

CARDS AND DICE IN SMOKY ROOMS: TOBACCO BANS AND MODERN CASINOS

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“Tobacco slows the reflexes, and any advertising which says it helps an athlete is falsehood and fraud.”

- Knute Rockne¹

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1. Roger William Riis, *How Harmful Are Cigarettes?*, *READER'S DIGEST*, Jan. 1950 at 1, 5.

I. INTRODUCTION

In the early and mid-1900s, cigarettes were popular symbols of toughness and, at the same time, elegance. Film and stage regularly featured cigarette-smoking tough guys and femme fatales.² Today, even though about forty-five million Americans smoke,³ tobacco has become the pariah of vices. Popular culture may accept old taboos, but it frowns on cigarettes.⁴

Cigarette smoke had long been seen as a nuisance, but it was not until the late 1940s that evidence began to emerge showing an association between cigarette smoking, various diseases, and shorter life expectancy.⁵ In 1964, the Surgeon General officially announced the health dangers

2. Early in the twentieth century, if women smoked, they did it in private because smoking was considered unladylike. In the 1920s, “advertisements began to be aimed at women and cigarette brands were designed to appeal to them.” LAURENCE PRINGLE, *SMOKING: A RISKY BUSINESS* 35 (1996). See also Kathleen Sablone, Note, *A Spark in the Battle Between Smokers and Nonsmokers: Johannesen v. New York City Department of Housing Preservation & Development*, 36 B.C. L. REV. 1089 (1995) (discussing how “smoking was a symbol of elegance and sophistication in popular culture”); Nancy R. Gibbs, *All Fired Up over Smoking*, TIME, Apr. 18, 1988, at 64, 69 (“Without smoking, it seemed, great detectives could not detect, writers could not write, lovers could not languish, heroes were deflated and vamps declawed.”).

3. JOSEPH L. BAST, *PLEASE DON'T POOP IN MY SALAD AND OTHER ESSAYS AGAINST THE WAR ON SMOKING* 11 (2006). Smoking prevalence of United States adults decreased from 42.4% in 1965 to 20.9% in 2004. U.S. DEP'T OF HEALTH & HUMAN SERVS. (U.S. DHHS), CENTERS FOR DISEASE CONTROL & PREVENTION, *SMOKING PREVALENCE AMONG U.S. ADULTS: TOBACCO INFORMATION & PREVENTION SOURCE (TIPS)* (2006).

4. For example, in the 2006 movie *Superman Returns*, Lois Lane and Superman have a child out of wedlock. The big “sin,” however, is that Lois smokes. This perception of smoking is in stark contrast to the days of *Casablanca*, in which smoking was heroically portrayed. See RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILLIP MORRIS* 114–15 (1997). Similarly, a Welsh oil painting, *Newport Nude*, that was put aside sixty years ago “for being too brazen for public display because the model is naked, drew fresh criticism when reintroduced in July [2008] at a public gallery in Wales but this time only because the naked model is holding a cigarette.” Chuck Shepherd, *News of the Weird: Scenes of the Surreal*, Aug. 17, 2008, <http://www.newsoftheweird.com/archive/nw080817.html> (last visited Feb. 9, 2009).

5. Peter D. Jacobson et al., *Historical Overview of Tobacco Legislation and Regulation*, in *SMOKING: WHO HAS THE RIGHT?* 42, 44 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998).

posed by smoking.⁶ This spurred more press on the subject, and eventually all cigarette packages had to carry a warning about the adverse health effects of smoking.⁷

In recent years, concern about secondhand smoke has led many state and local governments to ban smoking in some or all public areas. The targets of most restrictions have been restaurants, bars, and similar venues. Several communities have banned smoking in all public buildings.⁸ Many of the smoking bans contain express exemptions for casinos, but “[m]ore than two dozen states nationwide regulate smoking inside casinos,” and “eight ban smoking altogether inside the gambling halls.”⁹ Even if casinos are able to avoid the application of state or local smoking bans, lawsuits brought by nonsmokers on the basis of occupational safety or under the Americans with Disabilities Act may force casinos to ban smoking.

This Article will explore smoking restrictions in casinos by first looking at the history of tobacco’s importance to this nation. It will then examine the health effects associated with smoking, including secondhand smoke. This analysis will serve as a backdrop to the development of smoking bans and related litigation. The Article will then consider the economic impact that such bans are likely to have on the casino industry, and explore ways that the industry might minimize any negative impact by modifying business practices and by using legal and political processes. It will also explore smoking restrictions that might be required by litigation under various state and federal laws.

II. THE HISTORY OF TOBACCO AND ITS EFFECTS

A. *Tobacco’s Discovery and Impact on Early America*

The precise origin of tobacco use is unknown, but many scientists believe mankind first came into contact with the plant about eighteen thousand years ago.¹⁰ South American natives began cultivating tobacco

6. *Id.* at 44–45.

7. *Id.* at 46–47.

8. *See infra* note 120 and accompanying text.

9. Wayne Parry, *Casino Workers Cheer as Smokers Lose Loophole*, THE STAR-LEDGER (Newark, N.J.), Apr. 24, 2008, at N.J. 17. *See generally* 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 (2007).

10. IAIN GATELY, TOBACCO: A CULTURAL HISTORY OF HOW AN EXOTIC PLANT SEDUCED THE WORLD 3 (2001).

around 5000 B.C. in the areas presently known as Peru and Ecuador.¹¹ Over the next several thousand years, the practice spread to North America.¹²

In October 1492, Christopher Columbus reached the island he dubbed San Salvador and was met by the Tainos natives.¹³ The Indians, as he called them, brought many gifts, including “a kind of dry leaf that they hold in great esteems.”¹⁴ Confused by the offering and not realizing its value, Columbus threw the leaves overboard.¹⁵ Two weeks later, Columbus again encountered tobacco when he reached Cuba. Several men in his expedition reported meeting natives “with a little lighted brand made from a kind of plant whose aroma it was their custom to inhale.”¹⁶

11. *Id.*

12. *Id.* The earliest known image of tobacco use is a carving found in a Mayan temple in southern Mexico. PRINGLE, *supra* note 2, at 12–13. It shows smoke coming from a long pipe held by a man who may be a shaman (a priest or medicine man). *Id.* More than sixty kinds of tobacco grow in North and South America, and nearly all Native American people used these plants long before 1492. *Id.* at 12.

13. See GATELY, *supra* note 10, at 22; PRINGLE, *supra* note 2, at 11.

14. PRINGLE, *supra* note 2, at 11. The Tainos inhaled tobacco smoke through their nostrils. *Id.* Other Native American groups rolled dry tobacco leaves into a tube shape, tied the leaves tight, lit them, and inhaled the smoke through their mouths. Still others smoked tobacco in pipes. *Id.* at 11–12.

15. GATELY, *supra* note 10, at 22–23. Comedian Bob Newhart imagined a phone call being received in England from Sir Walter Raleigh:

What you got for us this time, Walt, you got another winner for us? Tob-acco . . . er, what's tob-acco, Walt? . . . It's a kind of leaf, huh? And you bought eighty tons of it?! . . . Let me get this straight, Walt, you've bought eighty tons of leaves? This may come as a kind of a surprise to you Walt but come fall in England, we're kinda upto our . . . It isn't that kind of leaf, huh? Oh! What kind is it then? Some special kind of food? . . . Not exactly? . . . Oh, it has a lot of different uses, like, what are some of the uses, Walt? . . . Put it in a piece of paper and roll it up. Don't tell me, Walt, don't tell me. You stick it in your ear, right? Oh! between your lips! . . . Then what do you do, Walt? . . . You set fire to it! Then what do you do, Walt? . . . You inhale the smoke, huh? You know, Walt, it seems you can stand in front of your own fireplace and have the same thing going for you! You see, Walt, we've been a little worried about you, y'know, ever since you put your cape down over that mud. Y'see, Walt, I think you're gonna have rather a tough time selling people on sticking burning leaves in their mouths. Listen, Walt, don't call us, we'll call you! G'bye!

BOB NEWHART, *Introducing Tobacco To Civilization, on SOMETHING LIKE THIS: THE BOB NEWHART ANTHOLOGY* (Warner 2001).

16. GATELY, *supra* note 10, at 23. These natives smoked tobacco through a

The crew soon shared the local custom quite regularly. Columbus chastised his men for partaking in this savage ritual, but he soon discovered that his words were wasted.¹⁷ He noted that “it was not within their power to refrain from indulging in the habit.”¹⁸ This habit eventually followed the men back to Europe, where tobacco proved to have mass appeal.¹⁹ By the mid-1500s, it was being cultivated in England, France, Portugal, and Spain.²⁰ The use of tobacco spread around the world.²¹

Of course, even long ago tobacco had its critics. In 1604, shortly after Sir Walter Raleigh introduced tobacco to England, King James wrote that smoking was “[a] custom [loathsome] to the eye, hateful to the Nose, [harmful] to the brain[], dangerous to the Lungs, and in the black[], stinking fume thereof [nearest] resembling the horrible Stigian smoke of the pit that is bottomless[.]”²² His work, *A Counterblaste to Tobacco* was issued at a time when many believed that tobacco smoke helped fight disease. “Men, women, and even children were urged to inhale tobacco

Y-shaped pipe called a toboca or tobaga, which is how most etymologists believe the plant got its name. KLUGER, *supra* note 4, at 9. Rodrigo de Jerez and Luis de Torres were brave enough to try the custom while on this expedition, thus they were the first Europeans to smoke tobacco. GATELY, *supra* note 10, at 23.

17. GATELY, *supra* note 10, at 23.

18. KLUGER, *supra* note 4, at 9 (quoting LEARNING MECHANISMS AND SMOKING 156 (William A. Hunt ed., 1970)).

19. Bartolemé de Las Casa, a witness of Columbus’s return to Europe, described the effects of smoking on the very first European smokers: “These *muskets* as we will call them, they call *tabaco*. I knew Spaniards on this island of Española (San Domingo) who were accustomed to take it, and being reprimanded by telling them it was a vice, they made reply that they were unable to cease from using it.” *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 969 (9th Cir. 2002) (quoting Bartolemé de Las Casas, *Historia de las Indias* (1875) (manuscript compiled 1527–1561) as translated in Charles Singer, *The Early History of Tobacco*, 219 Q. REV. 125, 127 (1913)).

20. PRINGLE, *supra* note 2, at 12–13.

21. *Id.*

22. James I of England, *A COUNTERBLASTE TO TOBACCO*, in 5 ENGLISH REPRINTS 112 (Edward Arber ed., AMS Press 1966) (1604). King James I of England critiqued smoking and explained that an individual who smoked would “reduce thereby his delicate, wholesome, and cleane complexioned wife, to that extremetie, that either shee must also corrupt her sweete breath therewith, or else resolve to live in a perpetuall stinking torment.” *Id.* Two centuries later, Queen Victoria established designated smoking areas near fireplaces in Windsor Castle to minimize the amount of smoke that would collect within. Walter E. Williams, *Cigarettes and Property Rights*, in SMOKING: WHO HAS THE RIGHT? 305, 305 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998)).

smoke to ward off the deadly plague.”²³ Native Americans primarily used it for medicinal or spiritual purposes.²⁴ “In 1603 an English boy wrote of the harsh whipping he received one morning—his punishment for not smoking a pipe of tobacco as ordered by school authorities.”²⁵ By the late 1700s, however, “most people gave up on the notion that tobacco could cure disease.”²⁶

Due to tobacco’s popularity throughout Europe, it became a fundamental economic building block of early America.²⁷ By the time of the American Revolution, tobacco had become the single most valuable commodity exported from the colonies to Great Britain.²⁸ As a result of the long and financially draining war with Britain and the chaotic Napoleonic wars, however, transatlantic trade became increasingly difficult. Accordingly, foreign demand for American tobacco cooled after the American Revolution—but domestic consumption increased.²⁹ Later on, a new invention would lead to an explosion in worldwide

23. PRINGLE, *supra* note 2, at 9.

24. Tobacco was widely believed among Native Americans to cure “asthma, rheumatism, chills, fevers, convulsions, eye sores, intestinal disorders, worms, childbirth pains, headaches, boils, cysts, coughs, [and] catarrh.” JORDAN GOODMAN, *TOBACCO IN HISTORY: THE CULTURES OF DEPENDENCE* 30 (1993). Tobacco enemas were also popular as a cure for a number of digestive problems. GATELY, *supra* note 10, at 8. Because of its value, tobacco was also a common spiritual offering. Worshipers would burn large amounts of tobacco as a way of soothing angry gods. GOODMAN, *supra*, at 30. Some tribes also used tobacco to test prospective spiritual leaders (shamans). See GATELY, *supra* note 10, at 6 (describing how shamans would make a potent tobacco tea and force prospects to drink it in excess—bringing prospects to the verge of death—and if they survived, the prospects were deemed worthy).

25. PRINGLE, *supra* note 2, at 9.

26. *Id.* at 14. “[M]idway though the twentieth century medical doctors still prescribed smoking for health reasons, as a harmless way to help lose weight.” *Id.* at 9–10.

27. So important was tobacco’s value to early America that Thomas Jefferson proposed to have tobacco leaves carved into one of the Capitol rotundas in Washington, D.C. See HENRY HOPE REED, *THE UNITED STATES CAPITOL: ITS ARCHITECTURE AND DECORATION* 98 (2005) (discussing decorative use of tobacco leaves in the small Senate rotunda and other areas).

28. Some historians, in reference to the American colonies’ dependence on tobacco to fund the Revolutionary War, have suggested that America bought its independence with tobacco. See U.S. DHHS, *CENTERS FOR DISEASE CONTROL & PREVENTION, REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL* 29–30 (2000).

29. In response to the cooling tobacco market, the United States changed the focus of its agricultural production over to “king cotton.” KLUGER, *supra* note 4, at 12.

consumption.³⁰

Prior to the late nineteenth century, tobacco was typically ingested by chewing, smoking it in a pipe, or inhaling snuff.³¹ Although cigarettes had been present in Europe since the early 1800s, they were rolled by hand, resulting in production that was slow and costs that were high.³² Still, the cigarette's ease of use and portability made it a desirable, though rare, consumer item.³³ "In 1880, a twenty-year-old Virginian named James Albert Bonsack applied for a patent on his invention: a cigarette-rolling machine."³⁴ Cigarette manufacturers were now able to produce large quantities of the product at a low cost.³⁵ Thus, the price of cigarettes was significantly reduced and the cigarette industry exploded.³⁶

B. *Early Smoking Restrictions*

Tobacco restrictions are not just a modern phenomenon. In 1619, when the first representative legislative assembly in the American colonies met in Jamestown, Virginia, the first law regulating the sale of tobacco was passed.³⁷ Major antismoking legislation was first introduced in the late nineteenth century.³⁸ These legislative efforts came in response to two separate concerns about smoking. The first concern focused on the fire hazard created by smoking.³⁹ The large wooden structures of major cities at the time were particularly prone to fires caused by careless disposal of lit

30. See *infra* note 35 and accompanying text.

31. U.S. DHHS, *supra* note 28, at 30.

32. "Bartholomé de Las Casa accompanied Christopher Columbus on voyages to the Caribbean in 1498 and 1502. He wrote of 'paper firecrackers' called 'tobaccos' that were smoked by the natives and by Spanish settlers, 'who, after [he] reprimanded them, saying it was a vice, answered that they were unable to stop taking it.'" PRINGLE, *supra* note 2, at 19.

