

# Snuffing Out A National Symbol What The United States Can Learn From France's New No-Smoking Law

## I. INTRODUCTION

For many French citizens, the cigarette is as much a national symbol as the baguette or beret. Since tobacco first appeared on the scene<sup>1</sup>, the French have been able to puff away at will in cafés, restaurants, and in virtually any other place they have desired. However, on November 1, 1992, this changed.<sup>2</sup> On that ill-fated day for smokers, the French government introduced a comprehensive national law that, for the first time, told people in France when and where they could light up. This Note will analyze the new French law, why it was enacted, and whether it has a chance to succeed. This discussion will then cross the Atlantic and compare the French law to smoking regulations in four jurisdictions in the United States to discover what restrictions exist on smoking at the federal level in this country and to analyze whether the United States will ever adopt a national no-smoking law similar to that enacted in France.

## II. THE FRENCH REACTION

Smoking in France is a national pastime. More than 40% of French citizens smoke<sup>3</sup>, one of the highest rates in Europe,<sup>4</sup> and 60%

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1. David W. Opperbeck, *Blowin' In The Wind: A Federal Answer to Environmental Tobacco Smoke*, 15 SETON HALL LEG. J. 231 (1991).

2. CODE DE LA SANTE PUBLIQUE ("Code of Public Health"). Partie Réglementaire. ("Regulation Section") ART. R. 355-28-1 Nouveau, Decret # 92-478 du 29 mai 1992. Art. 17. [hereinafter "French Statute"] (LEXIS, Intlaw Library, Frcode File) (unofficial translation by Deborah Levin):

I. To be inserted into the code of Public Health (Second part: Decrees in The Council of State) book III entitled: "The Struggle Against Social Problems"

II. The Title VIII of this book to be entitled: "The Struggle Against Addiction to Smoking" and includes a first chapter entitled: Ban on Smoking in places assigned a collective use

III. Articles 1 to 9 and 11 to 14 of the present decree become respectively articles R. 355-28-1 to R. 355-28-13 of the public health code.

Art. 1. The ban on smoking in places assigned a collective use by article 16 of the aforementioned law of July 9, 1976 shall apply in all closed and covered places accommodating the public or which constitute places of work.

3. Helen Evans, *French Plan to Ban Smoking in Public Places*, UNITED PRESS INT'L,

of all 18-year olds in France are smokers.<sup>5</sup> Even more shocking is the fact that 10% of all smokers in France are under the age of twelve.<sup>6</sup>

### A. *The Cost of Smoking*

More than 61,000 French citizens die from smoking-related ailments every year, which is approximately as many people as live in the seaside town of Cannes.<sup>7</sup> French health officials fear that if something is not done to curb the health habits of French citizens, smoking-related deaths will more than double to 135,000, by the year 2010.<sup>8</sup>

Smoking-related deaths are not unique to France. Annually, more than 3 million people around the world die from smoking-related ailments,<sup>9</sup> while in 1992, 700,000 will die in Europe alone.<sup>10</sup> Officials from the World Health Organization fear that unless smoking habits are changed and stringent anti-smoking regulations are imposed worldwide, 250 million people will have died from smoking by the year 2025.<sup>11</sup>

French officials say that their concern with curbing the nicotine habit is partially motivated by economics. Studies show that smoking costs the French \$8.8 billion in health care and \$2.6 billion in lost production annually, for a total social cost of \$11.4 billion.<sup>12</sup> Arguably, these statistics motivated French lawmakers to draft the nation's first smoking regulations. Although just 700 people died in France last year from causes directly related to second-hand smoke,<sup>13</sup> officials say a major purpose in the law is to protect the 60% of non-smoking French citizens from the dangers of "passive smoke."<sup>14</sup>

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May 31, 1992 (LEXIS, Nexis Library, Omni File). The smoking rate is shockingly high among women. Nearly two out of every three women smoke in France and the proportion of women who smoke more than one pack a day has doubled in the past five years from 6% to 12%. *Id.* This trend shows no signs of abating.

4. *Id.*

5. *Id.*

6. Judson Gooding, *An Ambivalent War Against Smoking*, THE ATLANTIC, June 1992, at 51.

7. *Id.* at 50.

8. Evans, *supra* note 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. Gooding, *supra* note 6, at 50.

13. Evans, *supra* note 3.

14. Alan Raybould, *Stubbed-Out Gauloises May Ignite Workplace War*, October 21, 1992 (LEXIS, World Library, Txtnews File).

## B. *Law Seeks to Limit Smoking*

On May 30, 1992, French lawmakers added a new chapter to their public health code, entitled "The Struggle Against Addiction to Smoking."<sup>15</sup> The law went into effect on November 1, 1992. The law affects the entire nation and regulates smoking in all public areas and in the workplace. The law bans smoking in all enclosed public places<sup>16</sup> and orders business owners to create a "fumoir" or "smoking room" where all their smoking patrons or employees may continue to indulge in their habit while minimizing the effect on non-smokers.<sup>17</sup> The law also restricts smoking on domestic airplane flights that last more than two hours and completely bans smoking on flights shorter than two hours.<sup>18</sup> The law also restricts smoking on board all commercial ships and on other forms of river transportation.<sup>19</sup> Smoking is completely

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15. *French Statute, supra* note 2.

16. *French Statute, supra* note 2, at Art. 4:

Art. 4. - I. Under reservation of the application of the following articles; in the establishments mentioned in articles L. 231-1 and L. 231-1 of the work code, it is forbidden to smoke in closed and covered premises assigned to the totality of the workforce, to include reception areas and areas used for collective dining, meeting and training rooms, relaxation rooms, areas reserved for leisure activities, cultural activities, and sports activities, sanitary and medically sanitary areas.

II. The employer shall establish, after consultation of the work doctor, committee of hygiene and security and working conditions, or in place of this, delegated personnel:

a) For the areas the above-mentioned I., an arrangement drawing of places which can be if the case arises reserved especially for smokers

b) For the areas of work other than those envisioned in the above-mentioned I., a drawing of organization or arrangement destined to ensure the protection of non-smokers. This drawing shall be updated as is needed every two years.

17. Suzanne Lowry, *Will the Smoking Dog Kick the Habit?*, THE DAILY TELEGRAPH, (London) October 9, 1992, at 17. See also *Departures: 'Non' smoking*, THE INDEPENDENT, (London), January 9, 1993, at 42. Air France recently took the new law one step further by making all of its international flights less than two hours smoke-free. A recent survey indicated that 71% of French fliers found the new law "acceptable" while 91% of fliers believed it was possible to refrain from smoking for one to two hours. *Id.*

18. *French Statute, supra* note 2, at Art. 11:

Art. 11. In commercial French aircraft or those aircraft in compliance with French regulations, with the exception of domestic flights of a duration of less than two hours, spaces can be reserved for smokers under the condition that the placement of these spaces will ensure the protection of non-smokers.

19. *French Statute, supra* note 2, Art. 12:

banned in all Metro stations.<sup>20</sup> The law allows for "fumeurs" to be put in all public schools, but restricts access to anyone under sixteen.<sup>21</sup> Thus, this provision effectively bans smoking in all French public schools.

### 1. *Ventilation Requirements Imposed*

Locations that choose to continue to allow smoking must abide by the law's minimum ventilation requirement, which regulates the amount of fresh air that must be circulated throughout the entire enclosed space where smoking is permitted.<sup>22</sup> The law specifically sets out a requirement of seven liters per second and per person for the premises if smoking is allowed in the building; it also states that seven cubic meters of fresh air should be circulated per occupant irrespective of whether that person is a smoker.<sup>23</sup> The law further requires all public places to contain

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Art. 12. On board commercial ships and river transportation boats including stationary boats receiving the public which are in compliance with French regulations on organization of spaces, possibly adjustable can be envisioned in order to put spaces at the disposal of smokers, in the limit of 30 per 100 of rooms.

20. Daphne Angles, *France is set to put curbs on smokers*, THE NEW YORK TIMES, Oct. 25, 1992, §5 at 3.

21. *French Statute*, *supra* note 2, at Art. 8:

Art. 8. In the enclosure of public and private teaching establishments as well as all premises used for teaching, specific rooms, separate from rooms reserved for teachers can be placed at the disposal of non-smoking teachers and staff.

Moreover, in the enclosure of high schools when these places are distinct from those middle schools, and in public and private establishments in which are undertaken higher education and professional training, rooms, with the exception of classrooms and meeting rooms can be placed at [the disposal of smokers].

