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Comment

Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois

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I. INTRODUCTION

In March of 2002, Heather Crowe was diagnosed with an inoperable lung tumor, which physicians determined was caused by secondhand cigarette smoke.[1] Heather had never smoked a day in her life, but cigarette smoke was killing her.[2] She was not dying because of her own decision to smoke; rather, she was dying because of where she worked.[3] Heather was a waitress for over forty years in smoke-filled restaurants but never realized the harm it could cause her.[4] After being diagnosed with lung cancer, Heather decided that she did not want anyone else to become sick this way and began campaigning for smoking bans across Canada.[5] She took up the cause for restaurant workers with the motto: "There should be no second-class lungs. Every worker deserves first-class protection."[6] She believed that allowing exceptions in smoking

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1. Ron Csillag, *Heather Crowe, Waitress 1945–2006*, THE GLOBE AND MAIL (Canada), June 3, 2006, at S11.

2. The Heather Crowe Campaign, Heather's Story, http://www.smoke-free.ca/heathercrowe/heathers-story.htm (last visited March 30, 2008) [hereinafter Heather's Story].

3. Csillag, *supra* note 1, at S11.

4. Heather's Story, *supra* note 2 ("Until last year, I had no idea that second hand smoke was dangerous. People would say, 'do you mind if I smoke?' and I said, 'I really don't care.' I didn't have any idea that the smoke in the restaurants could do me harm. I just wasn't protected. I just wasn't told.").

5. Heather's Story, *supra* note 2; *Anti-Smoking Crusader's Lung Cancer Has Spread—'Every Worker Deserves First-class Protection,'* THE TORONTO STAR, August 19, 2005, at D02 [hereinafter *Anti-smoking Crusader*].

6. *Anti-smoking Crusader*, *supra* note 5; Heather's Story, *supra* note 2 ("Waiters and waitresses do not have second-class lungs and there is no reason why we should continue to have second-class protection for our health.").

bans for restaurants and bars "only devalue[s] the health and safety of bar and restaurant workers. . . ."[7] Heather's campaign was incredibly successful throughout Canada, but she died ten days before the smoking ban in her own province took effect.[8] Heather said the goal of her lobbying effort was for her to be the "last person to die from secondhand smoke."[9] Unfortunately, workers like Heather will continue to die from secondhand smoke unless comprehensive protections for nonsmokers are implemented.[10]

Secondhand smoke, also called environmental tobacco smoke ("ETS"), is a problem affecting countries, states, and cities around the world.[11] In the United States alone, secondhand smoke is responsible for an estimated 3400 lung cancer deaths and 22,700 to 69,600 heart disease deaths annually among adult nonsmokers.[12] Food service

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7. Letter from Heather Crowe to all Ministers responsible for workplace safety and health (Nov. 25, 2002), Physicians for a Smoke-Free Canada, http://www.smoke-free.ca/eng_home/news_press_November27-crowe-letter.htm (last visited March 30, 2008); *see* Heather's Story, *supra* note 2 ("Some people say 'well, if you don't like the smoke you don't have to work there,' to which my reply is 'if other people have protection in the workplace then why not us?' All I'm asking for is equal rights. We should not be disposable workers. I'm not asking the smokers to give up smoking, I'm asking them to step outside when they smoke, to protect all workers.").

8. Csillag, *supra* note 1, at S11 (reporting that shortly after Heather died, a smoking ban took effect in Ontario and Quebec that prohibited smoking in "bars, restaurants, private clubs, schools, universities, bingo halls, casinos and virtually any other public place . . . ."). In addition to her successful smoking ban campaigns, Heather also became the first person in Canada to receive workers' compensation for cancer caused by occupational exposure to cigarette smoke. *Id.* In filing her claim, Heather reasoned, "If I'd lost my hand at work they'd have paid me. . . . So if they're going to take chunks out of my lungs, why wouldn't I be entitled [to benefits]?" *Id.*

9. Heather's Story, *supra* note 2 ("It's too late for me, but it doesn't mean that I have to curl up in a ball and let it go, you know? It's not too late for future generations.").

10. Csillag, *supra* note 1, at S11 (stating that an average thirty-two Canadians had died from secondhand smoke since Heather's death only two weeks earlier).

11. *See* Secondhand Smoke: Questions and Answers, National Cancer Institute, http://www.cancer.gov/cancertopics/factsheet/Tobacco/ETS (last visited March 30, 2008) [hereinafter Secondhand Smoke: Questions and Answers] (stating that many national, state, and local laws have been passed in the United States in order to reduce nonsmokers' exposure to secondhand smoke). Current federal smoking regulations include smoking bans on domestic airline flights, almost all flights between the United States and foreign countries, interstate buses, and most trains. *Id.* Federal law also prohibits smoking in most federally owned buildings and in all federal buildings providing routine services to children. *Id.* In addition, some foreign nations have passed smoking bans in workplaces, including France, Ireland, New Zealand, Norway, and Uruguay. *Id.*

12. Fact Sheet: Secondhand Smoke, Center for Disease Control and Prevention, http://www.cdc.gov/tobacco/data_statistics/Factsheets/SecondhandSmoke.htm (last visited March 30, 2008) [hereinafter Secondhand Smoke CDC]. Secondhand smoke is also responsible for 150,000–300,000 lower respiratory tract infections (i.e. pneumonia and bronchitis) in children under eighteen months, resulting in 7500–15,000 hospitalizations annually, and it increases the number and severity of asthma attacks in 200,000–1,000,000 children with asthma. Press Release, Envtl. Prot. Agency, EPA Designates Passive Smoking a "Class A" or Known Human

workers like Heather are especially susceptible to the effects of ETS; their risk of developing lung cancer is approximately 50% higher than the general population due to the higher concentrations of ETS in bars and restaurants.[13] The serious health consequences of secondhand smoke have led many states to pass smoking restrictions in an effort to protect nonsmokers.[14] Though these restrictions are a step toward solving the problem of secondhand smoke exposure, many are far too permissive to protect nonsmokers adequately.[15] Any level of secondhand smoke can cause life-threatening diseases; thus, only states with strong comprehensive protections provide the level of protection necessary to prevent these dire health effects.[16]

In 2006, the federal government released a Surgeon General's report stating that there is no safe level of exposure to secondhand smoke.[17] At the time the government issued this report, Illinois law did not afford its citizens the protection necessary to combat the dangers of secondhand smoke.[18] After the Surgeon General issued the report,

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Carcinogen (Jan. 7, 1993), *available at* http://www.epa.gov/history/topics/smoke/01.htm [hereinafter Press Release, EPA]; Prevention and Early Detection: Secondhand Smoke, American Cancer Society, http://www.cancer.org/docroot/PED/content/PED_10_2X_Secondhand_Smoke-Clean_Indoor_Air.asp (last visited March 30, 2008).

13. Michael Siegel, *Involuntary Smoking in the Restaurant Workplace: A Review of Employee Exposure and Health Effects*, 270 JAMA 490 (1993). Siegel reviewed multiple studies, finding that the excess risk of lung cancer for food service workers ranges from 10% to 90%. *Id.*

14. *See* State Laws Restricting Smoking, http://www.virtualsql.com/abcqxyz/dev/slati-live/appendixb.asp (last visited March 30, 2008) [hereinafter State Laws] (reporting states' smoking restrictions in fourteen different kinds of places, such as childcare centers, restaurants, schools, health facilities, and public transit); State Laws Restricting Smoking in Public Places and Workplaces, American Lung Association, http://slati.lungusa.org/appendixa.asp (last visited March 30, 2008) (reporting that forty-seven states have laws restricting smoking in public places, forty have laws restricting smoking in private workplaces, and all fifty have restrictions on smoking in government buildings).

15. *See* Leah Cowdrey, *Any Amount of Secondhand Smoke is Unhealthy, Report Says*, NATION'S HEALTH, Aug. 2006, at 9 (discussing a report issued by the Surgeon General finding that "[a]ny level of exposure to second-hand smoke puts nonsmokers at an increased risk for life-threatening disease . . . ."); State Laws, *supra* note 14 (detailing the extent of state smoking restrictions). The actual report, U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL (2006), is available at: http://www.surgeongeneral.gov/library/secondhandsmoke/report/ (last visited March 30, 2008) [hereinafter HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE].

16. *See* Cowdrey, *supra* note 15, at 9 ("The report should be a wake-up call for lawmakers to enact comprehensive clean indoor air laws that prohibit smoking in all indoor public places and workplaces . . . .") (quoting Ron Davis, MD, American Medical Association president-elect).

17. HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE, *supra* note 15.

18. *See* Illinois Clean Indoor Air Act, 410 ILL. COMP. STAT. 80/1 (2006), *repealed by* Smoke Free Illinois Act, Ill. Pub. Act 95-17, § 90, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1-75).

however, Illinois legislators realized that Illinois' current law was not rigorous enough to fully address the issue of ETS exposure.[19] Following the lead of many other states,[20] Illinois passed the Smoke Free Illinois Act in 2007, which became effective January 1, 2008.[21] The Smoke Free Illinois Act is a comprehensive smoking ban that completely prohibits smoking in almost all public places, including restaurants and bars.[22] This Comment suggests that the Smoke Free Illinois Act is a great victory for the health of nonsmokers in Illinois and provides greater protections and stronger enforcement than bans in three other states.[23] This Comment also suggests that although the Act provides these crucial protections, it is both over-inclusive and under-inclusive in its coverage.[24]

This Comment examines the Smoke Free Illinois Act and compares it to smoking bans in three other states with large metropolitan cities similar to Chicago.[25] Part II of this Comment outlines the history of smoking and anti-smoking measures in the United States, including the evolution of the knowledge of the health effects of cigarette smoke.[26] Part II also discusses the anti-smoking measures in Illinois that set the stage for the statewide ban.[27] Next, Part III explains the provisions of the Smoke Free Illinois Act and discusses general arguments supporting and opposing smoking bans.[28] Part IV then analyzes the Act objectively and compares it to smoking bans in three other states, outlines the positive and negative aspects, and predicts the probable effects of the Act.[29] Finally, Part V proposes possible changes to the

19. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 5, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/5).

20. *See* Secondhand Smoke: Questions and Answers, *supra* note 11 (explaining that state and local governments are increasingly requiring private workplaces, bars, and restaurants to be smoke-free).

21. Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073.

22. *Id.* For further explanation of the Smoke Free Illinois Act, see *infra* Part III.A (discussing the different provisions of the Smoke Free Illinois Act).

23. *See infra* Part V (concluding that the Smoke Free Illinois Act surpasses protections in other states).

24. *See infra* Part V (stating that the Act needs to exempt private clubs and provide greater coverage to children to provide full protection to all interests at stake).

25. *See infra* Parts III and IV (examining the Smoke Free Illinois Act and comparing it to similar bans in other states).

26. *See infra* Part II.A–B (detailing the evolution of smoking and knowledge of its effects in the United States).

27. *See infra* Part II.B.3 (discussing state and local anti-smoking measures in Illinois).

28. *See infra* Part III (explaining the various provisions of the Smoke Free Illinois Act and general public reaction to smoking bans).

29. *See infra* Part IV (analyzing the statute objectively and subjectively in the context of other states' statutes).

statute, such as an exemption for private clubs and increased protections for children.[30]

II. BACKGROUND

Anti-smoking measures have evolved significantly since the negative health effects of cigarette smoke were discovered in the 1960s.[31] To realize the significance of the Smoke Free Illinois Act, it is necessary first to understand the health effects of secondhand smoke and how the Act fits in the national and local framework of smoking legislation.[32] Accordingly, this Part first discusses the effects of secondhand smoke.[33] Then, it describes the current status of smoking legislation across the United States and the evolution of state and local smoking regulations in Illinois.[34]

A. Environmental Tobacco Smoke

Tobacco has been a part of the American economy and culture for hundreds of years.[35] Before the 1960s, smoking was a widely accepted and even glamorized practice in American society.[36] Since the 1960s, the percentage of smoking Americans has decreased by half, from approximately 40% to 20%.[37] The main reason for the sharp downward turn in the prevalence of smoking is simple—knowledge.[38] Until the

30. *See infra* Part V (proposing possible alterations to the Act).

31. *See infra* Part II (discussing the effects of cigarette smoke and the evolution of smoking regulations in the United States).

32. *See infra* Part II (explaining the health consequences of ETS and smoking regulations in the United States and Illinois).

33. *See infra* Part II.A (describing the negative health effects of ETS).

34. *See infra* Part II.B (examining the development of smoking regulation in the United States and in state and local governments of Illinois).

35. Matthew Baldini, Comment, *The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout*, 26 SETON HALL L. REV. 348, 348 (1995) (noting the established history of tobacco in the United States); Marot Williamson, Comment, *When One Person's Habit Becomes Everyone's Problem: The Battle Over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L.J. 161, 164 (2007) (discussing tobacco's historical importance in the national economy).

36. Baldini, *supra* note 35, at 348 ("In the early part of the twentieth century, the habit of smoking flourished throughout the country."); Michele L. Tyler, Note, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 783 (1998) (explaining the past portrayal of smoking in television and film as "glamorous and sophisticated").

37. Percentage of adults who were current, former, or never smokers, overall and by sex, race, Hispanic origin, age, education, and poverty status, Center for Disease Control and Prevention, http://www.cdc.gov/tobacco/data_statistics/tables/adult/table_2.htm (last visited March 30, 2008) [hereinafter Current, Former, or Never Smokers].

38. Tyler, *supra* note 36, at 783 (noting that "public opinion began to turn after the 1964 Surgeon General's report . . .").

1960s, the public had little knowledge of the serious health effects of smoking tobacco.[39] As the public's knowledge of the health effects increased, the incidence of smoking decreased, and the anti-smoking movement in the United States became stronger.[40]

1. Public Knowledge Concerning the Health Effects of Tobacco Smoke

In 1964, the Surgeon General released the first report concerning the effects of tobacco smoke on the human body.[41] This report informed Americans that smoking could be scientifically linked to various cancers in the human body.[42] This report was the first from the Surgeon General, but it would not be the last.[43] Since the 1960s, the Surgeon General has released numerous reports, all detailing the negative health consequences linked to cigarette smoke.[44] In fact, almost every report released by the Surgeon General between 1964 and 2006 focused on the adverse health consequences of smoking.[45] The 1986 "Surgeon General's Report on the Health Consequences of Involuntary Smoking," however, was the first report released that detailed the effects of secondhand smoke.[46]

In 1993, the Environmental Protection Agency ("EPA") released a report identifying environmental tobacco smoke as a "Group A" or known human carcinogen.[47] Group A is the EPA's "category of greatest scientific certainty for known or suspected carcinogens."[48] The report concluded that ETS increases the risk of lung cancer in

39. *Id.* ("Not so long ago, smoking was considered an acceptable adult choice; its health effects limited to smoker's cough and yellowed teeth.").

40. Current, Former, or Never Smokers, *supra* note 37 (showing that the incidence of smoking among adults in the United States steadily declined from 42.4% in 1965 to 20.9% in 2004).

41. *See generally* U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE OF THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) (discussing the health effects of tobacco smoke).

42. *See generally id.* (discussing the link between smoking and mortality rates).

43. *See* Reports of the Surgeon General, United States Department of Health & Human Services, http://www.surgeongeneral.gov/library/reports.htm (last visited March 30, 2008) (listing the reports issued by the Surgeon General).

44. *See id.* (listing multiple consecutive reports focusing on smoking after the 1964 report).

45. *See id.* (listing the reports of the Surgeon General between 1964 and 2006). Out of forty-four total reports issued by the Surgeon General between 1964 and 2006, thirty-two address the dangers of tobacco. *Id.*

46. *Id; see also* Trends in Secondhand Smoke Exposure Among U.S. Nonsmokers: Progress and Gaps, Center for Disease Control and Prevention, http://www.cdc.gov/tobacco/data_statistics/Factsheets/SecondhandTrends.htm (last visited March 30, 2008) [hereinafter Trends in Secondhand Smoke Exposure] (explaining the progress since the release of the 1986 report).

47. Press Release, EPA, *supra* note 12.

48. *Id.*

nonsmokers and increases the risk of lower and upper respiratory problems in young children and infants.[49] This report lent new credence to a growing consensus in the scientific community that cigarette smoke was not only harmful to smokers but to nonsmokers as well.[50]

2. The Health Consequences of Environmental Tobacco Smoke

Environmental tobacco smoke is the combination of sidestream smoke (the smoke given off by the burning end of a tobacco product) and mainstream smoke (the smoke exhaled by the smoker).[51] ETS is composed of more than 4000 chemicals; at least 250 of these are considered harmful, and fifty are known to cause cancer.[52] Some of the more commonly known chemicals contained in secondhand smoke are arsenic, benzene (found in gasoline), cadmium (used in batteries), chromium, and beryllium (a toxic metal).[53] Environmental tobacco smoke also contains noxious gases such as carbon monoxide, ammonia, hydrogen, cyanide, and formaldehyde.[54]

Smokers only inhale about 10% of the total time they are smoking; 90% of the time, the cigarette simply sits and burns, polluting the air around the smoker.[55] Thus, the main source of ETS is sidestream smoke, not mainstream smoke exhaled by smokers.[56] The fact that 90%

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49. *Id.* The findings concerning respiratory problems in young children and infants were based on more than 100 studies. *Id.*

50. *Id.*

> The lung cancer findings in EPA's assessment are based on several important analytical findings: first, the chemical and physical similarity of ETS to that inhaled by smokers; second, the known lung carcinogencity of tobacco smoke to smokers; third, the known exposure to ETS and uptake by the human body; and fourth, a thorough and comprehensive review of more than 30 studies in both the United States and abroad that examined the relationship between lung cancer and exposure to secondhand smoke in people who never smoked, usually the spouses of smokers. EPA concluded from the total "weight of evidence" of all the studies that ETS increases the risk of lung cancer in non-smokers.

Id.

51. Secondhand Smoke: Questions and Answers, *supra* note 11.

52. *Id.* ("Many factors affect which chemicals are found in secondhand smoke, including the type of tobacco, the chemicals added to the tobacco, the way the product is smoked, and the paper in which the tobacco is wrapped.")

53. *Id.* (giving examples of the chemicals found in ETS).

54. Allison D. Schwartz, Comment, *Environmental Tobacco Smoke and its Effect on Children: Controlling Smoking in the Home,* 20 B.C. ENVTL. AFF. L. REV. 135, 141–42 (1993) (discussing the components of ETS).

55. *Id.* at 141.

56. *Id.* ETS is composed of two forms of smoke from burning tobacco products: sidestream smoke and mainstream smoke. Prevention and Early Detection: Secondhand Smoke, *supra* note

of ETS is composed of sidestream smoke makes it even more dangerous than if it were composed mostly of smoke exhaled by the smoker.[57] Sidestream smoke burns at a lower temperature than mainstream smoke and thus contains markedly higher concentrations of toxins and carcinogens.[58] When smokers draw in oxygen with a puff of their cigarette, the tobacco burns at a higher temperature, which eliminates more of the toxins through combustion.[59] While the smoke a nonsmoker inhales may be more widely dispersed, it contains higher concentrations of hazardous chemicals and is thus more harmful than the smoke the smoker is actually inhaling.[60]

a. Health Effects on the General Population

Secondhand smoke is one of the leading causes of preventable death in the United States today.[61] Each year, it is responsible for tens of thousands of lung cancer and heart disease deaths among adult nonsmokers.[62] Aside from deaths resulting from these conditions, regular ETS exposure increases the risk of developing heart disease by 25% to 30% and lung cancer by 20% to 30% in nonsmokers.[63] Research also suggests that secondhand smoke may increase the risk of

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12. Sidestream smoke is "smoke that comes from the end of a lighted cigarette, pipe, or cigar," and mainstream smoke is "smoke that is exhaled by a smoker." *Id.*

57. Schwartz, *supra* note 54, at 142 (explaining that sidestream smoke contains higher levels of toxins than mainstream smoke).

58. *Id.* at 141 (noting that cigarettes burn at a lower temperature when not actively being inhaled).

59. *Id.* at 141–42.

60. *Id.* at 142.

> There is twice as much tar and nicotine in sidestream smoke than in the smoke inhaled directly from the cigarette. There are [sic] also three times as much carbon monoxide, which robs the blood of oxygen; thirty times as much zinc and nickel; up to fifty times more formaldehyde; twenty to one hundred times as much cancer-causing N-nitrosamine; and up to one hundred and seventy times as much ammonia. These chemicals effect [sic] everyone who inhales them.

