Cigarette Smoking as a Public Health Hazard: Crafting Common Law and Legislative Strategies for Abatement

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CIGARETTE SMOKING AS A PUBLIC HEALTH HAZARD:
CRAFTING COMMON LAW AND LEGISLATIVE STRATEGIES
FOR ABATEMENT

George P. Smith, II*

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In 2001-2002, I was a Visiting Fellow in Georgetown/Johns Hopkins Program on
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It is a pleasure for me to acknowledge the assistance of former students in the prepa-
ration of this article: Anthony B. Casarona, D. Christian Hunt, David H. Karceski and Clint A.
Rosso. Some of the arguments propounded in Section III regarding the Doctrine of Anticipa-
tory Nuisance, are drawn from my article, Revalidating the Doctrine of Anticipatory Nuisance, 29 Vt.
A cigarette is the perfect type of a perfect pleasure. It is exquisite, and it leaves one unsatisfied. What more can you want?

The reconciliation of individual rights and community values on the streets is a profoundly difficult problem. For a problem so intractable, a pluralistic legal approach is advisable. Judges should refrain from using the generally worded clauses of the United States Constitution to create a national code that denies cities sufficient room to experiment.


INTRODUCTION

A. Private v. Public Rights

Obdurate tobacco smokers have always argued that, in a democratic country such as America, they have unfettered freedom to smoke anywhere and any time they wish. The on-going debate over this issue continues often lacking candor and being driven by two central propositions: that all tobacco companies are evil incarnate and teen smoking must be stopped at all costs.

While the United States Supreme Court has never recognized a constitutionally protected right to any particular style of life, smoking as an expressive act of autonomy has been protected by the First Amendment. The extent to which judicial protection is given to life style actions is, however, always checked by the right of the state to prevent identifiable social harms.


4. Robert J. Samuelson, Smoking Fictions, WASH. POST, Feb. 25, 1998, at A17. But see John Schwartz, Haze Begins to Clear over Hazards of Passive Smoking, WASH. POST, Sept. 29, 1997, at A3 (showing the growing realization that various governmental agency reports are, indeed, correct in concluding secondhand smoke is a carcinogen as hazardous as radon, yet accepting the fact that the true level of risk posed by exposure to this hazard will be very difficult to ever establish firmly); Marc Kaufman, Secondhand Smoke Poses Heart Attack Risk CDC Warns, WASH. POST, Apr. 23, 2004, at A1 (reporting on the findings of a recent study published in the British Medical Journal confirming the surprises associated with second hand smoke). See also Abigail Tanford, At Sea With the Marlboro Man, Aug. 15, 2000, at Z05 (reporting that one in five teenagers smoke); Marc Kaufman, Anti-Smoking Units Failed to Stop Teens: Students Were Studied for 15 Years, WASH. POST, Dec. 20, 2000, at A3; Ceci Connolly, Teen Girls Using Pills, Smoking More Than Boys, WASH. POST, Feb. 9, 2006, at A3 (reporting on results of the most recent 2004 survey by the White House Office of National Drug Control finding which shows conclusively—for the past two years—that more young women (730,000) than men started smoking, and 675,000 began smoking marijuana).

5. LAURENCE A. TRIBE, AMERICAN CONSTITUTIONAL LAW 848 (2d ed. 1988).

6. Id. at 1167. Although never explicitly recognizing a right to smoke, in Allegher v. Louisiana, the U.S. Supreme Court acknowledged the right to be free from physical restraint and embraced “the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways.” 165 U.S. 578, 589 (1897). This holding, arguably, secures for the smoker an implied right to smoke. Alan S. Kaufman, Comment, Where There's Smoke There's Fire: The Search for Legal Paths to Tobacco-Free Air, 3 COLUM. J. ENVTL. L. 62, at 68, n. 36 (1976-77). In a more recent case, N.Y.C. C.L.A.S.H., Inc. v. City of New York, a federal district court held that smoking is not essential to the enjoyment of associates in New York City restaurants and bars. Likewise, by extended application, it could be argued that smoking is also not an essential right for either association and assembly or public leaders. 315 F. Supp. 2d 461, 478 (S.D.N.Y. 2004).

7. TRIBE, supra note 5, at 554.

8. Id. at 852.
a form of symbolic speech, and thus subject to reasonable restrictions placed on its use in public forums, places and manner of use, smoking is also becoming more and more recognized as a social medical harm as well. While a basis for abridging various practices of a life style cannot be based on either public intolerance or animosity, the fact that its use is now documented—medically—as a significant cause of illness allows the government to regulate, if not prohibit, its use in public forums.

“Perfect pleasures,” such as those found in alcohol consumption and cigarette smoking, give rise to hedonistic delights. Whether this pursuit of hedonism and the extolation of pleasure or happiness is the highest good remains an open question. The central question is whether smokers have a fundamental right to engage in behavior patterns—the pleasures and pains of which are mainly theirs—without societal approbation and punishment. More and more, society shows less respect to smokers than it appears to pity them and put them on the road to smokeless salvation.

In a democratic society, once the state apprises its citizens of the harmful medical consequences of tobacco use—and safeguards those who wish to avoid environmental tobacco smoke (ETS)—it has been suggested that one's right to commit “suicide by degree” through use of smoking is a “basic human right” which must be accommodated. Autonomy, then, is two sided and allows for not only the freedom to choose what is beneficial, but which is harmful as well.

Yet, for those asserting autonomous rights of decisionmaking, comes realization that for every right there is a coordinate responsibility that the pri-

9. Id. at 1142.
10. PUBLIC HEALTH LAW AND ETHICS 51, 52 (Lawrence O. Gostin ed., 2000). See Jennifer Huget, Smoke Gets in Their Eyes, WASH. POST, Mar. 29, 2005, at F1 (detailing the reasons behind the fact that forty-six million U.S. adults, or 22.5 percent of the population, continue to smoke—among them being that cigarettes smell good, are relaxing, considered a normal hobby, and a way to cope with stress). But see Libby Copeland, Got a Light? A Ritual Gone in a Puff of Smoke, WASH. POST, Jan. 7, 2006, at C1 (reporting on the effect of widening prohibitions on smoking in public places as blunting the use of cigarettes as social instruments of seduction). See generally Nigel Gray, Time to Change Attitudes to Tobacco: Product Regulation over Five Years?, 100 ADDICTION 575 (2005).
12. PUBLIC HEALTH LAW AND ETHICS, supra note 10.
15. Mano Vargas Llosa, A Languid Sort of Suicide, N.Y. TIMES, Sept. 1, 2000, at A26. See Gina Kolata, Exchanging Cigarettes for Bagels, N.Y. TIMES, Dec. 19, 2004, at A3 (discussing how some statistical correlations show a definite connection between smoking and obesity—for, as national body weights have risen from 1980 to 2000, “smoking rates fell by 27 percent... as a whole and by 38 percent among middle-aged Americans;” and the findings of economists at the Graduate Center of the City University of New York “that for every 10 percent increase in the price of cigarettes, the numbers of obese people rises 2 percent”—with the estimate being that smoking cessation accounts for twenty percent of the national increase in obesity).
mary right to be exercised reasonably. Issues of public health, then, shape the extent to which an assertion of autonomy may be acknowledged and asserted.

The sobering statistics of tobacco use are indisputable—with its use accounting for approximately 400,000,00 deaths each year among Americans which in turn accounts for nineteen percent of all total deaths. Tobacco use also contributes significantly to deaths arising from cancer, cardiovascular disease, lung disease, etc. Even with these statistics, the tobacco industry continues to expend eleven billion dollars a year on advertising to promote its products. And, while the time has long past where the cigarette is seen rightly as a cultural accessory, there is disturbing evidence that advertising efforts of the tobacco industry are aided by the ongoing efforts of the motion picture industry to reinstate and glamorize the act of smoking. In 2000, it

16. PUBLIC HEALTH LAW AND ETHICS, supra note 10, at 51, 52. In 1990, the Centers for Disease Control and Prevention estimated that the number of tobacco use deaths was 418,690,000 and included thirty percent of all cancer deaths and twenty-one percent of cardiovascular disease deaths. Id. See also Dept. of Health and Human Svcs., 2004 Surgeon General’s Report—The Health Consequences of Smoking, http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2004/index.htm#full (showing conclusively, for the first time, that smoking causes diseases in every organ of the body and reporting that the economic costs of smoking, in the United States, exceeds $157 billion each year—with seventy-five billion dollars being attributable to medical costs and another eighty-two billion dollars in lost productivity). Indeed, a new study concludes that direct medical costs to non-smokers exposed to secondhand smoke is about five billion dollars annually, while indirect costs—including lost wages and disability costs total approximately $4.7 billion. Theo Francis, Moving the Market: Study Tallies Annual Cost of Secondhand Smoke, WALL ST. J., Aug. 17, 2005, at C3.