22. *French Statute*, *supra* note 2, at Art. 3:

Art. 3. Without prejudice to the specific arrangements of title II of the present decree, the locations put at the disposal of smokers are to be either specific premises or designated spaces.

These premises or spaces are to respect the following standards:

a) Minimal flow of ventilation of 7 liters per second and per occupant for the premises in which the means of ventilation is ensured by mechanical or natural conduits

b) Minimal volume of 7 cubic meters per occupant, for premises in which ventilation is ensured by exterior openings.

An order made conjointly by the minister of health, if need be, with the competent minister, can establish higher standards for certain premises in function with their conditions of use.

23. *Id.*

signs indicating where smoking is allowed and where it is not.<sup>24</sup> Aside from each workplace in France, this requirement also applies to each cafe, bistro, restaurant, or any other enclosed space open to the public. Hotels and restaurants are free to decide on the dimensions of the smoking area, but they must provide a non-smoking section.<sup>25</sup>

## 2. *Stiff Fines for Violators*

Although the law may be difficult to enforce in a practical sense, because it would require the presence of police officers in every cafe and restaurant in the nation, the statute does provide for some stiff fines for violators. Anyone who smokes in an area designated as a non-smoking section is subject to a "class three" police fine.<sup>26</sup> A class three fine entails penalties between 600F to 1,300F (\$115 - \$250).<sup>27</sup>

Fines are much more severe for employers or proprietors who fail to abide by the new law. Anyone who does not create a non-smoking section or provide proper ventilation, or who does not post appropriate and adequate signs reflecting the division between smokers and non-smokers, will be subject to a class five police fine.<sup>28</sup> A class five fine entails penalties from 1,300F to 3,000F (\$250 - \$575).<sup>29</sup>

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24. *French Statute*, supra note 2, at Art. 6:

Art. 6. A visible sign will recall the principle of the ban on smoking in the areas provided by Article 1 of the present decree and will indicate the areas which are at the disposal of smokers.

25. Angles, supra note 20.

26. C. PEN. Art. R. 25 Decr. #85-956 of Sept. 11, 1985.

27. J.O., C. ADM. CONTRAVENTIONS DE POLICE ET PEINES. Chapitre I - Des Peines. Art. R. 25 (Decr. #85-956 du 11 Sept. 1985, art. 3) (unofficial translation by Deborah Levin). Currency exchange rates are based on listings in WALL ST. J., Oct. 29, 1992, §3 at 15.

28. *French Statute*, supra note 2 at Art. 14:

Art. 14. To be punished by fine for violations of the third class, whoever shall smoke in one of the places cited by the first article of the present decree, outside of the area made available to smokers

To be punished by fines for violations of the fifth class

a) Whoever does not reserve areas conforming to the provisions of this decree.

b) Whoever does not respect the standards of ventilation provided by article 3 of this decree.

c) Whoever does not put in place a sign provided in article 6 of this decree.

29. J.O., C. ADM. CONTRAVENTIONS DE POLICE ET PEINES. Chapitre II - Contraventions et Peines. Section I. - Premiere Classe. Art. R. 26 (Decr. #90-897 du 1 oct. 1990, art. 21) (unofficial translation by Deborah Levin). Currency exchange rates are based on listings in WALL ST. J., Oct. 29, 1992, §3 at 15.

Enforcement of the new law will certainly be a problem. Although most French citizens support the law,<sup>30</sup> violations are likely to occur because of what smokers call a government intrusion into their way of life. In fact, French officials have already said that they do not intend to send police officers out in the streets to enforce the new law.<sup>31</sup> However, on the Paris Metro, ticket inspectors will be asked to make sure passengers are complying with the new rules.<sup>32</sup>

Despite the public posturing by various special interest groups both for and against the law, initial public reaction has been ambivalent.<sup>33</sup> Many French citizens continue to smoke in the newly created non-smoking sections of cafes and restaurants.<sup>34</sup> Despite the initial resistance, government officials say they still remain firmly committed to the restrictions.<sup>35</sup>

### C. *The French Resistance*

Resentment to the new law began even before it went into effect.

#### 1. *Problems at Work*

Employers resent the money they will have to spend reconfiguring their offices and buying ventilation systems.<sup>36</sup> Because the law does not allow workers to be fired for violations, employers are worried that employees may use their smoking habits as excuses for disrupting the office environment, then hide behind the law as protection, claiming that they are being singled out because they are smokers.<sup>37</sup> Labor leaders see the law a little differently. They are already calling it "repressive," because it not only discriminates against smokers, but in their view, gives employers a powerful tool to use against employees by refusing to hire smokers.<sup>38</sup> For its part, the government hopes to avoid a virtual war between smokers and non-smokers and believes the

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30. Evans, *supra* note 3.

31. Angles, *supra* note 20.

32. *Id.*

33. Dana Thomas, *Paris is (Still) Burning: Smokers Snub New French Law*, THE WASH. POST, December 26, 1992, §C at 1.

34. *Id.*

35. *Id.*

36. Raybould, *supra* note 14.

37. *Id.*

38. Elaine Gangley, *French Smokers To Be Curtailed*, THE CALGARY HERALD, October 23, 1992, §A at 13.

law will be able to strike a balance.<sup>39</sup> The government has been stressing the need for what it calls "progressive reforms."<sup>40</sup>

Labor leaders are also concerned that the government's new campaign against tobacco will cost jobs.<sup>41</sup> At least one trade union is predicting a new 30% tax increase on cigarettes will cut consumption by 20%.<sup>42</sup> As proof, the CGT trade union points to a move by government tobacco producer SEITA, made in the wake of the new tax increase, to close three of its plants, thus eliminating 443 jobs by mid-1993.<sup>43</sup> In fact, the first budget proposed by France's newly elected government calls for an even higher tax on cigarettes.<sup>44</sup>

## 2. *Hitting Close to Home*

The French government's attempt to reduce smoking is ironic in that it is the largest producer of cigarettes in the country. Any reduction in smoking that is not offset by higher taxes will have an impact on the government coffers. A pack of cigarettes is estimated to cost SEITA, the government company, just nine francs. But for each pack of Gauloises or other brand it sells, SEITA produces five francs, or nearly \$1, in tax revenue for the state.<sup>45</sup>

Smoking is big business in France, generating nearly \$5.5 billion in taxes for the state.<sup>46</sup> To put that number in perspective, SEITA produces the equivalent of 2.3% of France's National Budget.<sup>47</sup> Yet despite an apparent addiction to tobacco revenue, the French government continues to try to reduce the incidence of smoking in its population. Previous government efforts have included restrictions on advertising,<sup>48</sup> specifically, the introduction of a larger warning label on all packages sold in the country.<sup>49</sup> In 1991, the government increased

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39. Raybould, *supra* note 14.

40. *Id.*

41. *Muted Inflation Impact From Tobacco Rise-Beregovoy*, REUTERS, December 24, 1992 (LEXIS, Nexis Library, Omni File).

42. *Id.*

43. *Id.*

44. Mark Brasier, *France braced for budget squeeze*, THE DAILY TELEGRAPH, May 10, 1993, at 23. The government plan also includes tax increases for wine and gasoline. The extra money is needed to help close a growing deficit and spur economic growth and infrastructure development. *Id.*

45. Gooding, *supra* note 6, at 50.

46. *Id.*

47. *Id.*

48. *Id.* at 54.

49. *Id.* at 54.

cigarette prices by 5%.<sup>50</sup> In December, 1992, the parliament passed a law increasing cigarette prices by an additional 30%. This two-step tax increase pushed prices up 15% in January, 1993, and another 15% in May, 1993. The additional \$830 million the tax is expected to raise is slated to help close the country's \$3.9 billion social security budget deficit and help fund programs aimed at deterring children from smoking.<sup>51</sup> Yet, all of the previous government efforts have failed to reduce the percentage of smokers by more than a meager 0.4% per year, despite a belief by 76% of the population that smoking is a health hazard.<sup>52</sup>

#### D. *French Government Committed to Curbing Smoking*

France has one of the highest rates of smoking in the European Community<sup>53</sup> and, prior to the enactment of the new law, stood alone with England as the only nation without any national no-smoking policy governing public places.<sup>54</sup> Despite all the money that a tax on cigarettes may bring the French Government, lawmakers believe that the habit still costs France more than it brings in. Since smoking and its related ailments cost France a total of \$11.6 billion dollars, the \$5.5 billion brought in by SEITA does not outweigh the cost of smoking to the general public. The increased health care costs that France must pay because of smoking are not only a drain on the national treasury, but also increase the price of French products, thus reducing France's competitive position both inside the European Community and in world markets. It is clearly within the best interests of the French people to reduce their nation's addiction to cigarettes. Despite the short-term economic and social costs that may be associated with the new law and the government's effort to reduce smoking, lawmakers obviously believe that the nation is best served in the long run by enacting the new law. Although it will be difficult to enforce and violations will be rampant, the government will probably continue to support the law. French lawmakers will do so in the hope that, in the long run, along with tax increases and advertising restrictions, smoking will be reduced and the French people will willingly snuff out one of their national symbols.