33. Cigarette consumption had increased enough by 1864 to become subject to a federal tax. U.S. DHHS, *supra* note 28, at 30.

34. PRINGLE, *supra* note 2, at 16.

35. U.S. DHHS, *supra* note 28, at 30. The son of a plantation owner, Bonsack worked on creating such a machine in order to win a \$75,000 prize offered by the Allen & Ginter Tobacco Company. KLUGER, *supra* note 4, at 19. Bonsack patented his rolling machine in 1880. *Id.* It produced cigarettes at a rate nearly fifty times faster than the most skilled hand rollers. *Id.*

36. U.S. DHHS, *supra* note 28, at 30.

37. Gene Borio, *Tobacco Timeline: The Seventeenth Century—The Great Age of the Pipe*, http://www.tobacco.org/resources/history/Tobacco_History17.html (last visited Feb. 11, 2009).

38. Jacobson et al., *supra* note 5, at 43.

39. *Id.*

tobacco products.⁴⁰ The second concern focused on morality issues.⁴¹ Smoking was considered by many to be immoral or, at least, a nasty habit.⁴² The reformers were particularly concerned about children and teenagers—laws prohibiting tobacco sales to persons under the age of eighteen or twenty-one were fairly common.⁴³

By the beginning of the twentieth century, fourteen states had laws banning the production, sale, advertisement, or use of cigarettes.⁴⁴ Most of these laws established relatively harsh penalties for violations.⁴⁵ The laws were primarily based on the perceived immorality of tobacco use, but they were upheld by the United States Supreme Court as a valid exercise of the states' police power to protect the public health.⁴⁶ The popularity of smoking, however, eventually outgrew the antismoking movement. Antismoking sentiments remained strong among some churches and temperance groups, but the laws often went unenforced.⁴⁷

40. *Id.* The great Chicago fire took place in 1871. Chicago Historical Society, *The Electronic Encyclopedia of Chicago* (2005), <http://www.encyclopedia.chicagohistory.org/pages/6335.html>. Traditionally blamed on Mrs. Catherine O'Leary's cow (which supposedly knocked a lantern over to start the fire), the fire does appear to have started in the O'Leary barn. *Id.* A civic board empowered to investigate the cause of the fire, however, exonerated Mrs. O'Leary. *Id.* Even today, smoking remains the number one cause of preventable fires. Reuters, *U.S. Fire Administration Kicks Off Public Safety Campaign to End #1 Cause of Preventable Home Fire Deaths—Fires Caused by Smoking Materials*, January 8, 2008, <http://www.reuters.com/article/pressRelease/idUS160767+08-Jan-2008+PRN20080108>.

41. Jacobson et al., *supra* note 5, at 43.

42. *Id.*

43. *Id.* at 46–49. Exactly the same concerns existed about gambling at that time. See Ronald J. Rychlak, *Lotteries, Revenues, and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 32–35 (1992).

44. See, e.g., Jacobson et al., *supra* note 5, at 44 (“[F]ourteen states had passed laws banning the production, sale, advertisement, or use of cigarettes.”).

45. *Id.* For example, New Hampshire passed a law prohibiting “any person, firm, or corporation to produce, sell, or store for sale, any form of cigarette.” *Id.* Illinois made the manufacture, sale, or gift of cigarettes a crime punishable by a \$100 fine or thirty days' imprisonment. *Id.* New York passed a law prohibiting women from smoking in public. *Id.*

46. *Id.* (citing *Austin v. Tennessee*, 179 U.S. 472 (1900)); see also Justin C. Levin, Comment, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 192–93 (2004) (discussing the use of police power regulations to restrict legal behavior that puts the public at risk).

47. Jacobson et al., *supra* note 5, at 44. One reason the laws lacked effectiveness was that they did not prohibit the sale of the individual elements that make up the cigarette: the rolling paper and the loose tobacco. U.S. DHHS, *supra* note 28, at 32. Some retailers even sold matches at highly inflated prices and included

The popularity of cigarettes soared during the 1920s and 1930s.⁴⁸ During World War I, cigarettes were given to every United States soldier and sailor as part of daily rations.⁴⁹ Many groups that had previously opposed the use of tobacco, including the YMCA and the Red Cross, changed their stance when it came to supporting the troops.⁵⁰ These groups even sent cigarettes to soldiers in the field.⁵¹ During World War II, tobacco farmers were exempted from the draft because they were deemed “essential workers.”⁵² The military continued providing soldiers with cigarettes during World War II and other military actions up until the 1970s.⁵³ Even “Rosie the Riveter” was often depicted with a cigarette between her lips or in her hand.⁵⁴ Of course, many soldiers developed habits that continued after they returned to civilian life.⁵⁵ As one author put it a few years after the conclusion of World War II:

In all the history of human habit, there have been few changes so remarkable as the tidal-wave increase of cigarette smoking in the United States. Within a single generation, a new habit has laid hold upon an entire people to an extent which we do not begin to realize,

cigarettes as a free gift. *Id.* This is reminiscent of the way some early gambling devices gave each gambler a small token in an effort to avoid the legal definition of gambling. See Ronald J. Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 560 (1990).

48. U.S. DHHS, *supra* note 28, at 34.

49. *Id.* at 32. General John Joseph Pershing stated, “You ask me what we need to win this war. I answer tobacco, as much as bullets.” *Id.* (quoting ROBERT SOBEL, *THEY SATISFY: THE CIGARETTE IN AMERICAN LIFE* 84 (1978)).

50. *Id.*

51. *Id.* Some commentators have even argued that cigarettes attained a heroic status through their association with soldiers during World War II. *Id.* at 37 (citing JESSE M. GEHMAN, *SMOKE OVER AMERICA* (1943)). Some military leaders called cigarettes “every soldier’s best friend,” because “nicotine combated both boredom and stress.” PRINGLE, *supra* note 2, at 33. For a period of time after the war, “cigarettes became an acceptable and noncontroversial part of U.S. life.” U.S. DHHS, *supra* note 28, at 37 (quoting RONALD J. TROYER & GERALD E. MARKLE, *CIGARETTES: THE BATTLE OVER SMOKING* 124 (1983)).

52. JOHN C. BURNHAM, *BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY* 101 (1993). By the end of the war, “the percentage of American women who smoke[d] had doubled.” *Id.*

53. Williamson, *supra* note 9, at 164.

54. BURNHAM, *supra* note 52, at 101.

55. See U.S. DHHS, *supra* note 28, at 33. The typical rationale for the repeal of antismoking laws after World War I was, “If cigaret[te]s were good enough for us while we were fighting in France, why aren’t they good enough for us in our own homes?” *Id.* (quoting *Cigaretts for Grown-Up Kansans*, 92 LITERARY DIG. 12 (1927)).

and with effects which we certainly do not understand.⁵⁶

Before long, people would begin to learn quite a bit more about the health effects of this newly widespread habit.

III. HEALTH CONCERNS

A. Harm to Smokers

The health effects of smoking had long been a concern, but the evidence of a link between smoking and health problems was inconclusive.⁵⁷ By the late 1940s, however, evidence began to emerge showing the association between cigarette smoking and shorter life expectancy.⁵⁸ An interesting snapshot of the understatement of health effects related to smoking appeared in a 1950 *Reader's Digest* article entitled *How Harmful Are Cigarettes?*⁵⁹ It reviewed the so-called smoker's cough, said that smoking did not affect pregnant women any more than other people, and found that smoking seemed to have adverse impacts on athletes.⁶⁰ The article identified no proof that smoking caused heart disease, but noted evidence that heart disease was more prevalent among smokers.⁶¹ It also noted the debate over whether smoking caused cancer—including the American Cancer Society's concession that there was no generally accepted answer to that question.⁶² The article quoted a Harvard doctor: "I used to tell patients with angina pectoris or coronary artery disease to smoke not more than two cigars or eight cigarettes a day. Now I am more inclined to urge them to omit smoking entirely."⁶³ The author of

56. Riis, *supra* note 1, at 1.

57. With the increased popularity of the cigarette during the 1920s, the medical community began to study the health risks associated with the practice. Before 1940, most physicians took a neutral position on the health risks posed by cigarette smoking. The consensus was that smoking in moderation posed no significant health risks. See Jacobson et al., *supra* note 5, at 43–47.

58. *Id.* at 44. In 1947, Capital Records had its first million-selling record with Tex Williams' recording of *Smoke, Smoke, Smoke (That Cigarette)*, written by Merle Travis. The chorus of that song is as follows: "Smoke, smoke, smoke that cigarette/ Puff, puff, puff and if you smoke yourself to death/ Tell St. Peter at the Golden Gate, that you hate to make him wait, but you just gotta have another cigarette." TEX WILLIAMS, SMOKE, SMOKE, SMOKE (Capital Records 1947).

59. Riis, *supra* note 1, at 1.

60. *Id.* at 3–5.

61. *Id.* at 6–7.

62. *Id.* at 7–8.

63. *Id.* at 7 (quoting Dr. Samuel Levine of Harvard).

the article admitted that he had been smoking forty cigarettes per day when he began working on the article but that he had now cut down to ten cigarettes per day, closer to the eight cigarettes per day that “apparently, harm no normal person.”⁶⁴

Two years later, *Reader’s Digest* published another influential article, this one much less uncertain about the health consequences of smoking. It was entitled *Cancer by the Carton*.⁶⁵ By 1964, the Surgeon General officially announced the health dangers posed by smoking. Despite concluding that tobacco was not addictive,⁶⁶ the Surgeon General found a causal relationship between smoking and lung cancer, chronic bronchitis, emphysema, and coronary disease.⁶⁷ This finding spurred additional press and more concern about smoking than ever before.

At the time the 1964 Surgeon General’s Report was published, no

64. *Id.* at 11.

65. Roy Norr, *Cancer by the Carton*, *READER’S DIGEST*, Dec. 1952, at 738.

66. U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, *PUBLIC HEALTH SERVICE, PUBL’N NO. 1103, SMOKING AND HEALTH 354* (1964). In conformity with existing definitions, the report noted that tobacco was “habituating” but not addictive.

The tobacco habit should be characterized as an *habituation* rather than an *addiction*, in conformity with accepted World Health Organization definitions, since once established there is little tendency to increase the dose; psychic but not physical dependence is developed No characteristic abstinence syndrome is developed upon withdrawal.

. . . .

Discontinuation of smoking . . . is accomplished best by reinforcing factors which interrupt the psychogenic drives. Nicotine substitutes or supplementary medications have not been proven to be of major benefit in breaking the habit.

Id.

To be addictive, by definition, a substance had to have a mind-altering effect. Since tobacco did not have that, it could not be classified as addictive. *See* W. Kip Viscusi, *The New Cigarette Paternalism*, *REG.*, Winter 2002, at 60 (“All addictions are not of equal concern to society. I would rather undergo an operation by a surgeon who is addicted to cigarettes than one who is addicted to heroin. Unlike drug addicts, smokers are productive, functioning members of society . . .”). Moreover, “[t]he overwhelming evidence points to the conclusion that smoking—its beginning, habituation, and occasional discontinuation—is to a large extent psychologically and socially determined.” U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, *supra*, at 40. The Surgeon General did not change the listing from habituation to addiction until 1988. Viscusi, *supra*, at 60.

67. *See* Jacobson et al., *supra* note 5, at 44–45.

statute, administrative ruling, or court decision required cigarette packaging or advertising to contain any statement about the health dangers attributable to cigarette smoking. Shortly thereafter, however, the Federal Trade Commission (FTC) proposed that cigarette packages state the amount of tar and nicotine in cigarettes.⁶⁸

Public concern over the Surgeon General's report and the pending FTC regulations convinced tobacco-industry leaders that action by Congress was inevitable, and prompted them to begin working for a deal. The result was the Cigarette Labeling and Advertising Act.⁶⁹ This Act required the following warning to be put on the label of all cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health."⁷⁰ The warning had to be on packages by January 1, 1965, and had to be included in cigarette advertising beginning July 1, 1965.⁷¹

On its surface, the Cigarette Labeling and Advertising Act looked like a problem for the tobacco industry, but the tobacco industry was actually quite pleased. The legislation had a provision precluding the FTC and any state or local government from requiring any warning on cigarette packages other than the one approved by Congress, and it also prohibited

68. C. EVERETT KOOP, U.S. DEP'T OF HEALTH & HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING, 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 488 (1989), available at http://profiles.nlm.nih.gov/NN/B/B/X/S/_/nnbbs.pdf.

69. 15 U.S.C. §§ 1331–1341 (2000).

70. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 4, 79 Stat. 282, 283 (1965) (codified at 15 U.S.C. §§ 1331–1341). In 1969, Congress amended the law to require a ban on cigarette advertising in any medium of electronic communication that is subject to the jurisdiction of the Federal Communications Commission. 15 U.S.C. § 1335. In 1989, Congress again amended the law to include four specific health warnings to be rotated on packages of cigarettes. *Id.* § 1333(a). 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.* Much later, Congress passed similar legislation to require warning labels on smokeless tobacco products. *See id.* §§ 4401–4408.

71. In 1990, Congress banned smoking on almost all domestic flights. 49 U.S.C. § 41706(a) (2000). In 1994, Congress banned smoking in schools, forbidding smoking in "any indoor facility owned or leased or contracted for and utilized by such person for provision of routine or regular kindergarten, elementary, or secondary education or library services to children." 20 U.S.C. § 6083(a) (2000).

any other warnings in cigarette advertising.⁷² Sales remained constant,⁷³ the tobacco industry continued to invest hundreds of millions of dollars in advertising, and it now had a great defense to any lawsuit based upon failure to warn: it was doing exactly what Congress told it to do.

The tobacco industry had faced its first lawsuit alleging negligence and breach of warranty in 1954.⁷⁴ Between 1954 and 1994, private citizens filed at least 813 unsuccessful tort actions against tobacco companies.⁷⁵ These suits proved unsuccessful because there had not yet been a scientifically reliable, causal connection associating cigarette smoking with cancer.⁷⁶ Without this important link, plaintiffs could not show that their

72. A *New York Times* editorial called the Cigarette Labeling and Advertising Act of 1965 “a shocking piece of special interest legislation . . . a bill to protect the economic health of the tobacco industry by freeing it of proper regulation.” Editorial, *Cigarettes vs. FTC*, N.Y. TIMES, July 9, 1965, at 28; see also Elizabeth Brenner Drew, *The Quiet Victory of the Cigarette Lobby: How It Found the Best Filter Yet—Congress*, ATL. MONTHLY, September 1965, at 76 (calling the bill “an unabashed act to protect private industry from government regulation”).