17. PUBLIC HEALTH LAW AND ETHICS, supra note 10, at 51, 52. See Bridget M. Kuehn, Link Between Smoking and Mental Illness May Lead to Treatments, 295 JAMA 483 (2006). “Since 1964, 10 million people have died from smoking related illnesses.” Jack Gillum, Strong Words, Images Target Smoking, USA TODAY, July 13, 2003, at 1D.

18. Allan M. Brandt & Julius B. Richmond, Tobacco Pandemic, WASH. POST, Jan. 15, 2004, at A21. See Alex Kuczynski, Big Tobacco Newest Bill Boards Are on the Pages of Its Magazines, N.Y. TIMES, Dec. 12, 1999, at A1 (discussing how tobacco companies—in response to severe restrictions on how they advertise—are using publishers of consumer magazines as new marketing outlets for advertising tobacco products). See also George D. Smith & Andrew N. Phillips, Passive Smoking and Health: Should We Believe Phillip Morris’s Experts?, 313 BRIT. MED. J. 929 (Oct. 12, 1996) (reporting how the tobacco industry magnifies doubt and confusion in the minds of the public and seeks to discredit evidence that environmental tobacco smoke is detrimental to health over the meaningful health risks to nonsmokers exposed to environmental tobacco smoke (ETS)).


20. See Ian Johns, Sexy Cigarette Chic from Bogart and Dietrich to Wilds, THE LONDON TIMES, July 26, 2002, at 15 (recounting how early movies with the advent of sound in the 1920s, encouraged their actors to look calm and “cool” by smoking—thus giving rise to “cigarette sex” on the screen which was seen as a useful shorthand for foreplay; and then observing how on screen smoking fell out of favor in the health conscious 1980s). See Chris Hastings, Hollywood Faces Fury as Smoking on Screen Returns to 1950s Level, SUN. TELE., Mar. 7, 2004, at 15 (reporting
was determined that 8.8% of all deaths globally were associated with cigarette smoking which marked a forty-five percent increase in tobacco deaths since 1990.\textsuperscript{21} By the year 2030, projections show tobacco use deaths will double by ten million—with the developing nations accounting for seventy percent of this increase.\textsuperscript{22}

More and more, smoking is assuming the attributes of not only anti-social action, but of social deviance. As such, it thereby assumes the role of a social divider. Smokers are, accordingly, presented with essentially two alternatives: they may accept and follow a contemporary standard of civility which seeks to minimize the effects of ETS on others\textsuperscript{23} or be excluded from arenas of public social interaction and thereby confined to either their homes or smoking zones.\textsuperscript{24}

B. Re-defining Civility

Civility has been defined, alternatively, as “good breeding, refinement” and “behavior proper to the intercourse of civilized people; ordinary courtesy or politeness as opposed to rudeness of behavior.”\textsuperscript{25} As Mayor of New York City in 1998, Rudolph W. Guiliani chose to define it as “the basic respect you have to have for the law”\textsuperscript{26} and moved to restrict various forms of offensive street life from sidewalk food vendors,\textsuperscript{27} discourteous cab drivers,\textsuperscript{28} and confrontational beggars\textsuperscript{29} to slow, foot-dragging pedestrians\textsuperscript{30} and to “gum-dropping litterbugs.”\textsuperscript{31} Michael Bloomberg, Mayor Guiliani’s successor, has

that a study of 150 films made from 1950 to 2002 found there to be presently approximately eleven depictions of smoking, typically, in every hour of film making).

\begin{itemize}
\item \textsuperscript{21} Brandt & Richmond, supra note 18.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Gusfield, supra note 19.
\item \textsuperscript{24} Blake D. Poland, \textit{Smoking, Sigaro, and The Purification of Public Space, in SMOKING: WHO HAS THE RIGHT? 189, 190 (Jeffrey A Schaler & Magda E. Schaler eds., 1998).}
\item \textsuperscript{25} Civility, II THE OXFORD ENGLISH DICTIONARY 447, 448 (1961).
\item \textsuperscript{27} Harden, supra note 26.
\item \textsuperscript{28} Id. \textit{See also} Editorial, \textit{You Talking to Me?}, N.Y. TIMES, Apr. 12, 1998, at A12.
\item \textsuperscript{30} Verena Dobnik, \textit{Mayor Puts His Foot Down on Pedestrians}, WASH. POST, Dec. 27, 1997, at A12.
\item \textsuperscript{31} Frank Lombardi, \textit{Stickin' It to Gum Chewers, Rudy Issues Ticket Warning}, N.Y. DAILY NEWS, Oct. 22, 1998, at 7. The Irish government sought, unsuccessfully, to impose a special tax of approximately six cents a pack on gum—thus, in an attempt to curtail purchases of gum and cover the costs of gum removals from public sidewalks, streets and buildings. Instead of
sought to build upon this record by not only making New York City more quiet\textsuperscript{32} but its restaurants and bars smokeless.\textsuperscript{33} In Washington, D.C., civility was broadened to include a vociferous pre-boarding bus patron talking on her cell phone who was arrested and handcuffed when she refused to lower her voice.\textsuperscript{34}

Walking down the streets of any major metropolitan area brings countless assaults to the senses of the average pedestrian. Vulgar, loud-mouthed passers-by make life on the sidewalks and streets a challenge for those defenseless individuals not disposed to similar conduct. Dodging bicyclists riding on pedestrian designated sidewalks is commonplace. "Music" filters from unsecured head sets or earphones not only from the sidewalk foot traffic, but from the streets where road warrior automobile drivers with rolled-down windows serenade the passerby at levels of ninety decibels or more. Loud, and often animated cell phone banterings add to the level of discomfort on the sidewalks. Leashed and unleashed animals, and the products of their nature, present further roadblocks to sidewalk discourse and mobility. Pan handlers present yet other obstacles to the flow of foot traffic. And, of course, visual acuity is challenged by tasteless graffiti on the outside walls of office buildings and buses.\textsuperscript{35}

Perhaps no more serious threat to the olfactory sense is to be found that in environmental tobacco smoke (ETS) or second hand smoke.\textsuperscript{36} As hun-

\begin{itemize}
\item\textsuperscript{32} See Michael Powell, Mayor Pushes Initiative for a Quieter New York, Many Resident Say: Fat Chance, Bloomberg, WASH. POST, June 13, 2004, at A3 (detailing how the mayor wants his "police officers to issue fines for everything from180-decibel industrial-strength construction generators to Chihuahuas who yip more than 5 minutes, to ... ice cream trucks that ... jingle" their bells too long).
\item\textsuperscript{33} Jennifer Steinhauser, Bloomberg Seeks to Ban Smoking in Every City Restaurant and Bar, N.Y. TIMES, Aug. 9, 2002, at A1. See 24 N.Y. CITY RULES, § 10-02 (2003) (prohibiting smoking in all indoor areas of all places of employment and public places but allowing limited exceptions for tobacco businesses); see also N.Y. PUB HEALTH LAW Art. 13-E §§1399-n through 1399-x (McKinney’s 2005) (regulating smoking in bars, food service establishments, places of employment, etc., but granting exceptions to cigar bars, outdoor dining areas, private homes and automobiles, etc.); Winnie Hu, New York State Adopts Strict Ban on Workplace Smoking, N.Y. TIMES, Mar. 27, 2003, at D2 (observing that the “state ban would apply to localities that either do not have any anti smoking laws, or that have less restrictive ones”).
\item Lindsay Layton, Between Metro and Cell User, a Disconnect; Officer Shoves, Arrests Pregnant Woman Over Loud Call, WASH. POST, Sept. 28, 2004, at A1.
\item See generally Editorial, You Talking to Me?, N.Y. TIMES, Apr. 12, 1998, at A12; Ellickson, \textsuperscript{supra} note 2.
\item See Kaufman, \textsuperscript{supra} note 4 (reporting on a new advisory from the Centers for Disease Control and Prevention that confirms that secondhand smoke—with as little as thirty minutes’
dreds of pedestrians use the public streets and sidewalks to advance their business and social pursuits, they are smothered on an hourly basis by smoke of this nature.\(^{37}\) Either on their way to work or taking rest periods, many citizens believe they have a constitutional right to smoke on open streets exposing their fellow pedestrian-citizens to significant health risks and raising significant and unreasonable barrier to civil discourse.\(^{38}\) Put simply and directly, \textit{al fresco} inhalation should join its indoor counterpart as a banned activity—-a public health nuisance, to be sure. As public space, the sidewalk must be free of becoming carcinogenic incubators for the citizenry.\(^{39}\)