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50. *Id.* at 54.

51. *See Muted Inflation*, *supra* note 41. The tax increase was twice as much as originally planned. *Id.*

52. Gooding, *supra* note 6, at 54.

53. A survey commissioned by the Tobacco Institute, which is sponsored by US Tobacco Companies, looks into the attitude towards smoking in offices, INT'L HERALD TRIBUNE, OCT. 16, 1985.

54. *Id.*



### III. UNITED STATES FEDERAL SMOKING LAW

#### A. *The State of Smoking in the United States*

Unlike France, the United States has no national law regulating smoking in either private or public places. The federal government launched its first attack on smoking in 1964, when the Surgeon General released his groundbreaking report, entitled *The Surgeon General's Advisory Committee on Smoking and Health*.<sup>55</sup> That report was the first official statement by the government linking smoking with a plethora of health hazards.<sup>56</sup> When the report was issued in 1965, 40% of the U.S. population smoked, about the same percentage of French citizens who smoke today.<sup>57</sup> Twenty-eight years later, the rate of smoking in the United States had dropped to 29%.<sup>58</sup> Health officials claim that the United States has been able to reduce its percentage of smokers through the use of increased awareness of the health hazards associated with smoking,<sup>59</sup> increased federal and state taxes on cigarettes,<sup>60</sup> increased effectiveness of smoking cessation programs,<sup>61</sup> and an overall change

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55. *Reducing the Health Consequences of Smoking: 25 Years of Progress, A Report of the Surgeon General* (1989). The report found that after 25 years of intense governmental effort in getting Americans to quit smoking, many major accomplishments had been achieved. The report had five conclusions:

1. The prevalence of smoking around adults decreased from 40 percent in 1965 to 29 percent in 1987. Nearly half of all living adults who ever smoked have quit.
2. Between 1964 and 1985, approximately three-quarters of a million smoking-related deaths were avoided or postponed as a result of decisions to quit smoking or not to start. Each of these avoided or postponed deaths represented an average gain in life expectancy of two decades.
3. The prevalence of smoking remains higher among blacks, blue-collar workers, and less educated persons than in the overall population. The decline in smoking has been substantially slower among women than among men.
4. Smoking begins primarily during childhood and adolescence. The age of initiation has fallen over time, particularly among females. Smoking among high school seniors leveled off from 1980 through 1987 after previous years of decline.
5. Smoking is responsible for more than one of every six deaths in the United States. Smoking remains the single most important preventable cause of death in our society.

56. *Id.* at ii.

57. *Id.* at 11.

58. *Id.* at 12.

59. *Id.* at 263.

60. *Id.* at 264.

61. *Id.* at 409.

in the public perception of smoking.<sup>62</sup> Government officials observe that although an estimated 390,000 Americans still die each year from smoking-related diseases,<sup>63</sup> at least 750,000 deaths have been either avoided or postponed as a result of decisions to quit smoking or not to start.<sup>64</sup> Yet, in contrast to the French Government's plan, all of these accomplishments were achieved in the United States without the enactment of a national no-smoking law.

### B. *Federal Smoking Regulations*

In 1965, Congress passed the first nationwide smoking regulation, when it ordered all cigarette manufacturers to print "CAUTION: Cigarette Smoking May Be Hazardous to Your Health" on each package sold in the country.<sup>65</sup> This law was followed up four years later when lawmakers banned all cigarette advertising on television and radio<sup>66</sup> and required manufacturers to strengthen warnings on all packages with a new and more direct warning: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."<sup>67</sup> Fourteen years later, Congress tightened up the regulations a notch by requiring a series of rotating warnings to be placed on all cigarette packaging, and by requiring advertisements that carried more direct and menacing warnings.<sup>68</sup> As a general rule, the tobacco

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62. *Id.* at 11.

63. *Id.* at 12.

64. *Id.* at 11.

65. Julie Rovner, *Anti-Smoking Forces Stoke Legislative Fires*, 44 CONG. Q. 3049 (1986). Although this was not technically a government law that regulated the smoking behavior of people, it was the first government attempt to pass a law that it hoped would affect smoking habits. Up to this point, there was no law requiring warning labels on cigarettes despite knowledge by many health officials that they were dangerous to one's health. *Id.*

66. *Id.* The law was originally supposed to go into effect on January 1, 1970, but both cigarette companies and broadcasters asked that the ban take effect the next day so they could advertise on the big college football bowl games. *Id.*

67. *Id.*

68. Cigarette Labeling and Advertising Act of 1965, 79 Stat. 283, *as amended*; 15 USCA §1333 (1982). The Act was amended again in 1983 to require a series of four rotating warning labels to appear on all cigarette packages and advertisements. The rotating warnings are:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to your Health.

SURGEON GENERAL'S WARNING: Smoking by Pregnant Women

industry and its allies in Congress did not oppose the advertising regulations and more stringent warnings.<sup>69</sup> Numerous judicial decisions have allowed tobacco companies to escape tort liability for the harms caused by cigarette smoking by arguing that the labels act as waivers absolving the manufacturers of any responsibility for the harms that may occur due to a smoker's decision to smoke. In short, the companies have been able to successfully argue that since Congress imposed these warning labels upon the companies, smokers have long been aware of the risks involved with their activities and have assumed the risk for any harms that may result.<sup>70</sup>

One law the tobacco industry fought was the 1989 decision by Congress to ban smoking on virtually all domestic airline flights.<sup>71</sup> Despite the industry's opposition, the bill passed overwhelmingly.<sup>72</sup> In areas where the federal government does have complete control, it has exercised restrictions upon smoking. The General Accounting Office, which controls nearly a third of all government office space, passed regulations in 1986 designed to guarantee all federal workers "a reasonably smoke-free environment."<sup>73</sup> The United States Military has also taken steps to eradicate smoking from its ranks.<sup>74</sup> Aside from these limits, the federal government also has policies in place for all of its offices that require smoking "to be held to an absolute minimum in areas where there are non-smokers."<sup>75</sup> These regulations ban smoking in such places as elevators, restrooms, corridors, and libraries.<sup>76</sup> Although many of these policies are not mandatory, they do give agency heads a wide range of powers to regulate smoking within their jurisdictions.<sup>77</sup>

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May Result in Fetal Injury, Premature Birth, And Low Birth Weight  
SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

69. Rovner, *supra* note 65, at 3051.

70. ROBERT E. GOODIN, NO SMOKING 16-20 (1989).

71. Ken Fireman, *Flying Cold-Turnkey; Health Groups Cheer Planned Cigarette Ban On Most U.S. Flights*, NEWSDAY, Oct. 18, 1989, at 5.

72. 49 U.S.C.A. § 1374 (West supp. 1992). The tobacco industry argued that the present ventilation systems on board aircraft were sufficient to handle any problems. Despite their opposition, Congress passed a temporary smoking ban on domestic flights in 1987. Two years later, the temporary ban became permanent.

73. Rovner, *supra* note 65, at 3050.

74. *Id.*

75. Federal Property Management Regulation, 41 C.F.R. § 101-20.105-3 (1991).

76. *Id.*

77. *Id.*

### C. Conclusion

Although the federal government has taken steps to curb smoking in some areas, it has yet to attempt to regulate smoking in non-government workplaces or in public areas. Although efforts to regulate smoking have been attempted by Congress, as will be discussed below, there are currently no federal statutes with the scope of the French no-smoking law. Despite the Surgeon General's efforts to educate Americans about the dangers of smoking, the federal government has left most of the regulatory responsibility up to the individual states.

## IV. STATE SMOKING REGULATIONS

After the Surgeon General's Report on Smoking came out in 1964, most states limited their regulation of smoking to restricting behavior that might cause fires. At the time the report was issued, 19 states had laws that prohibited smoking near explosives, fireworks, or other hazardous fire areas.<sup>78</sup> Only 13 states had regulations on the books that limited smoking in specific public places.<sup>79</sup> Nine years later, Arizona became the first state to restrict smoking in public areas specifically because smoking was a health hazard.<sup>80</sup> The following year, Connecticut became the first state to restrict smoking in restaurants.<sup>81</sup> When Minnesota passed its landmark Clean Indoor Air Act in 1975,<sup>82</sup> it became clear that the most aggressive and innovative smoking regulations in the country would not come from the federal government, but rather from the states.