73. Because people already knew about the risks associated with tobacco, the warning did not significantly change consumer demand. As Dr. Francis L. Blasingame, executive vice president of the American Medical Association, observed in written testimony to the Federal Trade Commission:

“With respect to cigarets [sic], cautionary labeling cannot be anticipated to serve the public interest with any particular degree of success. The health hazards of excessive smoking have been well publicized for more than 10 years and are common knowledge. Labeling will not alert even the young cigarete [sic] smoker to any risks to which he is not already aware.”

Viscusi, *supra* note 66, at 58–59 (quoting Blasingame’s testimony).

74. Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make It Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 621 (citing USA TODAY, *Tobacco Settlement*, June 25, 1997, available at <http://www.usatoday.com/news/smoke/smoke26.htm>).

75. *Id.*

76. The difficulty of establishing causation in modern environmental exposure cases is illustrated in *Miller v. National Cabinet Co.*, 168 N.E.2d 811 (N.Y. 1960). This lawsuit was brought by the widow of a cabinet maker who had died of leukemia. *Id.* at 812. Mrs. Miller was convinced that exposure to benzene had caused her husband’s leukemia, and she wanted her husband’s employer to pay for her loss. *Id.* Unfortunately, her first problem was that she had to prove that benzene could cause leukemia. *Id.* at 812–13. Today it is accepted that a causal relationship exists between exposure to benzene and leukemia, but at the time of this lawsuit, there was insufficient evidence of causation. *Id.* at 813. The *Miller* court went further and noted that in order to be successful, Mrs. Miller would also have to prove that benzene did, in fact, cause Mr. Miller’s leukemia. *Id.* at 817. She was not able to meet this level of causation. *Id.* Finally, even if Mr. Miller’s leukemia had been caused by exposure to

health-related damages were foreseeable to the defendants.⁷⁷

In addition to causation problems, the contributory negligence of plaintiffs—by continuing to smoke despite knowing the risks—left courts unwilling to hold the tobacco companies liable.⁷⁸ By the mid-1990s, however, the landscape began to change.⁷⁹ In *Cipollone v. Liggett Group, Inc.*, the plaintiff claimed—and the Third Circuit agreed—that nicotine addiction can supply the causation element necessary for a tort cause of action.⁸⁰ During a previous trial involving the same parties, plaintiff Cipollone revealed a confidential study prepared by the Philip Morris

benzene, Mrs. Miller would not be able to recover from Benzoil unless she could show that his leukemia was caused by that brand of benzene. *Id.* It would be unfair to hold the Benzoil company responsible if the disease had been caused by exposure to a different brand of benzene. *Id.*

Mrs. Miller was out of luck, but she was not the only plaintiff affected by such rules. Modern chemicals and environmental exposure can cause injuries that do not show up for decades or that skip the exposed generation and impact only the next. For example, in one situation, pregnant women were given a certain medication for the purpose of preventing miscarriage and the adverse impact was not observable until their daughters reached childbearing age. *See Sindell v. Abbott Labs.*, 607 P.2d 924, 925 (Cal. 1980). Sometimes even when there is evidence of a correlation between exposure and injury, the cause-and-effect status is much less certain. *See In re “Agent Orange” Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985); *In re “Agent Orange” Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). This can make causation almost impossible to prove. In fact, the common law rule was that the result had to occur within a “year and a day” or else it was considered too remote to meet the legal causation standard. *See generally* Ronald J. Rychlak, *Understanding Visual Exhibits in the Global Warming Debate*, in HEARTLAND POLICY STUDIES, March 2008, at 13 (discussing causation).

77. *See* Jonathan S. Goldman, Comment, *Take That Tobacco Settlement and Super-Size It!: The Deep-Frying of the Fast Food Industry?*, 13 TEMP. POL. & CIV. RTS. L. REV. 113, 122 (2003).

78. *Id.* at 122–23. The Surgeon General’s required package warnings became a “chief legal weapon” for the tobacco industry. *Id.* at 122. Because the warning was clearly printed on every cigarette package, the plaintiffs had fully assumed the risks of their actions by continuing to smoke. *Id.* at 122–23.

79. In a case that helped set the tone for the decade, the plaintiffs claimed that manufacturers and distributors of alcohol have a duty to warn consumers that they may “develop[] the disease of alcoholism” through “excessive consumption.” *Joseph E. Seagram & Sons v. McGuire*, 814 S.W.2d 385, 385 (Tex. 1991).

80. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 563 n.19 (3d Cir. 1990) (suggesting that if a plaintiff can show that he or she became addicted to nicotine as a result of smoking, the jury can consider the effects of cigarettes smoked after addiction when determining whether a tobacco company’s “conduct proximately caused [a plaintiff’s] lung cancer”); *see also* Alan Schwartz, *Views of Addiction and the Duty to Warn*, 75 VA. L. REV. 509 (1989).

Research Center called *Motives and Incentives of Cigarette Smoking*.⁸¹ The study contained a statement telling the company to “think of the cigarette as a dispenser for a dose of nicotine.”⁸² As a result of this and other industry studies, the trial judge found evidence of a conspiracy among the three major tobacco companies that was “vast in its scope, devious in its purpose, and devastating in its results.”⁸³

In *Castano v. American Tobacco Co.*,⁸⁴ the trial court originally certified a plaintiff class that would have included all nicotine-dependent persons in the United States, regardless of any cause (or influence) other than the efficient-cause influence of smoking a cigarette.⁸⁵ This would have been the largest class action ever brought by smokers against the tobacco industry, but the Fifth Circuit struck it down because the differences among the plaintiffs—what products exposed them to nicotine, how long they had been exposed, what knowledge they had about the effects of smoking, and how they began smoking—impacted “the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses.”⁸⁶

The onslaught of continual governmental investigations and civil litigation began to chip away at the tobacco industry’s apparent invincibility.⁸⁷ However, perhaps the most important action taken against

81. See *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487 (D.N.J. 1988); WILLIAM L. DUNN, MOTIVES AND INCENTIVES IN CIGARETTE SMOKING 5 (Philip Morris 1972), available at <http://tobaccodocuments.org/landman/2024273959-3975.html>. Though the court opinion does not specifically mention this study by name, William L. Dunn testified at the trial about the Philip Morris research study. See Transcript of William L. Dunn’s Trial Testimony, *Cipollone*, 683 F. Supp. 1487 (No. CA-83-2364), available at <http://legacy.library.ucsf.edu/tid/bnq57a00>; see also *The U.S. Tobacco Wars*, BBC News, Sept. 28, 1999, <http://news.bbc.co.uk/2/hi/americas/457180.stm> (discussing *Cipollone* and the Philip Morris research study).

82. DUNN, *supra* note 81, at 5.

83. *Cipollone*, 683 F. Supp. at 1493.

84. *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

85. See T. Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nationwide Mass-Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit Is a “Novel” Claim or Injury*, 49 BAYLOR L. REV. 817, 818–19 (1997) (prior to this, plaintiffs sought damages for smoking-related illness—not for nicotine addiction).

86. Patel, *supra* note 74, at 622 (quoting *Castano*, 84 F.3d at 742–43).

87. At least one jury returned a verdict against the Brown & Williamson Tobacco Corporation based upon the suppression of information concerning nicotine addiction. See Suein L. Hwang et al., *Jury’s Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1, A4 (reporting a \$750,000

the tobacco industry was the development of information about the effects of smoking on nonsmokers.⁸⁸

B. *Secondhand Smoke*

The smoke that comes off the end of a burning cigarette, cigar, or pipe, along with the smoke that is exhaled by the smoker, make up what most individuals refer to as secondhand smoke, or “environmental tobacco smoke” (ETS).⁸⁹ A 1972 U.S. Surgeon General’s report first noted the possible threat to nonsmokers from ETS.⁹⁰ “The issue was addressed again in Surgeon General’s reports in 1979, 1982, and 1984.”⁹¹ The 1986 Surgeon General’s report resulted in three important conclusions concerning ETS:

First, involuntary smoking is a cause of lung cancer and other diseases in healthy nonsmokers; second, the children of parents who smoke compared with children of nonsmoking parents have an increased frequency of respiratory infections, an increase in respiratory symptoms, and slightly smaller rates of increase in lung function as the lungs mature; third, the separation of smokers and nonsmokers within the same airspace may reduce, but does not eliminate, the exposure of nonsmokers to passive smoke.⁹²

The Environmental Protection Agency (EPA) has since labeled

verdict by a Florida jury for a smoker with lung cancer).

88. See BAST, *supra* note 3, at 12 (“The only legitimate grounds for interfering in smokers’ choices are the potentially harmful effects of secondhand smoke on nonsmokers.”).

89. PRINGLE, *supra* note 2, at 50. “ETS has two sources. One is the ‘used,’ or secondhand, smoke that people exhale after they inhale . . . [] smoke from their burning cigarettes[]. The other source of ETS is called sidestream smoke. It rises from the burning tip of a cigarette . . .” *Id.* Sidestream smoke “contains much higher amounts of benzene, polonium-210, cadmium, and other chemicals known to cause cancer.” *Id.*

90. Jerome Arnett, Jr., *Best Available Scientific Evidence Shows Secondhand Smoke Is No Danger*, ENV’T & CLIMATE NEWS, July 2008, at 8.

91. *Id.* The first major study linking ETS to cancer showed that nonsmoking women married to smokers had a much higher risk of dying from lung cancer than nonsmoking women married to nonsmokers. Williamson, *supra* note 9, at 166 (citing STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 392 (1996)).

92. Bradley M. Soos, Note, *Adding Smoke to the Cloud of Tobacco Litigation—A New Plaintiff: The Involuntary Smoker*, 23 VAL. U. L. REV. 111, 113 (1988) (citing U.S. DHHS, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986)).

secondhand smoke as a Class A carcinogen,⁹³ and has reported that secondhand smoke “is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers.”⁹⁴

In 2004, the Centers for Disease Control (CDC) released a study indicating that minimal exposure to smoke can increase the risk of heart attacks, even for nonsmokers.⁹⁵ In 2006, the U.S. Surgeon General’s office

93. See Viscusi, *supra* note 66, at 62 (“The watershed event in the assault against secondhand smoke was EPA’s designation of environmental tobacco smoke as a group-A carcinogen.”); Levin, *supra* note 46, at 190 (“ETS is also listed as a carcinogen by the United States National Toxicology program.”). Highly toxic substances like benzene and asbestos are also classified as class-A carcinogens. Jeffery S. Kinsler, *Exposure to Tobacco Smoke Is More Than Offensive, It Is Cruel and Unusual Punishment*, 27 VAL. U. L. REV. 385, 390 (1993). The EPA report that announced ETS’s classification also observed that “exposure to concentrated ETS, such as that found in cars or small offices, is especially dangerous.” *Id.*

94. Levin, *supra* note 46, at 190 (quoting U.S. ENVTL. PROT. AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER & OTHER DISORDERS 3 (1993)). In addition to causing lung cancer in nonsmokers, “[a]cute and chronic respiratory diseases are also linked to exposure to passive smoke, and the evidence of this link is notably strongest in infants.” Soos, *supra* note 92, at 113.

95. See Editorial, *Of Smoking Bans and Heart Attacks*, N.Y. TIMES, Apr. 27, 2004, at A24 (describing how a six-month ban on smoking in public places in Helena, Montana, reduced the number of heart attack admissions in area hospitals). Recent biomedical studies have repeatedly found that sustained exposure to secondhand smoke is associated with an increased risk for a wide variety of diseases and conditions, including low birth weight, ear problems, asthma, coronary heart disease, and lung cancer. Lidia Arcavi & Neal L. Benowitz, *Cigarette Smoking and Infection*, 164 ARCHIVES INTERNAL MED. 2206, 2210 (2004) (“Long-term tobacco smoke exposure is a risk factor for otitis media and bronchitis in children.”); Joaquin Barnoya & Stanton A. Glantz, *Cardiovascular Effects of Secondhand Smoke: Nearly as Large as Smoking*, 111 CIRCULATION 2684, 2689 (2005) (finding secondhand smoke can produce negative cardiovascular effects—such as increased arterial stiffness—after only an hour of exposure); Jiang He et al., *Passive Smoking and the Risk of Coronary Heart Disease—A Meta-Analysis of Epidemiologic Studies*, 340 NEW ENG. J. MED. 920, 924 (1999) (finding an association between passive smoking and an increased relative risk of coronary heart disease); Hanne K. Hegaard et al., *The Effect of Environmental Tobacco Smoke During Pregnancy on Birth Weight*, 85 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 675, 679 (2006) (“The present study demonstrates that pregnant nonsmokers exposed to ETS at home as well as outside the home give birth to children with significantly lower birth weight than children born to nonsmokers unexposed to ETS.”); Martin Kharrazi et al., *Environmental Tobacco Smoke and Pregnancy Outcome*, 15 EPIDEMIOLOGY 660, 667 (2004) (discussing the correlation between low birth weights and maternal ETS exposure); David M. Mannino et al., *Health Effects Related to Environmental Tobacco Smoke Exposure in Children in the United States*, 155 ARCHIVES PEDIATRICS ADOLESCENT MED. 36, 39 (2001) (“[O]ur strongest effects were in the youngest children, with ETS exposure being associated

released a new report on ETS called *The Health Consequences of Involuntary Exposure to Tobacco Smoke*.⁹⁶ This report concluded that there is no risk-free level of ETS exposure.⁹⁷ The report provides a comprehensive review of studies examining the effectiveness of separate smoking sections and ventilation systems. It concludes: “[t]hese studies clearly demonstrate that secondhand smoke exposure can be eliminated with a smoking ban However, the findings also indicate the need for full compliance with such bans because incomplete compliance will lead to continued exposure.”⁹⁸

Many studies have failed to find a link between ETS and health problems. Frankly, conclusively proving such a link would be virtually impossible using epidemiological evidence alone.⁹⁹ Harvard economist W. Kip Viscusi has written: “Careful review of the studies of the lung cancer–environmental tobacco smoke linkage indicates that none of the studies has ever demonstrated a relationship that passes the usual tests of statistical significance. As a result, there have been a number of critiques of the EPA

with an increased risk for ever and current asthma and wheezing.”); *see generally* Peter H. Whincup et al., *Passive Smoking and Risk of Coronary Heart Disease and Stroke: Prospective Study with Cotinine Measurement*, 329 BRIT. MED. J. 200 (2004) (finding an association between passive smoking and an increased relative risk of coronary heart disease). In fact, ETS has been identified as the third leading cause of preventable cancers in the United States, with the Centers for Disease Control and Prevention estimating that nearly 50,000 Americans die annually from ailments caused by ETS. Williamson, *supra* note 9, at 166 (citing HUGH WATERS, *THE ECONOMIC IMPACT OF SECONDHAND SMOKE IN MARYLAND* 19 (2006)). The risk of developing lung cancer from exposure to ETS is one in one thousand, but that risk doubles for nonsmoking spouses of smokers. Kinsler, *supra* note 93, at 390.

96. U.S. DHHS, *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/>.

97. *Id.* at 11.

98. *Id.* at 642.

