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Air pollution has been an especially important topic of discussion in recent times. However, the focus has primarily been on the large, industrial polluter. Relatively little attention has been given to the pollution caused by the individual. To be sure, examples of restrictions on individual pollution can be found. For instance, prohibitions on open burning have been enacted in Illinois which place restrictions on individuals as well as on industry. The automobile has also been recognized as a source of pollution. However, although the automobile involves pollution by individuals, the approach to solving this problem has consisted primarily of demands on automobile manufacturers rather than restrictions on individual use of the motor vehicle.

The problem addressed in this note is a highly individual form of pollution—tobacco smoke. Industry is only involved in producing this pollution to the extent of manufacturing the instrumentality, such as the pipe, cigar, cigarette, and variations on these forms. The realities of the tobacco smoking process make it difficult to envision practical requirements for pollution control devices which can be imposed on the tobacco industry as they have been imposed on the automobile industry.

Tobacco smoking has been discussed in the popular press at length with respect to its dangers to the health of the smoker. In 1964, the Surgeon General reaffirmed the position taken by the Public Health Service as to the ill effects of smoking on the individual smoker. Re-

1. ILL. REV. STAT. ch. 111 2/3, § 1009(c) (1973).
ciently, however, the attention has shifted from the smoker himself to the effects that his habit imposes on those in his immediate vicinity. The Surgeon General has also added his voice to those who assert that tobacco smoke is harmful to the nonsmoker.

Scientific analysis has revealed that cigarette smoke contains toxic substances, such as carbon monoxide, hydrogen cyanide, and nitrogen dioxide, as well as tar and nicotine. Cigarette smoke contains 250 parts per million (ppm) of nitrogen dioxide while concentrations as low as 5 ppm are considered dangerous. Long-term exposure to hydrogen cyanide above 10 ppm is considered dangerous, but cigarette smoke contains 1600 ppm of hydrogen cyanide. Concentrations as high as 100 ppm of carbon monoxide often occur in tunnels and garages. This is a small concentration compared to the 42,000 ppm of carbon monoxide found in cigarette smoke.

Naturally, these concentrations dissipate to lower levels upon being released into the air; otherwise the smoker would not survive. However, the scientific evidence now indicates that the levels of noxious gases are not reduced to a healthful level in many situations. Studies on carbon monoxide, the subject of more study in relation to smoking than the other toxic substances in tobacco smoke, demonstrate the dangers to the nonsmoker. Carbon monoxide is a poisonous gas formed by the incomplete burning of any fuel containing carbon. When inhaled in the lungs along with oxygen, carbon monoxide is absorbed by the hemoglobin in the blood to a greater extent than the oxygen, forming carboxyhemoglobin. This process results in a deprivation of oxygen to the body tissues and vital organs, causing them to function improperly. The Surgeon General has reported that the carboxyhemoglobin levels can be raised significantly for both smokers and nonsmokers in improperly ventilated smoke-filled rooms be-

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5. Banzhaf III, Please put your cigarette out; the smoke is killing me! TODAY'S HEALTH, April, 1972, at 38-41; Ban on Public Smoking? NEWSWEEK, Jan. 25, 1971, at 90-91.


8. The importance of obtaining and evaluating information on nitrogen dioxide in cigarette smoke-filled rooms was noted in the 1972 report of the Surgeon General because of results of a study in which bronchial and pulmonary parenchymal lesions were observed in rodents continuously exposed to low levels of nitrogen dioxide. 1972 SURGEON GENERAL'S REPORT, supra note 6, at 124.


10. 1972 SURGEON GENERAL'S REPORT, supra note 6, at 125. A study of the car-
cause the carbon monoxide level in such rooms can range from 20 to 80 ppm and above.\textsuperscript{11} Lower concentrations can also produce adverse effects, particularly if the individual is exposed to a smoke-filled room for longer periods.\textsuperscript{12}

To place these concentrations into perspective, consideration of certain accepted standards is useful. For a person working a forty-hour week, consisting of five eight-hour days, the level of carbon monoxide set as the time-weighted occupational Threshold Limit Value is 50 ppm,\textsuperscript{13} and a reduction in this level to 35 ppm is under consideration.\textsuperscript{14} The levels more recently set by the Environmental Protection Agency as the primary and secondary ambient air quality standards for carbon monoxide are even lower: 9 ppm, maximum eight-hours concentration, not to be exceeded more than once per year, and 35 ppm, maximum one-hour concentration, also not to be exceeded more than once per year.\textsuperscript{15}