C. Shaping New Values

When new or exogenous values enter the fabric of democracy, ideally they are shaped by legislatures instead of the courts. Yet, a persuasive argument can be made for the courts to “legislate” these new norms or values—especially economic ones—when they are underestimated or ignored in legislation.\(^{40}\)

Public health concerns over cigarette smoking are an example of a new societal value that is rooted not only in health but economics as well; for, the consequences of public smoking negatively impact the health expenditures that local, state, and national governments make. The public consequences

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\(^{37}\) Ellickson, supra note 2, at 1177. See generally Richard P. Sargent et al., \textit{Reduced Incidence of Admissions for Myocardial Infarction Associated with Public Smoking Ban: Before and After Study}, 328 \textit{BRIT. MED. J.} 977 (April 24, 2004) (studying the health effects on residents of Helena, Montana, when public smoking was banned); see also Terry F. Pechacek & Stephen Babb, Commentary: \textit{How Acute and Reversible are the Cardiovascular Risks of Second Hand Smoke?}, 328 \textit{BRIT. MED. J.} 980 (April 24, 2004) (confirming the significance of the Helena, Montana, study of public smoking and the real concerns of exposure to secondhand smoke).


\(^{39}\) See Bruce B. Cohen, \textit{Killer Smoke}, \textit{WASH. POST}, Oct. 7, 1997, at A17 (observing that “at least 60 known carcinogens have been identified in secondhand smoke”); Francis, supra note 16.

also jeopardize, if not destroy, lives of citizens. The Center for Disease Control and Prevention released information showing 8.6 million Americans have chronic illnesses (for example chronic bronchitis, emphysema, or heart attack) which are related to smoke.41

Legislative bodies and the courts have the capacity to meet, if not contain, cigarette smoking by contemporizing the vitality of the common law doctrine of nuisance through creative use of the specific doctrine of anticipatory nuisance. Legislative bodies and courts also have the capacity to codify the “traditional” balancing test used by the Restatement of Torts to determine whether an unreasonable act has become a nuisance42 into legislative drafting standards at the local and state levels. What a judge balances in every legal action is, in essence, the values—here, economic, private and public health—safeguarded by holding for the plaintiff as opposed to the values of what is sacrificed in defeating plaintiffs’ claims.43 Similarly, when one legislative goal of protecting the public health is pursued, individual liberties of choice to smoke with impunity must be curtailed to advance the common goal of a good, healthy life for the greatest numbers of citizens possible.

Rather than cast the analysis within a central framework of constitutional law, emphasis will instead be placed on the undergirding and unifying principles of property law as the guiding vector of force in dealing with the abatement of public cigarette smoking. Part I of this article surveys the changing cultural and socio-political values which shape the present debate on the limits of smoking. Part II of this article presents the public health predicate as the underlying justification for developing tobacco control strategies. Part III explores how these strategies have a historic grounding and contemporary relevance within the common law of nuisance. The potential use and application of the doctrine of anticipatory nuisance is tested as a feasible remedy to abate cigarette smoking in Part IV. Difficulties in applying tobacco containment policies in public spaces and then in restricted environments is next investigated in Parts V and VI respectively. In Part VII, the value and importance of local ordinances, as an integral part of a tobacco control strategy, is shown; and Part VIII investigates further the nature of current legislative efforts to resolve the issue of tobacco control and abatement. Finally, Part IX analyzes the need for strengthening legislative drafting approaches to the central issue and concludes that by integrating common law principles and permutations of nuisance law into legislative frameworks, a strong model for containing cigarette smoke can be achieved.

42. RESTATEMENT (SECOND) OF TORTS §§ 826, 827(a)-(d), 828(a)-(c), 831 (1977).
I. PUBLIC HEALTH CONSIDERATIONS

The aim or goal of public health is “to reduce disease and maintain the health of the population.” As for tobacco use, specifically, the goal is more ambitious in that not only does public health seek to “reduce disease, disability and death related to tobacco use through prevention and cessation,” but to protect nonsmokers from environmental tobacco smoke or ETS.

The prevention of disease and the advancement of health-promoting conditions for the people is always preferable to cure. In order to secure the public health, “organized community effort” must be undertaken in what is now seen as a multi-dimensional goal since “health” includes not only those concerns listed previously, but also decent housing, adequate income, public education, etc. By widening the traditional boundaries of public health, the role of government is also expanded. One view holds the government should seek to ensure for all citizens the basic means to attain the “good life” yet refrain from detailing the content of that life other than preventing others from infringing on the “inalienable rights” to life, liberty and the pursuit of happiness. The alternative view is that the government is but a facilitator of communal values and, as such, exists to define, and then accommodate, reinforcing goals for combating social ills. As such, politics, culture, and economics all combine as vectors of force in shaping and in testing policy in this area.

No doubt one of the central most justifications for public health intervention is the need to advance the greatest good (for example health) for the greatest number of people and thereby achieve economies of scale through sound benefit-cost policies. Thus, public health and safety are equated with the pursuit of and maintenance of the common good. With government actions that seek to not only promote health and prevent injury and disease come inevitable interferences with personal liberties and economic freedoms. As always, the test becomes the extent to which a sound balance is struck between these two rights.

44. Public Health Law and Ethics, supra note 10, at 31.
46. Public Health Law and Ethics, supra note 10, at 34.
47. Id. at 38.
48. Id. at 39.
49. Id.
50. Id. at 65.
51. Id. at 32.
52. Id. at 155-57.
53. Id. at 165.
54. Id. at 157.
Cigarette Smoking as a Public Health Hazard

The advancement of public health was a paramount value in the Multi-state Tobacco Settlement Agreement (MSA) of 1998 which settled suits brought in forty-six states against tobacco manufacturers to recover Medicaid expenditures for treating smoking related illnesses. As a result of the settlement, “participating manufacturers will pay out nearly $206 billion over the next 25 years to the settling states and territories.” The settlement marks a milestone in the long and arduous battle to make tobacco manufacturers accountable for the harm caused by their products.

While there is a common perception that the war against tobacco ended after this historic settlement agreement, this is not the case. Tobacco regula-

MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS 164-83 (2d ed. 2005); Laura Hermer, Municipal Home Rule in New York: Tobacco Control at the Local Level, 65 BROOK. L. REV. 321 (1999) (discussing issues left open by the MSA which will become issues in the future); Ellen Wertheimer, Pandora’s Humidor: Tobacco Producer Liability in Tort, 24 N. KY. L. REV. 397 (1997).

56. Hermer, supra note 55, at 322. Sadly, “cash-strapped state governments are spending nearly half of the $7.9 billion they received in tobacco settlement money in 2003 went for general purposes” instead of for tobacco education, treatment, and public health. Vanessa O’Connell, States Siphon Off Bigger Share of Tobacco-Settlement Money, WALL ST. J., Oct. 9, 2003, at A1. Although not required to direct settlement monies for smoking-related purposes, many state legislatures indicated this would be done. Id. See Frank A. Sloan et al., Determinants of States’ Allocations of the Master Settlement Agreement Payments, 30 J. HEALTH POL. POL’Y & L. 643 (2005) (analyzing the effects of voter characteristics, political parties, interest groups, etc. on allocation decisions for the tobacco Master Settlement Agreement and concluding that tobacco-producing states and those having a higher proportion of conservative Democrats, elderly, African-Americans, or Hispanics, in general spent less money on tobacco control); States Failing to Spend Tobacco Settlement Funds on Prevention, 16 ALCOHOLISM & DRUG ABUSE WKLY. 3 (2004) (discussing a new report showing thirty-seven states are funding tobacco prevention programs—if at all—at less than half of the recommended funding level by the Centers for Disease Control); A BROKEN PROMISE TO OUR CHILDREN: THE 1998 STATE TOBACCO SETTLEMENT SEVEN YEARS LATER (2005). But see Marc Kaufman, Smoking in U.S. Declines: Cigarette Sales at a 54-Year Low, WASH. POST, Mar. 9, 2006, at A1 (reporting on a national decline in cigarette sales, which is causing financial losses for some states—this, because tobacco industry settlement payments to the states are tied, to some extent, to the number of cigarettes sold).