99. According to one commentator,

The research used to justify government regulation of secondhand smoke has been powerfully challenged by critics, including Congress’s own research bureau. According to the Environmental Protection Agency, the risk ratio for 40 years of exposure to a pack-a-day smoker is just 1.19. Epidemiologists as a rule are skeptical of any relative risks lower than 3 and dismiss as random ratios less than 1.3. Science writer Michael Fumento and others have documented how the threat of secondhand smoke has been greatly exaggerated.

BAST, *supra* note 3, at 6.

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analysis.”¹⁰⁰

The most serious dispute over ETS centered around a 1998 report by the International Agency for Research on Cancer (IARC), which found “weak evidence of a dose-response relationship between risk of lung cancer and exposure to spousal and workplace ETS.”¹⁰¹ Before the study was published, the media reported allegations that the IARC and the World Health Organization (WHO) were suppressing information.¹⁰² For instance, the *Wall Street Journal* reported:

The only definitive large-scale study on [ETS] was designed in 1988 by a WHO subgroup called the International Agency on Research on Cancer. It compared 650 lung-cancer patients with 1,542 healthy people in seven European countries. The results were expressed as “risk ratios,” where the normal risk for a nonsmoker of contracting lung cancer is set at 1. Exposure to tobacco smoke in the home raised the risk to 1.16, and exposure to smoke in the workplace increased it to 1.17. This supposedly represents a 16% or 17% increase. But the admitted margin of error is so wide—0.93 to 1.44—that the true risk ratio could be trivial or nonexistent.¹⁰³

In response, WHO issued a press release stating that the results of the study had been “completely misrepresented” in the popular press and were, in fact, very much in line with similar studies demonstrating the harms of passive smoking.¹⁰⁴ The results of that specific study may have been inconclusive and others may have also failed to reveal the dangers of ETS,¹⁰⁵ but many studies do show adverse health impacts from ETS

100. Viscusi, *supra* note 66, at 62.

101. Paolo Boffetta et al., *Multicenter Case-Control Study of Exposure to Environmental Tobacco Smoke and Lung Cancer in Europe*, 19 J. NAT'L CANCER INST. 1440, 1440 (1998).

102. *Smokescreens: The World Health Organization is Showing Signs of Allowing Politics to Get in*, ECONOMIST, March 14, 1998, at 23. The study was published in the Journal of the National Cancer Institute in October of the same year.

103. Lorraine Mooney, *Smoking Out Bad Science*, WALL ST. J. (European Ed.), Mar.12, 1998, at A18.

104. Press Release, World Health Organization, *Passive Smoking Does Cause Lung Cancer, Do Not Let Them Fool You* (March 9, 1998), available at <http://www.who.int/inf-pr-1998/en/pr98-29.html>.

105. In *Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA*, U.S. District Court Judge William Osteen issued a summary judgment in the tobacco industry's challenge to the EPA's findings on the health effects of ETS. *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435 (M.D.N.C. 1998). In that order, the court threw out the EPA's study of ETS for several reasons, including that

exposure.¹⁰⁶ For attorneys, perhaps the most important fact is that “more than 80% of Americans now believe secondhand smoke is harmful to nonsmokers.”¹⁰⁷

As its defenses began to weaken (because nonsmokers were not usually limited by contributory negligence), the tobacco industry became an even bigger target for tort claims. With scientific evidence of causation, a group of trial attorneys, headed by Mississippi lawyer Dickie Scruggs, developed a theory to permit state governments, as opposed to individual smokers, to file suit. The idea was that the tobacco companies should reimburse the states for Medicaid expenditures on behalf of smokers who developed cancer or other health problems.¹⁰⁸ Working with state attorneys general—and perhaps with the threat that criminal charges¹⁰⁹ might be pressed against the tobacco companies—this group convinced the tobacco companies to sign the “Master Settlement Agreement.”¹¹⁰

This agreement required the industry to pay \$10 billion per year over twenty-five years, or \$250 billion total, which was supposed to fund a

the “EPA’s study selection is disturbing. First, there is evidence in the record supporting the accusation that the EPA ‘cherry-picked’ its data.” *Id.* at 460. Moreover, the court found that “[u]sing its normal methodology and its selected studies, [the] EPA did not demonstrate a statistically significant association between ETS and lung cancer.” *Id.* at 463. In addition, the “EPA could not produce statistically significant results with its selected studies.” *Id.* at 462. Its ruling highlighted numerous errors in the scientific process, as well as procedural failings. *Id.* at 462–63.

In 2003, the *British Medical Journal* published a large and detailed study on ETS. “The authors studied more than 35,000 California never-smokers over a 39-year period and found no statistically significant association between exposure to SHS and lung cancer mortality.” Arnett, *supra* note 90, at 8; *see also* Gio Batta Gori, *Stoking the Rigged Terror of Secondhand Smoke*, REG., Spring 2007, at 14.

106. *See supra* note 95.

107. Arnett, *supra* note 90, at 8.

108. This settlement was based upon the idea of an efficient-cause determinism overcoming the free will of individuals. *See generally* Ronald J. Rychlak & Joseph F. Rychlak, *Mental Health Experts on Trial: Free Will and Determinism in the Courtroom*, 100 W. VA. L. REV. 193, 201 (1997) (“Efficient causation is an external force applied to the object or person in question, bringing about a consequent event.”).

109. *See* Peter J. Boyer, *The Bribe*, NEW YORKER, May 19, 2008, at 44, 47–49 (discussing negotiations with tobacco companies in a Mississippi Medicaid case and the threat of criminal action).

110. The Master Settlement Agreement involved the four largest tobacco companies, forty-six states, the District of Columbia, and five U.S. Territories. *See* Patel, *supra* note 74, at 623. Mississippi, Florida, Texas, and Minnesota had already secured individual settlements with the tobacco companies eight months earlier. *Id.*

charitable foundation that would support the study of programs to reduce teen smoking and substance abuse and the prevention of diseases associated with tobacco use.¹¹¹ (According to some, the money actually “goes directly into state government coffers and is spent largely for the benefit of non-smokers.”¹¹²) Despite the enormous monetary award granted to the states, the settlement did not preclude individual smokers from bringing future lawsuits.¹¹³ Perhaps even more importantly, by agreeing to it, the tobacco companies gave governmental agencies all the evidence they needed to put even greater restrictions in place.

IV. SMOKING BANS

Long before cities and towns began enacting smoking bans, many

111. Symposium, *Up in Smoke: Coming to Terms with the Legacy of Tobacco: Appendix III—Tobacco Settlement Summary*, 2 J. HEALTH CARE L. & POL’Y 167, 167–68 (1998). Under the agreement, the foundation will:

- Carry out a nationwide, sustained advertising and education program to counter youth tobacco use and educate consumers about the cause and prevention of diseases associated with tobacco use.
- Develop, disseminate and test the effectiveness of counter advertising campaigns.
- Commission studies, fund research and publish reports on factors that influence youth smoking and substance abuse.
- Track and monitor youth smoking and substance abuse with a focus on reasons for increases or failures to decrease tobacco and substance use rates.
- Create[] an industry-funded \$1.45 billion national public education fund for tobacco control.
- The fund is established to carry out a nationwide sustained advertising and education program to counter youth tobacco use and educate consumers about tobacco-related diseases.

Id.; see Patel, *supra* note 74, at 623. *But see* Rychlak, *supra* note 43 (arguing that earmarking money is often offset in the appropriations process).

112. BAST, *supra* note 3, at 12.

113. See Goldman, *supra* note 77, at 126. One major criticism of the Master Settlement Agreement is that it failed to settle anything. In fact, less than one year after the settlement was signed, the number of cases pending against the largest tobacco manufacturers nearly tripled. See Patel, *supra* note 74, at 653. With lead plaintiff attorney Dickie Scruggs now in prison for attempted bribery of a judge, some attorneys have begun to speculate about the validity of his earlier work. See generally Boyer, *supra* note 109.

private businesses voluntarily designated smoke-free areas. By 1991, 85% of private businesses had some type of smoking policy.¹¹⁴ The Surgeon General's 2006 report, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, prompted additional employers and businesses—including major hotel chains—to adopt voluntary smoke-free policies.¹¹⁵

The great advantage of voluntary policies is that they let the free market work. Some private businesses cater to smokers; others to nonsmokers.¹¹⁶ For example, if a bar owner knows that 80% of his regular patrons are smokers, he might permit smoking.¹¹⁷ On the other hand, some businesses will increase revenues by banning smoking. Many businesses will do what they can to accommodate both smokers and nonsmokers. Mandatory regulations do not provide this freedom to the business owner and therefore do not provide similar freedom of choice to the consumer.¹¹⁸

While voluntary smoking policies remain common, mandatory smoke-free policies are becoming the norm.¹¹⁹ Because secondhand smoke

114. Sablone, *supra* note 2, at 1094.

115. Centers for Disease Control and Prevention (CDC), *Trends in Secondhand Smoke Exposure Among US Nonsmokers*, <http://www.cdc.gov/features/smokeexposure/> (last visited Mar. 4, 2009). According to the CDC, as of 2003 seventy-two percent of households in the United States have no-smoking rules. *Id.*

116. Williams, *supra* note 22, at 311–12; Rekha Basu, Op-Ed., *Logic Takes Detour with Smoking-Ban Exemptions*, DES MOINES REG., April 11, 2008, at 13A (“[P]atrons have a choice in bars. If you’re a smoker, you’d gravitate to the smoke-filled ones. If you don’t want to be around it, there are smoke-free alternatives. They should have left that up to bar owners.”).

117. Mary Ann Ford, *Area Businesses Preparing Smoke-Free Accommodations Before Ban*, PANTAGRAPH (Bloomington, Ill.), (Dec. 29, 2007) available at <http://www.pantagraph.com/articles/2007/12/30/news/doc4776dcea12f10351362831.txt>. (“They say 80 percent of [] people don’t smoke but 80 percent of my customers do. . . . I’m looking at a 20 to 25 percent drop in business [due to a smoking ban].”).

118. A Kentucky restaurant association unsuccessfully challenged the validity of a smoking ban, arguing, among other things, that the government was impermissibly infringing upon its members’ rights to conduct their businesses as they chose. *Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t*, 131 S.W.3d 745, 752 (Ky. 2004). In upholding the smoking ban under the police power, the Kentucky Supreme Court found that “[t]here is perhaps no broader field of police power than that of public health.” *Id.* (quoting *Adams, Inc. v. Louisville & Jefferson County Bd. of Health*, 439 S.W.2d 586, 589 (Ky. 1969)). The court noted that the smoking prohibition turned on whether it was reasonably related to protecting the public health and determined that the prohibition met this requirement. *Id.*

119. Lainie Rutkow et al., *Banning Second-Hand Smoke in Indoor Public Places Under the Americans with Disabilities Act: A Legal and Public Health*

is viewed as a danger to public health, states and municipalities can regulate smoking under their police power, which allows them to “make laws protecting the public health.”¹²⁰ As of July 2008, 748 municipalities in the U.S. had 100% smoke-free bans.¹²¹ Twenty-one states and the District of Columbia banned smoking in stand-alone bars.¹²² In many states, however, casino gaming floors are exempted from the smoking regulations.¹²³

State and local regulations can impose a competitive disadvantage on businesses by driving customers elsewhere.¹²⁴ For that reason, once

Imperative, 40 CONN. L. REV. 409, 412 (2007). (“As of June 2007, thirty states and the District of Columbia banned smoking in at least some public places, including restaurants, bars, casinos, and workplaces.”). Yet, approximately thirty percent of the U.S. population still lives in a jurisdiction without restrictions on secondhand smoke. AM. NONSMOKERS’ RIGHTS FOUND., PERCENT OF U.S. STATE POPULATIONS COVERED BY 100% SMOKEFREE AIR LAWS 3 (2009), <http://www.no-smoke.org/pdf/percentstatepops.pdf>. For a study of Chicago’s ban, see generally Adrienne Detanico, Comment, *Banning Smoking in Chicago’s Social Scene: Protecting Labor and Broadening Public Health Policy*, 40 J. MARSHALL L. REV. 1063 (2007); see also WIBW-TV, *Congress Considers Controls over Cigarettes*, July 16, 2007, <http://www.wibw.com/home/headlines/8531822.html> (discussing the modern trends in smoking restrictions and Congress’s recent initiative to control the amount of toxic substances in cigarettes themselves).

120. Levin, *supra* note 46, at 192. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973) (holding, in an obscenity case, that the state has the power to protect “the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself”).

121. AM. NONSMOKERS’ RIGHTS FOUND., MUNICIPALITIES WITH LOCAL 100% SMOKEFREE LAWS 1–18 (2009), <http://www.no-smoke.org/pdf/100ordlisttabs.pdf> (including municipalities with ordinances or regulations that do not allow smoking in attached bars or separately ventilated rooms and do not have size exemptions).

122. ACTION ON SMOKING AND HEALTH, STATE SMOKEFREE AIR LAWS AT-A-GLANCE, <http://ash.org/smokingbans.html> (last visited Mar. 4, 2009). These jurisdictions are: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Ohio, Rhode Island, Utah, Vermont, and Washington. *Id.* See Joe Cera, *Smoke ‘Em If You Got ‘Em: Time is Running Out for a Burning Emblem of Washington Power Brokers*, LEGAL TIMES, August 28, 2006, at 1 (discussing the smoking ban affecting cigars in Washington D.C.).

123. Iowa recently exempted casino gaming areas from a statewide smoking ban. Basu, *supra* note 116 (“the double-standard is glaring”); Shawn Gude, *Iowa Governor Signs Smoking Ban*, DAILY IOWAN, April 16, 2008, at 1A, 3A (“The Legislative Services Agency has estimated the state will lose about \$9 million in the upcoming fiscal year because of the ban. Some charge lawmakers couldn’t stomach losing further revenue from a smoking ban on gambling floors in casinos.”).

124. See Ford, *supra* note 117 (discussing customers lost by businesses subject

smoking bans are put in place, affected businesses tend to push for bans that will cover their competitors, including casinos.¹²⁵ Until that happens, however, unrestricted businesses may try to take advantage of those businesses that have to prohibit smoking.¹²⁶ This has led some commentators to call for a national ban.¹²⁷ Perhaps the best way to understand the issues is to examine the path of regulation in one jurisdiction.

A. *The New Jersey Experience*

The experience in Atlantic City, New Jersey, illustrates many of the issues that typically emerge when states enact smoking bans. In January 2006, Governor Richard J. Cody signed a law that would prohibit smoking in all indoor public places—including restaurants, bars, and casinos.¹²⁸ Concerns about the economic impact the ban would have on the gaming industry stalled the bill, but a compromise was eventually reached.¹²⁹ After it was signed into law in 2006, the New Jersey Smoke-Free Air Act made New Jersey the eleventh state in the nation to ban smoking in almost all indoor public places and workplaces.¹³⁰ Like most smoking regulations, the New Jersey law defined an “indoor public place” as any “structurally enclosed place of business [or] commerce . . . which is generally accessible to the public.”¹³¹ It also defined “workplace” as “a structurally enclosed location or portion thereof at which a person performs any type of service

to a smoking ban and efforts by competitors not subject to the ban to attract customers from those businesses).