The physiological effects of exposure to levels of carbon monoxide approximating 50 to 100 ppm are diverse, such as altered auditory discrimination,\textsuperscript{16} visual acuity,\textsuperscript{17} ability to distinguish relative brightness,\textsuperscript{18} and impaired time interval discrimination.\textsuperscript{19}

\begin{itemize}
  \item Boxohemoglobin level in two nonsmokers rose from 2 to 5 percent (that of smokers, from 5 to 10 percent) when seated in a cigarette smoke contaminated car where the level of carbon monoxide was at 90 ppm. Another study team observed that when seven nonsmokers were exposed for approximately 90 minutes to a "smoked" room containing 30 ppm of carbon monoxide, there was a rise in carboxyhemoglobin from a mean of 0.9% to 2.0% (from 3.3% to 7.5% for smokers). \textit{Id.}\textsuperscript{11}
  \item 12. The 1972 Surgeon General's Report noted several controlled experiments in this area. For instance, the smoking of ten cigarettes in an enclosed car produced carbon monoxide levels up to 90 ppm. Another study team, working with a ventilated chamber, found levels of carbon monoxide up to 20 ppm concentration after seven cigarettes were smoked in a one-hour period; however, significantly, the team recorded peaks of carbon monoxide concentrations up to 90 ppm at the seat next to the smoker. A third team reported 80 ppm of carbon monoxide in an enclosed room, 18 by 20 feet, with a 10-foot ceiling, where sixty-two cigarettes were smoked in two hours. \textit{Id.} at 123.
  \item 13. Exposure to eight or more hours of carbon monoxide concentrations 10 to 15 ppm will produce a level of carboxyhemoglobin which has been associated with adverse health effects, as manifested by impaired time-interval discrimination. Evidence also indicates that exposure to eight or more hours of carbon monoxide concentrations of 30 ppm can cause impaired performance on psychomotor tests and impairment in visual discrimination. \textit{Id.} at 126.
  \item 14. 29 C.F.R. § 1910.93, Table G-1 (1973).
  \item 16. 40 C.F.R. § 50.8 (1973).
  \item 17. \textit{Id.} at 126.
  \item 18. \textit{Id.} at 126.
  \item 19. \textit{Id.} at 126.
\end{itemize}
The above hazards can affect any normal individual. A variety of other annoying symptoms observed in the nonsmoker exposed to smoke-filled surroundings have also been noted. These symptoms include eye irritation, nasal symptoms, headache, cough, and sore throat. Work productivity can also be affected. A more serious danger is presented to those persons with certain health problems, such as heart disease and emphysema. Furthermore, individuals with a history of allergic reactions have been shown to experience more frequent adverse responses to tobacco smoke than other nonsmokers. Some individuals have specific allergies to cigarette smoke itself. The number of people suffering from allergy-related ailments alone form a significant group. In 1971, an estimated 13.5 million individuals suffered from hay fever without asthma; another 8.6 million suffered from asthma; and an additional 8.6 million displayed symptoms of other allergies.

Given the dangers presented by exposure to tobacco smoke, what can the nonsmoker do to protect himself? Appraising the situation realistically, staying within one's own walls is hardly practical. The average person must trade in stores to purchase the goods he needs, spend time at his place of employment, occasionally visit government offices to conduct business required of him as a citizen, and perhaps ride public transportation. The average nonsmoker also prefers not
to be constructively evicted by tobacco smoke from places of amusement, including theatres and restaurants.

To be sure, certain regulations concerning smoking on public transportation have been promulgated in recent years. An occasional fire regulation also provides incidental protection for the nonsmoker; provided, of course, that the regulation is observed. However, such occasional regulation of smoking hardly provides the comprehensive protection that medical research indicates may now be required. This note will examine possible legal bases for the assertion of nonsmokers' rights in the State of Illinois. Relevant federal law, where it overlaps the state law, will be discussed.

Tobacco smoke pollution can be characterized as a special kind of air pollution, caused by individuals rather than by industry, creating its dangers through the accumulated efforts of several polluters rather than through the discharges of one or a few local industrial polluters, and occurring within enclosures rather than in the general external atmosphere. The traditional legal approaches to air pollution will be examined for their applicability in the context of this somewhat unique type of pollution.

CONSTITUTIONAL BASIS

To many thoughtful persons a right to breathe clean air seems so fundamental that it would be expected to be constitutionally protected. However, no doubt owing to the fact that the problems presented by modern technology did not face our forefathers, the United States Constitution lacks explicit language on which to rest environmental rights.


28. The Municipal Code of Chicago prohibits smoking in public elevators and retail stores employing more than fifteen persons where merchandise is displayed for sale, thereby attracting crowds within small areas. The ordinance declares that smoking in such places is a menace to public health, safety, and property. However, the exclusion from the provisions of the ordinance of areas set apart for serving food or beverages, waiting or rest rooms, beauty parlors, executive offices, and other rooms or areas where merchandise is not exposed demonstrates that the chief interest protected is property rather than health. CHICAGO, ILL., CODE § 193-7.9 (1969).

29. Senator Gaylord Nelson, upon introducing an amendment to the United States Constitution which would recognize an inalienable right to a decent environment said, "If we have a right that is more important than any other right, it is the right to live in a clean and decent environment. . . ." 116 CONG. REC. 85 (1970).
The absence of explicit language in the Constitution has led to efforts to infer the right to a decent environment from the due process clause or the ninth amendment. There are few judicial decisions, however, recognizing a general environmental right under the Constitution. One judge did find that he had no difficulty in finding that the right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life. However, the court could not apply this constitutional right because the polluter was a private company. In the absence of state action, the court found that there could be no violation of the constitutional right, thus denying relief and pointing out another important obstacle in asserting such rights under the United States Constitution.