57. See Alan Scott, The Continuing Tobacco War: State and Local Tobacco Control in Washington, 23 SEATTLE U. L. REV. 1097 (2000) (discussing unresolved tobacco issues); see also Carol D. Leonnig, U.S. Trial against Tobacco Industry Opens, WASH. POST, Sept. 22, 2004, at A3 (reporting on the largest civil racketeering trial ever maintained by the Justice Department alleging, as such, for the last fifty years, that the nation’s largest tobacco companies—notably Philip Morris and R.J. Reynolds—sought to deceive the public about the scientifically proven damages of smoking in a direct attempt to protect profits the industry earned from the sale of cigarettes). On February 4, 2005, the court ruled against the government in United States v. Philip Morris, U.S.A., Inc., 396 F.3d 1190 (D.C. Cir. 2005). Then, on August 17, 2006, U.S. District Court Judge Gladys Kessler, in a 1,742 page opinion, ordered Philip Morris and seven other tobacco companies, to undertake a massive, court-supervised, ten-year public media campaign to correct years of misrepresentation which had deceived the public about the health hazards of smoking.
tion continues on at the state and local levels. Further, because the MSA did not address several key issues, such as protection of nonsmokers from secondhand smoke, there is significant opportunity for state and local governments to step in and address this health problem. The MSA’s silence on secondhand smoke mirrors the uncertainty in society as to how far the law should reach into regulating this unsettled area. Current litigation reflects that regulation of secondhand smoke is the next issue for courts, legislatures and municipalities to address in the continuing battle over tobacco controls. In order to regulate secondhand smoke, municipalities must address two concerns: the need of lawmakers to justify these regulations which necessarily intrude on individual rights and, secondly, the establishment of the proper authority and power to regulate secondhand smoke.

A. Teenage Addiction and the FDA

Findings by the Center for Disease Control and Prevention (CDC) concluded that “[m]ore than a third of high school students who try cigarettes develop a daily smoking habit before they graduate.” For those continuing on to college, the Harvard School of Public Health found smoking among college students has increased substantially in recent years—all signaling great dangers for the health of the next generation of adults. Of equal concern are

Specific terms such as “low tar,” “light,” and “mild” were outlawed. The District Court could not impose the $280 billion sought by the government, but a fourteen billion dollar penalty to cover the costs of assisting those wishing to stop smoking and for an education marketing plan to discourage smoking initially was granted. Henri E. Wauvin & Robert Stein, Big Tobacco Lied to Public, Judge Says: Industry Avoids Huge Penalties but Is Ordered to Correct False Advertising, WASH. POST, Aug. 18, 2006, at 1 (summarizing United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006)). But see Price v. Philip Morris, Inc., 848 N.E.2d 1, at 53-56 (Ill. 2005) (determining that since the Federal Trade Commission had approved the use of light and low tar labels on packages of cigarettes, Philip Morris could not be held liable for a $10.1 billion judgment awarded by a lower state court to the 1.14 million current and former Illinois citizen smokers for alleged deception by the labeling by Philip Morris of “light” and “low tar” cigarettes as safer than regular cigarettes).

58. See id. “[T]he MSA is completely silent on ETS and smoking in public places.” Hermer, supra note 55, at 360. See also Nat’l. Assn. of Attorneys Gen., supra note 55; DERTHICK, supra note 55 at, at 71-92.


the figures which show each day 4,000 youth under the age eighteen try smoking for the first time, and 1,000 of those children become regular smokers.\footnote{62}

The Food and Drug Administration (FDA) has taken an aggressive role in trying to regulate access to tobacco smoking for teenagers\footnote{63}—owing in large part to indisputable research which has found smoking morbidity and mortality reduced significantly when access to cigarettes is curtailed.\footnote{64} In 1996, the FDA promulgated regulations designed to not only ban cigarette sales in vending machines and restrict advertising to black and white text format in publications having more than fifteen percent young readership, but also to ban billboard advertisement of tobacco within 1,000 feet of a school or playground\footnote{65} and require the tobacco industry to fund a year-long anti-tobacco media campaign.\footnote{66}

Prior to this direct effort to restrict juvenile smoking, past congressional efforts included: passage in 1965 of The Cigarette Labeling and Advertising Act which required all cigarette packages to carry health warnings;\footnote{67} the Public

\footnote{62. See FDA Authority over Tobacco: Legislation Will Protect Kids and Save Lives, Feb. 15, 2007, www.tobaccofreekids.org/reports/fda. By way of comparison, the U.S. Center for Disease Control and Prevention estimated in 1997 that twenty-three percent of adults nationwide smoke—with the state of Kentucky leading with one in three adults lighting up in 1997. \textit{Where's the Smoke?}, WASH. POST, Nov. 10, 1998, at Z05. Yet a recent report by the National Association of Attorneys' General Tobacco Committee found the nation's per capita consumption of tobacco fell by 4.2\% in 2005 which, in turn, reflected an overall drop by more than twenty percent since the tobacco settlement in 1998. Marc Kaufman, \textit{Smoking in U.S. Declines Sharply}, WASH. POST, Mar. 9, 2006, at A1. The report attributed this decline to advertisement restrictions, aggressive anti-smoking campaigns, and higher cigarette prices, the average of which in 2004 was $3.16—compared with $1.74 a pack in 1997. \textit{Id.} It was concluded that the national goal set for 2010 of having no more than fifteen percent of youths and twelve percent of adults smoking is achievable. \textit{Id.} But see Colleen McCain Nelson, \textit{Smoking Foes Use Laws to Win Hearts and Lungs}, DALLAS MORNING NEWS, Nov. 17, 2005, at 1A (commenting on statistics from the Centers for Disease Control and Prevention showing that in 2004, 20.9\% of Americans said they smoke regularly).


\footnote{64. \textit{Institute of Medicine}, \textit{Growing Up Tobacco Free} (1994).


Health Cigarette Smoking Act of 1969 which banned all cigarette advertising from television and radio;\textsuperscript{68} and the 1992 Alcohol, Drug Abuse and Mental Health Agency Reorganization Act which, among other provisions, provides incentives for all the states to enact and enforce laws against the sale and distribution of tobacco products to individuals under the age of eighteen years.\textsuperscript{69} In 1994, Congress passed the Pro Children Act which prohibits smoking in those indoor facilities used routinely for delivery of various services to children (for example schools, libraries, day care centers, health care facilities, and early childhood development centers).\textsuperscript{70}

B. The National Action Plan for Tobacco Cessation

In August 2002, then Secretary of the U.S. Department of Health and Human Services Tommy G. Thompson convened a special investigatory subcommittee to study and shape national efforts to combat cigarette smoking. Its report was issued February 11, 2003.\textsuperscript{71}

Central to the ambitious recommendations of the subcommittee are: efforts to increase the Federal Excise Tax on cigarettes by two dollars a pack;\textsuperscript{72}


\textsuperscript{69} Alcohol, Drug Abuse, and Mental Health Reorganization Act, 42 U.S.C. § 300x-26 (2004). For a general history of cigarette regulation, see Richard Kluger, Ashes to Ashes: America's Hundred Year Cigarette War, the Public Health and the Unabashed Triumph of Philip Morris (1996). On October 10, 2004, the U.S. Senate approved a bill, called the Family Smoking Prevention and Tobacco Control Act, which, if it had been enacted into legislation, would have empowered the FDA to regulate the sale, distribution and advertising of cigarettes and tobacco products. S. 2974, 108th Cong. (2004). For a discussion of the arguments for and against that bill, see Edward Alden & Neil Buckley, All Cigarette Makers But One Oppose FDA Regulation Plans, FINANCIAL TIMES, July 19, 2004, at 6.


\textsuperscript{71} Michael C. Fiore et al., Preventing 3 Million Premature Deaths and Helping 5 Million Smokers Quit: A National Plan for Tobacco Cessation, 94 AM. J. PUB. HEALTH 205 (2004). In a report issued by the American Lung Association, forty states and the District of Columbia were given a grade of "F" for not meeting minimum standards required for developing programs designed to prevent smoking and to assist smokers in their efforts at cessation. Marc Kaufman, Smoking-Prevention Work Criticized in Most of U.S., WASH. POST, Jan. 10, 2006, at A13. In order to meet the 2010 national objective of reducing the prevalence of cigarette smoking in the adult population by twelve percent, tobacco control programs need to be implemented fully—not only as to the initiation, but the cessation of smoking. CDC Report, supra note 66, at 752. Overall state spending for fiscal years 2002-2004 on tobacco prevention and control programs declined twenty-eight percent in the United States—with two states, Florida and Massachusetts, cutting their programs by seventy-five percent. Id.