Id.

61. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 5, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/5) (stating that secondhand smoke is the third leading cause of preventable death in the United States); Cowdrey, *supra* note 15, at 9 (noting that ETS remains a leading cause of preventable death despite the decrease in exposure over the last twenty years).

62. Secondhand Smoke CDC, *supra* note 12 (citing CAL. ENVTL. PROT. AGENCY, PROPOSED IDENTIFICATION OF ENVIRONMENTAL TOBACCO SMOKE AS A TOXIC AIR CONTAMINANT (2005), *available at* http://www.arb.ca.gov/toxics/ets/ets.htm).

63. Secondhand Smoke CDC, *supra* note 12.

breast cancer, nasal sinus cavity cancer, and nasopharyngeal cancer in adults.[64]

Breathing secondhand smoke has an *immediate* effect on a person's heart and blood vessels, increasing the chance of heart attack.[65] Exposure also causes respiratory problems, such as coughing, phlegm, chest discomfort, and reduced lung function.[66] ETS is especially harmful to children.[67] Each year, it causes 150,000 to 300,000 lower respiratory tract infections (such as pneumonia and bronchitis) in children younger than eighteen months of age, resulting in 7500 to 15,000 hospitalizations.[68] In addition, ETS affects asthmatic children, causing increases in the number and severity of asthma attacks in 200,000 to 1,000,000 children with asthma.[69]

Though exposure to ETS has fallen substantially since the publication of the 1986 Surgeon General's report on secondhand smoke, more than 126 million nonsmokers in America still face ETS exposure in their

64. Secondhand Smoke: Questions and Answers, *supra* note 11; Prevention and Early Detection: Secondhand Smoke, *supra* note 12 ("A report from the California Environmental Protection Agency in 2005 concluded that the evidence regarding secondhand smoke and breast cancer is 'consistent with a causal association' in younger, mainly premenopausal women. The 2006 U.S. Surgeon General's report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, concluded that there is 'suggestive but not sufficient' evidence of a link at this point.").

65. Secondhand Smoke CDC, *supra* note 12; Secondhand Smoke: Questions and Answers, *supra* note 11. A table in the American Heart Association's *Circulation* journal lists the effects of secondhand smoke on the cardiovascular system as: platelet activation, endothelial dysfunction, inflammation and infection, atherosclerosis (low HDL levels, plaque instability, increased oxidized LDL), increased oxidative stress, decreased energy metabolism, increased insulin resistance, and outcome measures (increased infarct size, decreased heart rate variability, increased arterial stiffness, increased risk of coronary disease events). Joaquin Barnoya & Stanton A. Glantz, *Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking*, 111 CIRCULATION: J. AM. HEART ASS'N. 2684, 2685 (2005). Endothelial dysfunction occurs as a result of damage to the endothelium, the first layer in an artery that is in contact with the blood. *Id.* at 2687. The endothelium "maintains vessel integrity and controls vascular tone and the vascular inflammatory process." *Id.* Atherosclerosis is the name of the process in which substances (called plaque) build up in the inner wall of the arteries, leading to stiffening of the artery, decreased blood flow, and rupture. Atherosclerosis, American Heart Association, http://www.americanheart.org/presenter.jhtml?identifier=4440 (last visited March 30, 2008). An infarct is an area of tissue death due to lack of oxygen; in this case, it occurs in the heart because of the blockage caused by atherosclerosis in the arteries. Definition of Infarct, http://www.medterms.com/script/main/art.asp?articlekey=3969 (last visited March 30, 2008); Barnoya and Glantz, *supra*, at 2691.

66. Prevention and Early Detection: Secondhand Smoke, *supra* note 12 (highlighting conclusions from the 2006 Surgeon General's report).

67. *Id.*; Secondhand Smoke: Questions and Answers, *supra* note 11; Secondhand Smoke CDC, *supra* note 12 (detailing the effects of ETS on children).

68. Prevention and Early Detection: Secondhand Smoke, *supra* note 12.

69. *Id.*

homes and workplaces.[70] This is especially disconcerting considering the amount of time nonsmokers spend exposed to this dangerous toxin.[71]

b. Health Effects of ETS Exposure in the Workplace

The workplace is a main source of secondhand smoke exposure for adults in the United States.[72] According to the Occupational Safety and Health Administration ("OSHA"), secondhand smoke meets the criteria required to be classified as a "potential cancer-causing agent," and the National Institute for Occupational Safety and Health ("NIOSH") recommends that people view ETS as a potential occupational carcinogen.[73] Scientific studies have shown that ETS exposure in the workplace is linked to an increased risk of lung cancer and heart disease among nonsmokers.[74] One meta-analysis[75] study concluded that there is a 24% greater risk for lung cancer among workers exposed to secondhand smoke than among unexposed workers.[76] This same study

70. Trends in Secondhand Smoke Exposure, *supra* note 46. Levels of the chemical cotinine, a marker of ETS exposure, fell by 70% from 1988–1991 to 2001–2002. *Id.* (citing U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL (2006), *available at* http://www.surgeongeneral.gov/library/secondhandsmoke/report/). "The proportion of non-smokers with detectable cotinine levels has been halved from 88% to 43%." *Id.* (citing James L. Pirkle, John T. Bernert, Samuel P. Caudill, Connie S. Sosnoff & Terry F. Pechacek, *Trends in the Exposure of Nonsmokers in the U.S. Population to Secondhand Smoke: 1988–2002*, 114 ENVTL. HEALTH PERSP. 853, 853 (2006)).

71. Trends in Secondhand Smoke Exposure, *supra* note 46.

72. Secondhand Smoke Exposure in the Workplace, U.S. Department of Health and Human Services, http://www.surgeongeneral.gov/library/secondhandsmoke/factsheets/factsheet5.html (last visited March 30, 2008); Prevention and Early Detection: Secondhand Smoke, *supra* note 12 (identifying three locations where nonsmokers should be "especially concerned" about ETS exposure).

73. Prevention and Early Detection: Secondhand Smoke, *supra* note 12.

74. Secondhand Smoke Exposure in the Workplace, *supra* note 72; Prevention and Early Detection: Secondhand Smoke, *supra* note 12; Leslie Stayner et al., *Lung Cancer Risk and Workplace Exposure to Environmental Tobacco Smoke*, 97 AM. J. PUB. HEALTH 545 (2007) (quantitatively evaluating the association between lung cancer and exposure to ETS in the workplace).

75. The meta-analysis was performed using data from twenty-two studies from multiple locations worldwide of workplace ETS exposure and lung cancer risk. Stayner et al., *supra* note 74, at 545. The locations of the studies were the United States, Hong Kong, England, Japan, Greece, China, Europe, Russia, India, Germany, Taiwan, and Canada. *Id.* at 546. The studies ranged in coverage from 1971 to 1998. *Id.*

76. *Id.* at 545, 547–48. The study was conducted by multiple health sciences researchers from the United States, France, and Germany. *Id.* at 550. See *id.* for detailed credentials of the researchers.

found that "workers classified as being highly exposed" to ETS have twice the risk of developing lung cancer than unexposed workers.[77]

Workers in bars and restaurants are particularly susceptible to secondhand smoke due to their often constant and long-term exposure to ETS at work.[78] A study published in the *Journal of the American Medical Association*[79] measured the ETS concentrations in restaurants and bars as compared to office workplaces and homes with at least one smoker present.[80] The study concluded that mean ETS concentrations in restaurants are 1.6 to 2.0 times higher than levels in office workplaces, and 1.5 times higher than levels in homes with at least one smoker.[81] The concentrations in bars are 3.9 to 6.1 times higher than in offices, and 4.4 to 4.5 times higher than in homes.[82] In addition, the study found that food service workers, in general, have approximately a 50% greater risk of developing lung cancer than the general population.[83]

B. Smoking Legislation

Since the Surgeon General's report in 1964, the federal government and many state and local governments have recognized the need for smoking regulation.[84] National legislation has evolved in the last forty years from passive to active measures to curb smoking.[85] Many state

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77. *Id.* at 545.

78. Jody Hodgdon, Note, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire,* 3 PIERCE L. REV. 49, 52 (2004).

79. Conducted by Michael Siegel, from the University of California, Berkeley/University of California, San Francisco Preventive Medicine Residency Program. Siegel, *supra* note 13.

80. Siegel, *supra* note 13. The study measured the concentration of ETS by examining levels of carbon monoxide, nicotine, and respirable suspended particulates in bars, restaurants, offices, and residences with at least one smoker. *Id.* Air survey data on ETS levels came from more than 1000 offices, 400 restaurants, and 600 homes. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Fifty percent is the approximate average risk; the actual risk ranges from 10% to 90% for all food service workers (bar and restaurant workers). *Id.* To determine the increased risk of lung cancer for food service workers, Siegel analyzed results from six epidemiologic studies that controlled for active smoking. *Id.*

84. Secondhand Smoke: Questions and Answers, *supra* note 11 (highlighting governmental efforts to reduce nonsmokers' exposure to ETS); Prevention and Early Detection: Secondhand Smoke, *supra* note 12 (noting that many state and local governments have passed clean indoor air laws); Baldini, *supra* note 35, at 348–49 ("[The 1964] report became the foundation of the modern anti-smoking movement.").

85. Samuel J. Winokur, Note, *Seeing Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants,* 75 GEO. WASH. L. REV. 662, 686–88 (2007) (detailing the current federal legislation dealing with smoking).

and local governments have passed comprehensive smoking bans, and even more have passed some form of indoor air legislation.[86]

1. Federal Smoking Regulation

Congress passed the first federal smoking legislation in 1964 after the Surgeon General issued a report on smoking.[87] This regulation required each package of cigarettes to carry a now-familiar warning label: "CAUTION: Cigarette Smoking May Be Hazardous to Your Health."[88] In 1969, Congress amended the law, banning cigarette advertising in any medium subject to regulation by the Federal Communications Commission.[89] Then, in 1989, Congress made another amendment to the law, changing the warning label from a single warning to a rotating set of four health warnings.[90]

Since 1989, Congress has taken a more active approach to curbing smoking, instituting full bans on smoking in certain places.[91] There are now smoking bans on most domestic flights, flights between the United States and foreign countries, interstate buses, and trains.[92] The federal government also prohibits smoking in most federal buildings and in all facilities that provide routine, federally-funded services to children, including schools.[93] In addition to direct regulations, Congress passed the Synar Amendment in 1992, which conditioned states' receipt of

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86. State Laws Restricting Smoking in Public Places and Workplaces, *supra* note 14 (listing state smoking regulations by type of place covered); *see* Winokur, *supra* note 85 (stating the problem with inconsistent local regulations).

87. Winokur, *supra* note 85, at 686.

88. *Id.* at 687 (citing the Cigarette Labeling and Advertising Act, 15 U.S.C §§ 1331–1341 (2000)).

89. *Id.* (citing 15 U.S.C. § 1335 (2000)).

90. *Id.* (citing 15 U.S.C. § 1333(a) (2000)).

> These warnings begin with "SURGEON GENERAL'S WARNING" and include one of four messages: "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy", "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health", "Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight"; and "Cigarette Smoke Contains Carbon Monoxide."

Id. at 687 n.213. Congress also passed legislation requiring warning labels on smokeless tobacco products. *Id.* at 687.

91. *Id.* at 687. Secondhand Smoke: Questions and Answers, *supra* note 11 (discussing measures to reduce ETS exposure).

92. Secondhand Smoke: Questions and Answers, *supra* note 11; Winokur, *supra* note 85, at 687 ("[The smoking ban on domestic flights] resulted from evidence that ETS on planes would have substantial health effects on both crew and passengers. Despite opposition from the tobacco industry, the legislation passed overwhelmingly.").

93. Secondhand Smoke: Questions and Answers, *supra* note 11; Winokur, *supra* note 85, at 687 (citing 20 U.S.C. § 6083(a) (2000)).

federal grants on the passage of state laws regarding the sale of tobacco to minors.[94]

2. State and Local Regulations

All fifty states have some form of smoking regulation in place, ranging from regulations that are very permissive to those that are very strict.[95] Thirty-nine states have a restriction on smoking in private workplaces, forty-seven states have a restriction on smoking in public places, and all fifty states have restrictions on smoking in government buildings.[96] While all states have some form of smoking restrictions, only nineteen states, including Illinois, ban smoking in bars and restaurants.[97] Most notably, California, New York, and Massachusetts each have comprehensive smoking bans that prohibit smoking in bars and restaurants completely.[98] In addition to the many state regulations that have been adopted, thousands of municipalities have enacted smoking ordinances as well.[99]

3. Illinois State and Local Regulations

Until 2008, the Illinois Clean Indoor Air Act ("Act") was the principal smoking regulation in the state.[100] A provision of the Act

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94. 42 U.S.C. §§ 300x–21–35 (2000). The Synar Amendment required states to prohibit the sale of tobacco to those under eighteen; if the state did not implement such a law, they would receive less funding for substance abuse treatment and prevention. 42 U.S.C. § 300x–26 (2000 & West Supp. 2007). All states now have laws banning the sale of tobacco to minors. Winokur, *supra* note 85, at 688.

95. State Laws Restricting Smoking in Public Places and Workplaces, *supra* note 14 (listing states that restrict smoking in public places, private workplaces, and government buildings).

96. *Id.*

97. Kevin McDermott, *Businesses don't seem choked elsewhere Studies of other states found no big change for restaurants and bars*, ST. LOUIS POST-DISPATCH, May 6, 2007, at A1. McDermott notes that the number of states with this type of ban is constantly changing as more states approve bans. *Id.*

98. Michael B. Cabral, Note, *Smoked Out: Massachusetts Bans Smoking in Restaurants and Bars*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 401, 411–20 (2005) (comparing the Massachusetts ban to bans in New York and California). California was the first state to pass such a ban. *Id.* This Comment will compare the Smoke Free Illinois Act to the bans in Massachusetts, California, and New York because they contain cities of similar size to Chicago. *See infra* Part IV (analyzing Illinois' ban in comparison to Massachusetts, California, and New York).

99. Press Release, Ams. For Nonsmokers' Rights, Americans for Nonsmokers' Rights Celebrates 30 Years of Advocacy (Mar. 1, 2006), *available at* http://www.no-smoke.org/document.php?id=486 (last visited March 30, 2008). "According to the ANR Foundation's Local Tobacco Control Ordinance Database, 3000 communities have enacted tobacco-related ordinances, of which 440 are 100% smokefree workplace, restaurant, and/or bar laws." *Id.*

100. Illinois Clean Indoor Air Act, 410 ILL. COMP. STAT. 80/1 et seq. (2006), *repealed by* Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.).

allowed local governments to set their own smoking regulations, provided that the restrictions were no less strict than the state Act.[101] Since the Act's enactment in 1990, this provision has been utilized by many municipalities, including Chicago.[102] The Illinois Clean Indoor Air Act was repealed by the Smoke Free Illinois Act, which took effect on January 1, 2008.[103] Chicago passed its own smoking ordinance in 2005, and the provisions of this ordinance, which are as restrictive or more restrictive than the Smoke Free Illinois Act, remain in effect concurrently with the state ban.[104]

a. The Illinois Clean Indoor Air Act

The legislature enacted the Illinois Clean Indoor Air Act ("Act") as a public health statute, based on the finding that tobacco smoke "is harmful and dangerous to human beings and a hazard to public health."[105] Section 4 of the Act prohibited smoking in a "public place."[106] Section 4.5 further prohibited smoking in any portion of the living quarters in a building used in whole or in part as a student dormitory utilized by a public or private institution of higher education.[107] Section 5 of the Act provided an exemption from the general smoking ban by allowing designated smoking areas in public

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101. 410 ILL. COMP. STAT. 80/11, *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078.

102. Monique Garcia & Jeffrey Meitrodt, *House OKs smoking ban; Blagojevich says he'll sign it; bill would take effect Jan. 1,* CHI. TRIB., May 2, 2007, at C1 (stating that forty-four communities in Illinois have smoking bans in place).

103. Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078.

104. CHI., ILL., MUNICIPAL CODE § 7.32 (2005); Ill. Pub. Act 95–17, § 65, 2007 Ill. Legis. Serv. 1077 (allowing local governments to regulate smoking as long as these regulations are at least as restrictive as the provisions of the Smoke Free Illinois Act).

105. 410 ILL. COMP. STAT. 80/2, *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078. The statute is in Chapter 410 of the Illinois Compiled Statutes, which is the Public Health chapter; it is under the subcategory Health Prevention and Protection. 410 ILL. COMP. STAT. 80/1 et seq., *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078.

106. 410 ILL. COMP. STAT. 80/4, *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078. "Public Place" is defined as:

> . . . any enclosed area used by the public or serving as a place of work including, but not limited to, hospitals, restaurants, retail stores, offices, commercial establishments, elevators, indoor theaters, libraries, art museums, concert halls, public conveyances, educational facilities, nursing homes, auditoriums, arenas, and meeting roms, but *excluding* bowling establishments and *excluding* places whose primary business is the sale of alcoholic beverages for consumption on the premises and *excluding* rooms rented for the purpose of living quarters of sleeping or housekeeping accommodations from a hotel . . . and private, enclosed offices occupied exclusively by smokers, even though such offices may be visited by nonsmokers.

Id. (emphasis added).

107. *Id.* § 80/4.5.

places.[108] It allowed appointed government officials and proprietors to establish a smoking area on the premises of the public place.[109] It also exempted factories, warehouses, and similar places of work not frequented by the public.[110]

Enforcement of the Act was discussed in Sections 6 through 8, which detailed the appropriate enforcement measures and penalties.[111] The Act provided that government officials or proprietors in control of a public place had to make reasonable efforts to contain smoking within the established areas by posting signs, contacting law enforcement, or by other appropriate means.[112] Those who violated the Act could be found guilty of a petty offense, and Section 8 specifically allowed the Department of Health, local boards of health, and individuals personally affected by repeat violations to institute an action to enjoin violations of the Act.[113] In addition to Sections 6 through 8, Section 11 also touched on enforcement, allowing local governments to regulate smoking in places that do not fall within the statutory definition of "public place," as long as the regulation is at least as restrictive as the Act.[114]

b. The Chicago Clean Indoor Air Ordinance of 2005

In 2005, Chicago took advantage of Section 11 of the Illinois Clean Indoor Air Act by enacting the Chicago Clean Indoor Air Ordinance of 2005 ("Ordinance" or "Chicago Ordinance").[115] The Chicago Ordinance is a much more restrictive regulation than the Illinois Clean Indoor Air Act.[116] It prohibits smoking in all enclosed public places

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108. *Id.* § 80/5. "This prohibition does not apply in cases in which an entire room or hall is used for a private social function and seating arrangements are under the control of the sponsor of the function and not of the proprietor or person in charge of the place." *Id.* § 80/4.

109. *Id.* § 80/5. Section 5 provides that a person establishing a smoking area:

> . . . shall utilize existing physical barriers, ventilation systems, and other physical elements of the premises to minimize the intrusion of smoke into areas where smoking is not permitted. When a public place is a single room or enclosure, a person establishing such area may satisfy the purposes and provisions of this Act by establishing a reasonable portion of the room or enclosure as a smoking area.

Id.

110. *Id.* § 80/4.

111. *Id.* § 80/6–8.

112. *Id.* § 80/6.

113. *Id.* § 80/7–8.

114. *Id.* § 80/11(a),(c). Any "home rule unit" that passed an ordinance regulating smoking prior to October 1, 1989 is exempt from the requirement that the law be at least as restrictive as the Act. *Id.* § 80/11(b).

115. CHI., ILL., MUNICIPAL CODE § 7.32 (2005).

116. *Compare* 410 ILL. COMP. STAT. 80/1 et seq., *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078 (allowing smoking areas and regulating fewer places than the Chicago

and places of employment within Chicago, with only a few exemptions.[117] Though the Chicago Ordinance covers many public places that the Illinois Act did not, the most important difference between the two laws is that the Chicago Ordinance includes bars and taverns as "public places."[118]

While the Chicago Ordinance prohibits smoking in many locations, it does provide exemptions.[119] For instance, smoking is allowed in private residences as long as the home is not used as a childcare, adult care, or healthcare facility or a home-based business open to the public.[120] The Ordinance also exempts 25% of hotel rooms, retail tobacco stores, private clubs, and any other place that can demonstrate it has been equipped with devices that render the exposure to secondhand smoke equivalent to that occurring in the ambient outdoor air.[121] Bars, taverns, and restaurant bar areas were exempt under the Chicago Ordinance until July 1, 2008, provided that smoking is only permitted within fifteen feet of a restaurant bar area until that time.[122] The Ordinance also allows owners and operators of establishments to declare their entire establishment or outdoor area non-smoking if they wish.[123]

The Chicago Department of Public Health and the Department of Business Affairs and Licensing are granted enforcement powers under the statute.[124] Like the Illinois Act, the Chicago Ordinance allows the Chicago Department of Health or any person affected by a violation of the law to apply for an injunction to enforce the provisions.[125]

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ordinance), *with* CHI., ILL., MUNICIPAL CODE § 7.32 (completely banning smoking in public places, including places the Illinois Act did not cover).