### A. Oregon: A Legislative Pioneer

In 1981, Oregon enacted its "Indoor Clean Air Act."<sup>83</sup> The law was the first statewide attempt to regulate smoking in public and private areas. The purpose of the law was to protect non-smokers in confined areas from the health hazards generated by tobacco smoke.<sup>84</sup> The law is the most stringent non-smoking regulation in the Pacific Northwest.<sup>85</sup>

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78. *Surgeon General's Report*, *supra* note 55, at 557.

79. *Id.*

80. *Id.* at 558.

81. *Id.* at 558.

82. MINN. STAT. ANN. § 144.391-144.417 (1989).

83. OR. REV. STAT. § 443.835-443.875 (1992).

84. OR. REV. STAT. § 443.840.

85. Rick Kershenblatt, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. BRIDGEPORT L. REV. 133 (1987).

Unlike statewide non-smoking laws in Washington and California, Oregon regulates smoking in the workplace.<sup>86</sup>

### 1. *The Oregon Indoor Clean Air Act*

The Indoor Clear Air Act restricts smoking in all public places.<sup>87</sup> A public place is defined as "any enclosed indoor area open to and frequented by the public."<sup>88</sup> The law lists such places as retail stores, banks, grocery stores, meeting rooms, and commercial establishments as examples.<sup>89</sup> Despite this seemingly broad ban, the law is not totally inclusive of all public places nor is it as restrictive as the Minnesota Clean Indoor Air Act.<sup>90</sup> Oregon's law exempts such places as cocktail lounges,<sup>91</sup> offices occupied solely by a smoker,<sup>92</sup> a public meeting hall being used in a private capacity,<sup>93</sup> a store that sells tobacco products,<sup>94</sup> and any restaurant that seats less than 30 people.<sup>95</sup>

#### a. *Let My People Know*

As with the French law, Oregon requires that proprietors whose establishments are subject to the regulation post appropriate signs.<sup>96</sup> The French law requires merely that an area be identified as smoking or non-smoking,<sup>97</sup> while Oregon states that signs must be posted in the building being affected by the regulation and it must be a "sign posted conspicuously on all entrances normally used by the public."<sup>98</sup>

#### b. *Ventilation Guidelines Make Breathing Easy*

Oregon also specifies that public places with smoking sections must also provide for appropriate ventilation,<sup>99</sup> but, unlike the French law, there is no minimum requirement for the amount of fresh air to flow

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86. OR. REV. STAT. § 243.350.

87. OR. REV. STAT. § 433.835.

88. *Id.*

89. *Id.*

90. MINN. STAT. ANN. § 144.391-144.417.

91. OR. REV. STAT. § 433.850(a).

92. OR. REV. STAT. § 433.850(b).

93. OR. REV. STAT. § 433.850(c).

94. OR. REV. STAT. § 433.850(d).

95. OR. REV. STAT. § 433.850(e).

96. OR. REV. STAT. § 433.850(f).

97. *French Statute*, *supra* note 2, at Art. 6.

98. OR. ADMIN. R. 333-15-040 (1992).

99. OR. ADMIN. R. 333-15-050 (1992).

through the ventilation system.<sup>100</sup> The Oregon law merely requires that the mechanical air filtration system be of "adequate capacity to serve the entire dining and waiting area."<sup>101</sup> As long as the mechanical air filtration device is sufficient, a restaurant is exempt from the requirement to separate smokers and non-smokers.<sup>102</sup> However, the law was not intended to impose an economic burden upon Oregon businesses by requiring them to make any changes in their ventilation system,<sup>103</sup> something about which many French businesses complain.<sup>104</sup> The Health Division's administrative rules require only that smoking and non-smoking sections be reasonably proportionate to the preferences of customers.<sup>105</sup> If that requirement has been met, the establishment is not required to seat a non-smoker in a non-smoking section if none is available.<sup>106</sup>

c. *Proprietors Pay the Price, Not Smokers*

The law imposes penalties upon violators who fail to post or maintain appropriate signs or who fail to designate a no-smoking area in a public place.<sup>107</sup> Penalties include a fine of up to \$100 for any single violation in any 30-day period,<sup>108</sup> thus giving the State Health Division or local board of health the right to petition a court to enjoin further violations.<sup>109</sup> The Oregon State Health Division also provides individuals with the opportunity to file a complaint with the Division about an alleged violation.<sup>110</sup> Although the law gives the Health Division any power available under the law to enforce the regulations,<sup>111</sup> there

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100. *French Statute*, *supra* note 2, at Art. 3.

101. OR. ADMIN. R. 333-15-050(c) (1992).

102. *Id.*

103. Sally Christensen, *More Non-Smoking Seating Not Required*, OREGONIAN, June 18, 1991, §D at 6. Health Officials say the state legislature was wise in not trying to mandate how much seating should be reserved for non-smokers. When the law was put in place five years ago, smoking areas were much larger than they are today. Since the law is not restrictive in its requirements, officials say they have been able to expand the non-smoking sections in restaurants as more and more Oregonians stop smoking. *Id.*

104. Raybould, *supra* note 14.

105. OR. ADMIN. R. 333-15-035(3).

106. Christensen, *supra* note 103.

107. OR. REV. STAT. § 433.990(5).

108. *Id.*

109. OR. REV. STAT. § 433.860.

110. OR. REV. STAT. § 433.855.

111. *Id.*

are no specific penalties for smokers who violate the restrictions, unlike the French law, which imposes a \$100 - \$250 fine on smokers who light up in a no-smoking area.<sup>112</sup>

## 2. *Other Oregon Restrictions*

Aside from the restrictions imposed by the Oregon Indoor Clean Air Act, state law also restricts smoking in hospital rooms,<sup>113</sup> state office buildings,<sup>114</sup> public meeting rooms,<sup>115</sup> elevators,<sup>116</sup> and public buses.<sup>117</sup> Although Oregon is not as restrictive as some states, it is still one of the most aggressive regulators of cigarette smoking in the country and is the most aggressive regulator in the Pacific Northwest.

## B. *Minnesota: Extending Restrictions to the Workplace*

In 1975, the State of Minnesota broke legislative ground when it passed its Clean Indoor Air Act.<sup>118</sup> Unlike the nation's first no-smoking law enacted in Arizona in 1973, which merely recognized that smoking was a hazard, or the country's first clean air act, passed in 1974 by Connecticut, the Minnesota law was the first to extend smoking restrictions to public places and private worksites.<sup>119</sup>

### 1. *The Minnesota Clean Indoor Air Act*

When the Minnesota legislature passed the new law, it specifically laid out its public policy justifications for the stringent restrictions:

The Legislature finds that:

(1) smoking causes premature death, disability, and chronic disease, including cancer, heart disease, and lung disease;

(2) smoking related diseases result in excess medical care costs; and

(3) smoking initiation occurs primarily in adolescence.

The legislature desires to prevent young people from starting

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112. *French Statute*, *supra* note 2, at Art. 14.

113. OR. REV. STAT. § 441.815.

114. OR. REV. STAT. § 243.350.

115. OR. REV. STAT. § 192.710.

116. OR. REV. STAT. § 479.015.

117. OR. ADMIN. R. 860-65-095.

118. MINN. STAT. § 144.411.

119. *Surgeon General Report*, *supra* note 55, at 558.

to smoke, to encourage and assist smokers to quit, and to promote clean indoor air<sup>120</sup>

The law requires that non-smoking sections be created in all public places, which are defined as any enclosed indoor area used by the general public or that serves as a place of work including restaurants, retail stores, and other commercial establishments.<sup>121</sup> The law also completely bans the use of tobacco products in day-care centers,<sup>122</sup> health care facilities, clinics,<sup>123</sup> and all public elementary and secondary schools.<sup>124</sup>

The law does not mandate no-smoking areas in bars,<sup>125</sup> enclosed areas hosting private social functions,<sup>126</sup> factories, warehouses, or other similar areas not frequented by the general public.<sup>127</sup> Unlike Oregon's Clean Indoor Air Act, there is no exception for businesses with certain types of ventilation systems. Unlike the French law, there is no minimum requirement for ventilation in an enclosed area, except for a vague statement requiring that the existing barriers and ventilation minimize the effect of cigarette smoke on people in the adjacent no-smoking section.<sup>128</sup>

a. *Minor Fines and Injunctions for Violators*

The law requires all proprietors in charge of a public place to ensure that the law is enforced by posting appropriate signs, arranging seating to provide a smoke-free environment, and asking smokers who light up in a no-smoking section to refrain from doing so if asked by a client or an employee.<sup>129</sup> The law is enforced by the State Commissioner of Health<sup>130</sup> and provides for two types of penalties. Smokers who do not abide by the restrictions are subject to a petty misdemeanor, which provides for fines between \$100 - \$200.<sup>131</sup> If proprietors violate

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120. MINN. STAT. § 144.391.