\textsuperscript{72} Fiore et al., supra note 71, at 208, 209.
the establishment of a national network of smoking cessation quit lines accessible twenty-four hours a day, seven days a week in every state, the District of Columbia, and the federal territories;73 support for all clinicians to assure that they have the skills and support systems necessary to assist them in helping their patients quit tobacco use;74 insurance reform to include tobacco treatment coverage for FDA approved pharmacotherapy which, in turn, would allow over-the-counter medications or vouchers for physician approved prescription medication;75 and the creation of public/private partnership initiatives which, among other things, would engage not only health insurers, employers, schools, and even faith-based organizations in providing counseling as part of dependence treatment benefit packages, but advance programs and policies that seek to foster the motivation to quit among tobacco users.76

The various components of the action plan are to be funded, essentially, by a Smokers Health Fund derived as such from the proposed increase of the Federal Excise Tax on cigarettes estimated to be at least fourteen billion dollars (out of a total of twenty-eight billion dollars generated).77 By raising the federal tax from thirty-nine cents to $2.39 a pack, it has been estimated that three million premature deaths could be prevented and five million American citizens would be assisted in their efforts to quit smoking within a year.78

Interestingly, taxpayers having income less than $30,000 pay approximately fifty-three percent of the present cigarette tax—while “[o]nly one percent is paid by those with incomes over $100,000.”79 Thus, a real argument can be made against imposing additional federal or state taxes on cigarettes because there would be a disproportionate penalty on the poor who, themselves, spend more of their modest incomes on tobacco than the rich.80

Apart from the issue of equity in the taxation of cigarettes, the potential for success of this National Action Plan is in serious doubt for another reason—this, because the Bush Administration has stated it has no plans to raise the federal excise tax.81 Without the creation of a financial base through the imposition of new taxes or other budget re-allocations, the National Action Plan has little real chance to become operational.

73. Id. at 206.
74. Id. at 208.
75. Id. at 207.
76. Id. at 209.
77. Id. at 208.
79. Samuelson, supra note 3.
80. Id.
C. International Responses: The European Union and the World Health Organization

Even though the fifteen member countries of the European Union (EU) provide almost one billion dollars a year to tobacco farmers as crop subsidies, recent efforts to restrict smoking at local and state levels have seen the imposition of laws that, among other things, make government buildings smoke free as well as either impose complete bans in pubs and restaurants or create non smoking zones. Other efforts have led to placing warnings on all cigarette packs sold. There are also efforts seeking to ban cigarette advertising in newspapers, on billboards, on the Internet, and at sporting events. Additionally, tobacco manufacturers are required to reduce tar levels in their products and are no longer allowed to call cigarettes “light” or “mild.”

Interestingly, while the United Nations does not have full legislative authority to direct change in its member states, the European Union (EU) maintains a type of legislative supremacy over the national acts of its members by issuing directive and regulations. Directives are binding, yet allow the members considerable means to attain the end goals of these directives. Contrariwise, regulations have the effect of law in each of the member states and do not have the degrees of discretionary latitude for implementation that is found in directives. The struggle to shape a tobacco policy that ensures not only corporate accountability, but also protects individual liberty and asserts the public health powers of the states far exceeds the membership of the EU and is, indeed, transnational.

While piecemeal tobacco control legislation has been enacted over the last three to four decades by various members of the EU, it has been seen as largely ineffective because of its failure to ban, uniformly, point-of-sale adver-


83. Johnson, supra note 82.

84. Knox, supra note 82.


86. Id.

87. Id.

88. For a comparative analysis of this global struggle in Australia, Canada, Denmark, France, Germany, Japan and the United States, see Unfiltered: Conflicts over Tobacco Policy and Public Health (Eric A. Feldman & Ronald Bayer eds., 2004).
Cigarette Smoking as a Public Health Hazard

...tising for tobacco products.\textsuperscript{89} In order to address this very complicated issue of “tobbaccous,” the World Health Organization (WHO) began an initiative in 1995 to draft a Framework Convention on Tobacco Control whose purpose was to improve transnational tobacco control by showing how tobacco is a significant contributor to health inequities in members of the world community and developing a comprehensive tobacco control strategy which could be implemented.\textsuperscript{90} On May 21, 2003, the WHO announced that its Framework Convention had been accepted by all of its 192 member states.\textsuperscript{91} Widespread ratification, however, will surely be more problematic.

The WHO, a specialized agency of the United Nations, is charged with the responsibility for providing global leadership in implementing the United Nations goals in transnational health.\textsuperscript{92} Historically, nonenforceable guidelines and non-binding regulations have been the sole arsenal of the WHO.\textsuperscript{93}

While the WHO's Tobacco Convention makes a noble statement of purpose, Article 13—considered to be the key provision on tobacco advertising—is defective, and its defectiveness is destructive of the whole instrument. By failing to direct the suspension of point-of-sale retail tobacco advertising—the central market focus of present industry efforts—the Convention becomes yet another shallow symbol of U.N. ineptitude.\textsuperscript{94} Instead of taking a bold, forthright position, Article 13 only requires that parties to the Convention following their “own national constitution” proceed to take “legislative, executive, administrative and/or other appropriate measures.... to restrict

\textsuperscript{89} Bump, \textit{supra} note 85, at 1300, 1301. \textit{See} Adam Sage, \textit{Paris Offers a Pipe of Peace to Les Tabacs}, \textit{THE LONDON TIMES}, Nov. 15, 2003, at 21 (detailing the French government’s plan to freeze the taxes on cigarettes until 2008—this in a country where thirty-four percent smoke—and where, with the exception of the United Kingdom, cigarettes are already more expensive; with the French move being designed to mollify the smoking constituency). A recent report submitted to the European Parliament showed conclusively that in the twenty-five countries comprising the European Union, over 79,000 adults die as a result of passive smoking and the report called for a legislative program to prevent smoking in all enclosed public areas—including workplace environments, bars and restaurants. \textit{SMOKE FREE PARTNERSHIP: LIFTING THE SMOKESCREEN: 10 REASONS FOR A SMOKE FREE EUROPE—NEW REPORT ISSUED IN THE EUROPEAN PARLIAMENT} 141 (2006), available at http://www.ersnet.org/ers/show/default.aspx?id_attach=13509.


\textsuperscript{92} Taylor, \textit{supra} note 90, at 279.


tobacco advertising, promotion and sponsorship." While a comprehensive ban on all tobacco advertising, promotion, and sponsorship is set out as one such measure, its use is neither urged nor encouraged.

The WHO Draft Convention which entered into force as the world’s first tobacco control treaty on February 27, 2005, was signed by 168 nations and will apply specifically, for the time being, in only the fifty-seven countries which have ratified it. While countries such as Britain, Japan and Germany have approved the treaty already, the Bush Administration—although approving the text in May, 2004—has not sent it to the Senate for ratification.

Although commendable in design and in its nobility of purpose, the Convention’s continuance of only partial tobacco advertising bans—directed primarily to television and radio outlets—is its fatal weakness. Indeed, until the transnational community is of one mind in combating the health issues of tobacco production and use, the Framework Convention will remain but a framework—one lacking a firm foundation for implementation.

II. COMMON LAW APPROACHES TO ABATEMENT

A. The Law of Nuisance

At various times, a number of legal theories have been advanced to abate the effect of cigarette smoking and have included assault and battery.


97. Id. See also Toby Helm, No Smoking—Even Outside the Office, DAILY TELEGRAPH, June 21, 2006, at 1 (discussing how Britain’s new smoking law to take effect in June 2007, which outlaw smoking in all pubs, restaurants, private clubs, and enclosed work areas, is providing a base of expectation for subsequent legislation outlawing smoking in open spaces or wherever there is a health risk posed from secondhand smoke); Kaufman, supra note 71.

98. Bump, supra note 85, at 1304. Largely because the United States opposed a blanket advertising ban, the final treaty provides for nations having commercial free speech protections to opt out of that provision. Kaufman, supra note 96; see also Benjamin Mason Meier, Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health, 5 YALE J. HEALTH POL’Y & ETHICS 137, 189-90 (2005) (discussing another weakness of the Convention: its failure to include any consideration of those addicted to nicotine and calling for a separate protocol for the treatment of tobacco dependence in order to deal with this omission).


101. Id. at § 9; Ezra, supra note 3, at 1085-86 (proposing a new civil action for smoker battery and acknowledging the inherent problems with its enforcement); see also Renee Vintzel Loridas, Secondary Smoke as a Battery, 46 A.L.R. 5th 813 §§ 2, 3 (1997).
negligence and product liability, intentional infliction of emotional distress, and punitive damages. Although actions in nuisance and trespass were actionable only for offenses affecting land interests, the flexibility within the standard of reasonable conduct that is tested in any claim of private or public nuisance, provides the very lynchpin for developing a fair strategy to combat smoking. When this principle is codified, legislatively, into local or state regulatory schemes designated to protect the public health, its decisiveness and relevance will be apparent.