117. CHI., ILL., MUNICIPAL CODE §§ 7–32–050, 080 (describing the areas covered by "public places" and the exemptions allowed).

118. *Id.* § 7–32–050.

119. *Id.* §§ 7–32–050, 080. Section 050 includes twenty-three listed places that are covered by the term "public place," but these are simply examples and not limitations; Section 080 includes seven places that are exempt, two of which were only exempt until July 1, 2008. *Id.*

120. *Id.* § 7-32–080.

121. *Id.* § 7–32–080. The commissioner of public health and the commissioner of the environment are authorized to decide what types of devices satisfy the requirements of Section 080(7). *Id.* § 7–32–080(7).

122. *Id.* § 7–32–080(5–6) (2005). The Smoke Free Illinois Act preempted this section because it was less restrictive than the SFIA. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 65, 2007 Ill. Legis. Serv. 1077 (West)(to be codified at 410 ILL. COMP. STAT. ANN. 82/65).

123. CHI., ILL., MUNICIPAL CODE § 7–32–090.

124. *Id.* § 7–32–120(A).

125. *Id.* § 7–32–120(F); 410 ILL. COMP. STAT. 80/8 (2006), *repealed by* Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1078 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.).

However, unlike the Illinois Act, the Ordinance assigns escalating fines as punishments for infractions.[126] These fines can amount to not more than $100 for the first infraction; $500 for the second within one year of the first; and $2500 for each additional violation within one year in addition to a sixty-day suspension or revocation of any permits or licenses held by the establishment.[127]

c. Other Local Regulations

Chicago is one of only forty-four communities that have enacted their own smoking regulations in Illinois.[128] Some of the bans have "phased-in exemptions for bars," while others have no exemptions at all.[129] The patchwork of communities with smoking bans has created a hostile environment among bar and restaurant owners, with many patrons crossing borders to frequent establishments in neighboring towns without bans.[130] Many of the communities that have enacted bans are in the Chicago area, which makes it very easy to cross borders into the next suburb.[131] Some of the notable Chicago area communities that have passed bans are: Wilmette, Skokie, Oak Park, Cicero, Berwyn, Riverside, Hinsdale, Wheaton, Tinley Park, Orland Park, and Naperville.[132] Many of these communities passed bans in response to the implementation of a Cook County clean indoor air ordinance, which is very similar to the Chicago Ordinance but allows towns to be exempt

126. CHI., ILL., MUNICIPAL CODE § 7-32-130.

127. *Id.* § 7-32-130(B). These punishments are only for owners/operators of a premises that fails to comply with the Ordinance. *Id.* An individual who violates the Ordinance shall be fined no more than $100. *Id.* § 7-32-130(A).

128. Garcia & Meitrodt, *supra* note 102.

129. Crystal Yednak, *Legislators Consider Statewide Smoking Ban; Illinois Bill Would Tie Existing Patchwork of Municipal Laws*, CHI. TRIB., Oct. 24, 2006, at SSW3.

130. Garcia & Meitrodt, *supra* note 102 (noting that business owners have started aggressively courting smokers to lure them to their town); Yednak, *supra* note 129 (explaining that businesses are complaining that their competitors in towns without bans are profiting at their expense). People believe a statewide ban would level the playing field for all businesses in Illinois. Josh Noel, *Bans Have Eateries in Flux—Owners Hope Statewide Smoking Law Levels Playing Field Again*, CHI. TRIB., May 2, 2007, at W1.

131. Noel, *supra* note 130 (explaining the situation of a Chicago-area business owner whose patrons have gone less than a mile up the road to a different suburb to smoke); *see* Terry Loncaric, *The Smoking Ban Bandwagon: Who's On It and Why?*, CHICAGO CONSCIOUS CHOICE, Mar. 2004, *available at* http://www.consciouschoice.com/2004/cc1703/smokingban1703.html (last visited March 30, 2008); Joseph Ruzich, *Cook Smoke Ban Set to Take Effect*, CHI. TRIB., Mar. 15, 2007, at W3 (discussing Chicago suburbs that have passed smoking bans of their own).

132. Loncaric, *supra* note 131 (describing the bans in Wilmette and Skokie); Noel, *supra* note 130 (explaining the anti-smoking laws in Wheaton, Tinley Park, Orland Park, and Naperville); Ruzich, *supra* note 131 (discussing the bans in Hinsdale, Wheaton, Oak Park, Riverside, Cicero, and Berwyn).

if they already have their own regulation in place, regardless of whether it is more or less strict.[133]

It is important to understand the health consequences of smoking and the existing smoking regulations because they were both factors that led Illinois to pass a statewide ban.[134] The health consequences precipitated the ban, and the existing regulations facilitated its structure and implementation.[135]

III. DISCUSSION

State and local regulations in Illinois helped set the stage for the possibility of a statewide comprehensive smoking ban, which became a reality when Illinois legislators passed the Smoke Free Illinois Act.[136] This Part discusses the Smoke Free Illinois Act, including its purpose, the establishments it affects, and the enforcement measures it encompasses.[137] This Part also outlines the general legal, social, and economic arguments supporting and opposing smoking bans.[138]

A. The Smoke Free Illinois Act

Governor Rod Blagojevich signed the Smoke Free Illinois Act ("SFIA" or "ban") into law on July 23, 2007, making Illinois the

133. Cook County, Ill., Ordinance 06–O–12 § 15 (Mar. 15, 2006) ("This division shall apply to all areas within Cook County, Illinois except those areas which are governed by an ordinance of another governmental entity (which by law may not be superseded by this division)."); Ruzich, *supra* note 131 (discussing how some towns scrambled to come up with their own ordinances before the Cook County ban took effect). The Cook County Clean Indoor Air Ordinance is very similar to the Chicago Ordinance, specifically listing twenty-four areas where smoking is regulated. Cook County, Ill., Ordinance 06–O–12 § 4 (Mar. 15, 2006).

134. *See supra* Part II (discussing the health effects of secondhand smoke and existing federal, state, and local smoking regulations).

135. *See infra* Part III.A (identifying the public health purpose behind the ban); *compare* Smoke Free Illinois Act, Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.), *with* CHI., ILL., MUNICIPAL CODE § 7.32 (2005) (noting the similar provisions and structure between the two bans).

136. Editorial, *Going Smoke-Free at Last*, CHI. TRIB., May 4, 2007, at C28 [hereinafter *Going Smoke-Free*]. "[T]he Illinois House joined the Senate in approving a statewide smoking ban in most public places. As in the earlier Senate vote, this one was shockingly lopsided, 73–42, signaling the dramatic momentum shift on this issue since Chicago passed its smoke-free law in December 2005 . . . [t]he smoking ban didn't come quickly or easily. It took years of political skirmishes in towns like Skokie, Wilmette, Arlington Heights, and Orland Park, where local officials stood up for public health at risk to their political careers and their communities' tax coffers." *Id. See supra* Part II.B.3 (giving a brief overview of smoking regulations in Illinois) and *infra* Part III.A (discussing the provisions of the Smoke Free Illinois Act).

137. *See infra* Part III.A (outlining the sections of the Act).

138. *See infra* Part III.B (providing general arguments for and against smoking bans).

twenty-second state to enact a broad smoking ban.[139] The SFIA took effect on January 1, 2008, replacing the Illinois Clean Indoor Air Act as the primary smoking regulation in Illinois.[140] When the bill was introduced, the Illinois Senate Executive Committee heard testimony from the Centers for Disease Control and Prevention, health advocates, smokers' rights groups, and businesses on the positive and negative effects of a comprehensive statewide smoking ban.[141] The ban passed the Senate on March 29, 2007, with a vote of 34-23,[142] and the House on May 1, 2007, with a vote of 73-42.[143] Despite receiving a passing vote, the ban faced opposition from downstate Illinois and the St. Louis metropolitan area, where legislators feared the ban would drive business into Missouri.[144]

The SFIA begins with a description of the legislative findings that prompted the passage of the ban.[145] The findings first detail the health consequences of secondhand smoke, stating that an estimated 2,900 Illinois citizens die each year from ETS exposure.[146] Next, the section addresses the 2006 Surgeon General's report, listing the major determinations made by the report, including the health consequences of secondhand smoke and information on smoke-free policies in

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139. Jim Ritter, *Kicking Some Ash . . . And Recouping Cash; Illinois Bans Smoking in Bars, Restaurants—Price Hike Could Be Next*, CHI. SUN TIMES, July 24, 2007, at 8; *Going Smoke-Free*, *supra* note 136.

140. Smoke Free Illinois Act, Ill. Pub. Act 95-17, § 90, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.). Section 90 repeals the Illinois Clean Indoor Air Act. *Id.*

141. Yednak, *supra* note 129. Senate President Emil Jones said the hearing was meant to provide more information to the legislators. *Id.* A representative from the Illinois Restaurant Association urged the legislature to leave the choice of going smoke-free up to individual restaurants or at least provide an exemption allowing restaurants to have a bar area where smoking was allowed. *Id.* Representatives of racetracks, off-track betting facilities, and bowling alleys also asked for an exemption. *Id.* An associate director from the CDC, however, argued that there was no such thing as a nonsmoking area and that any level of exposure is dangerous. *Id.*

142. Kevin McDermott & Erik Potter, *State Senate Backs Curb on Indoor Public Smoking: STATEWIDE?—Senate Vote is First Step to a Uniform Ban, IMPACT—Law Would Affect Bars, Restaurants and Casinos*, ST. LOUIS POST-DISPATCH, Mar. 30, 2007, at A1.

143. *Going Smoke-Free*, *supra* note 136 (noting the House vote).

144. McDermott & Potter, *supra* note 142 (pointing out that the Senate vote did not include a single "yes" vote from the Metro East area). State Sen. Bill Haine, D-Alton, voted against the ban, saying, "(Casinos) are going to lose money, no question, and that's going to come right out of the common school fund . . . . Missouri doesn't have a smoking ban, and gamblers smoke." *Id.*

145. Smoke Free Illinois Act, Ill. Pub. Act 95-17, § 5, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/5).

146. *Id.*, entitled "Findings." ("The General Assembly finds that tobacco smoke is a harmful and dangerous carcinogen to human beings and a hazard to public health.").

general.[147] Finally, the findings section includes support from the EPA and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers ("ASHRAE") explaining why air filtration is not sufficient to reduce secondhand smoke exposure to safe levels.[148]

The next section, Section 10, provides definitions of the terms used in the SFIA.[149] It defines the types of establishments affected by the ban, including the exempt establishments and the broad term "public place."[150] Some of the more important definitions are those detailing what constitutes a bar, restaurant, and private club because these public places were not completely smoke-free under existing Illinois law.[151]

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147. *Id.* Section 5 states:

> [T]he United States Surgeon General's 2006 report has determined that there is no risk-free level of exposure to secondhand smoke; the scientific evidence that secondhand smoke causes serious diseases, including lung cancer, heart disease, and respiratory illnesses such as bronchitis and asthma, is massive and conclusive; separating smokers from nonsmokers, cleaning the air, and ventilating buildings cannot eliminate secondhand smoke exposure; smoke-free workplace policies are effective in reducing secondhand smoke exposure; and smoke-free workplace policies do not have an adverse economic impact on the hospitality industry.

Id.

148. *Id.*

> Air cleaners, which are capable only of filtering the particulate matter and odors in smoke, do not eliminate the known toxins in secondhand smoke. [ASHRAE] bases its ventilation standards on totally smoke-free environments because it cannot determine a safe level of exposure to secondhand smoke . . . .

Id.

149. *Id.* § 10.

150. *Id.*

> "Public place" means that portion of any building or vehicle used by and open to the public, regardless of whether the building or vehicle is owned in whole or in part by private persons or entities, the State of Illinois, or any other public entity and regardless of whether a fee is charged for admission, including a minimum distance . . . of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited.

Id. The definition goes on to provide a long list of establishments included under "public place."
Id.

151. *Id.*; Illinois Clean Indoor Air Act, 410 ILL. COMP. STAT. 80/1 et seq. (2006), *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1073.

> "Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and that derives no more than 10% of its gross revenue from the sale of food consumed on the premises. "Bar" includes, but is not limited to, taverns, nightclubs, cocktail lounges, adult entertainment facilities, and cabarets . . . .
>
> "Private club" means a not-for-profit association that (1) has been in active and continuous existence for at least 3 years prior to the effective date of this amendatory Act of the 95th General Assembly, whether incorporated or not, (2) is the owner, lessee, or occupant of a building or portion thereof used exclusively for club purposes at all times, (3) is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain, and (4) only sells alcoholic

The section also identifies what is considered "smoking" under the ban, defining it as "the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment."[152]

Section 15 prohibits smoking in public places, places of employment, and governmental vehicles, including areas within fifteen feet of any entrance[153] to a public place or place of employment.[154] It does provide, however, that there are exemptions to this rule under Section 35.[155] These exemptions include: private residences, retail tobacco stores, private and semi-private rooms in nursing homes and long-term care facilities, and hotel and motel sleeping rooms designated as smoking rooms.[156] Private residences are only exempt if they are not used as a childcare, adult day care or healthcare facility, or as a home-based business open to the public.[157] Exemptions for tobacco stores are

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> beverages incidental to its operation. For purposes of this definition, "private club" means an organization that is managed by a board of directors, executive committee, or similar body chosen by the members at an annual meeting, has established bylaws, a constitution, or both to govern its activities, and has been granted an exemption from the payment of federal income tax as a club under 26 U.S.C. 501 . . . .
>
> "Restaurant" means (i) an eating establishment, including, but not limited to, coffee shops, cafeterias, sandwich stands, and private and public school cafeterias, that gives or offers for sale food to the public, guests, or employees, and (ii) a kitchen or catering facility in which food is prepared on the premises for serving elsewhere. "Restaurant" includes a bar area within the restaurant . . . .

Id.

152. Ill. Pub. Act 95–17, § 10, 2007 Ill. Legis. Serv. 1073.

153. *Id.* § 70:

> Smoking is prohibited within a minimum distance of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited under this Act so as to ensure that tobacco smoke does not enter the area through entrances, exits, open windows, or other means.

154. *Id.* § 15. A government vehicle is defined as "any vehicle owned, leased, or operated by the State or a political subdivision of the State." *Id.*

> "Place of employment" means any area under the control of a public or private employer that employees are required to enter, leave, or pass through during the course of employment, including, but not limited to entrances and exits to places of employment, including a minimum distance, as set forth in Section 70 of this Act, of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited; offices and work areas . . . and other common areas. A private residence or home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social service care on the premises, is not a "place of employment."

Id. § 10. The statute also prohibits smoking in the living areas of student dormitories. *Id.* § 25.

155. *Id.* § 15; *see id.* § 35 (describing the exemptions to the general prohibition of smoking in public places and places of employment).

156. *Id.* § 35.

157. *Id.*

automatically available to stores that were in operation prior to January 1, 2008 and specially qualified stores that begin operation thereafter.[158] Each store must file an affidavit every year with the Department of Public Health stating the percentage of income derived from the sale of tobacco and smoking accessories.[159] Private and semi-private rooms in nursing homes and long-term care facilities are exempt only if all the occupants are smokers having requested in writing to be placed in a smoking room and the smoke does not enter the rest of the facility.[160] Finally, an exemption applies to rented hotel and motel rooms designated as smoking rooms as long as all smoking rooms on the same floor are contiguous and the smoke does not permeate other rooms or areas of the premises.[161]

The SFIA also requires owners and operators of public places and places of employment to alter their premises in certain ways to make them smoke-free.[162] For instance, owners of public places and places of employment must post signs indicating that smoking is prohibited both inside the establishment and at every entrance.[163] Section 20 of the SFIA also requires all ashtrays to be removed from an area where smoking is prohibited by the ban.[164] The ban also allows any person in control of a public place or place of employment to designate any non-enclosed area as nonsmoking, provided the person posts signs in the same manner as previously described.[165]

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158. *Id.* "Any retail tobacco store that begins operation after the effective date of this amendatory Act may only qualify for an exemption if located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited." *Id.*

> "Retail tobacco store" means a retail establishment that derives more than 80% of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. "Retail tobacco store" does not include a tobacco department or section of a larger commercial establishment or any establishment with any type of liquor, food, or restaurant license.

Id. § 10.

159. *Id.* § 35.

160. *Id.*

161. *Id.* No more than 25% of the rooms in a hotel/motel may be designated as smoking rooms, and the status of rooms as smoking or nonsmoking cannot be changed except to add additional nonsmoking rooms. *Id.*

162. *Id.* §§ 25–30.

163. *Id.* § 20 (stating that the signs must be "No Smoking" signs or the international "No Smoking" symbol (a burning cigarette surrounded by a red circle, with a red line across it)).

164. *Id.*

165. *Id.* § 30. See *Id.* § 20 for the sign-posting requirements under the SFIA.

Sections 40 through 50 provide for the enforcement of the ban.[166] First, Section 40 gives certain agencies and departments authorization to enforce the ban and explains how to register complaints.[167] The section states that the "[Department of Public Health], State-certified local public health departments, and local law enforcement agencies shall enforce the provisions of [the SFIA] and may assess fines pursuant to Section 45 . . . ."[168] In addition, any person can file a complaint with any of the enforcing agencies and departments for a violation of the ban.[169] Next, Section 45 discusses violations of the ban and fines that should be assessed.[170] The enforcing entities must fine any person or entity that violates the SFIA; each day a violation occurs is a new and separate violation.[171] The fines are smaller for individuals violating the ban than for owners of places covered by the SFIA, and the fine for owners increases with each violation while there is no such increase for individuals.[172] The proceeds of any fine assessed under the SFIA are split evenly between the Department of Public Health and the enforcing agency.[173] Finally, Section 50 provides an enforcement mechanism for repeat offenders, allowing individuals personally affected by repeat violations or enforcing agencies to seek an injunction against the offending party in court.[174]

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166. *Id.* §§ 40–50. The title of Section 40 is "Enforcement; complaints," Section 45—"Violations," Section 50—"Injunctions." *Id.*

167. *Id.* § 40.

168. *Id.* § 40(a). Section 45 addresses the topic of violations and fines. Ill. Pub. Act, § 45, 2007 Ill. Legis. Serv. 1073.

169. *Id.* § 40(b). ("The Department [of Public Health] shall establish a telephone number that a person may call to register a complaint under this subsection (b).").

170. *Id.* § 45.

171. *Id.* § 45(a). In full, the subsection states, "A person, corporation, partnership, association or other entity who violates Section 15 of this Act shall be fined pursuant to this Section. Each day that a violation occurs is a separate violation." *Id.*

172. *Id.* § 45(b).

> A person who smokes in an area where smoking is prohibited under Section 15 of this Act shall be fined in an amount that is not less than $100 and not more than $250. A person who owns, operates, or otherwise controls a public place or place of employment that violates Section 15 of this Act shall be fined (i) not less than $250 for the first violation, (ii) not less than $500 for the second violation within one year after the first violation, and (iii) not less than $2,500 for each additional violation within one year after the first violation.

Id.

173. *Id.* § 45(c). The SFIA does not state how the Department and the enforcing agency are to use these proceeds.

174. *Id.* § 50.