121. MINN. STAT. § 144.414.

122. MINN. STAT. § 144.414(2).

123. MINN. STAT. § 144.414(3)(a).

124. MINN. STAT. § 144.4165.

125. MINN. STAT. § 144.415.

126. MINN. STAT. § 144.414.

127. *Id.*

128. MINN. STAT. § 144.415.

129. MINN. STAT. § 144.416.

130. MINN. STAT. § 144.417(1).

131. *Id.* The penalties for a petty misdemeanor are described in MINN. STAT. § 609.0331.



the law, the board of health or any affected party may obtain injunctive relief for repeated violations from any court with jurisdiction.<sup>132</sup>

b. *The Minnesota Law: Comparatively Tough*

By imposing penalties for smokers who violate the law, the Minnesota law is more restrictive than the Oregon Indoor Clean Air Act.<sup>133</sup> The penalties under the Minnesota law parallel those of the French anti-smoking law, in that individual smokers who violate the law are subject to financial penalties;<sup>134</sup> however, the Minnesota law does not impose the stiff, monetary punishment that the French law provides for proprietors who violate its provisions.<sup>135</sup> The purpose of the French law is punitive in nature, imposing fines up to \$600 on violators,<sup>136</sup> while the Minnesota statute stresses compliance through penalties, such as court-ordered injunctions, upon the violators.<sup>137</sup>

2. *Tobacco Industry Extinguishes New Restrictions*

Recent legislative attempts to broaden the Minnesota Clean Indoor Air Act were defeated the 1992 legislative session.<sup>138</sup> The proposal that failed would have banned smoking in the common areas of apartments and condominiums and would have required factories and warehouses, two types of indoor buildings presently excluded under the current statute, to create the same type of no-smoking sections that presently exist in office buildings. The bill also would have required private offices to ban smoking entirely if smoke from smoking sections drifts or is recirculated into the no-smoking sections.<sup>139</sup> Although just 20% of Minnesota residents smoke, lawmakers blame the bill's defeat on the increased clout and "big money politics" of the tobacco industry in the state.<sup>140</sup> Some legislators lamented that, had the industry been as powerful and as organized in 1975 as it is today, even the Clean Indoor Air Act itself might have been defeated.<sup>141</sup>

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132. MINN. STAT. § 144.417(3).

133. OR. REV. STAT. §§ 433.835-433.875.

134. *French Statute*, *supra* note 2, at Art. 14.

135. *Id.*

136. *Id.*

137. MINN. STAT. § 144.417(3).

138. Dennis J. McGrath, *Antismoking Bills Lost in Political Haze*, MINNEAPOLIS STAR TRIB., April 6, 1992, at 1B.

139. Dennis J. McGrath, *Smoking Squeeze; Tobacco Lobby Gets Help in Fighting Tax, Restrictions*, MINNEAPOLIS STAR TRIB., January 1, 1992, at 1A.

140. McGrath, *supra* note 138.

141. McGrath, *supra* note 139.

### 3. *Judicial Challenges*

A lawsuit filed in Hennepin County District Court in September, 1992, is the second known legal challenge to the Minnesota statute.<sup>142</sup> In the suit, an employee alleges that her employer did not provide her with a smoke-free environment because the employer did not stop smoke from the smoking section of the office from drifting into her workstation. She claims that the smoke provoked an outbreak of her asthma, which forced her to eventually be hospitalized. When she returned to work, she was terminated and is now claiming that she is the victim of an essentially illegal form of employment discrimination that is a by-product of the statute.<sup>143</sup> The woman's attorney claims that the state's Clean Indoor Air Act is unclear as to whether it provides any monetary remedy for employees harmed by violations and whether employers can hire or fire an employee because of their smoking preferences.<sup>144</sup> The attorney hopes the lawsuit will resolve ambiguities in the statute.<sup>145</sup>

The other known lawsuit involving the act was filed by a woman who claimed that she was the victim of discrimination because she smoked in her office. It is unclear how that suit was resolved, but most complaints involving violations of the statute are handled administratively by local health departments.

In a case involving the enforcement of the Clean Indoor Air Act, a Minneapolis area county employee won a \$150,000 judgment for harassment she suffered on the job after reporting that several of her co-workers were violating the provisions of The Act by lighting up in a no-smoking section.<sup>146</sup>

The Minnesota Clean Indoor Air Act is the most restrictive anti-smoking law in the nation. Although its intent does not appear to be as punitive in nature as that of the French law, it has been instrumental in changing the behavior of the people of Minnesota by reducing the percentage of smokers in the state. It has not caused a serious public

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142. Jill Hodges, *Employment Suit Invokes Minnesota's Clean Indoor Air Act*, MINNEAPOLIS STAR TRIB., Sept. 23, 1992, at 1D. The Clean Indoor Air Act prohibits smoking in a common space that is smaller than 200 square feet unless all employees who work in that space agree to allow it. The plaintiff is also claiming her employer violated the Minnesota Human Rights Act—a statute that covers various forms of discrimination. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *County Workers Who Reported Smoking Violations Wins Lawsuit*, MINNEAPOLIS STAR TRIB., May 9, 1993, (Metro ed.) §B, at 3.

outcry, nor been subjected to legal tests or judicial modification.

### C. *New York: "Protecting" The Empire State*

After 13 years of bitter partisan politics and a constitutional challenge, New York's Clean Indoor Air Act finally became law in July, 1989.<sup>147</sup> When the law took effect on January 1, 1990, New York State's Clean Indoor Air Act became one of the most stringent smoking regulations in the country.<sup>148</sup> Legislators say that the purpose of the law is to protect rather than to regulate.<sup>149</sup>

The law imposes strict smoking regulations on virtually every public place in the State of New York.<sup>150</sup> "Smoking is banned in the following places:" auditoriums,<sup>151</sup> elevators,<sup>152</sup> gymnasiums,<sup>153</sup> classrooms,<sup>154</sup> all forms of public transportation,<sup>155</sup> all public and private schools,<sup>156</sup> hospitals,<sup>157</sup> museums,<sup>158</sup> libraries,<sup>159</sup> banks and other financial institutions,<sup>160</sup> and restrooms.<sup>161</sup> All employers are required to adopt and implement a written smoking policy<sup>162</sup> and all non-smoking employees are entitled to a smoke-free work area.<sup>163</sup>

#### 1. *Specific Areas Exempted*

The New York law included many of the proposed changes that failed to clear the Minnesota Legislature via a series of amendments

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147. Elayne G. Gold, *New York State's Clean Indoor Air Act*, N.Y. ST. BAR J., March/April 1991, at 18.

148. *Id.*

149. *Id.*

150. N.Y. PUBLIC HEALTH LAW § 1399-o (McKinney 1990).

151. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(a).

152. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(b).

153. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(c).

154. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(f).

155. N.Y. PUBLIC HEALTH LAW § 1399-o (1)(g).

156. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(a).

157. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(b).

158. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(e).

159. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(f).

160. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(k).

161. N.Y. PUBLIC HEALTH LAW § 1399-o (2)(l). The statute also covers such places as indoor areas, waiting areas in public transportation terminals, service areas in cafeterias and businesses selling food for on-premises and off-premises consumption and retail stores where goods are for sale.

162. N.Y. PUBLIC HEALTH LAW § 1399-o (6).

163. N.Y. PUBLIC HEALTH LAW § 1399-o (6)(a).

to this state's Clear Indoor Air Act.<sup>164</sup> However, the New York law contains several exceptions to the smoking prohibitions which exist in the French statute, but are absent from the Oregon and Minnesota statutes. The New York law exempts private homes, residences, automobiles,<sup>165</sup> private social functions being held at public places, and in conventions and trade shows if it is not advertised that smoking is normally banned in the facilities hosting the event.<sup>166</sup> This anomaly occurs even though the public places hosting those events are normally smoke-free. The effect of this exception is basically to allow smoking at conventions and trade shows in New York.