125. See Gude, *supra* note 123 (noting one bar owner “criticized the action, calling the casino exemption hypocritical,” while another said, “[i]t’s already hard for us to compete with the casino industry [The exemption is] extremely frustrating from a small-business standpoint.”).

126. See, e.g., Ford, *supra* note 117 (discussing a bowling alley in Colfax, Minnesota, not yet subject to a smoking ban advertising to attract smokers from a neighboring town with a smoking ban).

127. See generally 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 (2007).

128. Associated Press, *New Jersey Gov. Signs Smoking Ban, Casinos Excepted*, FoxNews.com, Jan. 15, 2006, <http://www.foxnews.com/story/0,2933,181719,00.html>.

129. *Id.* The state exempted casinos when Atlantic City’s \$5-billion-a-year casino industry argued a smoking ban would hurt profits, state tax revenue, and jobs. *Id.*

130. N.J. STAT. ANN. § 26:3D (West 2008).

131. *Id.* § 26:3D-57.

or labor.”¹³² Individuals who violated the Act by smoking in prohibited areas or by failing to police the smoking ban were subject to incremental fines.¹³³

Despite the scope of the definition, “gaming areas within casinos” were exempted at the request of Atlantic City’s \$5-billion-a-year casino industry.¹³⁴ Gaming industry officials argued that a total smoking ban would cause significant losses in profits, tax revenues, and jobs.¹³⁵ Such losses could deal a crippling blow to the state’s economy because “Atlantic City’s gambling halls employ about 48,000 people, and the state’s 8 percent tax on casino revenue netted \$401 million” in 2006.¹³⁶ Because of the potential losses, the smoking ban would not have passed without the casino exemption.¹³⁷ “Two years ago, I couldn’t get this bill considered in either house,” said New Jersey State Senator John H. Adler.¹³⁸ “I thought that that was as much as we could get, and the governor concluded the same thing.”¹³⁹ Regina Carlson, the executive director of the New Jersey Group Against Smoking Pollution summed up the position of the legislature: “We had a choice of protecting 98 percent of the people, or zero, and it was an easy choice.”¹⁴⁰

132. *Id.*

133. *Id.* § 26:3D-62. The ban seems to have worked. According to the state health department, “there are about 80,000 fewer smokers in New Jersey than there were in 2005 and 2006.” Wayne Parry, *Atlantic City Council Poised to Snuff Out Casino Smoking*, STAR-LEDGER (Newark, N.J.), April 16, 2008, at 57.

134. Associated Press, *supra* note 127. The bans in other states do not have jurisdiction over Indian tribe casinos. *Id.* Other states have granted exemptions to private clubs and casinos, but these exemptions are only valid if the casino establishes certain conditions. See Keith Woodeshick, *Smoking Ban Legislation in New Jersey: Should Casinos Be Immune From Smoke?* 3 RUTGERS J.L. & URB. POL’Y 496, 503 (2006). For example, in Connecticut, “casinos are exempted from the smoking ban as long as they operate under a valid liquor permit.” *Id.* (citing *Smoking Act, P.A. 03-45, Doesn’t Apply to Casinos*, CONN. L. TRIB., Oct. 13, 2003, at 251). Delaware casinos may have smoking pavilions if they are open on one end. *Id.* at 503–04 (citing James Merriweather, *Bright Spot for Smokers*, NEWS J. (Wilmington, Del.), Jan. 17, 2004, at 16B).

135. Associated Press, *supra* note 128.

136. *Id.* (noting that these funds were used to benefit senior citizens and the disabled). But see Rychlak, *supra* note 43, at 51–53 (discussing the process of earmarking lottery proceeds).

137. Associated Press, *supra* note 128.

138. *Id.*

139. *Id.*

140. *Id.*

While it pleased the gaming industry, the casino exception did not sit well with some casino employees. Vince Rennich, a former table games supervisor at the Tropicana Casino and Resort and a nonsmoker, blamed his lung cancer on twenty-five years of inhaling ETS in his workplace.¹⁴¹ “A good majority of the time, I’m surrounded in a cloud of smoke,” said Rennich.¹⁴² “Even if it’s a no-smoking table, it doesn’t help. The way the smoke blows or drifts, you can only go so far. It’ll find you.”¹⁴³ Similarly, Al DeSimone, a casino dealer and a nonsmoker, complained, “On a daily basis, we breathe secondhand smoke three or four feet from our nose. We can’t move side to side, we can’t move away, we’re stuck there. It’s unhealthy.”¹⁴⁴ Tom Grey, executive director of the National Coalition Against Legalized Gambling, voiced similar concerns: “What this is all about is government willing to not protect the health and welfare of their own citizens.”¹⁴⁵

The exemption for casinos also did not sit well with other Atlantic City businesses—the New Jersey Restaurant Association threatened to file suit and ask a federal judge to block its enforcement.¹⁴⁶ “It should either be everybody or nobody,” said John Exabaktilos, owner of the Ducktown Tavern, located one block from the casino strip in Atlantic City, New Jersey.¹⁴⁷ “I took a rundown restaurant and built it up and now the state wants to tell me I have to tell my customers they can’t smoke? It’s just another thing that gives the casinos an advantage.”¹⁴⁸ One Atlantic City restaurateur complained: “It’s going to kill me, I know it is. . . . Do you know how many conventioners eat here and come out to the bar to smoke afterward? You can kiss them goodbye, now. They won’t even leave the

141. Wayne Parry, *Cancer Patient Says Casino Fired Him for Opposing Smoking*, ASSOCIATED PRESS, July 19, 2007, available at <http://www1.phillyburbs.com/pb-dyn/news/104-07182007-1379805.htm> (content available through subscription). Rennich was later fired from the Tropicana Casino and Resort one week after testifying before a state senate committee about the dangers of secondhand smoke in casinos. *Id.* Consequently, he brought suit against the casino under New Jersey’s Contentious Employee Protection Act—commonly known as the “whistleblower” law—which prohibits employees from being fired for reporting dangerous situations in the workplace. *Id.*

142. Associated Press, *supra* note 128.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

casino.”¹⁴⁹

In January 2007, Atlantic City considered passing a local ban that would override the state casino exemption, but gaming representatives pointed out that it could cut revenue by twenty percent and “mean the loss of as many as 3,400 jobs. The city council then enacted a compromise law restricting smoking to no more than twenty-five percent of the casino floor.”¹⁵⁰ The smoking areas, however, were not walled off and separated from nonsmoking areas, and casino employees complained that smoke continued to waft throughout the casino floor.¹⁵¹

In 2008, the City Council of Atlantic City once again considered banning smoking in casinos.¹⁵² About two dozen casino workers held a rally on the boardwalk to support the proposal.¹⁵³ “It’s been two years now, and dealers are still getting sick,” said Nate Chait, a dealer at Caesars Atlantic City.¹⁵⁴ “There will always be debate about whether a smoking ban will hurt profits. What’s not debatable is that second-hand smoke kills. From the bottom of our hearts, lungs and souls, we thank the city council for their support of us.”¹⁵⁵ Another former casino worker said, “It’s criminal that this was allowed to happen I pray that no one else will have to go through what I did: losing part of my lung, my health and my job.”¹⁵⁶ State Senator James Whelan, a former Atlantic City mayor, said exempting casinos from the state smoking ban “was a problem in the first place, frankly. I understand the economic argument, but this is a health issue.”¹⁵⁷ He said, “It’s indefensible. The science is conclusive on this: Second-hand smoke causes cancer and kills people.”¹⁵⁸

By the end of April, the Atlantic City City Council voted 9-0 to ban smoking in all gaming areas.¹⁵⁹ That ended “the last major loophole to a tough statewide ban on smoking in public buildings that had conspicuously

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149. *Id.*
150. Parry, *supra* note 9, at 17.
151. *Id.*
152. *Id.*
153. Parry, *supra* note 141, at 57.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. Parry, *supra* note 9, at 17.

exempted gambling halls.”¹⁶⁰ Smokers “will still be able to light up in unstaffed smoking lounges away from the table games and slot machines, if the individual casinos choose to build them,” but casinos workers will largely be sheltered from ETS.¹⁶¹

In the meantime, some smokers have already decided to take their business to the slot parlors in nearby Pennsylvania and New York. Atlantic City casinos are worried about losing even more business in an already bad economic climate.¹⁶² Casino owner Donald Trump, a nonsmoker, called it a “sad day for Atlantic City. . . . It puts Atlantic City at a huge competitive disadvantage with casinos in other states.”¹⁶³ He called for an immediate legal challenge from the Atlantic City Casino Association and said that the ban would cost the state hundreds of millions of dollars in lost future taxes.¹⁶⁴ For the time being, New Jersey officials just have to wait and see whether someone files a legal challenge and what impact the ban will have on state coffers.¹⁶⁵

B. *The Economic Impact of Smoking Regulations*

While some casinos maintain nonsmoking areas for gambling and dining, in most states a great deal of the casino floor falls into the smoking section.¹⁶⁶ As such, ETS is a nearly inherent part of the gaming environment. That means that casino employees are exposed to a great

160. *Id.*

161. *Id.*

162. *See id.* Kim Hoverman, a smoker playing at the Trump Taj Mahal Casino Resort, said: “I won’t come here at all; I live closer to Philadelphia, anyway. And I hate smoking outside.” *Id.* at 23. Tom McGuigan of Philadelphia was also playing at the Taj Mahal and said that he will not be gambling in Atlantic City. “I like to smoke,” he said. “I’ll do it in Philadelphia.” *Id.*; *see also* Laura Mansnerus, *As Atlantic City Eyes Smoking Ban, Casinos Fear Losses*, N.Y. TIMES, Nov. 29, 2006, at B1.

163. Donald Wittkowski, *Trump Huffs, Puffs about Smoking Ban*, PRESS ATLANTIC CITY, April 11, 2008, at A1.

164. *Id.*

165. *See generally* Randy Samson, Comment, *Atlantic City Special: Whether the Casino Exception to the New Jersey Smoke-Free Air Act Comports with the New Jersey Constitution’s General Prohibition of Special Laws*, 38 SETON HALL L. REV. 359 (2008). It should be noted that, as of the writing of this article, the City Council of Atlantic City voted to overturn the temporary smoking ban, thus reverting back to the prior arrangement of allowing smoking on no more than 25% of the casino floor. *See Atlantic City Suspends Casino Smoking Ban*, N.Y. TIMES, Oct. 27, 2008, at A24.

166. At least one Internet page lists “smoke free casinos” for gamblers who prefer nonsmoking venues. *See* AMERICANS FOR NONSMOKERS’ RIGHTS, SMOKEFREE GAMING LAWS (2009), <http://www.no-smoke.org/pdf/100smokefreecasinos.pdf>.

deal of ETS, but most states have been reluctant to ban smoking in gaming areas due to the impact that it would have on casino profitability.¹⁶⁷ Identifying the economic impact of smoking bans that are already in place informs legislators about the impact of laws they may pass, and it may convince them not to pass some laws.¹⁶⁸ It also lets investors know what to expect and how hard to fight proposed smoking restrictions. Unfortunately, there is contradicting evidence about the economic impact of smoking bans.

Many gamblers smoke. Casino officials are justifiably concerned that if a smoking ban were put in place, they might lose revenue. Most gamblers are at the casino for a substantial amount of time, certainly long enough for a smoker to crave at least one cigarette. If a ban were in place, smokers would probably leave the area to smoke and end up spending less time (and losing less money) in the casino. A 2008 study of Delaware's smoking ban found that the ban "had a significant negative impact on demand The smoking ban reduced gaming demand 15.9%."¹⁶⁹ Many bar and restaurant owners argue smoking bans "lead to an approximate 30 percent or greater decline in sales."¹⁷⁰ Such a reduction in demand not

167. Some states, including New Jersey, Illinois, Washington, and Colorado, have recently passed laws that ban smoking on casino floors. Ray Hagar, *Smoking Ban Casts Pall over Tavern Atmosphere*, RENO GAZETTE-J., April 6, 2008, at 10A, 11A.

168. In *Emery v. Caravan of Dreams, Inc.*, the president of a music and entertainment venue testified that banning smoking would have a major economic impact on his profitability. *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995), *aff'd*, 85 F.3d 622 (5th Cir. 1996). The court held that, in light of this testimony, a smoking ban was unreasonable because it would endanger the defendant's viability as a business. *Id.* In the years since the *Emery* decision, public accommodations have repeatedly raised economic concerns when contesting a request for a smoking ban. See David W. Cowling & Philip Bond, *Smoke-Free Laws and Bar Revenues in California—The Last Call*, 14 HEALTH ECON. 1273, 1280 (2005) (finding these economic concerns largely unfounded because a drop in business from smokers will be replaced by increased business from nonsmokers); Margie Skeer et al., *Smoking in Boston Bars Before and After a 100% Smoke-Free Regulation: An Assessment of Early Compliance*, 10 J. PUB. HEALTH MGMT. & PRAC. 501, 505 (2004) (discussing bar owners' worries about how to accommodate large groups of patrons that would now have to smoke outside).

169. Richard Thalheimer & Mukhtar M. Ali, *The Demand for Casino Gaming with Special Reference to a Smoking Ban*, 46 ECON. INQUIRY 273, 273 (2008).

170. U.S. DHHS, *supra* note 93, at 613 (citations omitted). To help businesses deal with potential losses, some smoking bans allow establishments to apply for a waiver if they can show that "compliance with a specific provision of this article would cause undue financial hardship." See N.Y. PUB. HEALTH LAW § 1399-u(1)(a) (McKinney 2006) (detailing waiver provision). However, a waiver might not

only affects the gaming entities, it also impacts employment and state revenue. When Colorado casinos went smoke-free, revenues took a very serious tumble.¹⁷¹ A smoking ban also hurt revenues in East St. Louis casinos.¹⁷² Even small, charitable operations can suffer. Mater Dei Academy is a small private school in Columbus, Ohio. For thirty-four years, it was primarily funded by tuition and charity bingo games. In 2005, Columbus banned smoking in all public buildings in the city, including bingo halls.¹⁷³ Bingo proceeds dropped dramatically and the school's very existence was threatened.¹⁷⁴

On the other hand, many academic studies suggest that smoking bans do not have serious adverse economic impacts on business.¹⁷⁵ Following

completely absolve the establishment from complying with the smoking ban. The waiver may be operative for a limited period of time, and the venue still may be required to work to minimize ETS's effects. *See, e.g., id.* § 1399-u(4) ("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 second-hand smoke and to ensure that the waiver is consistent with the general purpose of this article."); PHILA., PA., CODE § 10-602(3)(b) (2007) (providing that the application period for waiver for drinking establishments was set to expire ninety days after the January 7, 2008 effective date of the ordinance).

171. *See Hagar, supra* note 167, at 11A.