The capacity for individual self-control is obviously limited—particularly with the addictive powers of nicotine at work in tobacco products. It has remained for the common law to determine when conduct, in the course of life activities, is so unreasonable and offensive that transgressions of it subject the offender to legal liability. The extent to which legal liability is imposed for offensive conduct is set, first, and perhaps foremost, by prevailing moral standards which are translated subsequently into objective legal ones. This process of evolution or translation not only allows the law to be able to grow and adopt new principles for modern life, but retain those with historical relevance as it in turn responds to public policy and, indeed, is shaped by it.

While the vagaries of public policy change with the times, and in turn cast new interpretative directions for the Common Law, many of the Nation's central values remain immutable in their economic and moral soundings—especially so with the law of torts; for, the simple and direct rationale for tort law is to "shift the burden of loss from the victim to the person or entity that"

102. Ezra, supra note 3, at 1072-73; see generally Keeton et al., supra note 100, at § 96; Daniel Givelber, Cigarette Law, 73 Ind. L.J. 867, 893 (1998); Robert F. Cochran, Jr., Dangerous Products and Injured Bystanders, 81 Ky. L.J. 687 (1993); Cochran, supra note 13, at 702 (arguing that a strict liability be imposed on hedonic product liability for manufacturing alcohol and tobacco).
103. Restatement (Second) of Torts § 46 (1965); Ezra, supra note 3, at 1083.
104. Ezra, supra note 3, at 1085.
106. Keeton et al., supra note 100, at § 13.

As Robert C. Ellickson has observed, "... virtually all of us have some capacity for self-control." Ellickson, supra note 2, at 1187. See generally Thaddeus Mason Paige, Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulation, 61 Pitt. L. Rev. 419, 442 (2000).
109. See generally Oliver Wendell Holmes, Jr., The Common Law (1923).
110. Id. at 38.
111. Id. at 36.
112. Id. at 35, 36.
has unreasonably caused the loss. . . .” and by so doing deter “other potential harm doers from engaging in activity that would likely harm others in the same fashion.”

Both moral and economic vectors of force are thus clearly at work here in tandem and, indeed, may be seen as complementary in that the social ordering expects all members of society to not only behave reasonably in their relations with one another but to act rationally by maximizing economic efficiency in their property transactions. What is reasonable is, inherently, “bound up in an organic sense of custom, community, and individual responsibility.” Economics, as the other pillar of tort law, according to Richard A. Posner “subsumes the moral basis for tort law,” and because “we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval.” It is all within the crucible of the Common Law of Nuisance where the richness of tort law is given full play, that the catalyst for dealing with the public health hazard of tobacco is to be found.

Some anti-smoking forces expect that over time, when the prices for packs of cigarettes rise significantly, smoking tastes will be curbed. Others expect new smokeless or low-smoke cigarettes will go far to soothe public health concerns about smoking and passive smoking in particular.

B. Shaping a Template for Decisionmaking: Issues of Indeterminancy

When asked to decide whether a challenged use of property constitutes a nuisance, then, two types of judicial considerations are made: one, “a utilitarian calculus of the relative social values of the conflicting activities” in issue,
and two, a "justice-oriented evaluation" of what serves as both a fair distribution of the benefits as well as the burdens of the land ownership in issue.120

Consequently, when property disputes are resolved ultimately, they are done so by reference to human values; or, in other words, a normative framework which allows choice between freedom and security.121 Yet, the values implicit in choices among property rules are always in conflict as well as various in number and, indeed, incommensurable—resulting invariably in a vexatious conundrum: namely, how to effect a true comparison of the value of freedom and the value of security and make a choice of one over the other?122

Joseph W. Singer holds to the opinion that the nuisance doctrine's goal of resolving land use conflicts by assessing "the reasonableness of one owner's land use in light of the harm it causes to others" is a "nonresolution"—this, because a judgment of some kind, as observed, is required.123 Three choices are available: a balance of the interests of the concerned parties, a consideration of the overriding interests of the community, or a moral judgment made regarding which particular uses are to be favored.124

In any case, this solution to land use conflicts requires the exercise of judgment. It answers the dilemma by restating the problem. In so doing, it forces us to attempt to articulate the considerations of justice or utility that prompt us to want to rule in favor of freedom or security in particular cases or classes of cases. It calls for us to make a judgement and forces us to explain the factors that lead us one way or the other. It forces us to face the tension within the concept of property and within the legal institution of property head on, without flinching or turning away.125

Inasmuch as nuisance law seeks to resolve land use conflicts, then, by mandating the judicial decision maker to evaluate ultimate normative bases for property use—or, in other words, justice and social welfare—and then apply these norms to the facts of each case, the indeterminacy of this standard for decisionmaking is clear since it defines a specific framework for conflict resolution that simply cannot be applied in a forthright manner. Instead, subjective judgments—of necessity—must be made, thus defying the development of precedent to be incorporated into a type of equitable policy making or stare decisis. This, in turn, contributes to a very serious obstacle to the process of nuisance decision-making—namely, an unavoidable drift which is referred to as result oriented jurisprudence which in turn has been characterized as the "deepest problem of our constitutionalism."126

121. Id. at 37.
122. Id.
123. Id.
124. Id.
This classic concern arising over indeterminancy is reformulated, modernly, into what may be characterized as "Oprahizing" the law. Under the jurisprudence of Oprah Winfrey, herself, a popular, nationally syndicated television talk-show hostess, subjective feelings are embraced and elevated judicially in order to promote desired outcomes grounded in abstract and abstruse obligations severed, as such, from prior case precedents.\footnote{126} Admittedly, the Restatement of Torts balancing test seeks to establish a process for decisionmaking which, facially, is commendable.\footnote{127} The inherent weakness in the test itself, however, is seen in its very fluidity and flexibility and, thus, its absence of an a priori legal standard which adds to its difficulty in being operational. Others would, however, suggest that the test is efficacious and practical because it is guided and shaped by the standard of economic efficiency or reasonableness. Even though situational or fact-sensitive, there can be no more valid normative standard than economic efficiency in contemporary society.\footnote{128}

C. Classifying Nuisance

The courts have classified nuisance as either being per se, within itself, or per accidents. Within the first classification are found a variety of immoral activities (e.g., houses of prostitution) or practices of an extra hazardous nature which jeopardize public health, safety, and welfare. A nuisance per se, then, is one under circumstances at all times—regardless of location.\footnote{129} Contrariwise, nuisances per accidents, or those in fact, are taken to be those acts which have become unreasonable by reasons of circumstances and of surroundings.\footnote{130} Accordingly, for an action to be sustained this situation, a court must find that the facts, as proved, with respect to location, harm and other circumstances, establish a pattern of unreasonable conduct which must be abated.\footnote{131}

A private nuisance may be seen as an act or actions which interfere, unreasonably, with the use and enjoyment of another's use and enjoyment of land. Normally, it affects but a limited number of landowners—and usually concerns disputes between adjoining landowners. Public nuisance includes a number of activities which interfere with comfort, moral standards, health,
safety, and convenience of the community.\textsuperscript{132} A public nuisance is more general in scope and definition and includes "unreasonable interference[] with ... rights common to the general public."\textsuperscript{133}

The typical remedy for a public nuisance is found within the power of public officials (for example mayor, municipal, or county attorney) to seek abatement orders of the offending conduct or the imposition of criminal penalties, usually of a modest nature. Under the doctrine of public nuisance, recognition is given to not only "the value of the annoying conduct to its sponsor" but equally to the corresponding "magnitude of the harm to the public" resulting from the conduct.\textsuperscript{134}

D. Modern Approaches

In the United Kingdom, within the last one hundred years, the area regarded as traditional within the jurisdictional province of public nuisance has been replaced by statute.\textsuperscript{135} Consequently, today only two situations give rise to prosecutions for public nuisance: those where a "defendant's behavior amounts to a statutory offense" for which a nominal penalty is imposed and those where, although a defendant's behavior is not criminal, a local prosecutor is unable to find any other basis for imposing liability.\textsuperscript{136}

Because of this contemporary practice, and the recognition by some that "nuisance is merely a subset of negligence,"\textsuperscript{137} sentiment has been expressed for not only abolishing the crime of public nuisance—and thus recasting it by statute as applicable only to behavior creating a threat to either public safety or health—but restricting, as well, private nuisance actions to protection of property from non-physical damage such as noxious fumes and noise.\textsuperscript{138} Both the goal and the practical effect of these re-alignments would be to enhance and protect the environment from degradation by pollution.\textsuperscript{139}


\textsuperscript{134} Ellickson, supra note 2, at 1185.

\textsuperscript{135} Spencer, supra note 133, at 65, 76.