The law also has two exceptions that were subjected to a constitutional attack prior to its enactment.<sup>167</sup> The statute exempts limousines under private hire and wholly or partially owned luxury boxes in indoor arenas. Although smoking may occur in the private luxury boxes, the rest of the arena is still smoke-free.<sup>168</sup> As a result of these two exceptions, a suit was filed in State Supreme Court prior to the law's enactment, alleging the statute was elitist.<sup>169</sup> The judge who heard the complaint refused to delay the implementation of the statute, claiming the overwhelming evidence of the dangers of cigarette smoke outweighed the claimant's individual charges. The judge said that the constitutional claims of the plaintiff were without merit.<sup>170</sup>

## 2. *Stiff Fines for Violators*

Failure to comply with any of the provisions of the statute renders the violator subject to court-imposed civil penalties.<sup>171</sup> Penalties for a violation of the law can go as high as \$1,000.<sup>172</sup> Although the statute imposes stiff fines on violators, it does not subject them to liability based solely upon their violation of the statute. Despite this exception, violators can still be held accountable for harms resulting from the exposure to smoke.<sup>173</sup>

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164. McGrath, *supra* note 136.

165. N.Y. PUBLIC HEALTH LAW § 1399-q (1).

166. N.Y. PUBLIC HEALTH LAW § 1399-q (2)-(3).

167. Gold, *supra* note 147 at 21.

168. N.Y. PUBLIC HEALTH LAW § 1399-q (6)-(7).

169. Gold, *supra* note 145, at 21.

170. Gold, *supra* note 145, at 21.

171. N.Y. PUBLIC HEALTH LAW § 1399-s.

172. N.Y. PUBLIC HEALTH LAW § 1399-v

173. N.Y. PUBLIC HEALTH LAW § 1399-w.

The New York Clean Indoor Air Act potentially carries more severe penalties than the Oregon, Minnesota, or French laws. Yet New York law is vague about what constitutes a violation, while the other three laws are specific. Also, the New York law does not provide for any means of obtaining an injunction against a violator. The New York law speaks generally about any violation, while the other three lay out specific penalties for employers who fail to abide by the ventilation or sign requirements and smokers who ignore the restrictions.

#### D. *Arkansas: Fewer Restrictions in the South*

With just over 2.3 million people, Arkansas is the 17th least populous state in the country.<sup>174</sup> Yet it is one of the few states in the South to have any regulations on smoking at all.<sup>175</sup>

##### 1. *Arkansas Smoking Regulations*

In 1977, Arkansas passed its first smoking restrictions. This is the state's only statute aimed directly at smoking. In the text of the statute, the drafters laid out their justifications for passing the law. They cited "recent" scientific data as showing that non-smokers often receive damage to their health from second-hand smoke.<sup>176</sup> The law merely banned smoking in medical waiting rooms, hospital corridors, nurses' stations and clinics, all hospital rooms, and on school buses.<sup>177</sup> The law has not been modified and still does not allow smoking in those previously cited areas if those areas have been designated for smoking.<sup>178</sup> The statute also clearly exempts hotels, motels and restaurants.<sup>179</sup> The law sets up no enforcement measures, except that it declares a violation of the statute a misdemeanor and provides for fines between \$10-\$100 if convicted. The other United States jurisdictions compared in this

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174. MARK HOFFMAN, *THE WORLD ALMANAC AND BOOK OF FACTS* 627 (1992).

175. Kershenblatt, *supra* note 83, at 175-82.

176. ARK. CODE ANN. § 20-27-701 (Michie 1987).

PUBLIC POLICY:

(a) Information available to the General Assembly based upon scientific research data has shown that nonsmokers often receive damage to their health from the smoking of tobacco by others.

(b) It is therefore declared to be the public policy of the State of Arkansas that the rights of nonsmokers be protected in the manner provided in this subchapter.

177. ARK. CODE ANN. § 20-27-703 (A).

178. ARK. CODE ANN. § 20-27-703 (B).

179. ARK. CODE ANN. § 20-27-703 (C).

Note clearly lay out the causal connection of the harms they believe non-smokers can suffer from second-hand smoke and their reasons for implementing their laws.<sup>180</sup> In contrast, the Arkansas statute does not directly acknowledge the health hazards of second-hand-smoke.

a. *Independent Agencies Set Their Own Rules*

Arkansas has several other smoking regulations not connected with its statutory section on public smoking. The state allows the chief administrator of each state agency to formulate his own general office smoking policy, as long as the rights of both smokers and non-smokers are taken into consideration.<sup>181</sup> Smoking in public schools is also regulated, yet, unlike the other United States jurisdictions compared in this Note, it is still allowed as long as it occurs in a specially designated area.<sup>182</sup> The state legislature does ban smoking in state-licensed day-care centers, conceding that children exposed to smoking face a potential health hazard.<sup>183</sup>

b. *No Public or Workplace Restrictions*

Arkansas is still far behind in the number and type of regulations it imposes upon smoking. Unlike Oregon, New York, Minnesota, and France, it has no regulations restricting smoking in the workplace or indoor areas open to the public. In fact, Arkansas does not even recognize what 18 other states have - a non-smoker's right to a smoke-free workplace.<sup>184</sup>

2. *Smoking Regulations in Other Southern States*

Arkansas is not alone in its paucity of smoking regulations. North Carolina and Alabama have no smoking regulations whatsoever,<sup>185</sup> while states such as Tennessee, Louisiana, and Missouri have fewer restriction on an individual's right to smoke than Arkansas.<sup>186</sup> Although tobacco is a \$43.8 billion dollar business in the United States,<sup>187</sup> it is proportionally an even bigger business in tobacco-rich states, such as North

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180. ARK. CODE ANN. § 20-27-701.

181. ARK. CODE ANN. § 25-1-102 (B).

182. ARK. CODE ANN. § 6-21-609.

183. ARK. CODE ANN. § 20-78-217.

184. Kershenblatt, *supra* note 85.

185. *Id.*

186. *Id.*

187. McGrath, *supra* note 139.

Carolina. Lawmakers from tobacco states look at any restriction upon smoking that may cut the consumption of the product as a direct threat to the economic well-being of their citizens.<sup>188</sup>

Arkansas and many of the other Southern states, with little or no regulation of smoking, are clearly in the minority of jurisdictions in the United States. There is a distinct lack of uniformity of smoking regulations in the United States. Despite the strong public policy interests in states such as New York, Oregon, and Minnesota in protecting the rights of citizens to live and work in a smoke-free environment by heavily regulating an individual's right to smoke, that same policy impetus does not exist uniformly throughout the country. If the United States ever wants uniform national no-smoking regulations such as the recently enacted French law, they must come from the federal government.

#### V. EFFORTS BY UNITED STATES LEGISLATORS TO PASS A NATIONAL LAW

Despite legislative successes on the state and local levels, the powerful tobacco industry has been able to halt attempts by Congress to pass equally broad restrictions on the federal level.

##### A. *Tobacco Is Big Business*

The tobacco industry in the United States is responsible for more than 6.2 million jobs and more than \$11 billion dollars in government revenue.<sup>189</sup> The industry, through its lobbying group, "The Tobacco Institute," is also generous in distributing financial support, particularly to members of Congress.<sup>190</sup> However, for all the money tobacco brings to the government's coffers, some reports show that tobacco costs

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188. *Designation Of Smoking Areas in Federal Buildings: Hearings on H.R. 4488 and H.R. 4546 Before the Subcomm. on Health and the Environment*, 99th Cong., 2nd Sess. 125-28 (1986) (statement by Rep. Walter Jones of North Carolina).

189. Alyson Pytte, *Tobacco's Clout Stays Strong Through Dollars, Jobs, Ads*, 48 CONG. Q. 1542 (1990). The tobacco industry is a powerful presence in minority communities. The large companies contribute tens of millions of dollars in grants to minority causes and public schools. Leaders of those communities say that they depend on that money to help fund important programs. Lawmakers believe that that money from the tobacco companies helps silence what they believe are legitimate minority concerns over rising rates of smoking within their communities. *Id.*

190. *Id.* See also Kathleen Sylvester, *The Tobacco Industry Will Walk A Mile To Stop An Anti-Smoking Law*, GOVERNING, May 1989, at 38.