Commentators have also advanced the ninth amendment as a basis for the right to a decent environment. The theory is that the ninth amendment guarantees fundamental liberties not specifically enumerated in the Bill of Rights and that one of these is the right to a decent environment. Even those advancing the theory recognize that the lawyer faces some important problems in basing an environmental action on the ninth amendment. For instance, he must demonstrate that the ninth amendment does constitute a basis for asserting rights not enumerated in the Constitution, that the right to a decent environment is one of those protected but unenumerated rights, and that this right has been violated in the particular case before the court.

Although the ninth amendment has been used by the Supreme Court to protect rights not specifically stated in the Constitution, the ninth amendment has not proved to be a successful basis for environmental rights. For instance, in United States v. 247.37 Acres of Land a federal district court refused to apply the ninth amendment as a basis for environmental rights where a landowner attempted to assert a right to the preservation of property in its natural state against the government's power to acquire property for governmental pur-

31. Id. at 20795.
32. U.S. Const. amend. IX. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
34. Id. at 416.
poses. The court held that such a determination would have to be made by the Supreme Court before this lower court would recognize it.87

A typical comment was that made by the Fourth Circuit Court of Appeals in *Ely v. Velde*, 38 in which local citizens sought to prevent the state from building a new penal facility in an area of historic importance. The court stated: “While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction . . . .”39

The discouraging response of the courts to current constitutional doctrine as a basis for environmental rights has led to suggestions that a constitutional amendment be adopted which specifically guarantees the right to a decent environment.40 Significantly, many commentators point to article XI of the Illinois Constitution as an example of innovative, modern draftsmanship of constitutional protection of the environment.41

Section 1 of article XI of the Illinois Constitution provides: “The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.” Section 2 of article XI puts teeth into this declaration of policy by vesting each person with the right to a healthful environment: “Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”

The Illinois Constitution, then, provides an individual right to a healthful environment. The Illinois provision may be contrasted to those found in other state constitutions which speak more in terms of a public right. For instance, Rhode Island’s constitution says that the people “shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values . . . .”42 Pennsylvania’s constitution provides: “The people

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37. *Id.* at 20515.
42. R.I. CONST. art. I, § 17.
have a right to clean air, pure water, and to the preservation of the
natural, scenic, historic and esthetic values of the environment."43
The language of the Illinois provision is significant in the context of
nonsmokers' rights because it speaks directly to the right of each per-
son rather than the public at large and in terms of health rather than
in terms of the preservation of natural resources and esthetic values
of the environment. As a result, the application of the Illinois consti-
tutional language to nonsmokers' rights is easier and more direct than
the application of the Rhode Island and Pennsylvania provisions.

The Illinois provision goes even further than to provide the right
to a healthful environment. It also creates standing to sue to enforce
one's right to a healthful environment. This is an important provision
because it overrules the common law requirement that an Illinois
plaintiff must have suffered special damages, apart from those suffered
by the general public, before he has standing to protect his health.44
The provision also allows a person to sue either public or private par-
ties, thus eliminating the state action problem exemplified by Environ-
mental Defense Fund, Inc. v. Hoerner Waldorf Corp.45

The definitions contained in the Committee Report presented to the
Illinois Constitutional Convention further indicate the possible applica-
bility of the Illinois provision to the nonsmokers' rights problem. The
Committee Report stated that the word "healthful" was meant to de-
scribe "that quality of physical environment which a reasonable man
would select for himself were a free choice available..."46 By the
word "environment" was meant the "aggregate of all conditions af-
flecting the existence, growth and welfare of organisms."47

Analysis of the Illinois provisions has led one commentator to re-
mark:

Illinois has boldly and explicitly placed the right to a healthful
environment on a plane with other more familiar inalienable rights
such as the right to life, liberty and the pursuit of happiness; rights
which are not subject to the whims of the majority.48

44. Explaining the common law doctrine, the Committee on General Government
said in its report: "The theory is that a wrong or tort which is suffered by the public
in general is a public injury which can only be asserted by the Attorney General. Un-
less an individual can show... a 'special injury,' he will be said to have no 'standing'
and will not be afforded the opportunity to seek relief." S.H.A. Const. art. 11, § 2
(1970) [Illinois, Constitutional Commentary].
46. S.H.A. Const. art. 11, § 2 (1970) [Illinois, Constitutional Commentary].
47. Id.
Examined in the context of nonsmokers' rights, however, this new inalienable right may prove to be illusory due to the practical realities of bringing suit under article XI.

It has been pointed out that article XI has its own "built-in inhibiting factors" because the plaintiff has a double burden of proof: (1) that the defendant pollutes and (2) that the particular pollution involved causes damage to health. Although it should not be difficult to prove that the defendant pollutes by smoking his cigarette in a nonsmokers' rights case, proof that his particular pollution causes damage to health may be difficult.

This is the area in which the uniqueness of the nonsmokers' rights problem comes into play. As noted earlier, the dangers of tobacco smoke pollution generally arise from the accumulated efforts of many people in an enclosure. Any one person only contributes his share of the damage and the courts cannot hold him responsible for any more than his share. In this connection, it should be noted that the Committee on General Government in its report emphasized that allowing standing does not assume proof of the claim and that the section does not create any new remedies. So the plaintiff is left with the traditional remedies of declaratory judgment, injunction or damages if he has strict proof of economic personal injury.