172. *See id.* "It's been devastating," casino manager Tom Monaghan told the [Belleville, Ill.] News-Democrat 'It was like flipping a switch, with the new smoking bill.'" *Id.* The Nevada Clean Indoor Air Act was approved by Nevada voters in the 2006 general election. *Id.* It banned smoking in most indoor public places except for casino floors and bars that did not serve food. *Id.* The law said that if bars or taverns served food, they could not allow smoking. "So, smoking customers no longer patronized their businesses to have a beer, cigarette and perhaps a hamburger while playing the poker machines and watching sports on a big-screen TV." *Id.* at 10A. A lot of people went out of business, and many employees were laid off. *Id.* "Revenues for taverns, bars, grocery stores and drug stores have plummeted since the Nevada Clean Indoor Air Act became state law, said Steve Deschamps, general manager and chief financial officer for United Coin Machine Company, a Las Vegas slot route operator." *Id.*

173. *See From the Mail: Charity and Solidarity*, WANDERER, Dec. 8, 2005, at 11.

174. *Id.*

175. *E.g.,* W. J. Bartosch & G. C. Pope, *Economic Effect of Restaurant Smoking Restrictions on Restaurant Business in Massachusetts, 1992 to 1998*, 11 TOBACCO CONTROL ii38, ii40–ii42 (Supp. II 2002). "[A]doption of highly restrictive restaurant policies did not cause a significant deviation from the strong underlying positive time trend in restaurant sales . . ." *Id.* at ii40. *See also* Centers for Disease Control & Prevention, *Assessment of the Impact of a 100% Smoke-Free Ordinance on Restaurant Sales—West Lake Hills, Texas, 1992–1994*, 44 MORBIDITY & MORTALITY

enactment of some smoking bans, the number of patrons did not decrease significantly from the pre-ban levels.¹⁷⁶ Banning smoking may significantly increase the number of nonsmokers who visit a business, which could result in an overall gain of patrons. Accordingly, some restaurants and bars might experience positive economic effects after smoking bans are implemented. According to the New York City Department of Finance, restaurant sales tax receipts increased in the city during the year following the implementation of a citywide smoking ban.¹⁷⁷

In order to gauge the economic impact of smoking bans at casinos, it is important to know what percentage of gamblers actually smoke. This number has been a major point of contention between the casino industry and antismoking activists. The casinos argue that gamblers who smoke

WKLY. REP. 370, 371 tbl. 1 (1995) (concluding that the total sales of the restaurants did not decrease after implementation of the ordinance); Stanton A. Glantz & Lisa R. A. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales*, 84 AM. J. PUB. HEALTH 1081, 1081 (1994) (“An analysis of restaurant sales as a fraction of total retail sales, and of restaurant sales in cities with smoke-free restaurant ordinances compared with those in similar cities that do not have smoke-free ordinances, shows no significant effects on business.”); Stanton A. Glantz & Lisa R. A. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants and Bars on Revenues: A Follow-Up*, 87 AM. J. PUB. HEALTH 1687, 1688–89 (1997) (“Smoke-free ordinances generally had no statistically significant effect, either on the fraction of total retail sales that went to restaurants or on the ratio between sales in smoke-free cities and sales in comparison cities.”); Lisa Stolzenberg & Stewart J. D’Alessio, *Is Nonsmoking Dangerous to the Health of Restaurants? The Effect of California’s Indoor Smoking Ban on Restaurant Revenues*, 31 EVALUATION REV. 75, 86–87 (2007) (showing that though there was a decline in revenue immediately following the smoking ban, this decline was short lived, and revenues returned to preexisting levels rather quickly).

176. Centers for Disease Control & Prevention, *Impact of a Smoking Ban on Restaurant and Bar Revenues—El Paso, Texas, 2002*, 53 MORBIDITY & MORTALITY WKLY. REP. 150, 150 (2004) (concluding, after a regression analysis of sales tax receipts, that within one year of the implementation of a smoking ban in El Paso, Texas, there were no statistically significant changes in restaurant revenue); Andrew Hyland & K. Michael Cummings, *Restaurateur Reports of the Economic Impact of the New York City Smoke-Free Air Act*, 5 J. PUB. HEALTH MGMT. & PRAC. 37, 40 (1999) (“[I]f smokers were shifting their patronage to places where smoking was allowed, it would be expected that large restaurants, those without bar areas, and restaurants that recently enacted a 100 percent smoke-free policy would be more likely to report business losses. However, these data show that this was not the case.”).

177. N.Y. CITY DEP’T OF FIN. ET AL., *THE STATE OF SMOKE-FREE NEW YORK CITY: A ONE-YEAR REVIEW 2* (2004), available at <http://www.nyc.gov/html/doh/downloads/pdf/smoke/sfaa-2004report.pdf> (“From April 1, 2003, through January 31, 2004—the most recent data available—bar and restaurant business tax receipts were up 8.7% from the same period in 2002–2003.”).

make up over half of the industry's clientele.¹⁷⁸ On the other hand, the antismoking group Americans for Nonsmokers' Rights claims that the number is closer to twenty percent, which nearly mirrors the total percentage of Americans who smoke.¹⁷⁹ While both sides have their respective sources,¹⁸⁰ there has not yet been a comprehensive and reliable study that firmly establishes the percentage of casino patrons who smoke. Without this information, the industry-wide economic impact of a smoking ban cannot be accurately assessed.

In all likelihood, the economic impact of a smoking ban will vary greatly from one casino to another, based upon factors such as the habits of the casino's patrons and the availability of alternatives. Of particular concern will be the current quality of the air inside the casino. The concentration of various ETS pollutants in an indoor space varies greatly according to the following factors: the number of smokers, their pattern of smoking, the volume of the space, the ventilation in the room, the effectiveness of the air distribution, the rate of removal of ETS from the indoor air by air cleaners, deposition of particles onto surfaces, and surface adsorption and re-emission of gaseous components.¹⁸¹ Thus, studies analyzing air quality that indicate a problem in one area might not mean there is a problem in a different area if the above-listed factors are taken into consideration.

While not an absolute solution to the problems posed by exposure to ETS, separate designated smoking areas represent a reasonable compromise between the interests of casinos and antismoking activists.

178. See Jeremy LaMarche, *Smoke Free Casinos? Don't Bet on It.*, 19 LOY. CONSUMER L. REV. 311, 311 (2007) (discussing the argument by "the New Jersey casino industry, which estimates that smoking gamblers are half of their clientele").

179. See Americans for Nonsmokers' Rights, *Casinos and Gaming Venues*, <http://www.no-smoke.org/goingsmokefree.php?id=104#economic> (citing Chris A. Pritsos, *THE PERCENTAGE OF GAMBLERS WHO SMOKE: A STUDY OF NEVADA CASINOS AND OTHER GAMING VENUES* (2006), available at <http://www.no-smoke.org/pdf/nevadaeconstudy.pdf> (discussing a study showing the percentage of smoking gamblers in Nevada to be "roughly 21 percent")).

180. Casinos usually back their percentages by employee estimates, while antismoking activists commonly cite limited-scope surveys of casino patrons. Both methods have a high potential of skewing the percentage in favor of the respective sides. See, e.g., LaMarche, *supra* note 178, at 311 (discussing percentages of smokers given by the New Jersey casino industry); Laura Mansnerus, *As Atlantic City Eyes Smoking Ban, Casinos Fear Losses*, N.Y. TIMES, Nov. 29, 2006, at B1 (discussing percentages of smokers given by New Jersey casino and bar owners).

181. Rutkow et al., *supra* note 119, at 440-41, 452-54.

Under such a plan, casinos could create nonsmoking areas that are fully enclosed and physically separated from smoking areas. They could use separate, dedicated ventilation systems so that the air of the smoking section does not mix with the air in the nonsmoking section.¹⁸² This approach serves the interest of most concerned parties.¹⁸³ Nonsmoking gamblers could remain largely free of ETS exposure, and gamblers who smoke would have the opportunity to continue gaming normally, albeit separate from nonsmoking patrons. Casinos would not only benefit from the continued patronage of smoking clientele, but they may also attract more business from nonsmokers who would not have otherwise visited the establishment. The only remaining problem would be the exposure of casino employees in the smoking areas. If this approach is taken, casinos might assign only smoking employees to the smoking sections or obtain some type of waiver from the employees in those areas.¹⁸⁴

Antismoking advocates have strongly opposed the “separate and ventilate” approach.¹⁸⁵ They argue that there is no risk-free level of exposure to secondhand smoke, and that current air-cleaning technologies cannot eliminate all of the chemicals released in ETS.¹⁸⁶ Even if current technology cannot remove all ETS from the air, this approach does show good faith on the part of the casino, and it may persuade lawmakers not to risk the economic consequences of a full smoking ban in gambling establishments. It may also prompt further technology that works better than today’s ventilation systems.

182. See Robert P. Hagan, Comment, *Restaurants, Bars and Workplaces, Lend Me Your Air: Smokefree Laws as Private Property Exactions—The Undiscovered Country for Nollan and Dolan?*, 22 J. CONTEMP. HEALTH L. & POL’Y 143, 171 (2005).

183. See *id.* at 171–72 (explaining that while some “smokefree advocates have rejected the separate ventilation system as inadequate . . . it is certainly an improvement over no action at all” and strikes an appropriate balance between states’ interests and private property owners’ interests).

184. See *id.* at 172.

185. See Winokur, *supra* note 127, at 667 (“The only effective means of protecting nonsmokers in a public place is a smoking ban.”); Matthew A. Stinnett, Note, *A Breath of Fresh Air: A Smoking Ban’s Legal Invasion of Property Rights in Lexington Fayette County Food & Beverage Ass’n v. Lexington-Fayette Urban County Gov’t*, 32 N. KY. L. REV. 239, 255 (2005) (“[E]ven though a restaurant or bar may attempt to separate smokers and non-smokers into different sections, the non-smokers were still exposed to the lethal impact of second-hand smoke.”).

186. *Id.*

C. Politics, Lawmaking, and the Constitution

The gaming industry is very powerful in some states, but less powerful in others. As such, casinos may fend off smoking restrictions in some areas much longer than elsewhere. It seems clear, however, that the battle will be difficult. There are a few points to consider when looking at smoking restrictions.

Both smokers and private businesses, like restaurants and bars, have challenged smoking regulations under the Fourteenth Amendment. They have claimed that smoking regulations violate both their due process rights as well as the Equal Protection Clause.¹⁸⁷ Nonetheless, the United States Supreme Court has held that “the Fourteenth Amendment was not intended to interfere with the police power of the State to promote public health or morals.”¹⁸⁸ American citizens have no fundamental right to smoke, and “smokers are not a suspect class.”¹⁸⁹

When evaluating a law passed by a state using its police power, the courts are deferential and analyze the law using the rational basis standard of review.¹⁹⁰ Thus, the law “need only be rationally related to the end that the legislature intended for the statute to achieve.”¹⁹¹ This rational basis standard of review is satisfied by showing that prohibiting smoking indoors will ultimately reduce the amount of secondhand smoke to which the public is exposed. Accordingly, legislatures may pass laws prohibiting or limiting smoking if those laws are rationally related to the end they seek to secure; in this case, the end sought is the protection of the public from the

187. See, e.g., Chad Lawhorn, *Judge Upholds City Smoking Ban*, LAWRENCE J.-WORLD, Dec. 23, 2005, http://www2.ljworld.com/news/2005/dec/23/judge_upholds_city_smoking_ban/?city_local. John Steffes, a nightclub owner in Lawrence, Kansas, challenged the constitutionality of the city’s smoking ban because he felt that “[p]rivate enterprise should be allowed to run their business without the government taking it over.” *Id.* Steffes challenged the ban on the grounds that it superseded state law and was unconstitutionally vague. *Id.* For a discussion of the equal protection argument, see Williamson, *supra* note 9, at 170.

188. Levin, *supra* note 46, at 194 (citing *Mugler v. Kansas*, 123 U.S. 623, 669 (1887); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885)).

189. *Id.* at 195 (citing *Gaspar v. La. Stadium & Exposition Dist.*, 577 F.2d 897, 898–99 (5th Cir. 1978); *Owens v. Ventura County Super. Ct.*, 42 F. Supp. 2d 993, 998 (C.D. Cal. 1999)); see also *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 465 (S.D.N.Y. 2004) (challenging New York State and New York City smoking bans focusing on the constitutional effects on smokers, particularly with respect to socializing in bars and restaurants).

190. Levin, *supra* note 46, at 193.

191. *Id.* (citing *Williamson v. Lee Optical*, 384 U.S. 483, 487–88 (1955)).

health risks of secondhand smoke.¹⁹² As an example of how deferential the Court has been with respect to the protection of public health, consider that early in the twentieth century, several states had “laws banning the production, sale, advertisement, or use of cigarettes.”¹⁹³ The Supreme Court upheld these laws as valid exercises of the states’ police powers.¹⁹⁴

The gaming industry has been able to demand exemptions from smoking bans due to its political and economic influence.¹⁹⁵ Such exemptions, however, have been challenged by antismoking groups and by competing businesses. One Iowa newspaper has argued that public health advocates and restaurant lobbyists need to “join forces and push the next legislature to remove the exemption for casino gambling floors.”¹⁹⁶

It’s quite easy to understand why the casino lobby managed to get an exemption—at the expense of the dealers, janitors, wait staff and other casino employees. The lobbyists preached a worst-case gospel, prophesying that the state would lose millions in gambling revenue because the chain-smoking gamblers would abandon places like the Riverside Casino and head back to the Indian casinos (where the ban won’t be in effect, and the state doesn’t get a cut).

Add that possible loss of revenue to the prophesized loss in revenue from the tobacco tax—because the ban is supposed to help more smokers to quit or at least to cut back—and legislators start to get worried about the state budget.

192. *Id.* at 194–95. Not all impacts of such bans are immediately apparent. In March 2007, a Scottish man named Stewart Laidlaw was banished from a local pub in Dunfermline, Scotland, due to numerous complaints about his excessive flatulence. *News of the Weird*, OXFORD EAGLE, May 17, 2007 (citing DUNFERMLINE PRESS, March 22, 2007), available at <http://web.archive.org/web/20071017081947/newsoftheweird.com/archive/nw070513.html>. Laidlaw later explained that no one had complained before, but he conceded that was probably because cigarette smoke had masked the odor prior to a recent smoking ban. *Id.*

193. Jacobson et al., *supra* note 5, at 44.

194. *Id.* (citing *Austin v. Tennessee*, 179 U.S. 472 (1900)).

195. See Elizabeth Ahlin, *Iowa’s Smoking Ban’s Passage is Applauded Across the River*, OMAHA WORLD-HERALD, April 9, 2008, at 1 (“Exceptions include the gambling floors of casinos, but not casino bars or restaurants.”); Basu, *supra* note 115, at 13A (“The exemption was put in after hard lobbying by the casino industry, which warned the state it could lose \$100 million in tax revenues by banning smoking at casinos.”).