Americans at least \$52 billion in health and insurance costs and lost productivity, far more than tobacco brings in.<sup>191</sup> Despite the political clout of the tobacco industry, some members of the administration appear to be set on turning the country into a smoke-free society. The Bush Administration's Health and Human Services Secretary, Louis Sullivan, called tobacco revenue "blood money" and referred to cigarette manufacturers as "merchants of death."<sup>192</sup>

### B. *Constitutional Problems*

Traditionally, health and safety regulations have been left to individual states.<sup>193</sup> Since regulating smoking is considered a health and safety concern under the Commerce Clause, laws affecting smoking could be viewed as remaining within an individual state's police power. When it involves smoking, Congress has asserted its ability to regulate by banning smoking on domestic airline flights and other forms of public transportation<sup>194</sup>. In fact, when Congress banned smoking on all domestic flights, lawmakers cited the Commerce Clause as their justification, as if it affected interstate commerce.<sup>195</sup> It is likely that should Congress choose to create a national no-smoking law, such as the one in France, it could be justified under the current expansive view of the Commerce Clause.<sup>196</sup>

### C. *Congressional Attempts to Curb Smoking*

When Congress fought off a bitter attack by the tobacco industry and its allies and passed a bill virtually banning smoking on board all domestic airline flights, it won a great victory. In the past three years, lawmakers have been unable to build upon that success. Like the French government, most Congressional attempts to curb smoking have followed three paths: 1) reduce consumption by increasing the price of cigarettes through higher taxes, 2) impede the recruitment of new smokers and reduce the demand of present smokers by further restrictions

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191. Pytte, *supra* note 187.

192. *Id.*

193. See GERALD GUNTHER, CONSTITUTIONAL LAW 222-42 (12th ed. 1991) and U.S. CONST. art. I, §8, cl. 3.

194. 49 U.S.C.A. § 1374 (West Supp. 1992).

195. 137 CONG. REC. 391-401 (Sept. 14, 1989).

196. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); and *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177 (1938).



on advertising, and 3) reduce smoking by restricting the places where smoking is allowed.

### 1. *Reclassifying Tobacco*

Currently, the only two governmental agencies with power over tobacco are the Federal Trade Commission, which oversees health warning labels, and the Justice Department, which enforces the ban on television and radio advertisements.<sup>197</sup> Despite lawmakers' best attempts to curb tobacco use, they have been unable to escape the basic fact that many options are closed to them because they are trying to regulate a legal product. Several attempts have been made to rectify that situation. One bill attempted to define tobacco as a drug, thus bringing it under the control of the Food and Drug Administration.<sup>198</sup> Another attempt sought to define tobacco as a chemical substance, thereby making it the purview of the Environmental Protection Agency (EPA). This bill would have required the EPA to evaluate the safety of chemicals emitted by tobacco products.<sup>199</sup> Another effort tried to make tobacco a controlled substance, which would put it under the control of the Drug Enforcement Agency.<sup>200</sup> Each of these legislative initiatives has failed, mainly due to the power of the tobacco lobby in Congress.<sup>201</sup>

### 2. *Taxing Cigarettes Out of Style*

Although state taxes range from \$.02 per pack in North Carolina to \$.56 a pack in New York,<sup>202</sup> the federal government imposes a tax of just \$.24 per pack, which is imposed before the individual states levy their own taxes.<sup>203</sup> To reduce the federal deficit as well as consumption, some members of Congress tried, but failed, to increase the excise tax on cigarettes to \$.32 per pack. Officials said the increase

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197. Pytte, *supra* note 189, at 1546.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Stuart Vincent, *Smokers Taxes But Say They'll Find Ways To Deal With Boost Of 17 Cents A Pack*, *NEWSDAY*, June 2, 1993, at 7. Although New York State has the highest tax of any state on cigarettes, New York City recently approved a tax increase which brings its total tax to \$.64 per pack. New York State officials say the new tax increase will raise an additional \$170 million in revenue. The State Health Department expects the new tax to cut the number of smokers in the state by 88,000. *Id.*

203. 26 U.S.C. § 5701 (1991).

would raise an additional \$2.8 billion in revenue each year.<sup>204</sup> So far, all other attempts to raise the excise tax, even just by one penny per pack, have also failed, despite strong evidence that as prices increase, consumption decreases.<sup>205</sup> The tobacco industry has been able to successfully argue that cigarette taxes are regressive, since any increase in price disproportionately punishes lower income Americans, who make up the majority of smokers.<sup>206</sup>

### 3. *President Clinton's Health Plan*

In September, 1993, President Clinton unveiled a proposal for a new system of national health care.<sup>207</sup> A major component of the plan is to provide health insurance for an estimated 42 million uninsured Americans.<sup>208</sup> This new proposal is expected to cost the American People \$100 billion.<sup>209</sup> The plan is expected to be financed by a series of administrative efficiencies and a new round of taxes.<sup>210</sup> Included in those planned tax increases is a broad hike in the federal excise tax on cigarettes.<sup>211</sup> Although the details of the plan's financing have yet to be worked out, President Clinton has said he would like to see an increased tax of between \$.75 and \$1.00 per pack of cigarettes.<sup>212</sup> The President's proposed tax increase is expected to raise up to \$16 billion a year in additional revenue.<sup>213</sup> Recent polls have shown that public support is behind a higher cigarette tax to pay for health care reform.<sup>214</sup> President Clinton has said that higher cigarette taxes are justified in

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204. Pytte, *supra* note 187, at 1546.

205. Pytte, *supra* note 187, at 1547. *See also* Rovner, *supra* note 63, at 3052 and Goodin, *supra* note 68, at 108.

206. Rovner, *supra* note 65, at 3052.

207. Alissa J. Rubin, *Clinton Sets Health Agenda: Security For Everyone*, 55 CONG. Q. 2551 (1993).

208. Stuart Silverstein, *Clinton's Health Plan: A User's Guide*, THE LOS ANGELES TIMES, September 26, 1993, at 5.

209. James Risen, *Entitlements Haunt Congress' Budget Cutting*, THE LOS ANGELES TIMES, July 26, 1993, §A at 1.

210. *Clinton Decides Mix Of Taxes, But Trades Details For Broad Concepts*, Daily Labor Report, September 23, 1993 (LEXIS, Nexis library, Omni File).

211. *Id.*

212. Doug Fischer, *Tobacco Industry Fires Up For Fight*, THE OTTAWA CITIZEN, October 1, 1993, §A at 6.

213. Daily Labor Report, *supra* note 210.

214. Fischer, *supra* note 212. A recent survey indicated that two-thirds of U.S. voters prefer to pay for health reform with a cigarette tax of up to \$2.00 per pack over a general tax increase. *Id.*

that "smoking-related disease kills an estimated one in five Americans, and it's believed to cost the county \$68 billion a year in health-care expenses and productivity losses."<sup>215</sup> The tobacco industry is already gearing up for a fight. Industry officials are saying that since higher taxes cut cigarette consumption, the President's plan will put even more Americans out of work.<sup>216</sup> One industry official estimates that the President's proposal will cost the jobs of 75,000 people working in the growing and manufacturing of tobacco products.<sup>217</sup> Although it is almost certain that the present federal excise tax will increase from its current \$.24 per pack level, it is not known just how much of an increase Congress will approve. As a result of the public's support of health care reform and a higher cigarette tax to pay for that reform, the tobacco industry can only hope to use its powerful Washington influences to minimize that tax increase.

#### 4. *Other Legislative Efforts*

A proposal to ban all cigarette advertising was defeated in 1987.<sup>218</sup> Although similar proposals are brought up in each legislative session, a complete ban on cigarette advertising, similar to one being proposed in France, appears unlikely. Aside from obvious First Amendment issues that would come with a complete elimination of advertising for a legal product, the advertising industry has also expressed concern over a law that would eliminate the more than \$2 billion dollars a year tobacco companies spend on advertising in the United States.<sup>219</sup>

Another proposal that was defeated was a plan offered by Massachusetts Senator Edward Kennedy, which would have created a committee within the Department of Health and Human Services that would have had a \$110 million dollar budget to "regulate tobacco additives and distribute state grants for antismoking campaigns."<sup>220</sup> In March 1993, Ohio Representative James Traficant introduced a bill that would ban smoking in all federal office buildings including congressional offices and the Capitol building.<sup>221</sup> So far, that effort has yet to be brought to a vote.

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215. *Id.*

216. *Id.* at 7.