The damages from one exposure to one person's smoke, or even one exposure to several persons' smoke, are likely to be too minimal to sustain the expense of a traditional lawsuit. Furthermore, due to the number of smokers and their general ubiquity, endless lawsuits, ending in the recognition of a right but no real remedy, would need to be brought. Put simply, it is not practical to bring suit against each smoker contacted in an effort to eventually eradicate all tobacco smoke pollution in the individual's environment.

**Nuisance Law Basis**

The role of nuisance law in combatting air pollution has been extensively examined, but not with reference to its application to nonsmokers' rights. Due to the importance of nuisance doctrine to the

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49. Leahy, Individual Legal Remedies Against Pollution in Illinois, 3 LOYOLA CHI. L.J. 1, 6 (1972).
50. Id.
51. S.H.A. CONST. art. 11, § 2 [Illinois, Constitutional Commentary].
area of pollution, a separate discussion of the role of nuisance law in relation to tobacco smoke pollution is warranted. Nuisance law is generally classified into private nuisance and public nuisance because the rights that are violated by these two types of nuisances are different, although they can occur concurrently.

In one private nuisance case, Hall v. Putney, the court defined nuisance as “everything that endangers life or health, gives offense to senses, violates the law of decency, or obstructs reasonable and comfortable use of property.” A later Illinois decision defined a private nuisance as “an individual wrong arising from an unreasonable, unwarrantable or unlawful use of one's property producing 'such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.'” However, as broad as these statements are with respect to the nature of private nuisance, the context within which they were made involved violation of property rights. The Hall case involved noises, such as honking of horns, screeching of brakes, starting of engines, and closing of automobile doors, made by customers of a root beer stand located near the plaintiff's residence. Merriam v. McConnell, the later Illinois case, involved the depreciation of property value of the plaintiff's residence due to infestation of the area by box elder bugs attracted by the defendant's box elder trees.

Indeed, although the law of nuisance has dealt with the question of air pollution, recognition of the right to be free from such pollution has traditionally been based on the right of the property owner, as a property owner, to have the air over his premises reasonably free from contamination. Such cases, stressing the violation of property rights, are inapplicable in the nonsmokers' rights context. The average nonsmoker can protect himself from tobacco smoke on his own

54. Id. at 516, 10 N.E.2d at 207.
56. 291 Ill. App. 508, 10 N.E.2d 204 (1937).
58. E.g., Feder v. Perry Coal Co., 279 Ill. App. 314 (1935) (damage to livestock, crops and habitation caused by gases, fumes, and smoke coming onto plaintiff's property from a burning slag pile located on defendant's property); O'Connor v. Aluminum Ore Co., 224 Ill. App. 613 (1922) (dangerous acids and gases carried by wind onto neighbor's residence. Court denied recovery due to insufficiency of proof but said it would have allowed recovery for an eye injury received by the plaintiff from these gases and acids where the plaintiff was deprived of the use of her property due to the nuisance and received the personal injury while on her property); Winters v. Winters, 78 Ill. App. 417 (1898) (dust, chaff and smoke blown into plaintiff's house to the injury of his furniture); Lindblom v. Purity Ice & Refrigerating Co., 217 Ill. App. 306 (1920) (mist caused by operation of an ice plant interfering with use of rooms on the south side of plaintiff's house).
property, and such smoke generally does not occur in quantities sufficient to do actionable damage to his property.

A second problem in applying private nuisance law to nonsmokers' rights is that the private nuisance must interfere with the enjoyment by an individual or a determinate number of individuals of some right not common to the public. The general right to breathe clean air, if found by a court at all, will surely be found as a right of the public at large and not for a privileged few.

Further, the tradition of nuisance law as to damage shown may require more proof than the individual smoker can show in any single case against one smoker or even a group of smokers. This problem has been noted in analyses of other types of pollution.

Public, or common, nuisances, on the other hand, are those nuisances which affect or annoy the public generally. Some public nuisances have been specifically enumerated by statute. However, none of those enumerated are even remotely applicable to nonsmokers' rights. Further, there has been recent indication that the public

60. In Cooper v. Randall, 59 Ill. 317 (1871), a case also demonstrating the importance of invasion of property rights in this area, the supreme court approved the following instruction:

The law does not give damages for every inconvenience to, or interruption of the rights of another. There are numerous annoyances which, in the nature and condition of society, must inevitably arise and accrue to property of individuals, which can not in themselves fix a legal liability on the persons causing such inconvenience or interruption. The injury for which the law gives damages must be real, and not imaginary or whimsical. It must be sensible, tangible, and material, and not simply inconvenience or trifling interruption, and unless such injury has been inflicted in this case, the jury should find for defendants.

Id. at 324-25. See also Flood v. Consumers Co., 105 Ill. App. 559, 562 (1903), where the court held that it is not enough that the nuisance diminishes the value of surrounding property, that it renders other property unsalable, or that it prevents one from letting his premises for as large a rent as before, or to as responsible tenants. The court said that there must be a tangible or appreciable injury to the property or the nuisance must render enjoyment essentially uncomfortable or unreasonable.