196. Editorial, *Our View—Statewide Smoking Ban Still Needs Work*, IOWA CITY PRESS-CITIZEN, April 16, 2008, at 15A.

In fact, the lobbyists managed to worry enough legislators that it soon became apparent no proposed ban would have enough voters to pass unless it exempted at least the gambling floor.¹⁹⁷

Of course, when casinos receive exemptions, other businesses may suffer a competitive disadvantage. “Now [legislators] need to help affected businesses through this rapid transition and then move to level the economic playing field by removing the casino exemption altogether.”¹⁹⁸

The case of *Batte-Holmgren v. Galvin* involved a challenge to Connecticut’s law prohibiting smoking in most public places but exempting Connecticut’s casinos (which happened to be Indian casinos).¹⁹⁹ The plaintiffs claimed that the ban deprived them of substantial business while private clubs and casinos were not similarly harmed.²⁰⁰ They argued “that the legislature chose to exclude casinos solely because of the enormous economic strength and political power of the casinos.”²⁰¹

The court found a rational basis for the state’s concerns that justified the casinos being exempted from the ban.²⁰² The court concluded that the main reason for the exemption was that the casinos were located on tribal land. The court accepted the state’s argument that the state might lack legal authority to enforce state laws on tribal land,²⁰³ because tribes are sovereigns and possess the power to regulate their internal and social relations.²⁰⁴ The court further reasoned that even if the state had the authority to enforce the ban, it might lack the means to do so because the state did not have a local presence on tribal land.²⁰⁵ Thus, the court concluded that exclusions for Indian casinos from statewide smoking bans

197. *Id.*

198. *Id.*

199. *Batte-Holmgren v. Galvin*, No. CV044000287, 2004 WL 2896485, at *1 (Conn. Super. Ct. Nov. 5, 2004). After the Act was passed, it was amended to include the prohibition of smoking in the bar areas of bowling alleys, dog tracks, and facilities equipped with screens for simulcasting off-track betting race programs or jai alai games. *Id.*

200. *Id.* One plaintiff even submitted affidavits showing that her daytime business decreased by seventy to eighty percent after the imposition of the ban. *Id.* at n.3.

201. *Id.*

202. *Id.* at *3.

203. *Id.* at *5.

204. *See United States v. Kagama*, 118 U.S. 375, 377 (1886).

205. *Batte-Holmgren*, 2004 WL 2896485, at *5.

had a rational basis and were valid.²⁰⁶

An exception for all casinos—not merely those on tribal lands—might also further a legitimate state interest. The economic interest a state has in local casinos remaining financially solvent is undeniably high. If a state could show that a smoking ban would significantly jeopardize casino revenue, employment, and tax proceeds—considering the great amount of deference afforded to a state when the courts apply rational basis review—an exception for all casinos might well be upheld.²⁰⁷

Until recently, state law was the main, if not sole, concern for most casino operators. Local ordinances were of little concern because casinos are regulated almost solely by the state and often have a great deal of political influence in local government. As seen with the situation in Atlantic City, however, municipal governments may be a greater concern today as they put even stricter bans in place.²⁰⁸

In *American Cancer Society v. State*, plaintiffs challenged a state law that exempted gambling areas from local government smoking bans.²⁰⁹ The State of Montana contended that the state law preempted local regulation of gambling areas and that city smoking bans were inconsistent with that preemption.²¹⁰ The state argued that municipalities were prohibited from regulating “any form of gambling, lotteries, or gift enterprises.”²¹¹ The court, however, framed the issue differently and found that the pertinent question was whether the cities, “in passing clean

206. *Id.* at *6.

207. According to at least one estimate, casinos in Delaware lose about \$100 million annually due to that state’s smoking ban. News Summary, *Health, Economic Costs of Casino Smoking Debated*, JOIN TOGETHER, May 25, 2006, <http://www.jointogether.org/news/headlines/inthenews/2006/health-economic-costs-of.html> (last visited Mar. 5, 2009).

208. *See supra* part IV.A.

209. *Am. Cancer Soc’y v. State*, 103 P.3d 1085, 1087 (Mont. 2004) (involving the challenge of a law for being more restrictive than the Montana Clear Indoor Air Act of 1979 (codified at MONT. CODE ANN. §§ 50-40-101 to -109 (2003))).

210. *Id.* at 1090; *see also* *JTR Colebrook, Inc. v. Town of Colebrook*, 829 A.2d 1089, 1094 (N.H. 2003) (local ordinance was preempted by state law); *Entm’t Indus. Coal. v. Tacoma-Pierce County Health Dep’t*, 105 P.3d 985, 985–86 (Wash. 2005) (Supreme Court of Washington invalidated the county’s resolution based on a finding that it was preempted by the Washington Clean Indoor Air Act). *But see* *D.A.B.E., Inc. v. City of Toledo*, 292 F. Supp. 2d 968, 973 (N.D. Ohio 2003) (upheld a strict local ordinance based on a home rule law).

211. *Am. Cancer Soc’y*, 103 P.3d at 1090 (quoting MONT. CODE ANN. § 7-1-112(5) (2003)).

air ordinances, attempted to regulate a ‘form of gambling’ in contravention of the express prohibition?”²¹² The court answered in the negative and held that the cities were in no way regulating gambling, but were merely regulating clean indoor air.²¹³ Thus, following the reasoning of the Montana Supreme Court, a local ordinance prohibiting smoking may present serious problems for casino operators.²¹⁴

D. Litigation

A casino’s main concern regarding smoking policies might not come from the states or municipalities. Nonsmokers have increasingly used the courts in an attempt to force businesses to restrict smoking, as well as to receive compensation for complications caused by ETS exposure at work. So far, the courts have generally left the issue of smoking in the workplace in the hands of employers, subject to applicable statutory requirements.²¹⁵ Courts have, however, “upheld claims made under the common-law duty

212. *Id.*

213. *Id.* The court made the point that if Helena’s clean air ordinances impacted the offices of attorneys, this would not mean that the city was infringing on the court’s ability to regulate them. *Id.*

214. Commentators have suggested that casinos might challenge the constitutionality of smoking bans under the Takings Clause of the Fifth Amendment. *See Hagan, supra* note 182, at 143–44 (“A disturbing trend has developed in the United States that threatens private property rights protected under the Fifth and Fourteenth Amendments . . .”). It is possible for a smoking ban to amount to a taking in a couple of ways. First, a regulation or ban “rises to the level of a taking when the regulation [or ban] creates a ‘physical invasion’ of the property.” Levin, *supra* note 46, at 196 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). Second, a taking occurs “when [a] regulation ‘does not substantially advance [a] legitimate state interest[]’” *Id.* (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). The first argument is likely to fail because a smoking ban does not create an actual physical invasion of a casino’s property. Under the test adopted by the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), such an actual physical invasion is necessary for a claim to survive. *Id.* The second argument supporting a violation of the Takings Clause is also likely to fail. The police power of a state to promote and regulate the public health of its citizens will almost always be found to be a legitimate state interest. *Id.* Thus, it appears as though casinos are powerless to challenge a smoking regulation enacted by a state that would ban smoking on a casino floor. Perhaps a casino’s best shot at defeating such regulations lies in the lobbying arena. To avoid the potential hurdles presented by strict local ordinances, casinos and other places that operate gambling devices might lobby their state legislatures to expressly restrict the power of local municipalities to regulate smoking in their establishments.

215. John C. Fox, *An Assessment of the Current Legal Climate Concerning Smoking in the Workplace*, 13 ST. LOUIS U. PUB. L. REV. 591, 591 (1994).

to provide a safe workplace and more recently, workers' compensation statutes."²¹⁶ The successful claims usually have a combination of two elements. First, the nonsmoking employee was hypersensitive to ETS or suffered from a preexisting medical condition that was worsened by ETS in the workplace.²¹⁷ Second, the employer refused to take any action to help accommodate the hypersensitive employee.²¹⁸ Thus, a casino faced with such a situation must take special care to balance the needs of the nonsmoking employee with those of the employees who do smoke, perhaps by finding a nonsmoking workplace for the employee.²¹⁹

1. *The Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) requires businesses to make reasonable accommodations for people suffering from disabilities.²²⁰ Soon after the ADA's adoption, and as smoking in public places became a point of contention, commentators and scholars began to discuss "whether the ADA could be used to protect smoke-sensitive individuals."²²¹ In light of the "ever-expanding understanding of the public health benefits of smoking bans,"²²² some commentators now argue that the ADA "can and should be used to ban smoking in most indoor public places in the United States."²²³

216. Sablone, *supra* note 2, at 1115.

217. Fox, *supra* note 215, at 592.

218. *Id.*

219. *Id.*

220. 42 U.S.C. §§ 12101–12213 (2000). See generally Mark A. Gottlieb et al., *Second-Hand Smoke and the ADA: Ensuring Access for Persons with Breathing and Heart Disorders*, 13 ST. LOUIS U. PUB. L. REV. 635 (discussing the advantages of nonsmokers' use of the ADA as a tool to hold businesses accountable for injuries caused by ETS exposure); Rutkow et al., *supra* note 118 (arguing the ADA is one of the best tools to be sued to ban smoking in indoor public places).

221. Rutkow et al., *supra* note 119, at 413; see also Wendy E. Parmet et al., *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA*, 12 J.L. & HEALTH 1, 2 (1997) (discussing how some "have claimed that the refusal to prohibit or limit smoking constitutes a refusal to provide a 'reasonable accommodation' necessary to permit them to fully participate in a public accommodation or place of employment"); see generally Mary Kate Kearney, *The ADA, Respiratory Disabilities and Smoking: Can Smokers at Burger King Really Have It Their Way?*, 50 SYRACUSE L. REV. 1 (2000).

222. Rutkow et al., *supra* note 119, at 413.

223. *Id.* at 411 ("Evidence from a growing number of municipal smoking bans, new research on the effects of second-hand smoke, and recent clarifications of the meaning of the ADA combine to form a powerful legal and public health argument.").

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more major life activities.”²²⁴ Since “breathing is a major life activity,” an individual with a breathing problem, like asthma, would likely be covered by the Act.²²⁵ However, not everyone with an upper-respiratory problem would be covered. The disability must substantially limit the major life activity of the individual in order to be covered by the ADA.²²⁶ Courts have repeatedly held that such limitations cannot be merely potential or hypothetical, but must be actual and imminent.²²⁷ Accordingly, only those disabled nonsmokers who are substantially, actually, and imminently affected by ETS would be covered under the ADA.

Plaintiffs have argued that the reasonable accommodation standard of the ADA requires places of public accommodations, like casinos, to ban smoking completely because of the threat to their health presented by ETS exposure.²²⁸ While it seems that a casino would likely have to accommodate a nonsmoking individual covered under the ADA, a complete ban on smoking would not necessarily be required in order to achieve that end.²²⁹ For example, if an individual customer brought suit

224. 42 U.S.C. § 12102(1)(A).

225. *Id.* § 12102(2)(A). It is a well-established fact that ETS exposure poses an immediate and substantial risk to asthmatics and others with diminished respiratory capacity. Gottlieb et al., *supra* note 218, at 636. Thus, individuals with such afflictions would have an actionable claim against an establishment that unlawfully refused to accommodate their disability. *Id.* at 637.

226. 42 U.S.C. § 12102(1)(A); Kearney, *supra* note 221, at 4.

227. *See* Kearney, *supra* note 221, at 55–56 (citing *Sutton v. United Airlines*, 119 S. Ct. 2139, 2146 (1999)).

228. *See id.* at 19. As a place of public accommodation under the ADA, a casino must make

reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodation to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations[.]

42 U.S.C. § 12182(b)(2)(A)(ii).

229. At least one commentator has argued that plaintiffs could successfully use OSHA regulations to enforce smoking bans. *See* Detanico, *supra* note 119, at 1067–69 (noting also, though, that such claims have not been successfully made); OSHA Mission Statement, <http://www.osha.gov/as/opa/missionposter.html> (last visited Mar. 10, 2009); *see also* 29 U.S.C. § 651(b) (2000) (defining the role of OSHA as promoting “safe and healthful working conditions”).

against the casino under the ADA, banning smoking throughout all of the facilities would not seem to be a “reasonable modification” under the ADA.²³⁰ Since the goal of a casino is to provide hospitality to all of its customers, a complete ban on smoking could deprive a casino of the ability to be hospitable to its smoking customers, who may well make up a substantial portion of the clientele.

Casinos may also argue that a smoking ban modification would place an undue burden on them. The ADA provides an exception if the modification imposes an undue burden on the business. The undue burden analysis weighs several factors, including the financial or administrative impact of the accommodation.²³¹ A complete smoking ban in a casino would have a potentially severe financial impact on the business, and the administrative costs of enforcing the complete ban might make it unreasonable. In order to avoid such litigation, a casino should offer nonsmoking tables and slot machine areas on their gambling floor. Coupled with adequate ventilation systems, designated nonsmoking areas would significantly limit the liability a casino could face by an individual patron suing under the ADA.

In *Emery v. Caravan of Dreams*, plaintiffs Diane G. Emery and Patricia L. Young sued a musical entertainment venue under Title III of the ADA.²³² The plaintiffs claimed that the defendant discriminated against them by permitting smoking in its theater, even though the first two rows of seats were designated for nonsmokers.²³³ The plaintiffs demanded that the theater ban smoking when they attended events at the theater.²³⁴ Due to the nature of the services it provided, the theater was considered a public accommodation for ADA purposes.²³⁵ Plaintiff Emery suffered from cystic fibrosis, the symptoms of which were aggravated by cigarette

230. See Kearney, *supra* note 221, at 23 (explaining that courts have held that the ADA’s reasonable modification requirement does not require businesses to fundamentally alter their nature or mission).

231. *Id.* at 24. In an undue burden analysis, the courts will examine “the financial resources of the site involved; the number of persons employed at the site; the effect on expenses and resources; the administrative and financial relationship of the site to the corporation; and if applicable, the overall financial resources of the parent corporation and the number of its facilities.” *Id.* (quoting *Roberts v. KinderCare Learning Centers*, 896 F. Supp. 921, 927 (D. Minn. 1995) (citing 28 C.F.R. § 36.104)).

232. *Emery v. Caravan of Dreams*, 879 F. Supp. 640, 642 (N.D. Tex. 1995).

233. *Id.*

234. *Id.*

235. *Id.*

smoke.²³⁶ Her physician had warned her to avoid cigarette smoke because, after two or three breaths, it would put her into a coughing fit that would last from twenty to twenty-five minutes.²³⁷ Based on these findings, the court concluded that Emery had a disability as defined under the ADA.²³⁸

Emery argued that the theater's smoking policy denied her access to the venue and that only a complete smoking ban would accommodate her disability.²³⁹ The court interpreted this complaint to allege that Caravan of Dreams had failed "to make reasonable modifications in policies, practices, or procedures, when such modifications [were] necessary to afford . . . services . . . to individuals with disabilities."²⁴⁰ The court pointed out that a modification would not be necessary if it would "fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."²⁴¹ Caravan of Dreams's president "testified that banning smoking would have a major economic impact and would result in major national bands not coming to play at [the establishment]."²⁴² Based on this testimony, the court concluded that a smoking ban was not a reasonable modification under the ADA because it "would endanger Defendant's viability as a business."²⁴³

Many casinos would seem to be in a situation similar to that of Caravan of Dreams. A smoking ban could have serious economic repercussions, but that may not be the determinative factor. In *Staron v. McDonald's Corp.*, three children who had been diagnosed with asthma and a woman with lupus filed lawsuits against McDonald's and Burger King, claiming that the restaurants' smoking policies constituted discrimination under the ADA.²⁴⁴ The plaintiffs requested a declaratory

236. *Id.*

237. *Id.*

238. *Id.* at 643. The court found that plaintiff Young did not have a disability. *Id.*

239. *Id.* at 642.