The SFIA allows local governments to regulate smoking in public places and even in places not explicitly covered by the SFIA.[175] If a local government chooses to institute its own regulations concerning smoking in public places, it may do so, as long as the regulation is no less restrictive than the SFIA.[176] In addition, local governments can regulate smoking in any enclosed indoor area used by the public or serving as a workplace even if the area is not a "public place" as defined in the SFIA.[177]

The SFIA is a much more comprehensive smoking regulation than the Illinois Clean Indoor Air Act, which the SFIA repealed when it went into effect in January 2008.[178] The SFIA covers almost all public places with few exceptions and provides strong enforcement measures for both individuals and government agencies.[179]

B. The Debate over Smoking Bans

Though many see smoking bans as a triumph for the health of nonsmokers, some see it as an affront to smokers' rights and an overreaching act of paternalism by the government.[180] Illinois may have ended up on the "pro" side of the argument, but in order to fully understand the SFIA, it is essential to consider all aspects of the current social and legal climate surrounding the issue of smoking bans.[181] This Part will summarize both the legal and policy debates over smoking bans.[182]

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175. *Id.* § 65.

176. *Id.* § 65(a). The "no less restrictive" requirement only applies to regulations covering the same places as the SFIA, not any additional places local governments may choose to regulate. *Id.* Section 65 applies to "any home rule unit of local government, any non-home rule municipality, and any non-home rule county within the unincorporated territory of the county." *Id.* § 65.

177. *Id.* § 65(b).

178. *Compare* 410 ILL. COMP. STAT. 80/1 et seq., *repealed by* Ill. Pub. Act 95–17, § 90, 2007 Ill. Legis. Serv. 1073 (covering a limited category of public places), *with id.* §§ 1–90 (covering almost all public places).

179. *See generally* Ill. Pub. Act 95–17, §§ 1–90, 2007 Ill. Legis. Serv. 1073 (providing a list of places covered by the ban and those that are exempt, in addition to enforcement mechanisms).

180. *See infra* Part III.B (addressing various aspects of each side's argument).

181. *See infra* Part III.B (outlining the social and legal arguments advanced in support and in opposition of smoking bans) and *supra* Part III.A (detailing the provisions of the Smoke Free Illinois Act).

182. *See infra* Parts III.B.1–2 (outlining the legal and non-legal arguments advanced on both sides of the smoking ban debate).

1. The Constitutionality of Smoking Bans

The most significant legal question related to the bans is whether they are constitutional.[183] The most common constitutional arguments raised in opposition to the bans involve the freedom of speech, the freedom of association and assembly, regulatory takings, equal protection, and the right to privacy.[184] Though smoking ban opponents often argue that the statutes are unconstitutional, no constitutional challenge against a smoking ban has been successful thus far.[185]

a. First Amendment—Speech and Assembly/Association

Smokers argue that smoking bans violate their freedom of speech by prohibiting them from expressing themselves in the form of smoking.[186] Generally, they contend that smoking is "a part of [their] identity"[187] and that smoking bans prevent smokers from expressing this "identifying element."[188] Smokers claim that smoking is a political statement similar to flag burning—an act of rebellion—and should be

183. Haley M. Peerson, *Indoor Air Quality: Options for Regulating Environmental Tobacco Smoke*, 13 MO. ENVTL. L. & POL'Y REV. 114, 114–15 (2005) ("In order for any level of government to place restrictions on smoking indoors, such restrictions must pass constitutional muster."); Williamson, *supra* note 35, at 168 (discussing the constitutional issues surrounding smoking bans).

184. Peerson, *supra* note 183, at 115 (listing some of the constitutional issues raised by legislation that bans smoking); Winokur, *supra* note 85, at 678 (addressing the constitutional challenges to smoking bans).

185. Peerson, *supra* note 183, at 115 (noting that courts have consistently upheld smoking bans as constitutional); Winokur, *supra* note 85, at 679–86 (examining why constitutional arguments against bans have had no success); McDermott, *supra* note 97 ("A circuit judge in Hawaii dismissed last month a lawsuit by bar owners who had claimed that the state's smoking ban was an unconstitutional infringement on their property rights. *No* state smoking ban has been successfully challenged on constitutional grounds." (emphasis added)).

186. Peerson, *supra* note 183, at 115–17; Williamson, *supra* note 35, at 172–75; Winokur, *supra* note 85, at 682–84. All three articles rely in part on the same court case in their discussion of free speech claims: NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461 (S.D.N.Y. 2004). *C.L.A.S.H.* was a case brought in response to the New York City smoking ban that raised First and Fourteenth Amendment challenges. Williamson, *supra* note 35, at 172–75.

187. Peerson, *supra* note 183, at 115 ("[F]or a smoker, 'smoking is indeed part of the person's life and certainly his social life and crucially, more than that, *a part of his identity*' . . . ." (quoting *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 477)). Williamson, *supra* note 35, at 174 ("C.L.A.S.H. argued smokers identify themselves in part by the fact that they smoke, and the smoking bans deprive smokers from expressing this identifying element.").

188. Williamson, *supra* note 35, at 174.

protected just as flag burning is protected.[189] They also believe it conveys a message of camaraderie to other smokers.[190]

It is not clear that this is a winning argument.[191] For instance, in *NYC C.L.A.S.H., Inc. v. City of New York,*[192] the Southern District of New York rejected a free speech claim asserted in opposition to the New York City smoking ban.[193] The court ruled that conduct, by itself, is not protected speech without an element of expression, and the primary purpose of the conduct must be that expressive element.[194] The court ultimately held that the primary purpose of smoking in a restaurant or bar is not expression, despite whatever element of expression may exist; therefore, smoking is not protected speech.[195]

Smokers have also claimed that smoking bans violate their right to freedom of association and assembly under the First Amendment.[196]

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189. Peerson, *supra* note 183, at 115–16 ("Smoking is an act of 'rebellion against a State and a state of . . . affairs for which smokers feel a righteous rage of revulsion.'" (citing *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 477)).

190. *Id.* at 116.

191. *See id.* ("Since smoking conveys no message that is understood by those viewing it, smoking is merely conduct, which may be regulated.").

192. 315 F. Supp. 2d 461 (S.D.N.Y. 2004); *see supra* note 186 (discussing *NYC C.L.A.S.H.*).

193. *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 480; Peerson, *supra* note 183, at 116 ("'[W]hether smokers share some clandestine language not readily available to non-smokers . . . does not propel the act of smoking within the zone of First Amendment protection.'" (citing *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 479 n.12)); Williamson, *supra* note 35, at 174 n.95 ("[The] purpose of [the] smoking ban does not implicate First Amendment concerns because it is content neutral and reasonably related to [the] governmental interest of protecting [the] public from ETS." (citing *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 479–80)).

194. *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 476 ("[M]ere conduct, such as smoking, is not generally considered speech, and thus, is not in itself protected under the First Amendment. It is, however, possible for certain conduct to be sufficiently imbued with elements of expression so as to merit constitutional protection.").

195. Williamson, *supra* note 35, at 174 (citing *NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 478). The court in *NYC C.L.A.S.H.* did not state the specific motivation behind smoking, but it likely supposed smoking was pleasure or addiction. Winokur, *supra* note 85, at 683 n.175.

> Even if smoking were considered symbolic speech, it is likely that restrictions limiting forums that allow smoking would survive intermediate review. The government's interest in prohibiting smoking in bars and restaurants is to protect nonsmokers from the detrimental effects of ETS. Protecting the health and welfare of citizens is a well-established substantial government interest. Also, there are numerous alternative avenues of "expression" for smokers. Smoking is not restricted in city streets, homes, automobiles, or hotel rooms. So if smoking were to be classified as symbolic speech and receive full First Amendment protection, a forum restriction would pass constitutional muster because it is supported by a substantial purpose and smokers are free to "speak" their message elsewhere.

Peerson, *supra* note 183, at 116–17.

196. *E.g., NYC C.L.A.S.H., Inc.*, 315 F. Supp. 2d at 472; Peerson, *supra* note 183, at 118–19 (addressing the argument that smoking bans burden smokers' right to assemble); Winokur, *supra*

They argue that smoking bans interfere with their "right to associate freely with other people while exercising their First Amendment rights," or right to "expressive association."[197] Specifically, smokers contend that they are unable to engage fully in association at bars and restaurants without being able to smoke.[198] Smokers assert that smoking enhances the experience of exercising their First Amendment rights; therefore, smoking bans unduly limit or burden this experience.[199] The court in *NYC C.L.A.S.H.* also addressed the issue of freedom of association, finding that smokers have the same freedom to associate as nonsmokers and are just as fully able to exercise their First Amendment rights without smoking.[200]

b. Fifth Amendment—Takings Clause

In addition to relying on the First Amendment to oppose smoking bans, opponents of smoking bans also argue that the regulations are unconstitutional because such laws violate the Fifth Amendment by "deny[ing] business owners economically viable use of their land without compensation."[201] Pro-smoking advocates argue that restrictive anti-smoking measures are regulatory takings because they cause

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note 85, at 680–82 (discussing smokers' freedom of association claims and arguing that smoking bans do not interfere with the intimate or expressive association of smokers).

197. Winokur, *supra* note 85, at 680–81.

198. Peerson, *supra* note 183, at 118 ("Smokers have argued that a ban on smoking in bars and restaurants so substantially burdens the right to assemble as to effectively void it altogether.").

199. Winokur, *supra* note 85, at 681–82. *Contra* Peerson, *supra* note 183, at 118–19 (discussing smokers' argument that bans interfere with their association rights).

> It is curious that smokers do not believe they are fully able to engage in association at restaurants and bars without smoking, while nonsmokers are able to fully associate without smoking. Moreover, nonsmokers may argue that they are unable to fully engage in their right to associate because of the harmful ETS contaminating the air.

Id. at 118.

200. *NYC C.L.A.S.H., Inc.*, 415 F. Supp. 2d at 473 ("[T]here is nothing to say that smoking is a prerequisite to the full exercise of association and speech under the First Amendment . . . . First Amendment freedoms warrant no constitutional protection when such activities are not essential to the enjoyment of a particular right, or may otherwise be harmful to public health, safety, order, or general welfare."); *see also* Winokur, *supra* note 85, at 682 (noting that the Supreme Court has held that there is no "general right of social interaction" and that the association of smokers in bars probably falls under this category).

201. Winokur, *supra* note 85, at 679 (discussing constitutional challenges to smoking bans under the Takings Clause). *See generally* Nicholas A. Danella, Note, *Smoked Out: Bars, Restaurants, and Restrictive Antismoking Laws as Regulatory Takings*, 81 NOTRE DAME L. REV. 1095 (2006) (analyzing smoking bans under the Takings Clause).

businesses to sustain great economic loss and deny business owners the right to determine the use of their land.[202]

In order to determine whether a law constitutes a regulatory taking, courts apply a three-part balancing test considering: "1) the character of the governmental action; 2) the economic impact of the regulation on the claimant; and 3) the extent to which the regulation has interfered with the claimant's distinct investment-backed expectations."[203] Therefore, a court would determine whether a particular smoking regulation constitutes a regulatory taking on a case-by-case basis, and thus the result should vary depending on the claimant and his particular situation.[204]

c. Fourteenth Amendment—Decisional Privacy and Equal Protection

Smokers often maintain that they have a right to smoke in public places because smoking is a legal adult choice.[205] The legal basis for this assertion is the right to decisional privacy—"the respect for and protection from interference with an individual's autonomous decision-making."[206] The constitutional sources for the right to decisional

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202. Danella, *supra* note 201, at 1105, 1108. Danella applies the *Penn Central* analysis to anti-smoking regulations and determines that these kind of restrictive regulations likely constitute regulatory takings. *Id.* at 1107–16.

> Restrictive anti-smoking laws admittedly promote a legitimate state interest, but only through a significant intrusion into privately owned property. The bans erase a business owner's right to determine how he will use his own land. Just as an exercise of eminent domain or rezoning (in the absence of a public nuisance) requires the government to justly compensate property owners, so too must the government pay bar and restaurant owners whose land these restrictive anti-smoking laws partially take.

Id. at 1121. *But see* Justin C. Levin, Comment, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 197 (2004) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit . . . .") (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)); Winokur, *supra* note 85, at 679 (finding that smoking bans probably do not constitute regulatory takings because the *Penn Central* factors tend to weigh against opponents of smoking bans).

203. Winokur, *supra* note 85, at 679 (citing D.A.B.E., Inc. v. City of Toledo, 292 F. Supp. 2d 968, 971–72 (N.D. Ohio 2003) (identifying the *Penn Central* factors).

204. *Compare* Danella, *supra* note 201, at 1107–16 (finding that anti-smoking regulations do meet the three-part test and are thus regulatory takings), *with* Levin, *supra* note 202, at 195–98 (determining that takings challenges to smoking bans would fail), *and* Winokur, *supra* note 85, at 679–80 (arguing that the factors of the three-part test weigh against smoking ban opponents).

205. Tyler, *supra* note 36, at 800.

206. *Id.* Decisional privacy is one of three forms of privacy protected by "privacy rights": informational privacy, physical privacy, and decisional privacy. *Id.* at 787. Informational privacy is the right to keep information about oneself secret and is grounded in the Fifth Amendment's limitations on compulsory disclosure and self-incrimination. *Id.* Physical privacy is the "freedom from contact with other people and the desire for seclusion and solitude, and often involves areas such as the home where we have a greater expectation of freedom from unwanted

privacy are the "penumbras" surrounding the constitutional guarantees of the Bill of Rights and the right to "liberty" in the Fourteenth Amendment.[207]

Smokers believe that smoking regulations are simply acts of paternalism by the government, similar to seatbelt laws, which invade the right of the individual to make his own choices.[208] Smoking ban opponents liken the prohibition of smoking to the prohibition of any other high-risk choice, such as mountain climbing, eating fatty foods, and working long hours; they ask why the government feels the need to "protect" people from some choices and not from others.[209] Smokers argue that nonsmokers can make their own choice about going to a place where smoking is allowed and that employees can choose where they want to work; the government does not need to protect them from their own choices.[210]

Smoking ban proponents respond to the decisional privacy argument by asserting that smoking regulations do not interfere with smokers' rights to make adult choices.[211] Instead, they argue that smoking is not an adult choice because its impact is neither limited to adults nor is

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intrusion." *Id.* It is rooted in the First Amendment's freedom of speech and association and the Fourth Amendment's protection against warrantless searches and seizures. *Id.* at 787–88. Decisional privacy is the right to make decisions about personal matters free from interference and is based on the Fourteenth Amendment's guarantee of life, liberty, and due process. *Id.* at 788.

207. *Id.* at 800.

208. *Id.* at 802; Williamson, *supra* note 35, at 181 ("Opponents of smoking bans view antismoking legislation along the same lines as motorcycle helmet and seatbelt laws: acts promulgated by the 'government-as-nanny.'"); David Mendell & James Kimberly, *State Posts No-smoking Sign; Health Advocates Cheer New Law as Pub Patrons, Owners Feel Pinch*, CHI. TRIB., July 24, 2007, at C1 ("'It's the General Assembly being our new nanny. . . . After this they'll ban foods that are too fatty. You'll have to ask the state what you can eat and drink—they'll start regulating hamburgers.'" (quoting Wally Degner, a lifelong pipe smoker)); Yednak, *supra* note 129 ("'You cannot legislate choice . . . . If somebody does not want to go into a place where there is smoking, they don't have to go.'" (quoting Kenneth Sawyer, director of government affairs for the Illinois Restaurant Association)).

209. Jordan Raphael, Note, *The Calabasas Smoking Ban: A Local Ordinance Points the Way for the Future of Environmental Tobacco Smoke Regulation*, 80 S. CAL. L. REV. 393, 404 (2007) ("'If government has the power to protect people from making choices that involve relatively high risks, why stop at tobacco consumption? What about skiing, mountain climbing, hang gliding, drinking alcohol, and working long hours?'" (quoting ROBERT D. TOLLISON & RICHARD E. WAGNER, SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY 69 (1988)); Mendell & Kimberly, *supra* note 208 ("'I think it's ridiculous that alcohol is legal and they are going to ban tobacco. It's just taking away citizen's rights. They're just pushing people around for no reason.'" (quoting Heather Pavlik, a smoker)).

210. Williamson, *supra* note 35, at 181–82; Yednak, *supra* note 129.

211. Tyler, *supra* note 36, at 802.

smoking always the product of free choice.[212] Proponents point to the fact that 90% of adult smokers became addicted before their nineteenth birthday; furthermore, because cigarettes are addictive, the "addict" has no choice in the matter.[213]

Ban advocates also argue that smoking regulations do not completely prevent smokers from smoking but simply restrict where they can smoke.[214] Thus, the government is not impeding their right to choose to smoke.[215] They contend that while smokers might voluntarily expose themselves to the consequences of smoking, nonsmokers' exposure to secondhand smoke is much less voluntary.[216] The regulations attempt

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212. *Id.*

213. *Id.* at 802–03. Tyler points out that a majority of smokers begin smoking before they even reach the age of fourteen and that 3000 children under the age of eighteen begin smoking every day. *Id.* at 802.

> In addition, cigarette smoking is not a "choice" in the common sense of the term for the vast majority of smokers. Typically, "choice" implies the freedom to make a decision between two alternatives. An addict has no such freedom . . . . In fact, some antismoking advocates argue that [tobacco] is as addictive as heroin or cocaine. Surely, heroin and cocaine addicts are not "choosing" to use drugs, at least in the traditional sense of the word, and most would agree that limiting their use in public is not paternalistic.

Id. at 802–03.

214. Raphael, *supra* note 209, at 405.

215. *See id.* ("This minor intrusion . . . is far outweighed by the harm to third persons [that would result] from allowing smoking in public places." (internal quotation omitted)).

216. *Id.* at 404–05 (arguing that nonsmokers have much less choice in exposing themselves to potential harm); Yednak, *supra* note 129; *see* Peerson, *supra* note 183, at 120–21 (explaining why nonregulation will not work for the issue of smoking in public):

> [T]he problem with non-regulation is that in order for the market to work properly, there must be a combination of perfect knowledge and mobility between jobs. When it comes to ETS, many consumers and persons in the workforce do not have perfect knowledge of the risks caused by ETS. Because many of the injuries caused by ETS are long-term as opposed to presenting immediate and clear dangers, people do not have the incentive to become fully informed of the health and safety risks.
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> . . . .
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> In addition to the lack of perfect knowledge, employees and many consumers are not able to be perfectly mobile in the marketplace. People who work in bars and restaurants do not have many employment opportunities where ETS exposure does not pose a health risk because for the most part, that line of work tolerates ETS exposure. If an employee of a bar or restaurant had perfect knowledge of the risks of ETS exposure and made the decision not to work where they were exposed to ETS, they would probably be forced into unemployment. Similarly, consumers are faced with the decision of either frequenting bars and restaurants where smoking is allowed or not entering the market.

Id.

to address nonsmokers' exposure, not smokers' decision to smoke in the first place.[217]

In addition, proponents claim that there is no legitimate reason to require nonsmokers to "choose" to stay away from public places where smoking occurs because each group has an equal right to attend bars and restaurants.[218] Nonsmokers should not have to yield to smokers and give up social interaction in bars and restaurants simply because they do not want to expose themselves to the health risks of cigarette smoke.[219] To anti-smoking advocates, the fairest solution seems to be to require smokers to step outside when they smoke instead of forcing nonsmokers to avoid these establishments completely.[220] This argument also applies to workers; employees should not have to choose between their health and their occupation.[221]

Smokers also claim that smoking bans violate their rights under the Fourteenth Amendment's Equal Protection Clause.[222] Smokers assert that the government is discriminating against them by prohibiting the very conduct that defines them as a class.[223] Laws creating classifications that are not "suspect" or "quasi-suspect" are subject only to rational review by the courts.[224] A group usually only receives

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217. Yednak, *supra* note 129 ("Smokers have made the decision about health consequences to themselves from smoking. This issue is a question about the health impact to others from secondhand smoke." (quoting Sen. Terry Link, sponsor of the SFIA)).

218. Winokur, *supra* note 85, at 669–70 (responding to the argument that nonsmokers can just stay home if they do not want to be around smoke).

219. *Id.* at 669 ("It seems almost nonsensical to tell nonsmokers to stay home instead of going out to eat . . . . While opponents of smoking bans complain that nonsmokers are imposing their social norms on smokers, these smokers themselves should not be allowed to force their social habits on nonsmokers . . . .")

220. *See id.* at 669–70 (suggesting that the law should respond to the demand for nonsmoking restaurants); Heather's Story, *supra* note 2 ("I'm not asking the smokers to give up smoking, I'm asking them to step outside when they smoke . . . .").

