makes the same distinction as the Supreme Court with respect to off-duty activity that could detrimentally impact job performance. The statute specifically provides exclusions where (1) there is a bona fide reason for the restriction and it reasonably relates to the nature of the employment, or (2) where the restriction relates to the fundamental objectives of the organization. *Compare* Chandler v. Miller, 520 U.S. 305, 323 (1997), *with* N.C. GEN. STAT. § 95-28.2(c)(1), (2) (2001).

162. SULLUM, *supra* note 1, at 156. The author states that one survey of U.S. and Canadian workplaces determined that the percentage of buildings where smoking was prohibited rose from 42 in 1991 to 71 in 1994. In fact, New York has instituted a law where the street is one of the only places smoking is permitted. This has forced many smokers to leave their office in order to go outside and enjoy their tobacco. *Id.* at 155.

permitted hiring criteria based on genetic information.[163] Based on the Florida Supreme Court's reasoning in *Kurtz*,[164] employers would naturally want to control medical costs through any means available to them, even genetic testing.[165] However, this line of reasoning creates a "slippery slope" for regulation.[166] Arguably, employers seek to minimize costs by exerting control over certain behavior.[167] This is analogous to the argument that testing for predisposition to disease would also minimize costs by exerting control over not only off-duty habits, but also the very genetic information beyond employees' control.[168]

Although this policy is allegedly about the health of St. Cloud's employees, the ordinance is not fundamentally aimed at caring for the health of its workers. While St. Cloud's objective is "improv[ing], increas[ing] and enhanc[ing] the health of [St. Cloud] employees . . . .," the specific facts that are set forth in subsections (2) & (3) of the bulletin are based on the "increased loss experience of the group health insurance plans" and (3) "increases in premium costs for employees [being] borne by the General Fund and subsequently the taxpayers."[169]

While St. Cloud puts forth some compelling interests for the curtailment of smoking, as there is little doubt that smokers incur higher medical insurance costs,[170] there is another way to handle this

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163. *See* Jared A. Feldman & Richard J. Katz, *Genetic Testing & Discrimination in Employment: Recommending a Uniform Statutory Approach*, 19 HOFSTRA LAB. & EMP. L.J. 389 (2002) (stating that, as a result of advances in science and technology, employers now have the ability to detect diseases and debilitating conditions before they ever arise).

164. The Supreme Court of Florida found that elimination of medical insurance costs validates a compelling interest in reducing smokers from its ranks. *Kurtz*, 653 So.2d at 1029.

165. Feldman & Katz, *supra* note 163, at 390 (arguing that another motivation for an employer to use genetic results would be as a mechanism for controlling costs associated with health care issues).

166. *Kurtz*, 653 So.2d at 1029 (Kogan, J., dissenting).

167. Szobonya, *supra* note 74, at 548.

168. In light of this proposition there are currently twenty-six states that have sought to control this type of discrimination by enacting laws that prohibit it. Feldman & Katz, *supra* note 163, at 390.

169. H.R. Bulletin, *supra* note 20, at I (A), (B).

170. It has been stated that smokers take more sick days than their non-smoking counter-parts and increase health care costs by as much as $5,000 per smoking employee. Mike Thomas, *Just Think of it as Rewarding Nonsmokers*, ORLANDO SENTINEL, March 28, 2002, at D1, *available at* WL 3038210. *See also*

situation. St. Cloud could offset its loss just as easily by requiring smoking employees to pay the premium differences for their choice to smoke. As declared by one commentator, all that is necessary is to administer employee compensation and benefits plans in favor of people who do not smoke.[171] By shifting the burden on employees to pay the costs of their habit, St. Cloud would maintain its compelling interest in controlling costs while tobacco users would be able to continue with their tobacco use.[172]

Nevertheless, there are some individuals who ultimately believe that the government will still be required to pay for smokers through Medicare or Medicaid, which would eventually vest responsibility in taxpayers. However, these individuals misconstrue the issue at hand. The government, and hence, the individual taxpayer, is ultimately responsible for *all* individuals who make the choice to smoke, regardless of who their employers are. This problem will continue until the choice to either criminalize or extensively regulate tobacco usage is made.[173]

CONCLUSION

While the motives of St. Cloud may be commendable, and the goal of a healthier society admirable, its chosen method is deplorable. By regulating in this manner, St. Cloud is invading the private lives of individuals, not only during the hiring phase but also randomly throughout employment. Moreover, the instituted provisions are

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Pugsley, *supra* note 157, at 1092-93 (showing that employees who smoke are significantly more expensive to hire based on the extra costs they incur in terms of absenteeism, life insurance costs, productivity losses, and even in terms of attentiveness and productivity).

171. Thomas, *supra* note 170. However, choosing this type of action would also create a slippery slope. If employers were able to pass on the costs of behaviors that are cost creators to the employee, health care as we know it would be drastically different.

172. A version of this has been proposed before, whereby the employer would shift the burden to the employee to pay for his or her habit. Additionally, it has also been previously proposed that employers carry a predetermined limit of coverage for smokers, with the individual accepting responsibility for costs that exceed this amount. *See* Szobonya, *supra* note 74, at 571.

173. As Justice Kogan explains, "If the federal government . . . chose to regulate tobacco as a controlled substance, I have no trouble saying that this act alone does not undermine anyone's privacy right." *Kurtz*, 653 So.2d at 1029 (Kogan, J., dissenting).

overly restrictive of an individual's right to privacy while unacceptably controlling the right to choose legal manners of behavior. St. Cloud should re-examine its procedures and implement ones that pass the burden associated with smoking onto the individual smoker. St. Cloud has nobly followed C. Everett Koop's proclamation of an ultimate goal to be a smoke free society by 2000, but does not heed his subsequent clarification in which he states, "[W]hat I [meant was] not the complete absence of smoking, but a society in which you will not find people smoking in the presence of people who don't want it."[174] Ultimately, the issue is not about smoking around people who do not want "it," but rather about using tobacco in the privacy of one's own home.

174. SULLUM, *supra* note 1, at 59.