\textsuperscript{136} \textit{Id}. at 777.

\textsuperscript{137} Gearty, supra note 132, at 215.

\textsuperscript{138} \textit{Id}. at 242.

\textsuperscript{139} \textit{Id}; Spencer, supra note 133, at 84. \textit{See also} Gerry Cross, \textit{Does Only the Careless Polluter Pay? A Fresh Examination of The Nature of Private Nuisance}, 111 L.Q. REV. 445 (1995) (finding the tort of nuisance is one of strict liability with liability therefore attaching by virtue of occupancy and not of fault—with the taking of reasonable care providing no defense to such an action).
III. THE DOCTRINE OF ANTICIPATORY NUISANCE

A. Uncertainties in Application

Quite simply, as the term implies, an action for injunctive relief sounding in a theory of anticipatory nuisance, is one brought before the unreasonable use resulting in an actual nuisance has occurred. Seldom used as a common law action, the doctrine entrusts the courts with “[t]he power to interfere by injunction to restrain a party from so using his own property as to destroy or materially prejudice the rights of his neighbor ....” The central issue, then, for a court responding to a case based on anticipatory nuisance is both shaping the standard of immense severity a moving party must establish before issuing the injunction and then applying it to the facts of the instant case.

Never characterized as inert, the common law holds great promise as a finely-tuned mechanism for attacking the problems of secondhand smoke—and especially so with refined applications of the doctrine of anticipatory nuisance. “Society has repeatedly been confronted with new inventions and products that, through foreseen and unforeseen events, have imposed danger upon society .... The courts have reacted by expanding the common law to meet [such challenges].” A court armed with the doctrine of anticipatory nuisance aiming to contain on the street smoking and smoking’s irreversible effects, is capable of preventing the adverse, latent effects cigarette smoking involuntarily imposes upon innocent citizens.

Today, in England, balancing the interests of the plaintiff and defendant is of less importance to the courts than a more focused analysis of “the type of harm that is required in order to have an action, together with either the type of activity that attracts strict liability or (if there is no strict liability) the conduct that attracts fault-based liability.” Maria Lee, What Is Private Nuisance?, 119 L.Q. REV. 298, 299 (2003). Conduct is only important when a defendant’s activity fails to “attract strict liability.” Id. at 300, 301. Because of the indeterminate language of reasonableness, then, private nuisance has been termed a “vulnerable tort” which may well be absorbed by a reformulated tort of strict liability. Id. at 325.

141. Sharp, supra note 140, at 627.
143. Sharp, supra note 140, at 632.
B. Judicial Passivity

The feature most attractive and unique to an injunction awarded on the basis of an anticipatory nuisance claim is its capacity to prevent future harm. The environment or individuals, themselves, may sustain irreversible injury at the hands of technological advancement, economic progress in general, or individuals’ uncensored utilization of land.

The use of the anticipatory nuisance action by citizens desiring to block the prevention of environmental harms before they occur has a simple and direct goal: stopping both construction and operation of an industrial operation (for example, a solid waste disposal facility) before an irreparable injury occurs. Seemingly, a court should be commended for engaging in such perceptive forethought, electing to utilize the doctrine of anticipatory nuisance as, too often, the implementation of a post-injury remedial action proves plainly outrageous to the preservation of society’s health, welfare, and safety concerns. In those instances, hindsight amounts to exactly that—just hindsight and nothing more.

The doctrine of anticipatory nuisance has also been used creatively in order to enjoin the use of derelict or abandoned houses from becoming crack havens, to prevent street gang members from gathering in public places and thus becoming public nuisances and to require, through mandatory injunctive powers, the release of relevant information necessary to protect the

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147. Two variations of anticipatory nuisance, nuisance per se and nuisance per accidens, with divergent standards for qualification, have been recognized. A nuisance per se, as seen, occurs when the thing complained of, the activity, structure, or function of the structure would amount to a nuisance under all circumstances and at any conceivable time invariably undaunted by locality or positioning. See, e.g., Wallace v. Andersonville Docks, 489 S.W.2d 532, 535 (Tenn. App. 1972); Cherokee Hills Util. Dist. v. Stanley, 1989 WL 61322 (Tenn. App. 1989); Brammer v. Hous. Auth. of Birmingham 195 So. 256, 259 (Ala. 1940) (requiring that injury equate with "a natural or inevitable consequence"); Leatherby v. Gaylord Fuel Corp., 347 A.2d 826, 832 (Md. 1975). A nuisance per accidens, or nuisances in fact, becomes nuisance dependant upon surrounding circumstances, the act itself and its propensity to create danger. See, e.g., Cunningham v. Feezell, 400 S.W.2d 716, 718-19 (1966). See GITELMAN ET AL., supra note 129.

148. See generally KEeton ET AL., supra note 100. Doane, supra note 133, at 449 (describing an anticipatory nuisance as a "vehicle" for the prevention of irreversible harm).


150. Doane, supra note 133, at 456-57.


community from released sex offenders—this, in anticipating fear of acts of recidivism.¹⁵³

Only two states—Alabama¹⁵⁴ and Georgia¹⁵⁵—have enacted specific legislation which allows the issuance of injunctive relief “to restrain the nuisance before it is completed.” Interestingly, in Pennsylvania, the boards of health within each municipality are empowered “to abate or prevent a public nuisance or anticipated public nuisance.”¹⁵⁶

Inasmuch as the doctrine of anticipatory nuisance has the potential, through application, to secure a liveable controlled environment, at first glance it resembles a backyard bugzapper’s incandescent light’s attractiveness to an eager moth with tunnel vision. Yet, the shortcomings of the doctrine limit its ready application to prevent injury from occurring. One such weakness is the doctrine’s requirement of certainty and immediacy of harm which, in turn, has the effect of risking the unknown because it prefers economic investment rather than impeding progress.¹⁵⁷ The court, for example, in Holke v. Herman,¹⁵⁸ indicated that it would opt not to impede progress if the complainant could overcome three imposing obstacles: “[1] the uncertainty of future events, [2] the frequency of groundless alarms and [3] the despotism of needlessly preventing a citizen from using his property.”¹⁵⁹ The complainant’s likelihood of satisfying this burden and other comparably rigorous burdens used routinely by courts in adjudicating whether to issue an injunction is improbable. The occurrence or non-occurrence of a harmful future happening is rarely ever presentable as an absolute in an evidentiary proceeding prior to inception.¹⁶⁰ Simply put, the future is unpredictable. Therein lies the faulty reasoning of courts imposing overly-rigorous standards, bordering on the absolute, prior to granting injunctions based on anticipatory nuisance.¹⁶¹

Surely, injunctions should not be granted for prospective harms blankety without considering economic progress. The preservation of landowners’ and citizens’ health should be balanced against economic progress and its

¹⁵⁸. Id. at 125.
¹⁵⁹. Id. at 134.
¹⁶⁰. Andrew H. Sharp acknowledges that there exists a presumption in equity that an endeavor will be conducted in a non-offensive posture. Sharp, supra note 140, at 637.
¹⁶¹. Id. at 641. “Courts should not ignore a moderate risk of catastrophic or widespread harm merely because it is not highly probable that such harm would result.” Id. at 652; see also Doane, supra note 133, at 472 (recommending a balancing of two considerations: the probability and the magnitude of the injury).
Often, there is a refusal to recognize perhaps the "great possibility" of the occurrence of a nuisance is deserving of an injunction, given the justification for awarding an injunction in the first place is to prevent the conception of irreversible harm. In this regard, it is highly unlikely the judiciary will overcome its disdain that laces the doctrine requiring a court to rule that a proposed use of land is harmful prior to its occurrence and permit the doctrine of anticipatory nuisance to exert its full stopping power in the direction of future harms. The judiciary has not yet acknowledged an anticipated nuisance measured as doubtful, contingent, or conjectural, regardless of whether it utilizes the nuisance per se standard or nuisance per accidens standard.

Secondly, judges define the concept of anticipatory nuisance in non-specific, relaxed terminology. This lack of specificity further discourages individuals from petitioning courts for injunctions in reaction to a threatening nuisance because of the lack of predictability with which courts consider the factors they themselves elicit in the decision-making process. Judges not only vary inconsistently in determining whether to invoke a nuisance per se or per accidens standard, but inject arbitrarily into the traditional definition of anticipatory nuisance qualifying terms to, in an errant attempt, clear the air so to speak on the applicability of the doctrine. This selection of words intended to clarify the reaches of the doctrine has befuddled potential litigants attempting to discern whether or not a particular threatening nuisance satisfies the requirements of the definition. Generally, it can be seen that there is a wide judicial agreement to disagree on a consistent, comprehensible formula for solving anticipated land disputes. Unfortunately, this confusion discourages individuals from resolving impeding future harm regardless of the existence of an appropriate factual setting encouraging those individuals to approach cautiously the use of the doctrine of anticipatory nuisance subduing the doctrine's potential advantages. The more discouraged potential litigants become, due to the bleak prospects courts develop, the more frequently individuals will be subjected to less than ideal predicaments unnecessarily. Despite the sometimes overwhelming obstacles an anticipatory nuisance action is confronted with, complainants must continue to seek injunctions based on the doctrine due to the irreversible harms that may ensue if allowed to come to fruition uncontested.