221. Winokur, *supra* note 85, at 669 ("Given that ETS is harmful to health, it seems inherently unfair to tell employees of bars and restaurants to choose either their health or another profession—it should not be a Hobson's choice."). Merriam-Webster Dictionary defines "Hobson's choice" as "an apparently free choice when there is no real alternative; the necessity of accepting one of two or more equally objectionable alternatives." Merriam-Webster Online, http://merriam-webster.com/dictionary/hobson (last visited March 30, 2008).

222. Levin, *supra* note 202, at 194 (discussing how such an argument under the Equal Protection Clause would likely fail and that the Supreme Court has rejected similar arguments); Peerson, *supra* note 183, at 117; Winokur, *supra* note 85, at 684.

223. Peerson, *supra* note 183, at 117.

224. Winokur, *supra* note 85, at 684.

> Equal protection claims are subjected to three different levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny is used when a law either creates a classification based on a "suspect class," such as race or national origin, or "implicate[s] a recognized fundamental right." An intermediate level of scrutiny is

"suspect" or "quasi-suspect" status when its members have been "targeted for an immutable characteristic, [have] historically been discriminated against, and [are] unable to protect [themselves] in the political process."[225] Because smokers do not meet any of these characteristics, smoking bans would be subject to rational review for equal protection claims, under which a court will uphold a law as constitutional if there is a rational relationship to a legitimate state interest.[226] Smoking bans would likely meet this requirement because protecting the public health is a legitimate state interest.[227]

d. The "Right" to Smoke

The principal debate surrounding smoking bans is over which is the greater "right": a smoker's right to smoke or a nonsmoker's right to be free from ETS exposure in public.[228] Smokers have traditionally been allowed to smoke in public, so they perceive smoking bans as taking away a right they have historically enjoyed.[229] Smokers believe that they should be able to smoke in public because it is a legal activity and that nonsmokers should respect their decision to smoke by simply avoiding places where smoking is allowed.[230] In response to this

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used when a law creates a classification that is based either on a "quasi-suspect" class, such as gender or illegitimacy, or "implicate[s] an important government interest." All other laws are subject to rational basis review, and will be upheld if there is any set of facts that could support a rational basis for the classification.

Id.

225. *Id.*

226. Levin, *supra* note 202, at 194 (noting that the Supreme Court has held that the Fourteenth Amendment was not intended to interfere with the State's police power in promoting public health or morals unless the real motive is not to protect the community); Peerson, *supra* note 183, at 117 ("The Supreme Court has rejected the notion that a classification is suspect when entry into the class . . . is the product of voluntary action." (internal quotation omitted)); Winokur, *supra* note 85, at 684 (arguing that smoking is a voluntary activity and "entirely unrelated to any condition of human being" (internal quotation omitted)).

227. Levin, *supra* note 202, at 195 (stating that it is easy to make the argument that prohibiting a known human carcinogen will improve public health); Winokur, *supra* note 85, at 685 ("Under this deferential standard of review, smoking bans will easily survive because protecting the public health, in this case by attempting to mitigate the harmful effects of ETS, is a rational and legitimate interest of the state.").

228. Raphael, *supra* note 209, at 404–06 (discussing the right to smoke but also the right to be free of ETS); Williamson, *supra* note 35, at 168.

229. *See* Peerson, *supra* note 183, at 123–25 (discussing the "endowment effect" in regards to smokers' and nonsmokers' rights). The endowment effect is an economic phenomenon showing that people place more value on something once they own it even though the market value has not changed, and once they own it, they do not want to part with it even though they did not value it prior to their ownership. *Id.* at 123–24.

230. Tyler, *supra* note 36, at 800; Philip Ewing, *Restaurateurs Fear Loss of Business From a Statewide Smoking Ban; Proposal in House Gets Cool Reception From Metro East and Other Downstate Lawmakers,* ST. LOUIS POST DISPATCH, Feb. 13, 2006, at A1 ("'You know what,

argument, ban proponents say that a smoker's assumed right to smoke ends where it begins infringing on nonsmokers' purported right to breathe clean air.[231] Courts have refused to recognize a fundamental constitutional right on either side, holding that decisions about protecting nonsmokers from secondhand smoke are best left to the legislature.[232] In *City of North Miami v. Kurtz*, the Florida Supreme Court refused to recognize a constitutional "right to smoke" under the right to privacy.[233] In addition, the District Court for the Eastern District of Louisiana in *Gasper v. Louisiana Stadium & Exposition District* declined to find a fundamental right to be free from ETS under the Constitution as well.[234]

2. The Policy Debate over Smoking Bans

The arguments surrounding smoking bans do not only focus on specific legal issues; many focus on non-legal issues like health and economics.[235] Though these types of arguments may not be as persuasive in court as the legal arguments described above, they are vital in understanding the competing interests at stake in the smoking ban battle.[236]

The major argument supporting smoking bans is that bans protect the health of nonsmokers, especially restaurant and bar employees.[237]

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that's America,' said Sen. William Haine, an Alton Democrat. 'No one is coercing anybody to go into a tavern. At a certain point, people should respect the decisions of others to smoke or drink, even though they find them annoying.'"); Yednak, *supra* note 129.

231. David B. Ezra, *"Get Your Ashes out of my Living Room!": Controlling Tobacco Smoke in Multi-Unit Residential Housing*, 54 RUTGERS L. REV. 135, 147 (2001) ("'The right of smokers to smoke ends where their behavior effects the health and well-being of others; furthermore, it is the smokers' responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke'" (quoting the 1986 Surgeon General's Report)); Garcia & Meitrodt, *supra* note 102 ("'Smokers have a right to smoke, but . . . they should not have a right to force others to breathe their smoke.'" (quoting Rep. Karen Yarbrough (D-Maywood))); *Lightning Rod: Four Takes on a Possible Statewide Smoking Ban; Smoking? Take it Outside*, CHI. SUN-TIMES, May 3, 2007, at 6 ("Actually, smokers do not have a 'right to smoke.' What they DO have a right to do is spend their money how they wish and behave how they desire on their own private property, so long as this doesn't infringe on anyone else's rights.").

232. Raphael, *supra* note 209, at 405–06 (discussing court cases denying fundamental constitutional right status to both the right to smoke and the right to be free from ETS).

233. City of N. Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995).

234. Gasper v. La. Stadium & Exposition Dist., 418 F. Supp. 716, 721 (E.D. La. 1976).

235. *See infra* Part III.B.2 (addressing non-legal arguments for and against smoking bans).

236. *See infra* Part III.B.2 (explaining the competing economic and health interests surrounding smoking bans).

237. Winokur, *supra* note 85, at 667 (discussing the argument that bans protect nonsmokers from harmful exposure to ETS). *See supra* Part II.A.2 (discussing the health effects of smoking on the general population and on restaurant and bar workers specifically).

Proponents argue that because there is no healthy level of exposure to ETS, a smoking ban is the only way to adequately protect nonsmokers in public places.[238] They contend that complete restrictions on smoking can have an immediate impact on public health and motivate more people to quit smoking.[239] Opponents of bans argue, however, that the risks associated with ETS have been exaggerated and actually are not great enough to justify a sweeping smoking ban.[240]

The economic impact of the smoking bans is of great concern to bar and restaurant owners.[241] They argue that people will go out less often and buy less if they cannot smoke in bars and restaurants.[242] Owners contend that bans are especially harmful to business because the laws target their regular customers, who account for most of their profit.[243] In response, smoking ban supporters point to evidence that smoking bans do not have a significant economic effect on bars and restaurants and that they may even increase revenues.[244] Proponents also call

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238. Siegel, *supra* note 13; Winokur, *supra* note 85, at 667; Deborah L. Shelton, *Strike up the Ban? How We Compare,* ST. LOUIS POST DISPATCH, June 11, 2006, at B1 ("Protecting the health of workers and patrons is the goal of these policies." (quoting Cathy Calloway of the American Cancer Society)).

239. Shelton, *supra* note 238 ("Studies published in the *British Medical Journal* and other medical publications have reported declines in lung cancer deaths, asthma attacks, and hospital admissions for heart attacks after smoking bans were implemented . . . . Some studies have reported a 30 percent drop in smoking after a workplace goes smoke-free.").

240. Thomas A. Lambert, *The Case Against Smoking Bans*, 13 MO. ENVTL. L. & POL'Y REV. 94, 109–11 (2005).

> The latest science on ETS suggests that the risks it poses cannot justify this degree of liberty intrusion. The findings of [the 1993 EPA study showing that ETS causes 3,000 lung cancer deaths a year] . . . have been severely undermined since its publication . . . . [T]he EPA's findings that ETS poses a serious cancer risk, a finding that has been extremely influential in motivating state and local smoking bans throughout the United States, is simply incredible.
>
> So how great are the health risks associated with inhalation of ETS? According to the latest and most complete scientific studies on the matter, not very.

Id. at 109–10. Lambert points to studies that found nonsmokers living with smokers had no heightened risk of lung cancer and in fact had a lower risk of cancer. *Id.* at 110–11. He says the potential harms at issue to nonsmokers are simply "a greater number of watery eyes and runny noses, and aggravation of complications among asthmatics who voluntarily patronize establishments where smoking is permitted." *Id.* at 111.

241. Winokur, *supra* note 85, at 668; *see* Mendell & Kimberly, *supra* note 208 (noting business owners' fears that business will suffer).

242. Winokur, *supra* note 85, at 668.

243. Mendell & Kimberly, *supra* note 208. "'This will change my attitude toward dining out,' [one smoker] said. 'I'd rather stay home and eat take-out.'" *Id.* "'It is not good for the industry because it targets the regulars who make up the bulk of our profit margin,' [restaurateur] Bergeron said. 'Smokers tend to go out three to four times more often than non-smokers.'" *Id.*

244. Smoke-Free Policies Do Not Hurt the Hospitality Industry, Center for Disease Control and Prevention, http://www.cdc.gov/tobacco/data_statistics/Factsheets/SmokefreePolicies.htm

attention to the fact that 80% of the population does not smoke, and they argue that smoking bans may draw a new base of nonsmoking customers that previously did not want to be in a smoking environment.[245]

The provisions of the SFIA outline the protections that Illinois citizens will enjoy under the new smoking regulation.[246] Further, the general debate surrounding smoking bans provides insight into possible weaknesses and strengths of the SFIA and how the SFIA balances the competing interests at stake.[247]

IV. ANALYSIS

The Smoke Free Illinois Act is the most comprehensive smoking regulation passed in Illinois history and is only the nineteenth broad state smoking ban enacted in the United States.[248] It is comparable to comprehensive bans in other states and is even more restrictive than other bans in many respects, including the breadth of establishments it covers and the extent of its enforcement provisions.[249] This Part first outlines the comprehensive smoking regulations in effect in three other

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(last visited March 30, 2008) (providing findings from multiple studies on the economic effects of smoking bans on bars and restaurants).

> A comprehensive review reported that peer-reviewed studies examining objective indicators such as taxable sales revenue and employment levels have consistently found that smoking restrictions do not have a negative economic impact on restaurants and bars.
>
> An in-depth analysis of tax revenue data in California from 1990 to 2002 found that the 1995 state smoke-free restaurant law was associated with an increase in restaurant revenues. The analysis also found that the 1998 smoke-free bar law was associated with an increase in bar revenues.

Id.

245. McDermott, *supra* note 97 (discussing responses to opponents' argument that the Illinois ban will hurt local economies by driving smoking customers away).

> [P]roponents of the smoking ban point to another common-sense factor: All those people waiting in line for a table in the nonsmoking section of a restaurant, while the smoking section sits mostly empty. "Eighty percent of the population does not smoke, and those nonsmokers are just as willing to cross the river" to seek out a nonsmoking restaurant or casino, argued Kathy Drea of the American Lung Association's Illinois office.

Id.

246. *See supra* Part III.A (outlining the provisions of the SFIA).

247. *See supra* Part III.B (addressing the various legal and non-legal arguments both sides of the smoking ban debate advance in support of their positions).

248. *See supra* Part II.B.3 (discussing previous Illinois state and local smoking regulations); *supra* Part III.A (outlining the provisions of the Smoke Free Illinois Act).

249. *See infra* Part IV.B (outlining the ways in which the provisions of the SFIA are equivalent to or more restrictive than laws in California, New York, and Massachusetts).

states.[250] Next, this Part compares the laws of California, New York, and Massachusetts to Illinois and highlights the provisions of the SFIA that are more restrictive than laws in these other states to show how the SFIA provides greater protections for nonsmokers.[251] It then addresses problem areas in the SFIA that may leave nonsmokers vulnerable to ETS exposure and that may upset the balance between public safety and smokers' rights.[252] Finally, this Part discusses the likely general effects of the SFIA, including economic and health effects.[253]

A. Smoking Bans in Other States

Though many states have passed smoking regulations that fall under the category of "broad bans," the actual provisions of these regulations vary from state to state.[254] Although all broad bans seek to curb secondhand smoke exposure, most provisions fail to fully accomplish this goal.[255] For example, California's law includes a long list of exemptions and provides minimal enforcement tools.[256] New York allows waivers for some otherwise covered establishments, and Massachusetts has a very broad definition of "private residence," meaning that fewer establishments are covered in the first place.[257]

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250. California, New York, and Massachusetts were chosen for analysis mainly because they are states with large cities comparable to Chicago and may provide the best insight into the probable effects of a smoking ban in Illinois. *See infra* Part IV.D (discussing the probable effects of the SFIA, based largely on effects observed in California and New York). The large cities comparable to Chicago in these three states are: Los Angeles, New York City, and Boston. Chicago has a population of 2.8 million, Los Angeles—3.8 million, New York City—8.2 million, Boston—590,000. Population Finder, U.S. Census Bureau, http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on (search by city) (last visited March 30, 2008). Also, California provides the most information on the effects of smoking bans because it passed a ban on smoking in bars and restaurants ten years ago; because New York contains the largest city in the United States, it provides valuable information on how smoking bans work in major metropolitan cities. *See infra* Part IV.A (discussing the California and New York smoking bans); *infra* Part IV.D (describing the probable effects of the SFIA).

251. *See infra* Part IV.B (comparing the laws in California, New York, and Massachusetts to the SFIA and pointing out the strengths of the Illinois law).

252. *See infra* Part IV.C (identifying trouble areas in the SFIA).

253. *See infra* Part IV.D (describing the probable effects of the SFIA, based in large part on observed effects of other bans).

254. *See infra* Part IV.A (discussing the California, New York, and Massachusetts bans); *supra* Part III.A (discussing the Illinois ban).

255. *See infra* Part IV.A (describing the other states' laws); *infra* Part IV.B (comparing the other states' bans to the SFIA).

256. *See infra* Part IV.A.1 (outlining California's smoking ban provisions).

257. *See infra* Part IV.A.2 (discussing New York's ban); *infra* Part IV.A.3 (examining the Massachusetts ban).

1. California

California passed its smoking ban very early compared to other states. The ban passed in 1994, with restrictions on bars and restaurants taking effect in 1998.[258] The legislature's intent in passing the law was to prohibit smoking in all enclosed places of employment and to create a uniform statewide standard to restrict smoking in order to reduce employee exposure to ETS.[259] California passed the law under the Labor Code, reflecting the intent of the legislature to protect employees.[260]

The statute states that employers cannot "knowingly or intentionally" allow employees to smoke inside; however, an employer will not be found to have acted "knowingly or intentionally" under the statute if he takes reasonable steps to prevent smoking by a non-employee.[261] The statute does not provide any regulations for outdoor areas, not even for areas around establishments where smoking is prohibited.[262] The statute does not define "place of employment" or provide examples of locations covered by the statute, but instead provides examples of what is *not* considered a place of employment.[263] Because the statute is only

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258. CAL. LAB. CODE § 6404.5 (West 2003 & Supp. 2008); Cabral, *supra* note 98, at 416.

259. CAL. LAB. CODE § 6404.5(a). The full intent paragraph reads:

> The Legislature finds and declares that regulation of smoking in the workplace is a matter of statewide interest and concern. It is the intent of the Legislature in enacting this section to prohibit the smoking of tobacco products in all (100 percent of) enclosed places of employment in this state, as covered by this section, thereby eliminating the need of local governments to enact workplace smoking restrictions within their respective jurisdictions. It is further the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment, as specified in this section, in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees, and also to eliminate the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.

Id.

260. *Id.* § 6404.5. Conversely, the Massachusetts, New York, and Illinois laws are all categorized as public health laws. MASS. GEN. LAWS ANN. ch. 270, § 22 (West 2007); N.Y. PUB. HEALTH LAW §1399-n-x (McKinney 2002 & Supp. 2008); Smoke Free Illinois Act, Ill. Pub. Act 95-17, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.).

261. CAL. LAB. CODE § 6404.5(b)-(c). An employer is not considered to have violated the section if he has taken these reasonable steps: posting clear and prominent signs and requesting that a nonemployee who is smoking refrain from doing so. *Id.* § 6404.5(c).

262. *See id.* § 6404.5. The statute only prohibits smoking in enclosed spaces at a place of employment and makes no mention of any outdoor spaces. *Id.*

263. *Id.* § 6404.5(d) (listing places not covered by "place of employment"). The only definition provided in regards to "place of employment" is what constitutes an "enclosed space." *Id.* § 6404.5(b). "'Enclosed space' includes lobbies, lounges, waiting areas, elevators, stairwells,

specific with regard to exceptions to the term "place of employment," it allows for a broad interpretation of the term—only the places specifically mentioned as exempt are excluded.[264]

Despite the apparent inclusiveness of the term for covered places, the statute includes a long list of places exempt from coverage.[265] Twelve out of the fourteen exempt places are permanently exempt.[266] Gaming clubs and bars/taverns were exempt until January 1, 1998.[267] The exemptions under the California statute are more numerous than and differ substantially from those allowed by the SFIA.[268] The California act exempts 65% of hotel and motel guestrooms and allows designated smoking areas in the lobbies of these establishments.[269] Meeting and banquet rooms in hotels, restaurants, and public convention centers may also allow smoking except while food or beverage functions are taking place or when the room is used for exhibit purposes.[270] Private residences are also exempt in California, except for those homes used as family daycare, but the statute prohibits smoking in residences used as family daycares only during the hours of operation and in areas where children are present.[271] Warehouses, theatrical productions, and

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and restrooms that are a structural part of the building and not specifically defined in subdivision (d)." *Id.*

264. *See id.* § 6404.5(d) (listing the places that are not covered by the term "place of employment" and are thus exempt from the provisions of this act).

265. *Id.* (identifying the fourteen exemptions and defining some key terms).

266. *Id.*

267. *Id.* § 6404.5(d)(7)–(8). "For purposes of this paragraph, 'gaming club' means any gaming club, as defined in *Section 19802 of the Business and Professions Code,* or bingo facility, as defined in *Section 326.5 of the Penal Code,* that restricts access to minors under 18 years of age." *Id.* § 6404.5(d)(7).

> For purposes of this paragraph, "bar" or "tavern" means a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental. "Bar or tavern" includes those facilities located within a hotel, motel, or other similar transient occupancy establishment. However, when located within a building in conjunction with another use, including a restaurant, "bar" or "tavern" includes only those areas used primarily for the sale and service of alcoholic beverages.

Id. § 6404.5(d)(8).

268. *Compare* CAL. LAB. CODE § 6404.5(d) (allowing fourteen exemptions), *with* Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/35) (listing only four exemptions).

269. CAL. LAB. CODE § 6404.5(d)(1)–(2). Subsection 2 states that the smoking area in a lobby cannot exceed more than 25% of the floor area or 50% if the floor area is less than 2000 square feet. *Id.* § 6404.5(d)(2).

270. *Id.* § 6404.5(d)(3). "[F]ood or beverage functions" include setup, service, and cleanup activities. *Id.*

271. *Id.* § 6404.5(d)(11).

qualified medical research and treatment sites are also exempt.[272] Finally, employers may designate break rooms for smoking and employers with five or fewer employees can permit smoking on their premises, but both exemptions are subject to special qualifications.[273]

The smoking prohibitions contained within the California statute pertaining to enclosed places of employment supersede any local regulation, but local governments may regulate places that are not "places of employment" or places exempted from coverage.[274] Unlike Illinois' fines, which can reach $2500, any violation in California is punishable by a fine of up to $100 for a first infraction, $200 for a second violation within one year, and $500 for a third and each subsequent violation within one year.[275] Local law enforcement agencies, including health departments, are to enforce the provisions of the statute; they are not required to respond to any complaint, however, unless the employer has committed a third violation within the previous year.[276] The enforcement sections do not mention anything about injunctive actions by individuals or enforcing agencies, and the statute does not detail how enforcement officers are to discover violations.[277]

2. New York

In 2003, New York passed the Clean Indoor Air Act ("CIAA") banning smoking in indoor public places, including restaurants and

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272. *Id.* § 6404.5(d)(6), (9)–(10). The statute defines warehouses as a facility "with more than 100,000 square feet of total floorspace, and 20 or fewer full-time employees," but it does not include office spaces. *Id.* § 6404.5(d)(6). Smoking is allowed in theatrical productions only "if smoking is an integral part of the story" and at medical research and treatment centers only "if smoking is integral to the research and treatment." *Id.* § 6404.5(d)(9)–(10).