61. "Thousands of people, for example, may suffer the ill effects of air pollution. This can make total damages enormous without making any suit feasible, since the associated costs to any individual exceed the damages suffered." Lanzillotti and Blair, Some Economic and Legal Aspects of the Pollution Problem—The Automobile: A Case in Point, 24 U. FLA. L. Rev. 399, 404 (1972).

Tort actions for pollution are best adapted to cases involving single, stationary sources of pollution. The reason for this lies largely in the difficulties that may be encountered by plaintiffs in satisfying burden of proof and loss apportionment requirements in multiple source pollution cases. Unfortunately, one might expect in this urbanized, industrialized society to find the multiple source pollution situation to be much more common than the single source situation.


63. ILL. REV. STAT. ch. 100½, § 26 (1973). Enumeration includes fouling of rivers, ponds, etc., obstructing highways, carrying on ultrahazardous businesses, use of

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nuisance statutes will be literally construed on the ground that the determination of what constitutes a nuisance should be made by the legislature and not by the courts.\(^6\)

Although the enumeration of public nuisances in the Illinois statutes does not preclude an action based on common law,\(^6\) such a suit is unlikely to be successful, partly because the area is not as clear in the absence of statute when applied to a new area like nonsmokers’ rights and partly because there may be a developing constriction in the recognition of nuisance actions other than those enumerated in the statute.\(^6\)

The remedies provided for a public nuisance may not be particularly helpful in the assertion of nonsmokers’ rights. Public relief is asserted either through indictment or injunction. The injunction is generally granted where a nuisance is injurious to the public health and safety, particularly where the ordinary method of prosecution for criminal offense proves ineffective.\(^6\) However, the effectiveness of either remedy, indictment or injunction, is doubtful in the nonsmokers’ rights context. The nature of these remedies makes them more suitable for nuisances that are relatively stationary, that come from one primary source, and for which a relatively few defendants can be both identified and held responsible.\(^6\)

Traditional public nuisance law did require that a private person show special injury, different in kind and not merely different in degree from that suffered by the general public.\(^6\) This requirement

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64. People v. Goldman, 7 Ill. App. 3d 253, 287 N.E.2d 177 (1972). The court refused to extend the reading of the statute declaring buildings used for lewdness, assignation, or prostitution to be public nuisances.


68. People ex rel. Barrett v. Fritz, 316 Ill. App. 217, 45 N.E.2d 48 (1942), is an exception to this theory. The Attorney General attempted to enjoin 1400 defendants from open and notorious violations of gambling laws. The Attorney General was unsuccessful in this action due to a defective complaint rather than to the practical difficulties. However, the prospect of joining countless tobacco smokers in a suit by the Attorney General where no criminal law has been broken would present far greater obstacles to success even if the Attorney General could be convinced to attempt such an approach to the problem.

may have been removed by the new constitutional provision already
discussed. However, the suit by the individual private party, in addi-
tion to the problem of expense, is not likely to be any more effective
than the pursuit of relief by the state because of the number of people
who must be joined and the apportionment of injury which would have
to be proved against each.

In conclusion, nuisance law, whether public or private, cannot be
expected to contribute very much in the absence of legislative provi-
sions for a realistic remedy.

**Statutory Basis**

*The Environmental Protection Act*

Like the federal government, Illinois has enacted legislation to
protect the environment within its own state boundaries. The Illi-
nois General Assembly declared that environmental damage seriously
affects the public health and welfare. Among the targets of the Illi-
nois Environmental Protection Act is air pollution, which, the General
Assembly found,

constitutes a menace to public health and welfare, creates pub-
lic nuisances, adds to cleaning costs, accelerates the deterioration
of materials, adversely affects agriculture, business, industry, recre-
ation, climate, and visibility, depresses property values, and
offends the senses.

Air pollution has been defined as the

presence in the atmosphere of one or more air contaminants
in sufficient quantities and of such characteristics and duration as
to be injurious to human, plant, or animal life, to health, or to
property, or to unreasonably interfere with the enjoyment of life
or property.

Tobacco smoke, of course, fits into more than one of the enumerated
effects of air pollution in this broad legislative statement and certainly
fits the definition of air pollution, given a broad definition of "atmos-
phere." Because of these effects of air pollution, the declared pur-
pose of the air pollution provisions is to restore, maintain, and enhance
the purity of the air in order to protect health, welfare, property, and
quality of life. This broad declared purpose of the Act, then, could

70. See text accompanying note 44 supra.
73. Id. § 1002(a)(1).
74. Id. § 1008.
75. Id. § 1003(b).
76. Id. § 1008.
also be interpreted to protect the interests of the nonsmoker.