217. *Id.*

218. Pytte, *supra* note 189, at 1542-43.

219. Rovner, *supra* note 65, at 3052.

220. Pytte, *supra* note 189, at 1543.

221. Holly Yeager, *Traficant Continues To Spark Debate*, States News Service, March

### 5. *The Second-Hand Smoke Wild Card*

In December, 1992, the Environmental Protection Agency published a report blaming second-hand smoke for 3,000 cancer deaths and 300,000 respiratory illnesses each year.<sup>222</sup> The report unleashed a wave of public sentiment calling for more anti-smoking regulations to protect non-smokers from the dangers of second-hand smoke.<sup>223</sup> Prior to leaving office, President Bush was urged, but ultimately refused, to sign an executive order banning smoking in all federal buildings.<sup>224</sup> The tobacco industry fears such an order since, as the largest employer in the country, the federal government could serve as an example for a new wave of smoking regulations throughout the country.<sup>225</sup> President Clinton has not taken specific action because of the EPA report. There is no evidence that the report has dislodged the obstacles placed in Congress by the tobacco industry towards enacting federal smoking regulations. In fact, despite a renewed legislative push for more restrictions at the state and local level, EPA Director Carol Browner has "declined to endorse an explicit government ban on smoking."<sup>226</sup>

### D. *Conclusions*

Despite yearly attempts to increase regulation of smoking, the legislative muscle of the tobacco industry has blocked Congress' attempts to pass any major piece of anti-smoking legislation introduced since the 1989 law banning smoking on virtually all domestic flights. It is unlikely that President Clinton will pursue a more aggressive anti-smoking agenda. While he was Governor, Arkansas remained one of

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4, 1993 (LEXIS, Nexis Library, Omni File). Presently, each member of Congress is able to formulate their own office smoking policies. Although most members of Congress favor tighter controls on smoking in federal office buildings, House Speaker Thomas Foley has said that he "wouldn't support a completely smoke-free situation." *Id.*

222. Jerry Moskal, *Labor Secretary Considers Regulating Workplace Smoke*, Gannett News Service, January 12, 1993 (LEXIS, Nexis Library, Currnt File).

223. *New Regs Likely In Wake Of EPA Report*, American Political Network, Inc. January 8, 1993 (LEXIS, Nexis Library, Currnt File). Outgoing EPA Administrator William Reilly called on President Bush to enact more smoking regulations before he leaves office saying "I don't think there's a factory in the country that runs the risk to its workers that all of us run from exposure to tobacco smoke." *Id.*

224. Michael Kranish, *Bush is Urged to Bar Smoking at Federal Sites*, THE BOSTON GLOBE, January 13, 1993, §a at 3.

225. *Id.*

226. *Second-Hand Smoke: EPA Launches Full-Court Press*, American Political Network, July 22, 1993 (LEXIS, Nexis library, Omni File).

a handful of states with little or no regulation in this area. Congress appears content to allow the individual states to determine their own no-smoking policies, based upon the needs of their citizens, even if that means a lack of uniformity in smoking regulations from state to state.

## VI. ANALYSIS

### A. *Reaction to the French Law*

The initial French reaction to the no-smoking law has been mixed. Although a recent poll indicated that 84% of the population and 66% of smokers approve of the new decree,<sup>227</sup> most people appear to be ignoring it. Some restaurant owners are refusing to go along with the new restrictions for fear it may hurt business, while others put their mandatory no-smoking sections in basements or near kitchens.<sup>228</sup> Government officials say that, despite the sharp penalties built into the law, police have been told to be lenient until people get used to the new restrictions.<sup>229</sup>

Although the French law will likely remain on the books, it is unclear whether the law itself will have any effect on curbing smoking. The new law is just one of three lines of attack being taken by the French Government to reduce this deadly habit. In addition to proposals banning advertising and increasing the price of cigarettes, the new law should help reduce cigarette consumption in France in the long run. Despite their aggressive three-pronged attack, the French Government should be patient. In 1964, when the United States government began its anti-smoking effort, 40% of its population were smokers, the same as in France today. After 28 years of smoking restrictions, price increases, and advertising regulations, the smoking rate was reduced to

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227. Robin Smyth, *Puffing In The Last Chance BAR-TABAC - Anti-Tobacco Law*, REUTERS, November 1, 1992 (LEXIS, Nexis Library, Omni File).

228. Frances Kerry, *Public Smoking Ban Just A Wheeze, French Cafes Say*, REUTERS, November 1, 1992 (LEXIS, Nexis Library, Omni File). Some French Cafe owners say they would rather pay the fine than throw out loyal customers who continue to smoke. Some angry owners even say brazenly, "[n]othing will change." *Id.*

229. *Id.*

26.5%.<sup>230</sup> With the exception of its national law, the French Government is embarking upon a course of attack similar to the one taken by the United States. Although progress will come, it is likely to be slow.

### B. *American No-Smoking Laws*

The federal government appears willing to allow state and local governments to lead the battle against smoking in public places and in the workplace. All but two states have some restrictions on smoking in public places and hundreds of local ordinances regulate smoking, even in states without any restrictions.<sup>231</sup> Although the tobacco industry is aggressively fighting any restrictions on smoking at the local and state level, the trend is clearly towards more regulation and further restrictions of smoking in both public places and the workplace, especially in the wake of the EPA report on the dangers of second-hand smoke. The industry has chosen to fight new smoking regulations on the state level, lobbying for laws that preempt local attempts to impose more stringent rules.<sup>232</sup> Initial industry efforts have proven to be successful. At least nine states have passed "smokers' rights" laws, which attempt to protect the smoker by defining smoking as a civil right or preempting local ordinances that may be more stringent than those at the statewide level.<sup>233</sup> As more and more state legislatures consider laws imposing further restrictions on smoking, the industry will intensify its

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230. Opderbeck, *supra* note 1, at 11.

231. *Surgeon General's Report*, *supra* note 55, at 570.

232. Kathleen Sylvester, *Smoking Laws: After The Air War*, GOVERNING, August 1991 at 24. Aside from the 45 states with some limitations on smoking in public places, at least 600 localities have also imposed regulations that are in many cases more stringent than those at the state level. Because it is virtually impossible for the tobacco industry to oppose every local smoking restriction, the industry has decided it is more realistic to lobby for state laws which include language that preempts local ordinances. *Id.*

233. *Id.* See ARZ. REV. STAT. ANN. § 36-601.02 (f) (State no-smoking policies cannot discriminate against smokers); 1991 CONN. PUB. ACTS 91-271 (employers cannot discriminate against employees who smoke and cannot regulate employees smoking behavior outside of work); FLA. STAT. § 386.209 (preemption of all local smoking ordinances); ILL. REV. STAT. Ch. 111 1/2 Para. 8209 (preemption of local smoking ordinances and protection of employees who smoke from discrimination by employers); LA. REV. STAT. ANN. § 23:966 (employers cannot discriminate against employees who smoke); OKLA. STAT. tit. 63 § 1-1522 (preemption of local smoking ordinances); 35 PA. CONS. STAT. ANN. § 1235.1 (preemption of local smoking ordinances); R.I. GEN. LAWS. § 23-20.7.1-1 (employers cannot discriminate against employees who choose to smoke at home); VA. CODE ANN. § 15.1-291.4 (preemption of local smoking ordinances).

efforts to maintain the status quo and promises to do whatever it takes to protect the rights of the smoker from further erosion.

## VII. CONCLUSION

The French Government has taken some drastic steps to try to reduce cigarette consumption. With one of Europe's highest smoking rates, at a cost of \$11.4 billion a year, the government did not have a choice. The scope of the French law, affecting every public enclosed space and worksite in the country, is an important element in trying to change the traditional French custom of smoking. The nationwide law affects every French citizen, rather than those in a particular city or region. The new law, coupled with more advertising restrictions and price increases, should eventually produce a decrease in the number of smokers.

It took the United States 28 years to reduce its percentage of smokers from 40% to 26.5%. However, the United States never has, and probably never will, have a national no-smoking law as restrictive as the one in France. Although the United States has had price increases and advertising restrictions similar to those being offered in France, behavioral restrictions in public places and at work have been left to individual states and, thus, subsequently vary on a state by state basis. Despite this apparent inconsistency, the United States continues to win the war against smoking as evidenced by the decrease in consumption levels. Individual states have proved to be more innovative and aggressive in their regulation of smoking. Although the tobacco lobby continues to fight any new restrictions, their ability to stop legislation aimed at regulating smoking is severely diminished outside of Washington D.C. and the halls of Congress. The French may not like their national government telling them when and where they can smoke, but in the long run, resistance should wane. When it does, the French people may willingly snuff out one of their national symbols, thereby clearing the blue clouds of cigarette smoke that have so long been a tradition in the cafes of Paris.

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