273. *Id.* § 6404.5(d)(13)–(14). Breakrooms must meet the following qualifications: (1) air from the smoking room cannot be recirculated to other parts of the building; (2) the employer must comply with any ventilation standard adopted by the Occupational Safety and Health Standards Board ("OSHSB") or the EPA; (3) the room must be in an area where employees (not including custodial workers) are not required to enter; and (4) there are sufficient nonsmoking breakrooms. *Id.* § 6404.5(d)(13)(A)–(D). Employers with five or fewer employees can allow smoking where four conditions are met: (1) the area is not accessible to minors; (2) all employees in the area consent to allow smoking, and no one is required by their job to be in the area; (3) air from the smoking area is not re-circulated to the rest of the building; and (4) the employer complies with OSHSB or EPA ventilation standards. *Id.* § 6404.5(d)(14)(A)–(D).

274. *Id.* § 6404.5(g), (i). Also, employers may prohibit smoking in any enclosed place of employment for any reason. *Id.* § 6404.5(h).

275. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 45(b), 2007 Ill. Legis. Serv. 1073, 1076 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/45(b)); CAL. LAB. CODE § 6404.5(j).

276. CAL. LAB. CODE § 6404.5(j)–(k). All violations refer to a violation of subdivision (b), which prohibits smoking in enclosed areas of places of employment. *Id.*

277. *Id.* Specifically, the act does not state if individuals may register complaints (though it implies it by saying enforcement officers are not required to respond to complaints until after an employer's third violation) or if enforcement officers are to conduct inspections, or both. *Id.*

bars.[278] Unlike the California statute, the CIAA contains a long itemized list of establishments covered by the ban.[279] The CIAA does not generally restrict smoking in areas such as "public places" or "workplaces;" instead, it lists eighteen specific indoor places as the only places covered by the ban.[280] Places in which smoking is prohibited include: bars, places of employment, food service establishments, public transportation and waiting areas, youth detention facilities, all educational and vocational institutions, bingo facilities, and any facility that provides childcare services.[281] Smoking is also prohibited in private homes operating as childcare service facilities, but only when children enrolled in the program are present.[282]

The CIAA provides seven exemptions, and only a few differ significantly from the Illinois exemptions.[283] The most noteworthy category of places to which the CIAA does not apply is membership associations.[284] Membership associations, however, may only allow smoking if members of the association perform "all of the duties with respect to the operation of such association" without receiving any compensation.[285] Some of the other exemptions included in the New York law are hotel and motel rooms, cigar bars, outdoor dining areas,

278. N.Y. PUB. HEALTH LAW § 1399–n–x (McKinney 2002 & Supp. 2008); Jim Rutenberg & Lily Koppel, *As Air Clears, Even Smokers are Converted,* N. Y. TIMES, Feb. 6, 2005, § 1, at A25.

279. N.Y. PUB. HEALTH LAW § 1399–o (McKinney 2002 & Supp. 2008). A total of eighteen places are listed as indoor areas where smoking is not allowed. *Id.*

280. *Id.* The eighteen places themselves, however, do include somewhat general descriptions such as "places of employment." *Id.*

281. *Id.* Other places where the CIAA prohibits smoking are: "enclosed indoor areas open to the public containing a swimming pool," group homes for children, public institutions for children, residential treatment facilities for children and youth, general hospitals and residential healthcare facilities (excluding separate enclosed rooms designated as smoking rooms for patients), "commercial establishments used for the purpose of carrying on or exercising any trade, profession, vocation, or charitable activity," indoor arenas, and zoos. *Id.*

282. *Id.* § 1399–o(8).

283. *Compare* N.Y. PUB. HEALTH LAW § 1399–q (McKinney 2002 & Supp. 2008) (two of the seven exemptions are private residences and retail tobacco stores), *with* Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1073, 1076 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/35) (two of the four exemptions are private residences and retail tobacco stores).

284. N.Y. PUB. HEALTH LAW § 1399–q(4). The CIAA defines "membership association" as "a not-for-profit entity which has been created or organized for a charitable, philanthropic, educational, political, social, or other similar purpose." *Id.* § 1399–n(4). For a description of the controversial nature of membership associations, see *infra* Part IV.C.1 (discussing why the SFIA should exempt membership associations).

285. N.Y. PUB. HEALTH LAW § 1399–q(4). "Duties with respect to the operation of [membership] association[s]" include, but are not limited to, "the preparation of food and beverages, the service of food and beverages, reception and secretarial work, and the security services." *Id.*

and enclosed rooms used for promoting and sampling tobacco products, though all of these exemptions, except for hotel and motel rooms, are subject to some degree of qualification.[286]

Like Illinois' SFIA, the CIAA permits local governments to regulate smoking, as long as the regulations comply with at least the minimum standards set forth in the CIAA.[287] The ban designates enforcement to county boards of health or to an officer designated by the county for such purpose.[288] The enforcement section allows two forms of enforcement by officers: a civil penalty after a hearing and injunctive relief.[289] It also states that any person may register a complaint with an enforcement officer.[290] Penalties for a violation vary depending on who imposes the penalty; if the commissioner imposes the penalty, it cannot exceed $2000, but if any other enforcement officer imposes the penalty, it cannot exceed $1000.[291]

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286. *Id.* § 1399-q. To be exempt, cigar bars must generate 10% or more of their annual gross income from the on-site sale of tobacco products and rental of humidors. *Id.* § 1399-q(5). The statute also sets forth renewal procedures for the exemption. *Id.* The qualifications for smoking in outdoor dining areas are that the smoking area "(a) constitutes no more than twenty-five percent of the outdoor seating capacity of such food service establishment, (b) is at least three feet away from the outdoor area of such food service establishment not designated for smoking, and (c) is clearly designated with written signage as a smoking area." *Id.* § 1399-q(6). The exemption regarding enclosed rooms used for promoting and sampling tobacco products includes a limitation on the number of days per year that a facility may permit smoking for this purpose (two days per calendar year) and provides procedures for allowing smoking, such as posting notices at the entrance of the facility and providing notice to enforcement officers. *Id.* § 1399-q(7). The CIAA provides no limitations for the hotel/motel room exemption. *Id.* § 1399-q(2).

287. *Id.* § 1399-r(3).

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

Id.

288. *Id.* § 1399-t(1). This subsection also sets forth the procedure for designating an officer. *Id.*

289. *Id.* § 1399-t(2). This subsection limits the penalties to those allowed by the CIAA only; no additional penalties may be imposed. *Id.*

290. *Id.* § 1399-t(3).

291. *Id.* § 1399-v.

> The commissioner may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in subdivision one of section twelve of this chapter. Any other enforcement officer may impose a civil penalty for a violation of this article in an amount not to exceed that set forth in paragraph f of subdivision one of section three hundred nine of this chapter.

Id. Subsection 12(1) says the penalty imposed by the commissioner may not exceed $2000. *Id.* § 1399-v(12)(1). Section 309(1)f governs the fines imposed by "any other enforcement officer," and reads:

The CIAA establishes two affirmative defenses to a violation of the ban: one for owners/operators of places covered by the ban and another for employers.[292] The affirmative defense available to owners/operators applies when they did not have control over the establishment at the time of the violation.[293] Employers can establish an affirmative defense if they show that they made a good faith effort to ensure that their employees complied with the CIAA.[294] In addition, the CIAA includes a waiver provision, which allows enforcement officers to grant a waiver from a specific provision of the CIAA.[295] To obtain a waiver, an applicant must establish that: "(a) compliance with a specific provision of this article would cause undue financial hardship; or (b) other factors exist which would render compliance unreasonable."[296]

3. Massachusetts

Massachusetts passed its smoking regulation in 2004, banning smoking in bars and restaurants.[297] Instead of using broad terms like the New York statute, the Massachusetts law individually lists over forty places where the ban applies.[298] The ban covers workplaces, bars, restaurants, theaters, arenas, schools, healthcare facilities, childcare

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> Every local board of health may . . . (f) prescribe and impose penalties for the violation of or failure to comply with any of its orders or regulations, or any of the regulations of the state sanitary code, not exceeding one thousand dollars for a single violation or failure, to be sued for and recovered by it in any court of competent jurisdiction . . . .

N.Y. PUB. HEALTH LAW § 309(1)(f) (McKinney 2002).

292. N.Y. PUB. HEALTH LAW § 1399–s (McKinney 2002 & Supp. 2008).

293. *Id.* § 1399–s(1). For the owner/operator *not* to have had control over the premises, it must have been under the control of a lessee, sublessee, or some other person. *Id.*

294. *Id.* § 1399–s(2).

295. *Id.* § 1399–u(1).

296. *Id.* § 1399–u(1)(a)–(b). Though the CIAA allows waivers, it does include a restriction to keep the granting of these waivers in compliance with the purpose of the ban: "Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to secondhand smoke and to ensure that the waiver is consistent with the general purpose of this article." *Id.* § 1399–u(2). A *New York Times* article noted that during the first two years that the ban was in effect, "only about 190 waivers [were] granted statewide among 78,000 restaurants, bars, and bowling alleys." *Two Smoke-Free Years,* N. Y. TIMES, Aug. 7, 2005, at LI13. That means only about .2% of bars, restaurants, and bowling alleys received a waiver.

297. Cabral, *supra* note 98, at 401; MASS. GEN. LAWS ANN. ch. 270, § 22 (West 2007).

298. MASS. GEN. LAWS ANN. ch. 270, § 22(b)(2).

centers, and public transportation conveyances.[299] It also prohibits smoking in public buildings and government vehicles.[300]

The statute lists nine exemptions, including private residences not used as childcare or healthcare facilities, retail tobacco stores, and guest rooms in hotels/motels.[301] It also provides exemptions for membership associations, performers in a theatrical production, medical and scientific research, and workplaces dealing in tobacco.[302] The statute also allows smoking in "smoking bars," which are bars engaged primarily in the sale of tobacco products for consumption on the premises and which only gain incidental revenue from the sale of food, alcohol, or other beverages.[303] Though it does not list nursing homes as

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299. *Id.* Many of the places listed in Subsection (b)(2) receive further definition in subsection (a). *Id.* § 22(a).

300. *Id.* § 22(b)3. This prohibition includes private offices in public buildings and in courthouses. *Id.* It does not, however, apply to a resident or patient of a state hospital or the Soldiers' Homes. *Id.*

301. *Id.* § 22(c). The statute defines "residence" as:

> [T]he part of a structure used as a dwelling including without limitation: a private home, townhouse, condominium, apartment, mobile home; vacation home, cabin or cottage; a residential unit in a governmental public housing facility; and the residential portions of a school, college or university dormitory or facility . . . . For the purposes of this definition, a hotel, motel, inn, lodge, bed and breakfast or other similar public accommodation, hospital, nursing home or assisted living facility shall not be considered a residence.

Id. § 22(a).

302. *Id.* § 22(c). The exemption for membership associations does not apply "during the time the space is open to the public," "occupied by a non-member who is not an invited guest of a member or an employee of the association," or "rented from the association for a fee." *Id.* § 22(c)(2)(i)(A)–(C). The statute allows smoking when admittance is limited to members, invited guests, and employees. *Id.* § 22(c)(2)(ii). The term "employees" does not include contract employees, temporary employees, or independent contractors. *Id.* The statute allows smoking for "medical or scientific research on tobacco products, if the research is conducted in an enclosed space not open to the public, in a laboratory facility at an accredited college or university, or in a professional testing laboratory as defined by regulation of the department of public health." *Id.* § 22(c)(7).

303. *Id.* § 22(a), (c)(5). The term "smoking bar" is defined as follows:

> [A]n establishment that occupies exclusively an enclosed indoor space and that primarily is engaged in the retail sale of tobacco products for consumption by customers on the premises; derives revenue from the sale of food, alcohol or other beverages that is incidental to the sale of the tobacco products; prohibits entry to a person under the age of 18 years of age during the time when the establishment is open for business; prohibits any food or beverage not sold directly by the business to be consumed on the premises; maintains a valid permit for the retail sale of tobacco products as required to be issued by the appropriate authority in the city or town where the establishment is located; and maintains a valid permit to operate a smoking bar issued by the department of revenue.

Id. § 22(a).

an exemption, the statute does outline an application process for the designation of part of a nursing home as a residence, thus permitting smoking in that designated area.[304]

The Massachusetts statute allows further limitation of smoking by any political subdivision of the commonwealth.[305] It assigns enforcement of the ban to "the local board of health, the department of public health, the local inspection department or the equivalent, a municipal government or its agent, and the alcoholic beverages control commission."[306] The statute allows anyone to register a complaint and gives the supreme judicial court and superior court power to issue orders to enforce the ban.[307] Any owner/operator who violates the statute is subject to a fine of $100 for a first violation, $200 for a second within two years, and $300 for a third or subsequent violation within two years of the second violation.[308] If an owner/operator violates the statute repeatedly, "demonstrating egregious noncompliance as defined by regulation of the department of public health, the local board of health may revoke or suspend the license to operate."[309] The fines collected for violations go toward the enforcement of the statute or to educational programs on the effects of tobacco.[310]

B. The SFIA Provides Greater Protections for Nonsmokers than do Bans in Other States

Though all the statutes prohibit smoking in bars and restaurants, the SFIA is more comprehensive than the smoking bans in other states.[311]

Smoking bars also must "demonstrate on a quarterly basis that revenue generated from the sale of tobacco products are [sic] equal to or greater than 51 per cent of the total combined revenue generated by the sale of tobacco products, food, and beverages." *Id.* § 22(h)(b).

304. *Id.* § 22(f). This application process also applies to acute care substance abuse treatment centers. *Id.* Some of the notable requirements for the application are: "[t]he residential area shall not contain an employee workspace, such as offices, restrooms or other areas used primarily by employees;" "[t]he entire facility may not be designated as a residence"; areas where smoking is allowed must be ventilated to prevent smoke from traveling to nonsmoking areas; "[t]he nursing home shall make reasonable accommodations for an employee, resident or visitor who does not wish to be exposed to tobacco smoke." *See id.* § 22(f)(1)–(10) (outlining the requirements).

305. *Id.* § 22(j). The subsection also states: "Nothing in this section shall preempt further limitation of smoking by the commonwealth or any department, agency or political subdivision of the commonwealth." *Id.*

306. *Id.* § 22(m)(1). The paragraph also states: "In addition, in the city of Boston, the commissioner of health and his authorized agents shall enforce this section." *Id.*

307. *Id.* § 22(m)(3)–(4).

308. *Id.* § 22(l). The subsection also states: "Each calendar day on which a violation occurs shall be considered a separate offense." *Id.*

309. *Id.*

310. *Id.* § 22(m)(5).

311. *See infra* Part IV.B (explaining how the SFIA is broader than other acts).

It provides greater protection from secondhand smoke for employees and nonsmokers in general.[312] The SFIA also covers more establishments and allows fewer exemptions than smoking regulations in other states.[313] The statute provides individuals and enforcement officers more effective means by which to enforce the provisions of the SFIA, and it also grants greater enforcement power to individual citizens than other acts.[314] Furthermore, though the enforcement measures are not perfect, they are equal to or better than measures provided by other states.[315]

1. The SFIA Covers More Establishments

The SFIA covers more establishments than do laws in California, New York, and Massachusetts.[316] Specifically, the Illinois statute only allows four exemptions, and they are all places that the nonsmoking public generally does not enter—private residences, retail tobacco stores, private rooms in nursing homes, and 25% of hotel/motel rooms.[317] In contrast, California allows fourteen exemptions,[318] New York allows seven,[319] and Massachusetts allows nine.[320]

Illinois is the only state of these four that prohibits smoking outdoors within a reasonable distance of the doors or windows of a covered establishment where smoke could enter the nonsmoking area.[321] It also places the greatest restriction on smoking rooms in hotels/motels.[322]

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312. *See infra* Part IV.B (discussing the greater protections provided by the SFIA).

313. *See infra* Part IV.B.1 (stating that the SFIA covers more places than other bans).

314. *See infra* Part IV.B.2 (describing the SFIA's greater individual enforcement measures).

315. *See infra* Part IV.B.2 (discussing how the enforcement provisions compare to other states').

316. *Compare supra* Part IV.A (describing the provisions of the laws in California, Massachusetts, and New York), *with* Part III.A (discussing the SFIA).

317. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1076 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/35).

318. CAL. LAB. CODE § 6404.5(d) (West 2003 & Supp. 2008). Only twelve out of the fourteen exemptions are still in effect today; the exemption for bars and gaming clubs has expired. *Id.*

319. N.Y. PUB. HEALTH LAW § 1399–q (McKinney 2002 & Supp. 2008). Two of the seven exemptions are retail tobacco stores and private residences. *Id.*

320. MASS. GEN. LAWS ANN. ch. 270, § 22(c) (West 2007).

321. Ill. Pub. Act 95–17, § 70, 2007 Ill. Legis. Serv. 1077–78.

> Smoking is prohibited within a minimum distance of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited under this Act so as to ensure that tobacco smoke does not enter the area through entrances, exits, open windows, or other means.

Id.

322. *Compare* Ill. Pub. Act 95–17, § 35(4), 2007 Ill. Legis. Serv. 1076–77 (providing that not more than 25% of guestrooms may be designated as smoking rooms), *with* CAL. LAB. CODE §

Illinois only allows 25% or less of the guestrooms in a hotel/motel to be designated as smoking rooms, whereas California allows 65% and Massachusetts and New York place no limit on the number of rooms in which smoking is permitted.[323] The SFIA does not allow an exemption for membership associations, but both Massachusetts and New York include membership associations as one of the few exceptions to the ban.[324]

The SFIA also does not provide a way for bars to circumvent the smoking ban.[325] The Massachusetts and New York bans provide means by which bars can become exempt from coverage: Massachusetts allows an exemption for "smoking bars,"[326] and New York allows bars to seek waivers from coverage.[327] Neither procedure is a particularly simple way for bars to seek exemption, but the Illinois ban prevents bars from seeking exemption completely.[328] Finally, while other states only ban smoking in private homes when used as a childcare or healthcare facility, the SFIA also prohibits smoking when a private home is used as any business open to the public.[329]

6404.5(d)1 (only 65% of rooms may be smoking) *and* N.Y. PUB. HEALTH LAW § 1399–q(2) (no restriction) *and* MASS. GEN. LAWS ANN. ch. 270, § 22(c)3 (no restriction).

323. Ill. Pub. Act 95–17, § 35(4), 2007 Ill. Legis. Serv. 1076–77; CAL. LAB. CODE § 6404.5(d)1; N.Y. PUB. HEALTH LAW § 1399–q(2); MASS. GEN. LAWS ANN. ch. 270, § 22(c)3.

324. Ill. Pub. Act 95–17, § 10, 2007 Ill. Legis. Serv. 1074–76 (including "private clubs" under the definition of "public places" covered by the act); MASS. GEN. LAWS ANN. ch. 270, § 22(c)2; N.Y. PUB. HEALTH LAW § 1399–q(4).

325. Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073. Nowhere in the act does it provide any qualifications bars can meet in order to be exempt from the ban. *Id.*

326. MASS. GEN. LAWS ANN. ch. 270, § 22(c)5. A smoking bar is a bar that generates 51% or more of its total revenue (tobacco products, food, and beverage sales combined) from tobacco products. *Id.* § 22(h)b.

327. N.Y. PUB. HEALTH LAW § 1399–u. To qualify for a waiver, a bar must demonstrate that one of two things is true: compliance would cause undue financial hardship or "other factors . . . render compliance unreasonable." *Id.*

328. Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1073 (omitting bars from the list of possible ban exemptions).