As might be suspected, however, the focus on air pollution has resulted in an Act designed to regulate outdoor pollution while the nonsmokers' rights problem arises almost exclusively in an indoor setting. The prohibited acts specified in the air pollution provisions fall into five categories: (1) discharging contaminants into the environment in any state so as to cause or tend to cause air pollution in Illinois; (2) installing, constructing, or operating any equipment, facility, vehicle, or aircraft capable of causing or contributing to air pollution without a permit; (3) open burning of refuse; (4) selling or using any fuel or other article in any areas where such use or sale has been forbidden by the Pollution Control Board for reasons of air pollution control; and (5) spraying loose asbestos in the fireproofing or insulating of buildings or building materials or otherwise using asbestos in such unconfined manner as to permit asbestos fibers or particles to pollute the air. It would be straining the language of the Act to find protection of the individual in an indoor setting in these prohibited acts. The first prohibited act clearly refers to air pollution in the general outdoor atmosphere and attempts to protect the State of Illinois from pollution wafting across state borders. The second prohibited act enumerates equipment of a heavy variety, generally used outdoors or vented to the outdoors, so that the contaminants are discharged into the external atmosphere. The third prohibited act specifically refers to burning refuse in the open. The fourth prohibited act directs attention to the use of fuels, which are primarily used in equipment operated outdoors or vented to the outside of buildings, and also to other unspecified articles. The prohibited use of such fuels and other articles relates only to areas where sale and use is forbidden by the Pollution Control Board. The legislature must have been referring to general outdoor geographical vicinities. If indoor air had been the concern, the regulation should have operated anywhere, since the air confined inside an enclosure can reach contamination levels higher than the air external to the building. The fifth prohibited act involves asbestos, a material that is particularly hazardous to the health of all persons coming into contact with it and thus justifying the special attention of the General Assembly.

77. Id. § 1009.
Although the Act provides that the Pollution Control Board has general authority to adopt regulations to promote the purposes of the air pollution provisions of the Environmental Protection Act, the General Assembly has suggested certain areas for regulations, generally corresponding to the prohibited acts discussed above: ambient air quality standards; emission standards; standards for issuance of permits for construction, installation, operation of equipment, facilities, vehicles, vessels and aircraft, as well as requirements and procedures for their inspection, and alert and abatement standards for air pollution emergencies constituting an acute danger to health.

In turn, the regulations promulgated under the Act have tended to further restrict the application of this legislation to outdoor air exclusively by defining the problem of indoor pollutants right out of any potential relevance to the Act. For instance, the regulations adopted pursuant to the Act specifically define ambient air as "that portion of the atmosphere external to buildings comprising emission sources." This specific exclusion of indoor air from the ambient air quality standards, coupled with the absence of provision for the adoption of air quality standards for indoor air, does not merely bolster the argument that indoor air is not covered by the Act. The lack of standards for indoor air quality makes enforcement of the Act with respect to tobacco smoke pollution virtually impossible since a violation of no specific standard is no violation at all. Further, an "air contaminant" is "any solid, liquid, or gaseous matter, any odor, or any form of energy, that is capable of being released into the atmosphere from an emission source." Again, a broad definition of atmosphere could bring tobacco smoke pollution within the definition. However, the definition of emission source is "any equipment or facility capable of emitting specified air contaminants to the atmosphere." Again, we are led back to pollution by facilities or heavy equipment where the expectation is that the pollution will involve the outdoors.

The above discussion leads to the conclusion that tobacco smoke pollution can be seen to fit into the broad legislative statement of the general effects of air pollution, the purposes of the Act, and even into a broad interpretation of the definition of air pollution. However, the specific statutory language, along with the regulatory machinery de-

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79. ILL. REV. STAT. ch. 111½, § 1010 (1973).
80. Id. § 1010.
82. Id.
83. Id.
signed to implement the Environmental Protection Act, was intended to protect the individual in an outdoor setting, primarily from large polluters. Therefore, this statutory basis for assertion of rights against air pollution is inadequate as a protection for the nonsmoker.

**The Illinois Health and Safety Act**

In 1936, the Illinois legislature first passed the Health and Safety Act, the purpose of which was to protect the lives, health and safety of employees in the State of Illinois. The Illinois General Assembly amended the Illinois Health and Safety Act in 1972 and in 1973 to provide the enabling legislation that made Illinois the twentieth state to receive approval for its state plan for occupational safety and health under the Federal Occupational Safety and Health Act of 1970.

Among other duties imposed on the employer under the amended Act is the duty

to provide reasonable protection to the lives, health, and safety and to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Each employer also has a duty to comply with the occupational, health and safety standards promulgated under the Act. The individual employee also has a duty to comply with any rules promulgated under the Act that relate to his own conduct.

The coverage of the Act is very broad. Virtually every employer and employee in the State of Illinois comes under the provisions of the amended Act. The only two exceptions relate to employees of federal agencies and state agencies acting under the Atomic Energy Act of 1954.

The Illinois Industrial Commission is vested with the power and authority to administer the provisions of the Health and Safety Act. Pursuant to the Act, the Industrial Commission is to make, promulgate,

84. *ILL. REV. STAT.* ch. 48, § 137.1 *et seq.* (1936).
89. *ILL. REV. STAT.* ch. 48, § 137.3(a) (1973).
90. *Id.* § 137.3(b).
91. *Id.* § 137.3(e).
92. *Id.* § 137.2.
93. *Id.* § 137.1.
and publish rules which will effectuate the purposes of the Act. Under the former statute the Industrial Commission's authority to make rules was limited with respect to the nature of the rules he could make. These provisions were dropped out of the Act and replaced with a section providing for rules requiring that records be kept on deaths, illnesses and injuries, the adoption of federal safety and health standards as rules, variances from rules, emergency temporary standards and requirements for standards.