240. *Id.* at 644 (quoting 42 U.S.C. § 12182(b)(2)(A)(ii) (2000)).

241. *Id.* (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)).

242. *Id.*

243. *Id.*; see also *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 409–10 (1979) (a fundamental alteration to the nature of a clinical nursing program to meet the needs of a hearing impaired student was not required as an accommodation under the Rehabilitation Act); *N.M. Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 855 (10th Cir. 1982) (the Rehabilitation Act does not require program modification if such modification would jeopardize the overall viability of the program).

244. *Staron v. McDonald's Corp.*, 51 F.3d 353, 354–55 (2d Cir. 1995).

judgment that such policies were discriminatory under the ADA.²⁴⁵ Additionally, they sought a smoking ban in all facilities owned, operated, or leased by McDonald's and Burger King.²⁴⁶

McDonald's and Burger King filed motions to dismiss, arguing that a blanket ban on smoking in all of their restaurants was not a reasonable modification under the ADA.²⁴⁷ The district court agreed and dismissed the case.²⁴⁸ On appeal, McDonald's and Burger King conceded that their operations constituted public accommodations under Title III of the ADA.²⁴⁹ In addition, they agreed that the plaintiffs were disabled for ADA purposes.²⁵⁰ Therefore, the court focused solely on whether the requested smoking ban was a reasonable modification under the ADA.²⁵¹ The court concluded that, under the ADA, "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it."²⁵² Because the lower court had dismissed the case as a matter of law, the appellate court found that the fact-specific inquiry it envisioned had not yet been conducted.²⁵³ The case was remanded to the district court and the parties reached a settlement; therefore, the court never discussed a decision about the reasonableness and necessity of a complete smoking ban.²⁵⁴

In *Edwards v. GMRI, Inc.*, three asthmatic women attempted to eat at Ruby Tuesday restaurants in Gaithersburg, Maryland, and Rockville, Maryland, and at a Red Lobster restaurant in Rockville.²⁵⁵ Due to the

245. *Id.* at 355.

246. *Id.*

247. *Id.*

248. *Id.* Later that day, McDonald's announced that it had banned smoking in all corporate-owned-and-operated restaurants. *Id.*; see also Nancy Hass et al., *Fighting and Switching*, NEWSWEEK, Mar. 21, 1994, at 52 (stating that "the past few weeks have beaten the tar out of the nation's cigarette makers. . . . McDonald's declared itself smoke-free."). According to McDonald's, this rendered any appeal moot. *Staron*, 51 F.3d at 355. The court of appeals disagreed, and it heard the case. *Id.*

249. *Staron*, 51 F.3d at 355.

250. *Id.*

251. *Id.*

252. *Id.* at 356.

253. *Id.*

254. Rutkow et al., *supra* note 119, at 434.

255. *Edwards v. GMRI, Inc.*, No. DKC 97-4327, slip op. at 1 (D. Md. Mar. 1, 1999).

smoke, the women “had trouble breathing and were forced to leave.”²⁵⁶ They “claimed that the restaurant’s policy of allowing customers to smoke discriminated against persons with smoke-sensitive disabilities and effectively denied them access to the establishments in violation of Title III of the ADA.”²⁵⁷

Each of the parties “agreed that the defendants were public accommodations under the ADA,” but the defendants “questioned whether the plaintiffs’ asthma qualified them as disabled individuals under the ADA.”²⁵⁸ The court held that the defendants were relying exclusively on Title I cases—“confusing the major life activity of working with the major life activity of breathing.”²⁵⁹ The *Edwards* court found:

[T]he courts [in the Title I cases] held that the plaintiff was not substantially impaired because the condition or substance at issue was only a partial barrier to the defendant employer’s workplace or only prevented the plaintiff from performing a particular job. . . . In contrast, [p]laintiffs in this case allege that, for them, tobacco smoke is a complete barrier to [d]efendants’ restaurants.²⁶⁰

“The court found that the plaintiffs were disabled under the ADA, writing: ‘Just as a staircase denies access to someone in a wheelchair, tobacco smoke prevents [p]laintiffs from dining at [d]efendants’ restaurants.’ The court denied the defendants’ motion to dismiss, and the case eventually settled.”²⁶¹

As these restaurant cases reveal, ETS is perceived by most people as a serious threat that should be of concern to all businesses, including casinos and other gaming establishments. Whether they need to ban all smoking seems to be a case-by-case determination. As the court held in *Palmer v. Del Webb’s High Sierra*, while tobacco smoke may be more heavily associated with casinos and bars than with other businesses, “the amount and density of such tobacco smoke is highly inconstant and may range from none to quite dense, depending on the particular bar or casino and depending on the air filtration systems and other variables that vary

256. Rutkow et al., *supra* note 119, at 434 (quoting *Edwards*, No. DKC 97-4327, slip. op. at 1).

257. *Id.* (citing *Edwards*, No. DKC 97-4327, slip op. at 1).

258. *Id.* (citing *Edwards*, No. DKC 97-4327, slip op. at 4).

259. *Id.* at 435 (citing *Edwards*, No. DKC 97-4327, slip op. at 1–3).

260. *Id.* (quoting *Edwards*, No. DKC 97-4327, slip op. at 4).

261. *Id.* (quoting *Edwards*, No. DKC 97-4327, slip op. at 4).

from business to business.”²⁶² Proper ventilation and due consideration for the needs of smoke-sensitive customers and employees should help casinos avoid liability under the ADA.

2. Occupational Safety

Although seventy percent of all indoor workers are covered by some smoke-free policy, food and beverage service employees are the least-protected workers.²⁶³ In fact, bar and tavern workers are typically exposed to levels of ETS four to six times higher than employees in other workplaces.²⁶⁴ Most states have occupational health statutes that protect workers’ rights to a safe and nonhazardous work environment.²⁶⁵ These statutes naturally lend themselves to litigation involving ETS exposure. For example, in *Palmer*, the Nevada Supreme Court was forced to decide whether a casino worker claiming to suffer from a disease caused by ETS was entitled to compensation under the Nevada Occupational Disease Act (NODA).²⁶⁶ For twenty years, Palmer was employed at the defendant’s casino as a pit boss.²⁶⁷ The pit areas he managed had “noticeably high levels [of ETS],” and “the casino encouraged smoking by providing free cigarettes and numerous ashtrays.”²⁶⁸ Palmer claimed that the casino’s smoking policies violated state law and his “disease caused by inhaling

262. *Palmer v. Del Webb’s High Sierra*, 838 P.2d 435, 436 (Nev. 1992).

263. Donald R. Shopland et al., *Disparities in Smoke-Free Workplace Policies Among Food Service Workers*, 46 J. OCCUPATIONAL & ENVTL. MED. 347, 352 (2004).

264. Mark D. Eisner et al., *Bartenders’ Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, 280 J. AM. MED. ASS’N 1909, 1909 (1998).

265. See Jessica Niezgoda, Note, *Kicking Ash(Trays): Smoking Bans in Public Workplaces, Bars, and Restaurants—Current Laws, Constitutional Challenges, and Proposed Federal Regulation*, 33 J. LEGIS. 99, 102–09 (2006) (discussing California and New York indoor air regulations); Jeanne Dugan Cooper, *No Butts About It: Labor Department Seeks Smoking Ban in All Workplaces*, NEWSDAY, Mar. 26, 1994, at A5; see also Matthew Baldini, Comment, *The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout*, 26 SETON HALL L. REV. 348, 348–51 (1995) (arguing that tobacco regulation is ripe for federal regulation and suggesting that, given the power of tobacco lobbies over legislation, the best method for controlling ETS is employer-motivated and employee-designed workplace policies and employer-encouraged cessation programs).

266. *Palmer*, 838 P.2d at 435.

267. *Id.* at 437 (Young, J., concurring). Del Webb owned casinos and the New York Yankees, but he is probably best known for developing retirement communities in the western United States. See Ronald J. Rychlak, *Unlucky Numbers: Betting on, Against, and With the Yankee\$*, in *COURTING THE YANKEES: LEGAL ESSAYS ON THE BRONX BOMBERS* 225–27 (2003).

268. *Palmer*, 838 P.2d at 437–38 (Young, J., concurring).

tobacco smoke exhaled by others in the work place” was compensable under NODA.²⁶⁹

In reading the occupational disease statute, the court reasoned that the legislature intended for there to be a “connection between the *kind* of job and the *kind* of disease.”²⁷⁰ It concluded that the occupational disease must arise out of the employment and be related to the nature of the employment at hand.²⁷¹ The court refused to recognize tobacco smoke as being related to the nature of Palmer’s employment, stating: “It is apparent to us that despite its common place in bars and casinos, environmental tobacco smoke is not incidental to the character of these businesses, and is not a *natural* incident of these businesses.”²⁷² The court used the illustration of coal mining and black lung disease, stating that coal dust—the cause of black lung disease—“is incidental to the character of coal mining” because “mining coal necessarily creates coal dust.”²⁷³ Tobacco smoke, on the other hand, “is not part of the nature or *character* of a bar or casino business.”²⁷⁴ The court further noted that while tobacco smoke may be more heavily associated with casinos and bars than with other businesses, the levels of ETS vary greatly and depend on numerous factors that are specific to individual businesses.²⁷⁵

The *Palmer* court was also concerned that ETS exposure can occur in numerous places outside the workplace. The court noted that “secondary smoke is a hazard to which workers, as a class, may be ‘equally exposed outside of the employment.’”²⁷⁶ The court went on to say that although the Nevada legislature had not done so, it was “free to declare that any person who contracts some secondary smoke-related disease at work is eligible for occupational disease compensation.”²⁷⁷ Thus, the state legislature could easily provide avenues of relief for employees affected by ETS in the workplace if it so chose.

269. *Id.* at 435 (majority opinion).

270. *Id.* at 435–36.

271. *Id.* at 435.

272. *Id.* at 436. This is a mixed blessing for the gaming industry. When litigating under the ADA, casinos tend to argue that a smoking ban would significantly affect an important part of their business. *See supra* Part IV.D.1.

273. *Palmer*, 838 P.2d at 436.

274. *Id.*

275. *Id.*

276. *Id.* at 435. *See supra* notes 76–86 and accompanying text (discussion of causation).

277. *Id.* at 436.

In the future, casinos could certainly point to *Palmer* to argue that absent legislative action, medical conditions brought about by ETS do not constitute an occupational disease calling for workers' compensation. On the other hand, in *Mullen v. Treasure Chest Casino, L.L.C.*, the Fifth Circuit allowed a group of casino workers suffering from respiratory illnesses to form a class in order to bring suit.²⁷⁸ The plaintiffs sued the casino, citing defective and improperly maintained air-conditioning and ventilation systems.²⁷⁹ Over three hundred workers were stricken with occupational respiratory illnesses and they sought certification as a class.²⁸⁰ The Fifth Circuit ruled that the elements of numerosity, commonality, typicality, and adequacy of representation were all satisfied to allow for a class to be certified.²⁸¹ Whether the class would meet the same evidentiary hurdles set forth in the *Palmer* case was not resolved. By allowing the casino workers complaining of an occupational disease like this to form a class action lawsuit, however, the Fifth Circuit appears to have accepted the premise underlying the ETS suit filed by casino employees.²⁸²

278. *Mullen v. Treasure Chest Casino, L.L.C.*, 186 F.3d 620, 622 (5th Cir. 1999).

279. *Id.* at 623.

280. *Id.* Rule 23(a) of the Federal Rules of Civil Procedure requires a showing of:

- (1) numerosity (a class so large that joinder of all members is impracticable);
- (2) commonality (questions of law or fact common to the class); (3) typicality (named parties' claims or defenses are typical of the class); and (4) adequacy of representation (representatives will fairly and adequately protect the interests of the class).

Id. (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)).

281. *Id.* at 624–26.

282. The scientific community has long recognized the impact of ETS on casino employees. For example, in a 1997 study:

[E]nvironmental and medical evaluations were performed to evaluate occupational exposure to environmental tobacco smoke (ETS) among casino employees. Air concentrations of both nicotine and respirable dust were similar to those published in the literature for other nonindustrial indoor environments. The geometric mean serum cotinine level of the twenty-seven participants who provided serum samples was 1.34 nanograms per milliliter (ng/mL) (pre-shift) and 1.85 ng/mL (post-shift). Both measurements greatly exceeded the geometric mean value of 0.65 ng/mL for participants in the Third National Health and Nutrition Examination Survey (NHANES III) who reported exposure to ETS at work. This evaluation demonstrates that a sample of employees working in a casino gaming area were exposed to ETS at levels greater than those observed in a representative sample of the US population,

The bottom line seems to be that casinos must be aware of applicable occupational safety statutes and undertake efforts to protect workers and customers. These efforts should include proper ventilation, smoke-free areas, and accommodations on a case-by-case basis for extra-sensitive customers and employees.

V. CONCLUSION

Controversy regarding smoking and the restrictions placed on it has probably existed since the first smoker exhaled in the presence of a nonsmoker. Because of the legal, economic, and social issues raised by infringing upon one person's rights in favor of another's, the controversy is likely to continue for a long time.²⁸³ Casinos have a difficult task in trying to accommodate all of their patrons and protecting them from health hazards. They also have to be aware of employee's claims brought under the ADA or other workplace regulations.

Most casinos currently enjoy exemptions from smoking bans. Many of them, however, will soon be forced to deal with the regulations.²⁸⁴ While no perfect business solution exists, casinos need to look to the future. By restricting smoking to specific places, offering smoke-free gaming areas, maintaining proper ventilation, and making special accommodations for employees who complain about ETS, casinos can significantly reduce their risk of liability. They may, at the same time, better accommodate all of their customers and maintain better relations with their workers. The alternative invites governmental regulation, which would likely remove all discretion from the casino and result in a less accommodating destination for casino patrons.

and that the serum and urine cotinine of these employees increased during the workshift.

Douglas Trout et al., *Exposure of Casino Employees to Environmental Tobacco Smoke*, 40 J. OCCUPATIONAL & ENVTL. MED. 270, 270 (1998).

283. James Q. Lynch, *Smoking Foes to Target Casino Exemption Next*, GAZETTE (Cedar Rapids, Iowa), Apr. 16, 2008, at 1A, 6A (quoting Dan Ramsey of the American Lung Association commenting on a new smoking ban that had a gaming floor exception: "We'll be coming after casinos.").

284. There is no reason to doubt that lawmakers on the reservations will also consider such laws. The Attorney General in Connecticut already has opined that the state smoking ban can extend to cover the Indian casinos in that state. See Richard Blumenthal, Attorney General's Opinion, March 13, 2008, available at <http://www.ct.gov/AG/cwp/view.asp?a=1770&q=411768>.