329. Ill. Pub. Act 95–17, § 35(1), 2007 Ill. Legis. Serv. 1076 (prohibiting smoking in private residences "when used as a child care, adult day care, or healthcare facility or any other home-based business open to the public"); MASS. GEN. LAWS ANN. ch. 270, § 22(c)1 (banning smoking in private residences when utilized as childcare or healthcare facilities); N.Y. PUB. HEALTH LAW § 1399–o(8) (restricting smoking in private residences only when day care services are provided and children enrolled in the day care are present); CAL. LAB. CODE § 6404.5(d)11 (prohibiting smoking in "private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present.").

2. The SFIA Provides Stronger Enforcement Measures

In addition to covering more establishments, the SFIA provides overall greater means of enforcement.[330] It provides more options for individual citizens to enforce the ban and provides greater punishment for violations.[331] The SFIA allows individuals to register complaints for a violation, states that the Department of Health must establish a phone number for citizen complaints, and allows individuals to institute an action to enjoin violations.[332] While some of the other states allow individuals to register complaints, none of them provides a private right of action for an injunction; the closest any state comes is allowing enforcement agencies to bring an action for an injunction.[333] The Illinois ban provides greater protection for individuals because it allows citizens to respond to violations of the ban.[334] If a violation affects an individual, he does not have to wait for enforcement officers to take action; he can bring an action to stop the offending party, thus providing establishments with greater accountability to patrons' health.[335]

The SFIA also ensures greater compliance with the law by instituting harsh penalties for violations.[336] The SFIA and the Massachusetts ban both distinguish penalties based on who commits the violation: an individual or an owner/operator.[337] Under the SFIA, an individual who violates the ban receives a fine of no less than $100 and no more than $250; under Massachusetts' law, an individual only receives a $100 penalty.[338] The fines for owners/operators under the SFIA are at least

330. Ill. Pub. Act 95-17, §§ 40-50, 2007 Ill. Legis. Serv. 1077.

331. *Id.* §§ 40-50.

332. *Id.* §§ 40(b), 50. "Any person may register a complaint with the Department, a State-certified local public health department, or a local law enforcement agency for a violation of this Act." *Id.* "[A]ny individual personally affected by repeated violations may institute, in a circuit court, an action to enjoin violations of this Act." *Id.* § 50.

333. CAL. LAB. CODE § 6404.5(j), (k) (West 2003 & Supp. 2008) (creating a very weak individual enforcement provision and including no injunction provision whatsoever); MASS. GEN. LAWS ANN. ch. 270, § 22(l), (m) (West 2007) (allowing individuals to register complaints and allowing courts to issue orders to enforce the section); N.Y. PUB. HEALTH LAW §§ 1399-t, 1399-v (McKinney 2002 & Supp. 2008) (stating that individuals may register complaints and that the commissioner can choose to bring an action for injunction).

334. *See* Ill. Pub. Act 95-17, §§ 40(b), 50, 2007 Ill. Legis. Serv. 1077 (allowing individuals to file complaints and institute injunctive actions in court).

335. *Id.* § 50. By allowing individuals to report violations and bring injunctive actions, establishments and smoking patrons are less likely to avoid punishment for violations because while enforcement officers might not always be around, nonsmoking patrons will always be around to observe any violations.

336. *Id.* §§ 45-50.

337. *Id.* § 45; MASS. GEN. LAWS ANN. ch. 270, § 22(l), (m).

338. Ill. Pub. Act 95-17, § 45, 2007 Ill. Legis. Serv. 1077; MASS. GEN. LAWS ANN. ch. 270, § 22(m)(2).

$250 for a first violation, $500 for a second within one year, and $2500 for each additional violation within one year of the first.[339] In Massachusetts, the fines for owners/operators are $100 for a first violation, $200 for a second within two years of the first, and $300 for a subsequent violation within two years of the second violation.[340] The fines for Illinois are markedly higher than those in Massachusetts, though Massachusetts allows a somewhat stricter penalty for repeat offenders.[341] Under the SFIA, enforcement against repeat offenders is by way of injunction, but under Massachusetts law, the local board of health can revoke or suspend the establishment's license to operate.[342]

California does not discriminate between individuals and owners/operators, instituting the same fines for all violators: a fine of $100 for a first violation, $200 for a second within a year, and $500 for each subsequent violation within a year.[343] New York, in contrast, distinguishes fines based on who imposes them—the commissioner may impose a penalty of no more than $2000 for a violation, and any other officer may impose a penalty of no more than $1000.[344] California's penalties are obviously lower than Illinois' penalties, and though New York has a high "cap" on fines, the cap is still lower than the minimum for third time violators under the SFIA.[345] In addition, unlike Illinois,

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339. Ill. Pub. Act 95–17, § 45, 2007 Ill. Legis. Serv. 1077. Owner/operator refers to "a person who owns, operates, or otherwise controls a public place or place of employment." *Id.*

340. MASS. GEN. LAWS ANN. ch. 270, § 22(l). Owner/operator refers to "an owner, manager or other person in control of a building, vehicle or vessel." *Id.*

341. Ill. Pub. Act 95–17, § 45, 2007 Ill. Legis. Serv. 1073; MASS. GEN. LAWS ANN. ch. 270, § 22(l) (the first time fine in Illinois is $150 higher, for a second violation—$300 higher, and for a third—$2,000 higher).

342. Ill. Pub. Act 95–17, § 45, 2007 Ill. Legis. Serv. 1077; MASS. GEN. LAWS ANN. ch. 270, § 22(l). The Massachusetts statute states:

> If an owner, manager or other person in control of a building, vehicle, or vessel violates this section repeatedly, demonstrating egregious noncompliance as defined by regulation of the department of public health, the local board of health may revoke or suspend the license to operate and shall send notice of the revocation or suspension to the department of public health.

MASS. GEN. LAWS ANN. ch. 270, § 22(l).

343. CAL. LAB. CODE § 6404.5(j) (West 2003 & Supp. 2008).

344. See *supra* note 291 for a more detailed discussion of the penalties provided by New York law.

345. CAL. LAB. CODE § 6404.5(j); N.Y. PUB. HEALTH LAW § 1399–v (McKinney 2002 & Supp. 2008); Ill. Pub. Act 95–17, § 45, 2007 Ill. Legis. Serv. 1077. Because New York's penalties merely set a single cap on fines for any number of violations, it is hard to tell exactly how the fines compare to Illinois's three-tiered system; however, it is somewhat unreasonable to believe a first-time violator would receive the maximum fine. *See* N.Y. PUB. HEALTH LAW § 1399–v (addressing penalties under the New York law but failing to provide any guidance as to how these fines might actually apply to first, second, or third violations).

neither California nor New York provides additional penalties for repeat violators.[346]

The SFIA's inclusion of strong enforcement measures for individuals and enforcement agencies sets it apart from bans in other states.[347] These strong enforcement measures should provide greater incentives for individuals and establishments in Illinois to comply with the SFIA, and compliance is essential to accomplishing the public health purpose of the SFIA.[348]

C. Weaknesses in the SFIA

Balancing competing interests is a difficult task for any legislation, especially where the subject matter is the controversial issue of secondhand smoke.[349] A smoking ban must protect nonsmokers but not go so far that it infringes on viable rights of smokers.[350] Though the SFIA provides strong protections for nonsmokers, it still has flaws.[351] Some of the SFIA's provisions may go too far in regulating smoking, while others do not go far enough.[352]

1. The Prohibition Against Smoking in Private Clubs is Unreasonable

Of all the provisions in the SFIA, one stands out as particularly troublesome: the provision prohibiting smoking in private clubs.[353] This provision is problematic because it raises the question of whether the SFIA is encroaching on smokers' rights to decisional privacy.[354] Private clubs differ from any other "public place" the ban covers

346. CAL. LAB. CODE § 6404.5(j); N.Y. PUB. HEALTH LAW § 1399-v; Smoke Free Illinois Act, Ill. Pub. Act 95-17, § 45, 2007 Ill. Legis. Serv. 1077 (West).

347. *See* Ill. Pub. Act 95-17, §§ 40-50, 2007 Ill. Legis. Serv. 1077 (providing strong enforcement mechanisms for individuals and government agencies).

348. *See* Ill. Pub. Act 95-17, § 5, 2007 Ill. Legis. Serv. 1073-74 (articulating the purpose of the SFIA as protecting citizens from secondhand smoke in public places completely).

349. *See* Williamson, *supra* note 35, at 163 (explaining the conflicting interests at stake and why smoking bans have received mixed reactions).

350. *See id.* at 168 (stating that a major issue regarding smoking bans is who has the greater interest: smokers or nonsmokers).

351. *Compare supra* Part IV.B (discussing the strengths of the SFIA), *with infra* Part IV.C (detailing the weaknesses of the SFIA).

352. *See infra* Part IV.C (identifying provisions in the SFIA that may go too far or fall short).

353. *See* Ill. Pub. Act 95-17, § 10, 2007 Ill. Legis. Serv. 1074-75 (including "private clubs" under the definition of "public places" covered by the act); N.Y. PUB. HEALTH LAW § 1399-q(4) (listing membership associations as an exemption); MASS. GEN. LAWS ANN. ch. 270, § 22(c)2 (including membership associations as an exemption).

354. *See* Tyler, *supra* note 36, at 787-802 (discussing decisional privacy rights as they apply to smoking bans).

because they are not open to the public.[355] These clubs are members-only establishments.[356] In this way, a private club is very much like a private residence: it is a place where individuals who choose to associate with one another can assemble privately, usually for social purposes.[357] The SFIA even states that a "private club" is an association that occupies a building used exclusively for club purposes.[358] If a club uses its building exclusively for club purposes, it is arguably more difficult to assert that smoking on the premises is a danger to the public.[359]

2. The SFIA Should Provide Greater Protection in Two Areas

There are a few areas in the SFIA where further protections or clarifications might prove beneficial.[360] First, the law does not protect children who live in households with smokers.[361] Secondhand smoke has particularly harmful effects on children,[362] who are among the most vulnerable to ETS because they have no choice as to their exposure.[363] However, given the constitutional arguments described above, regulating smoking in the home is very difficult, especially on an

355. *See* Ill. Pub. Act 95–17, § 10, 2007 Ill. Legis. Serv. 1074–75 (describing that a private club is an association that uses its building "exclusively for club purposes at all times"); *see also* Curtis Tuckey, Commentary, *Smoking in private,* CHI. TRIB., Aug. 1, 2007, at C18 (expressing his belief that the SFIA goes too far in prohibiting smoking in private clubs). "But, unfortunately for [my cigar club], the current wording of the Smoke-Free Illinois Act will forbid us from smoking in private places not accessible to the general public, with only smokers present, and reserved for this purpose." *Id.*

356. *See* Ill. Pub. Act 95–17, § 10, 2007 Ill. Legis. Serv. 1074–75 ("[P]rivate club means an organization that is managed by a board of directors, executive committee, or similar body *chosen by the members* at an annual meeting, [and] has established bylaws, a constitution, or both to govern its activities . . . ." (emphasis added) (internal quotation omitted)).

357. *See Id.* § 10 (stating that a private club is an association that "is operated solely for a recreational, fraternal, social, patriotic, political, benevolent, or athletic purpose, but not for pecuniary gain").

358. *Id.*

359. *See* Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073 (banning smoking in workplaces and public places under the Public Health chapter of Illinois law).

360. *See supra* Part IV.B (describing how Illinois law is very comprehensive in its protection).

361. *See* Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073 (providing protection for children in daycare but allowing smoking in private residences).

362. *See supra* Part II.A.2.a (discussing the harmful effects of tobacco smoke on children).

363. Schwartz, *supra* note 54, at 167.

> To date, however, the public pays very little attention to the ways in which little children are exposed to smoke. Children suffer exactly the same physical irritations from tobacco smoke as adults, but unlike adults, children usually have no choice but to live with these smoke induced irritations. In other words, children are defenseless when it comes to protecting themselves from the harms of tobacco smoke pollution.

Id.

across-the-board basis.[364] This change, though seemingly drastic, may be a very real possibility as public sentiment toward invasive smoking regulations shifts in favor of those regulations in the future.[365]

The second weakness in the SFIA is that it does not provide specific rules for implementing the exemptions; it simply requires that "smoke shall not infiltrate" nonsmoking areas.[366] It provides no guidelines for accomplishing this imperative, leaving application up to the establishments, which leads to inconsistent results.[367] There is no method of eliminating smoke in the air completely, but guidelines of some kind with respect to air quality would help assure that the exemptions do not swallow the rule.[368]

D. Probable Effects of the SFIA

The effects on Illinois businesses and the public health are major issues in the debate surrounding the new smoking ban.[369] The likely effects on public health in Illinois are somewhat self-evident because of the harmful effects of secondhand smoke on individuals' health.[370] After New York passed its ban, average levels of respirable suspended particles, one measure of secondhand smoke exposure, declined by 84% in twenty hospitality venues; therefore, one can expect the indoor air quality in Illinois to improve dramatically after the ban.[371] According to studies published in the *British Medical Journal*, Illinois will also experience a decline in lung cancer deaths, asthma attacks, and heart attacks after the smoking ban goes into effect.[372] A perhaps less intuitive impact is that smoking bans actually reduce the amount of

364. *See id.* at 166–71 (detailing the difficulties of regulating the ETS exposure of children in their own home).

365. *See infra* Part V (discussing the need for smoking regulation in the home and how this may be achieved in the future).

366. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 35(3), (4), 2007 Ill. Legis. Serv. 1076–77 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/35(3), (4)). *But see* CAL. LAB. CODE § 6404.5(d)13(B) (West 2003 & Supp. 2008) (requiring employers to comply with ventilation standards of the EPA).

367. Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1076–77.

368. *See* Ill. Pub. Act 95–17, § 5, 2007 Ill. Legis. Serv. 1073–74 (stating that no technology exists that can remove chemicals that cause cancer from the air).

369. *See* McDermott & Potter, *supra* note 142 (noting that businesses fear the economic impact of the ban but that proponents look forward to the health benefits).

370. *See supra* Part II.A (discussing the health effects of cigarette smoke).

371. Smoke-Free Policies Improve Air Quality and Reduce Secondhand Smoke Exposure, Center for Disease Control, http://www.cdc.gov/tobacco/data_statistics/Factsheets/PoliciesImprove.htm (last visited March 30, 2008).

372. Shelton, *supra* note 238.

cigarettes people smoke and cause an increase in smoking cessation.[373] This means that the ban will improve the health of both nonsmokers and smokers.[374]

The economic effect of the ban is difficult to predict, but most studies show that smoking bans do not have a negative economic impact on the hospitality industry.[375] Bar revenues may drop at first, but should recover after people have time to adjust to the ban.[376] Studies in California and New York show that revenues actually increased after the implementation of bans due to more nonsmokers frequenting previously smoking establishments, and there is no reason to think the same will not occur in Illinois.[377] Whatever the exact economic impact in Illinois, it will not be the catastrophic effect that many bar and restaurant owners anticipate.[378]

Though the enactment of the ban should not hit hospitality business owners very hard, the state could lose as much as $60 million a year in

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373. Smoke-Free Policies Reduce Smoking, Center for Disease Control, http://www.cdc.gov/tobacco/data_statistics/Factsheets/reduce_smoking.htm (last visited March 30, 2008). "A 2002 review of 26 studies concluded that a complete smoking ban in the workplace reduces smoking prevalence among employees by 3.8% and daily cigarette consumption by 3.1 cigarettes among employees who continue to smoke." *Id.* "A Massachusetts study found that, compared to youth who live in towns with weak restaurant smoking restrictions, youth living in towns with laws making restaurants smoke-free were less than half as likely to progress to established smoking." *Id.*

374. *See id.* (showing that smokers smoke less under smoking bans).

375. Smoke-Free Policies Do Not Hurt the Hospitality Industry, *supra* note 244 ("Evidence from peer-reviewed studies that examine objective measures such as taxable sales revenue and employment levels shows that smoke-free policies and regulation do not have an adverse economic impact on the hospitality industry.").

376. Rutenberg & Koppel, *supra* note 278. One bar owner said that his business was down 25% right after the ban but that it stabilized at about 5%. *Id.*

377. Smoke-Free Policies Do Not Hurt the Hospitality Industry, *supra* note 244.

> An in-depth analysis of tax revenue data in California from 1990 to 2002 found that the 1995 state smoke-free restaurant law was associated with an increase in restaurant revenues. The analysis also found that the 1998 state smoke-free bar law was associated with an increase in bar revenues.
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> . . . .
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> Restaurant and bar revenues in New York City increased by 8.7% from April 2003 through January 2004 following implementation of the city's smoke-free law. Employment in the city's restaurants and bars increased by approximately 2,800 seasonally adjusted jobs from March 2003 to December 2003. The number of restaurants and bars in the city remained essentially unchanged between the third quarter of 2002 and the third quarter of 2003.

Id.

378. *Id.*; McDermott, *supra* note 97 ("[M]ost indications from the experience of other cigarette-banning states is that the economic sky won't fall in Illinois once the air clears."). *But see* Mendell & Kimberly, *supra* note 208 (reporting business owners' fears that they will lose a lot of money or even go out of business).

cigarette tax revenue.[379] Public and private medical insurance providers, however, should experience significant medical care savings because of improved health of nonsmokers, people who quit smoking due to the ban, as well as those who never began smoking in the first place because of the ban.[380]

In sum, the SFIA provides better protections for nonsmokers and stronger enforcement measures than similar bans in three other states.[381] Though it provides strong protections, the SFIA is both too broad and too narrow—it covers private clubs but does not cover children exposed to smoke in their homes.[382] The enactment of the SFIA will definitely provide health benefits to the general public, especially nonsmokers.[383] The economic effect on the hospitality business should not be too onerous, but the state and medical insurance providers should experience significant economic effects.[384]

V. PROPOSAL

Compared to other states' smoking bans, the SFIA is a very comprehensive and restrictive regulation.[385] It provides nonsmokers almost complete protection from ETS in public places and workplaces.[386] To improve this law, however, legislators should consider a few changes to increase protection for nonsmokers and to

379. McDermott, *supra* note 97

380. *See supra* Part II.A.2 (discussing the medical problems and hospitalizations associated with secondhand smoke); Thomas A. Hodgson, *Cigarette Smoking and Lifetime Medical Expenditures*, 70 MILBANK Q. 81, 110–14 (1992) (detailing the difference in medical expenditures between smokers and nonsmokers). Lifetime medical care expenditures of the average smoker exceed those of the average nonsmoker by 21% to 28%, accounting for differences not related to smoking. *Id.* at 112. The impact of a smoker quitting smoking is not completely clear because it depends on many variables, including how much they smoked and their age. *Id.* at 113. The key factor is probably the age at which the smoker quits, so the younger the people who quit smoking because of the ban, the more medical care expenditures would decrease. *Id.* at 113–14. If smoking bans prevent people from starting to smoke who would have started smoking had there not been a ban, medical care expenditures would decrease significantly, as well. *Id.* at 112. "Each year, decisions by more than one million young people to take up smoking commit the health care system to $8.2 billion in extra medical expenditures over their lifetimes." *Id.*

381. *See supra* Part IV.B (comparing Illinois' ban to bans in three other states).

382. *See supra* Part IV.C (pointing out weaknesses and omissions of the SFIA).

383. *See supra* Part II.A.2 (discussing the health consequences of secondhand smoke); Part IV.D (discussing the health benefits the smoking ban should produce).

384. *See supra* Part IV.D (discussing the probable economic effects on business owners, the state, and medical insurance providers).

385. *See supra* Part IV.B (arguing that the SFIA offers greater protections to nonsmokers).

386. *See id.* (describing how the SFIA protects nonsmokers).

maintain certain valid rights for smokers.[387] This Part proposes changes to the SFIA that could protect nonsmokers' health more effectively.[388] It also proposes a change that would add an exemption to avoid infringing on smokers' valid decisional privacy rights.[389] Finally, this Part suggests that a shift needs to occur in smokers' viewpoints for smoking regulation to be successful.[390]

A. Possible Changes to the SFIA

In general, the SFIA is very broad in application and provides strong protections for nonsmokers.[391] A few areas exist, however, where action by the legislature would improve the SFIA.[392] These areas are the specificity of exemptions, application to children, and private clubs.[393]

The SFIA's section on exemptions is brief, which could prove problematic when businesses attempt to implement the qualifications required for exemption.[394] Section 35 of the SFIA only says that smoke must not infiltrate nonsmoking areas, but it does not provide any guidelines for achieving this result.[395] The legislature needs to provide greater specificity in the exemption sections to ensure uniform application of the regulations and the greatest protection for nonsmokers.[396] For example, the SFIA should include specific air quality or ventilation standards that establishments must meet in order to qualify for exemption.[397]

Because the exemptions section is brief but very important, the legislature should also explain the exemptions more fully, especially the

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387. *See infra* Part V.A (discussing possible changes to the SFIA, including changes to appease smokers and nonsmokers).