The provision relating to the adoption of federal safety and health standards as rules is of particular interest to the discussion of non-smokers' rights. Any standard which the United States Secretary of Labor has promulgated under the Federal Occupational Safety and Health Act of 1970 becomes a rule of the Illinois Industrial Commission unless the Industrial Commission promulgates an alternate rule which is at least as effective as the federal standard in providing safe and healthful employment and places of employment. Any standards promulgated in the future by the United States Secretary of Labor likewise will become the rules of the Illinois Industrial Commission within sixty days of the federal effective date in the absence of an Illinois rule at least as effective.

As noted earlier, the maximum allowable time-weighted average concentration for carbon monoxide for an eight-hour workday is 50 ppm. Also noted earlier were several experiments demonstrating that improperly ventilated smoke-filled rooms can greatly exceed such a level, and that even in a ventilated room, although the general concentration of carbon monoxide is below the standard set, exceedingly high carbon monoxide concentrations occur in the vicinity of the smoker. This evidence demonstrates the possibility that many workplaces could be in violation of the federal standard and, therefore, of the Illinois law, as a result of tobacco smoke pollution.

The Act imposes the duty of enforcing the rules of the Industrial Com-

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94. Id. § 137.3(f).
95. ILL. REV. STAT. ch. 48, § 137.4 (1936). Two types of rules authorized by the former provisions were relevant to the nonsmokers' problem. These related to authorization of rules for the ventilation of places of employment to guard against injuries and disease and rules for the prevention of personal injury and disease by contact with poisonous or deleterious materials, dust, vapors, gases, or fumes. Id. at (a) and (c).
96. ILL. REV. STAT. ch. 48, § 137.4 (1973).
97. Id. § 137.4(d).
98. Id.
100. See note 11 supra.
mission on the Illinois Department of Labor. The first step for an employee who believes that a violation of a safety or health standard exists is to make a complaint to the Department of Labor. If the Department of Labor fails to issue a notice of violation or take other enforcement action within a reasonable time after a complaint has been made, any employees or employee representatives who believe that a violation of a safety or health standard exists may request a hearing before the Industrial Commission by filing a written petition setting forth the details and providing a copy to the employer or his agent and the Department of Labor.

The amended Health and Safety Act is not a complete solution to the nonsmokers' rights problem. Protection is provided only to employees in the work environment. The Act does not extend protection to nonworkers or to workers while they are not at their jobs. However, the significance of protection on the job should not be minimized. The Civil Aeronautics Board saw fit to protect nonsmoking airline passengers from smoking passengers on the ground that a passenger taking an assigned seat on an airliner cannot escape from tobacco smoke pollution for the duration of his flight. Surely, protecting the worker from tobacco smoke while on the job offers him many more hours of protection during his lifetime than that offered by regulations protecting him from tobacco smoke while he is traveling on airplanes.

The current provisions of the amended Health and Safety Act also may not provide adequate protection from carbon monoxide for the worker while on the job. The standard for concentrations of carbon monoxide is currently being reviewed to see if it should be reduced from 50 ppm over an eight-hour period to 35 ppm over an eight-hour period, in accordance with the recommendation of the National Institute for Occupational Safety and Health. Current medical evidence suggests that the 50 ppm standard does not adequately protect the worker against impairments in vigilance, coordination, timing behavior, visual perception, and certain cognitive functions. Even the

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101. ILL. REV. STAT. ch. 48, § 137.17(a) (1973).
102. Id. § 137.17(b).
106. CRITERIA FOR A RECOMMENDED STANDARD, 1972, supra note 22, at V-3. The
proposed 35 ppm standard may not be sufficient to protect some workers with health problems. Also, carbon monoxide is only one of many harmful constituents of tobacco smoke, the effects of which have still not been completely evaluated.

Further, some practical problems may arise in providing adequate protection from this problem. The methods adopted in monitoring for carbon monoxide or any other harmful constituents of tobacco smoke may not adequately protect the employee, since there is a present lack of first-rate detection devices for the workplace. The possible inadequacy of ventilation as a solution has also been noted.

These, of course, are problems involved in the administration of any standard under the Act. In the case of tobacco smoke, solution may be found in adequate spacing between employee work stations. Since the carbon monoxide produced in tobacco smoke is not the product of a necessary operation of the business involved, the problem could even be solved by placing an outright prohibition on the production of carbon monoxide from this source by banning smoking in the workplace, and perhaps limiting smoking to certain reserved areas only. Since the employee has a recognized duty under the Health and Safety Act to obey any regulations promulgated under the Act relating to his own conduct, the burden of compliance does not fall solely upon the employer.

Other common objections to any administrative solution—delay and inadequate resources to perform adequately—are also applicable to this potential solution to part of the nonsmokers' rights problem.