388. *See id.* (proposing a few additions to the SFIA).

389. *See id.* (proposing an exemption for private clubs).

390. *See infra* Part V.B (arguing that smokers' view of smoking in public needs to change in order for smoking legislation to move forward).

391. *See supra* Part IV.B (discussing the relative comprehensiveness of the SFIA).

392. *See supra* Part IV.C (identifying problem areas and omissions of the SFIA).

393. *See id.* (addressing the over-inclusiveness and under-inclusiveness of the SFIA).

394. Smoke Free Illinois Act, Ill. Pub. Act 95–17, § 35, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/35); *see supra* Part IV.C.2 (discussing the problem of vagueness in the exemptions).

395. Ill. Pub. Act 95–17, § 35(3), (4), 2007 Ill. Legis. Serv. 1073.

396. *See* Center for Disease Control, Ventilation Does Not Effectively Protect Nonsmokers from Secondhand Smoke, http://www.cdc.gov/tobacco/data_statistics/Factsheets/Ventilation.htm (last visited March 30, 2008) (showing that "even low levels of exposure can harm nonsmokers' health").

397. *See, e.g.*, CAL. LAB. CODE § 6404.5(d)(13)(B) (West 2003) (requiring compliance with EPA ventilation standards).

exemption for private residences.[398] That exemption prohibits smoking if a private residence is used as a child, adult, or healthcare facility, but does not state when and in what areas smoking is not allowed.[399] The legislature should ignore the lead of other states in this area and prohibit smoking at all times in residences used as care facilities, not only during hours of operation.[400] This is especially important for childcare facilities because any amount of ETS exposure is harmful to children.[401] The effects of even one cigarette can linger in a room for up to three hours after that cigarette has been extinguished.[402]

In addition to refining the regulation of childcare facilities, at some point in the future, the SFIA should address the problem of children's exposure to secondhand smoke in their homes.[403] This proposal is likely to be found impractical and unpopular in the near future. However, as public knowledge of the effects of ETS grows, the idea of restricting smoking around children in the home may become more acceptable.[404] The suggestion that smoking is a form of child abuse is already becoming more widely accepted by child abuse experts and those in the family law field.[405] Many states currently consider the parents' smoking status when deciding custody and visitation arrangements.[406] Some states have even passed laws prohibiting a

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398. Ill. Pub. Act 95–17, § 35(1), 2007 Ill. Legis. Serv. 1073; *see, e.g.*, MASS. GEN. LAWS ANN. ch. 270, § 22(f) (West 2007) (listing ten detailed requirements for designation of part of a nursing home as a residence).

399. Ill. Pub. Act 95–17, § 35(1), 2007 Ill. Legis. Serv. 1073.

400. *See* MASS. GEN. LAWS ANN. ch. 270, § 22(c)1 (prohibiting smoking only during the time when the residence is utilized as a care facility); N.Y. PUB. HEALTH LAW § 1399–o(8) (McKinney 2002 & Supp. 2008) (allowing smoking in private residences that operate as daycare facilities when children enrolled in the daycare are not present).

401. *See supra* Part II.A.2.a (discussing the particular harsh effects of ETS on children).

402. Judge William F. Chinnock, *No Smoking Around Children: The Family Courts' Mandatory Duty to Restrain Parents and Other Persons From Smoking Around Children*, 45 ARIZ. L. REV. 801, 810 (2003).

403. *See generally* Schwartz, *supra* note 54 (addressing the issue of ETS in the home and its effect on children).

404. *See id.* at 167–68 (arguing that society's realization of ETS dangers has brought a change in public opinion and that if people see the validity of protecting prison inmates from ETS, they should eventually see the need to protect children).

405. *See generally* Chinnock, *supra* note 402; Emily Bazar, *Laws prohibit smoking around children*, USA TODAY, Nov. 28, 2006, *available at* http://www.usatoday.com/news/health/2006-11-27-smoking-bans_x.htm; Jean F. Martin, Commentary, *Tobacco Smoking as a Form of Child Abuse*, 12 EUR. J. PUB. HEALTH 236 (2002) (all claiming that parental smoking is a form of child abuse and should be addressed by the legal system).

406. *See generally* KATHLEEN H. DACHILLE & KRISTINE CALLAHAN, *Secondhand Smoke and the Family Courts: The Role of Smoke Exposure in Custody and Visitation Decisions*, in TOBACCO CONTROL: REPORTS ON INDUSTRY ACTIVITY FROM OUTSIDE UCSF (UNIVERSITY OF CALIFORNIA, SAN FRANCISCO) (2005), *available at* http://repositories.cdlib.org/tc/reports/TCLC7

parent from smoking in a vehicle while a child is present and preventing foster parents from smoking while foster children are present.[407]

Obviously, preventing parents from smoking in their own homes raises constitutional privacy concerns.[408] While it is true that parents have legal autonomy to make decisions concerning their childrearing, the state also has a countervailing interest in the health of the child.[409] Few question the validity of the power of the government to protect children from physical abuse or neglect in their own homes; in those cases, the interest in the welfare of the child takes priority over the privacy rights of the parents.[410] Smoking around children is just as physical as traditionally accepted notions of physical abuse: it is physically damaging to the child's body, though the effects may not be as noticeable to the casual observer.[411] Although critics may argue that it is ridiculous to view secondhand smoke as abusive to children, the fact is that secondhand smoke kills more children every year than all unintentional injuries combined.[412] Any amount of ETS exposure can

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(discussing the impact that the smoking status of a parent can have on child custody and visitation rights).

407. Bazar, *supra* note 405. Arkansas and Louisiana have laws prohibiting smoking in cars carrying young children. *Id.* At least six states and some counties have laws prohibiting foster parents from smoking while caring for foster children. *Id.*

408. Jonathan M. Samet et al., *Involuntary Smoking and Children's Health,* 4 FUTURE CHILD. 94, 106 (1994) ("Any legal attempts to compel nonsmoking in the home are and will be highly controversial."). *See supra* Part III.B.1.c (discussing decisional privacy right and autonomous decision making).

409. Bazar, *supra* note 405 ("There are times when it's appropriate to regulate what people can do in their home . . . The state is responsible for that child." (quoting Kathleen Dachille, director of the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy at the University of Maryland School of Law)).

410. *See* Press Release, Cornell University, Cornell child abuse expert says it's time to recognize smoking as child abuse (Sept. 26, 1997), *available at* http://www.news.cornell.edu/releases/Sept97/smoking.abuse.ssl.html [hereinafter Cornell University] (explaining the conditions an act must meet to be considered child abuse).

> Before any parental act qualifies as child abuse or neglect and thus falls within the jurisdiction of the State, it must meet three conditions. First, there must be a basis in scientific knowledge or professional expertise that a particular practice is harmful or dangerous to children. Second, there must be a public debate stimulated by child advocates to use the new knowledge as a basis for challenging what has been regarded as normal and acceptable child rearing. Third, community values must adapt by accepting a new standard of care for children.

Id.

411. Martin, *supra* note 405, at 236 ("Such abuse, which may take place in a variety of situations, may not have the same dramatic features than [sic] broken limbs, hematomas, and brain concussions have, but it is ill-treatment nevertheless.").

412. Cornell University, *supra* note 410. According to researchers in the *Archives of Pediatrics and Adolescent Medicine*, the deaths caused by secondhand smoke include almost 3000 annually from low birth weight attributable to smoking, 2000 due to Sudden Infant Death

harm children, so eliminating exposure completely is the only way to protect them completely.[413] It seems incongruous that the law protects adults in restaurants and bars but does not protect defenseless children in their own homes.[414]

Because Illinois only recently passed its first broad smoking ban, incremental steps will probably be necessary before the prohibition of smoking in the home is a realistic possibility.[415] As smoking becomes more of a factor in court decisions and as smoking regulations expand, however, the openness of the public to regulation of smoking in the home may increase.[416] Although the legislature may not be able to prohibit smoking in the home in the immediate future, it may attain partial regulation of smoking in the home where children are present.[417]

Finally, the SFIA should include an exemption for private clubs.[418] Other states provide this exemption and with good reason: prohibiting smoking in membership associations infringes on smokers' decisional privacy rights.[419] Smokers have the right to smoke in a private place to which the public has no access.[420] Restricting smoking in private clubs

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Syndrome (in which smoking is a large factor), and 1300 due to respiratory infection, asthma, and burns. *Id.*

413. *See supra* Part II.A.2 (discussing the harmful effects of secondhand smoke on children).

414. *See* Smoke Free Illinois Act, Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82) (covering restaurants and bars but providing no protection for children in their homes).

415. *See supra* Part II.B (explaining the evolution of smoking legislation in the United States and Illinois). If Illinois passes measures banning smoking in childcare facilities completely, bans smoking in foster homes, and then bans smoking in cars carrying children as other states have done, these could be steps toward public acceptance of regulating smoking in the home.

416. *See* Cornell University, *supra* note 410 (James Garbarino, an expert on child protection and the director of Cornell University's Family Life Development Center, explaining that child abuse is "a matter of a constantly negotiated settlement between science and professional expertise on the one hand and community values and culture on the other. There is always a time and place to change the definition, to raise the standard of care.").

417. *Cf.* CAL. LAB. CODE § 6404.5(14) (West 2003 & Supp. 2008) (partially regulating smoking in small workplaces). The regulation allows a "smoking area," prohibits minors from being in the smoking area, and requires direct ventilation of the area to the outside. *Id.* A regulation similar to California's regulation of workplaces with five or fewer employees may be an attainable objective in the near future since a household with a child is analogous to a small workplace because both employees and children are entitled to safe environments. Schwartz, *supra* note 54, at 168 (discussing the fact that children have the right to "safe and healthful home living conditions" under the Child Abuse Prevention and Treatment Act).

418. *See supra* Part IV.C.1 (discussing why the inclusion of private clubs under the term "public places" infringes on valid rights of smokers).

419. *See* MASS. GEN. LAWS ANN. ch. 270, § 22(c)2 (allowing smoking in membership associations, with qualifications); N.Y. PUB. HEALTH LAW § 1399–q(4) (exempting membership associations from the ban); *see also supra* Part III.B.1.c (discussing decisional privacy rights).

420. *See* Tyler, *supra* note 36, at 800 (discussing "decisional privacy concerns—the respect for and protection from interference with an individual's autonomous decisionmaking").

not open to the public does not further the public health purpose of the SFIA because it does not protect the public from ETS.[421] Therefore, allowing an exemption for private clubs would still support the purpose of the SFIA.[422]

B. Smokers' Social Paradigm Needs to Shift

It is no surprise that smokers are the most vocal opponents to smoking bans.[423] After all, they are the ones who have the most to "lose" when these bans take effect.[424] What is surprising, however, is the social paradigm that underpins their arguments against bans.[425] This social paradigm prevents smokers from seeing the legitimacy of ban proponents' viewpoints.[426] For smoking bans to be successful and future regulation possible, this paradigm must shift, enabling smokers to accept the regulation of smoking in places where they expose nonsmokers to ETS.[427]

The term "social paradigm" refers to smokers' set of shared beliefs about social interaction and smoking that is the foundation of their argument against smoking bans.[428] Smokers believe that they have a right to smoke in certain places where they have historically been able to smoke.[429] They also believe that smoking is not actually harmful to

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421. *See supra* Part IV.C.1 (explaining why the SFIA's coverage of private clubs is unreasonable).

422. *See* Smoke Free Illinois Act, Ill. Pub. Act 95–17, 2007 Ill. Legis. Serv. 1073 (West) (to be codified at 410 ILL. COMP. STAT. ANN. 82/1 et seq.) (passed under the Public Health chapter of Illinois laws). Just as public health concerns cannot justify regulation of smoking in private residences and hotel rooms, they also cannot justify regulation of private clubs. *Id.* § 35(1)–(2).

423. *See* JONI HERSCH, ET AL., VOTER PREFERENCES AND STATE REGULATION OF SMOKING 23 (2003) (reporting findings on "preferences for smoking bans, by voting and smoking status"). Eight percent of voting smokers and 7% of non-voting smokers favor a smoking ban in bars, compared with 29% of all respondents. *Id.* Twenty percent of voting smokers and non-voting smokers support a ban in restaurants, compared with 51% of all respondents. *Id.*

424. *See* Raphael, *supra* note 209, at 410 (observing that smoking bans "suppl[y] a wealth transfer from smokers to nonsmokers, making the latter group better off through legislation").

425. *See supra* Part III.B (discussing smokers' arguments against smoking bans).

426. *See infra* Part V.B (explaining smokers' "social paradigm" and how it limits their view of smoking bans).

427. *See infra* Part V.B (discussing why the paradigm must shift in order for future regulation to be possible).

428. *See infra* notes 429–431 and accompanying text (explaining the three main beliefs comprising smokers' social paradigm). Thomas Kuhn explains that people who operate within a shared paradigm are committed to the same rules and standards. THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 11 (1962). At one point, Kuhn compares a paradigm to an "accepted judicial decision in common law," explaining that it is not a model for replication but "an object for further articulation and specification." *Id.* at 23.

429. *See* Tyler, *supra* note 36, at 808–11 (discussing the power of civility norms in society). "To a large extent, smokers accept that they may not smoke indoors at their workplace or in many

nonsmokers, but is rather merely an annoyance.[430] Lastly, they believe that smoking regulations unfairly target smokers and seek to make smoking a socially unacceptable activity.[431]

These beliefs predispose smokers against smoking bans; they perceive the ban as a punishment for smokers instead of a public health measure.[432] This paradigm supports smokers' arguments that nonsmokers should go somewhere else to avoid exposure to ETS, that smokers are not bothering anyone, and that bans deprive them of a legal right to smoke in public.[433] For smoking regulations to work, smokers must understand and comply with the regulations.[434]

For smokers' social paradigm to shift, they must accept the current prevailing social paradigm regarding secondhand smoke.[435] The prevailing social paradigm is that secondhand smoke is harmful and that public health interests demand smoking regulations in public places.[436] Since the first Surgeon General's Report regarding smoking was released in 1964, this new paradigm has been taking hold of the American public.[437] Many smokers, however, remain entrenched in

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indoor public places . . . . Yet there still remains a strong presumption that smoking is permitted in all places other than those clearly marked as nonsmoking." *Id.* at 809; *see also* Yednak, *supra* note 129 ("You cannot legislate choice . . . . If somebody does not want to go into a place where there is smoking, they don't have to go." (internal quotation omitted)).

430. Lambert, *supra* note 240, at 110 (arguing that the real health risks associated with ETS are low); Ewing, *supra* note 230 ("At a certain point, people should respect the decisions of others to smoke or drink, even though they find them annoying." (internal quotation omitted)).

431. Winokur, *supra* note 85, at 669 ("Some commentators argue that smoking bans are simply an attempt by nonsmokers to impose social norms on smokers."). *See* Alexia Elejalde-Ruiz, *Chicagoans React to Smoking Ban,* CHI. TRIB., Redeye Edition, July 24, 2007, at 7 (reporting that one smoker said, "I know [smoking] is bad, but I don't need someone giving me a ticket on the street telling me it's bad").

432. *See supra* Parts II and III (discussing the history behind smoking bans and the arguments for smoking bans).

433. *See supra* Part III.B (describing these arguments in greater detail). *See generally* Lambert, *supra* note 240 (arguing against smoking bans and responding to pro-ban arguments).

434. *See* Damon K. Nagami, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns,* 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 159, 159–60 (2001) (noting that for a smoking ban to work properly, "officials must implement effective enforcement methods to ensure the compliance of bar patrons and bar owners").

435. *See* KUHN, *supra* note 428, at 92–110 (discussing the process of paradigm choice when competing paradigms emerge and methods employed to choose a paradigm).

436. *See supra* Part III (discussing the public health purpose of the Smoke Free Illinois Act and detailing arguments for smoking bans in public places).

437. *See supra* Part II (addressing citizens' knowledge of the health effects of secondhand smoke, the decline of smoking in America, and the evolution of smoking regulations).

their social paradigm and cannot reconcile their beliefs with smoking bans.[438]

This entrenchment is understandable because smokers have been operating under assumptions about the benign effects of smoking for years.[439] Entrenchment in any established paradigm makes it difficult, perhaps almost impossible, for adherents to accept a new paradigm.[440] Logical arguments cannot persuade a community to shift from one paradigm to another because the logic of one paradigm is not rooted in the same assumptions as the logic of the other; thus, an argument based on assumptions of the new paradigm cannot be compelling to a member of the old paradigm.[441] Because of this logical disconnect, it will be difficult to shift from their social paradigm to the new social paradigm regarding secondhand smoke.[442]

Like the shifts from the Earth-centric to the heliocentric view of the universe and the shift to Newtonian physics, this paradigm shift will be gradual and will not be complete for many years.[443] Scientist Max Planck described the gradual shift in his autobiography, asserting that "a new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it."[444] Because

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438. Howard Margolis, *Paradigms and Barriers*, 1990 PSA: PROC. BIENNIAL MEETING PHIL. SCI. ASS'N, Volume Two, 431, 434. "Entrenchment in particular habits of mind shared across an expert community is . . . exactly what defines operating within some paradigm, tacitly guiding key intuitions within the community, facilitating communication and many aspects of constructive work, but also constraining what can be seen as making sense." *Id.* Margolis explains paradigm shifts as a special sort of shift in habits of mind. *Id.* at 432. He explains habits of mind as templates or patterns that guide people's intuitions in an automatic, non-conscious way. *Id.* He likens habits of mind to physical habits, in that they are unnoticed by the possessor and very difficult to change because they are so engrained in a person's thought processes. *Id.* at 432–34.

439. *See supra* Part II.A (discussing the historical prevalence of smoking in America).

440. Margolis, *supra* note 438, at 432–34.

441. KUHN, *supra* note 428, at 94–95 (explaining the difficulty of debating paradigm choice because arguments in support of a paradigm are rooted in that paradigm's assumptions, leading to circularity that cannot provide compelling logical arguments to a supporter of the competing paradigm).

442. *Id.* at 150–51 ("[T]he transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience. Like the gestalt switch, it must occur all at once (though not necessarily in an instant) or not at all."). Kuhn explains that many of the widely accepted ideas of science took decades to receive acceptance among adherents to competing ideas. *Id.*

443. *See id.* at 150–51 (pointing out that many people are not persuaded to follow emerging paradigms in their lifetime). Kuhn notes that Copernicanism did not make many converts until over a century after Copernicus' death and that Newtonian physics was not widely accepted for more than half a century after Newton's major work appeared. *Id.*

444. *Id.* at 151 (quoting Max Planck's *Scientific Autobiography*).

time and familiarity are the only ways to facilitate a complete paradigm shift, enforcement agencies should strongly enforce the SFIA now to allow the shift to occur as soon as possible, thus permitting smoking regulations to advance.[445]

VI. CONCLUSION

Environmental tobacco smoke is one of the greatest health issues facing the United States today. Recognizing that there is no safe level of ETS exposure, Illinois implemented a comprehensive ban that prohibits smoking in almost all public places, including bars and restaurants. The SFIA is a very broad ban that fully protects almost all workers and nonsmokers in the state of Illinois, people just like Heather Crowe—which is something previous state smoking regulations failed to do. The SFIA provides better protection and greater enforcement measures than similar laws in three other states.

Though Illinois residents should hail the SFIA as a drastic step forward in eliminating secondhand smoke and improving the health of all citizens, it is not perfect. The law is both over-inclusive and under-inclusive in its coverage. To protect both nonsmokers' health interests and smokers' viable privacy interests more fully, the legislature needs to provide an exemption for private clubs and should work toward protecting children from secondhand smoke. Providing an exemption for private clubs would respect the decisional privacy rights of smokers and better promote the public health purpose of the SFIA. Additionally, although protecting children's interests will be incremental, it is imperative that children be protected from secondhand smoke because they suffer some of the greatest health consequences and have no control over their exposure. Until smokers accept the dangers of ETS and the public health benefits of smoking bans, the legislature cannot achieve complete protection for Illinois citizens. The SFIA, however, is a significant step toward realizing that goal.

445. *See id.* at 150–51 (explaining the time it can take for a paradigm shift to occur).