The critical factor upon which the National Institute for Occupational Safety and Health based the recommended 35 ppm standard was the level of carboxyhemoglobin which that concentration of carbon monoxide would produce upon continuous eight-hour exposure in a nonsmoker engaged in sedentary activity. The Institute bases its recommended standard upon cardiovascular and behavioral evidence documenting the initiation or enhancement of deleterious myocardial alterations in individuals with coronary heart disease who are exposed to carbon monoxide concentrations sufficient to produce a carboxyhemoglobin level greater than 5%. However, some studies suggest that deleterious myocardial effects can occur at 3 to 5% carboxyhemoglobin in patients with angina pectoris. Other studies have suggested that there is no safe level of carbon monoxide for some heart patients, that “even normal” amounts of carbon monoxide may operate as the last straw in precipitating coronary attacks. The significance of the issue is demonstrated by the remarks of Dr. Betram D. Dinman, medical director of Aluminum Co. of America, Pittsburgh, Pa., reported in BNA, OCCUPATIONAL SAFETY & HEALTH REPORTER Vol. 3, No. 29, at 920 (Dec. 20, 1973), wherein it was noted that most workers who are over forty years old suffer from some form of latent coronary affliction.
However, a more serious problem, somewhat related to the usual inadequate resources, is the real possibility that the tobacco smoke pollution problem will not be taken seriously by the administrative agency involved, resulting in a lack of enforcement of the standards when applied to tobacco smoke. The tobacco smoke problem has only recently come into recognition as a health hazard to the nonsmoker and may be too easily dismissed by administrators who are accustomed to the ubiquity of tobacco smokers and are more comfortable dealing with the more traditional occupational health and safety problems encountered in the factory. Then the nonsmoker is faced with the difficult task of legally compelling the bureaucratic machinery to work.

RECOMMENDATIONS AND CONCLUSIONS

The review of various legal bases for assertion of nonsmokers' rights in Illinois has revealed a general absence of consideration for this type of problem. The constitution of Illinois provides a right which is difficult and expensive to enforce in the context of the nonsmokers' rights problem. Nuisance law presents the same general enforcement problems along with a heavy tradition in property law that does not transfer easily to the problem at hand. Air pollution legislation has addressed the health aspect of the problem and then left a large part of the problem unsolved by ignoring the fact that people have to breathe the air inside of buildings as well as outside. This statutory gap is the result of focusing on protection of the environment rather than the individual in the legislative plan.

The one bright spot on the horizon may be the Health and Safety Act of Illinois, which has a great potential for protecting the nonsmoker within the work environment. The nonsmoking employee need not institute the expensive, traditional lawsuit to enforce his rights under this legislation. Standards based on health considerations have already been set for at least one of the constituents of tobacco smoke, carbon monoxide. The enforcement machinery is already in

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112. Kenneth W. Holland, Illinois Director of Labor, has already warned employees that the filing of "frivolous" or "insupportable" complaints will be counter-productive and will quickly destroy the credibility of the employee or organization making them. His remarks were intended to discourage the use of the occupational safety and health program for the purpose of inconveniencing or disciplining the employer but may also reveal an underlying judgment as to what types of complaints the Department of Labor will seriously entertain. Id. at 6.
existence under the Illinois Department of Labor. Since the plan is new because of recent adoption of the federal occupational health and safety program, traditional types of complaints have not yet had a chance to develop to the exclusion of others. The nonsmoking employee should certainly seek to enforce his rights to air free of tobacco smoke under this law.

Whatever protection the Illinois Health and Safety Act provides to nonsmokers does not operate in the nonworking situation. The objective here is not to control the smoker in the privacy of his own home or in private gatherings. However, the nonsmoker should be able to go to places open to the public without facing bombardment by the tobacco smoke of others. To this end, the Illinois General Assembly should follow the lead of the Arizona legislature, which recently declared smoking tobacco in any form to be a public nuisance if done in certain specified places used by or open to the public.\textsuperscript{113} The Arizona law prohibits smoking in elevators, indoor theaters, libraries, art museums, concert halls, and busses.\textsuperscript{114} Although a step in the right direction, the Arizona provision is much too narrow to provide meaningful protection to the nonsmoking public. Therefore, any proposed Illinois law should provide broader coverage, endeavoring to cover all places open to or used by the public. Coverage should include all stores, restaurants, and other businesses open to the public, hospitals, doctors' offices, educational institutions, and city, state and county buildings.

Provision in such a law could be made for smoking areas set aside for the convenience of those who smoke. However, the areas set aside should not be such as to defeat the objective of the law. For instance, any restroom area set aside for smoking should be separated from other areas of the restroom, and equivalent nonsmoking lounge areas should be provided.

Violation of such a proposed law banning smoking in public places could subject the violator to a fine, which should be high enough to deter and low enough to ensure a reasonable expectation of enforcement. Arizona provides for a fine of ten to one hundred dollars,\textsuperscript{115} which seems acceptable provided that any fine above fifteen dollars is reserved for unusual cases.

Admittedly, this combination approach, \textit{i.e.}, a solution based partly

\begin{footnotesize}
\begin{enumerate}
\item [113.] \textit{Ariz. Rev. Stat.} § 36-601.01 (Supp. 1973).
\item [114.] \textit{Id.} § 36.601.01.A.
\item [115.] \textit{Id.} § 36.601.01.B.
\end{enumerate}
\end{footnotesize}
on the existing Illinois occupational safety and health program and partly on a public nuisance statute, does not completely solve the problem. The nonsmoker still cannot expect to attend a private gathering without facing the tobacco smoke problem. However, the approach does permit the nonsmoker to work, conduct most of his business and enjoy much indoor recreation in an environment free of tobacco smoke pollution.

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