Admirable causes such as the containment of the irreversible effects cigarette smoke on involuntary, secondhand smokers is a perfect example of imminent danger that should not persist uncontested. The doctrine of antici-

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164. See Williams, supra note 149, at 243.
165. Doane, supra note 133, at 453. (showing that state statutes and case law fail to show a uniform, clear cut standard for plaintiffs attempting to enjoin threatening nuisances).
166. Sharp, supra note 140, at 642-43; Doane, supra note 133, at 453.
167. Williams, supra note 149, at 249.
patriotary nuisance is adept at securing a controlled environment regarding the unrestricted emission of harmful and offense containment. The result of regular subjection to secondhand smoke is more than mere conjecture or unfounded fear. A public space saturated with secondhand smoke qualifies easily as a nuisance per accidens. It embodies an exact set of circumstances that courts utilize the doctrine of anticipatory nuisance to enjoin. The facts and circumstances—the unpleasant inhalation of large quantities cigarette smoke, considered in conjunction with the particular location, a well-populated, public gathering space—amounts to a nuisance per accidens. Physical harm is certain to result from extensive exposure to secondhand smoke. A balancing of the interests, the social utility of a citizen’s right to smoke cigarettes in public places weighed against the gravity of physical harm committed upon secondhand smokers, serious illness and possible resultant death, favors liberating non-smokers from subjection to harmful cigarettes smoke by way of a permanent injunction.

C. Preservation of the Public Health and Safety

There is one other general rule of the law of anticipatory nuisance that provides comfort for landowners and citizens disoriented by the thick of uncertainty courts have created. Courts will enjoin activities, structures, or technological instruments that endanger the public health. As a consequence of the judiciary’s unfortunate agreement to speak in non-specific terms, this general rule eases that uncertainty which confronts litigants threatened by potential health hazards. No individual committing such an offense upon innocent citizens or neighboring landowners can shelter himself from liability.


169. Purver, supra note 168.

170. Wilsonville v. SCA Services, Inc., 426 N.E.2d 824 (1981) (granting an injunction to prevent continued operation of a chemical waste disposal site due to eventual contamination of the surrounding air, water and earth); Missouri v. Illinois, 180 U.S. 208, 241, 248-49 (1901) (granting an injunction preventing the discharge of sewers into the Mississippi river reasoning that large quantities of the sewage would probably poison the water supply); Sharp v. 251st St. Landfill, 925 P.2d 546, 548 (1996) (reasoning that the granting of the injunction was “anchored” on the probability that the water sources would be polluted by utilization of the landfill). Endangerment of the public health encompasses irreversible contamination of the environment as the latter will affect the former inevitably in an adverse manner.

171. The predisposition of courts to protect individuals from public health hazards is not a new phenomenon. From the time of Aldred’s Case, courts have revisited time and again the settled rule of this country that an individual is reserved the right to maintain a structure or activity upon his own land which is regarded as dangerous, intolerable or uninhabitable to his surrounding neighbor’s well-being. Aldred’s Case, 9 Co. Rep. 57b, 816. For an in depth analysis of Aldred’s case see Smith, supra note 40, at 682-686.

172. Abrams & Washington, supra note 144, at 364 (noting that a public nuisance is an interference with or an intrusion upon a public right, not necessarily involving a restricted
behind a belief in the sanctity of private property.\footnote{See Camfield v. United States, 167 U.S. 518, 522 (1897) (acknowledging the general proposition that "a man may do what he will with his own," and holding that this right is subordinate to \textit{Sic utere tno ut alienum non das} and—thus—determined no fence could be erected which enclosed 20,000 acres of public lands for pasturage purposes and large reservoirs for water built to irrigate these lands).} However, the public health hazard or catastrophe that the land user will commit must result in a serious grievance and not a frivolous or ultrasensitive complaint.\footnote{Prauner v. Battle Creek Cooperative Creamery, 113 N.W.2d 518, 522 (1962). In Prauner, the court denied the injunction reasoning that despite the serious danger that could occur, the assumption that a petroleum storage facility would be operated safely was well-warranted. Emphasizing the carefulness with which the facility would be operated, the court discredited the argument that an individual would ever sustain a serious injury as a result of such operating standards. \textit{Id}.} Two cases shed light on the level of seriousness courts require. The court, in \textit{Missouri v. Illinois}, provided qualification for the meaning of serious grievance and the threshold that an intrusive activity, structure or instrument must cross to be regarded as such. Often, the intrusion must affect a life source.\footnote{Missouri v. Illinois, 180 U.S. 208, at 210 (1901).} In this case, the reality that the water supply was "indispensable to the life and health and business of many thousands of inhabitants in the State of Missouri" was emphasized.\footnote{Id. at 210 (relying on expert testimony to assist in the decisionmaking process that determines the permanence of harmful acts).} Similarly, the case of \textit{Sharp v. 251st Street Landfill} announced that the anticipated nuisance must be "a matter of public juris and of immediate, local, national and international concern."\footnote{Sharp v. 251st St. Landfill, Inc., 925 P.2d 546, at 552 (1996) (justifying the intrusions as a matter of publici juris reasoning that "no commodity affects and concerns the citizens of Oklahoma more than fresh groundwater.") (citing Dulaney v. Okla. State Dept. of Health, 868 P.2d 676, 684 (Okla. 1993)).} The obvious justification for prohibiting activity responsible for consequences of this magnitude is that often it is difficult to remediate completely pollution to water supply, for example, once it occurs.\footnote{The \textit{Sharp} court maintained that the "difficulty, complexity and costliness of remedying groundwater contamination was well documented and that once serious contaminated groundwater is often rendered unusable and cleaning it up is often unsuccessful." \textit{Sharp}, 925 P.2d at 555 n.12.} The judiciary, however, does not make the determination of the certainty of irreversible contamination or damaging health consequences independently.\footnote{Id. at 555 (relying on expert testimony to assist in the decisionmaking process that determines the permanence of harmful acts).} Wisely, expert testimony is relied upon heavily
when efforts are undertaken to decipher effective and ineffective arguments founded upon intricate scientific reasoning and complex understandings. A judicial determination that health consequences of a certain activity are imminent and actual is essential to enjoining threatening nuisances. Subsequent to such a determination, an individual’s right to non-interference takes precedent over even economically advantageous endeavors. In the absence of such a determination, courts are reluctant to impede economic progress. As evidenced by past plaintiffs’ arguments, an under-reliance on adverse health effects of an activity accompanied by a corresponding over-emphasis on olfactory and aurally oriented nuisance concerns may assure the denial of an injunction. A final determination is often fixated on the presence or absence of the possibility of sustaining a physical injury of a serious nature. In Roach v. Combined Utility Commission of Easley, for example, the complainant noted initially the existence of a concern for health, yet, failed to promote it as a chief argument in the case. As a result, the injunction was denied. Plaintiffs desiring injunctions must prove that the unwholesome activity, the target of the enjoinment, threatens individuals’ physical well-being to be assured a substantial level of credence in their arguments positioned inopportunity against the current of economic progression.

Clearly, cigarette smoke in public gathering places endangers the public health. The public health hazard that smokers commit upon exercising their offensive habits within public spaces is not a frivolous grievance. Clean air is indispensable to the life of all individuals, and the effects of cigarette contaminated air are irreversible. Non-smokers hold the trump card: the argument in favor of the preservation of their own health, welfare, and safety.

D. Recreational Uses of Public Space

While physical injury, illness, or the contamination of the environment acts as a potential plaintiff’s trump card, a judicial recognition of the recreational value land represents to individuals provides sound public policy and popular sentiment to bolster the granting of an injunction to prevent the in-
ception of a threatening nuisance. It is unlikely a counterposing activity would be enjoined solely for its interference with the occupation of a public area for enjoyment alone. To a degree, however, judicial recognition of the appropriateness of land for recreational purposes surfaces chiefly when the most beneficial uses of a public area coexist meritoriously. Concern is expressed for the dominant surgence of a legitimate activity allowed to persist at the expense of another equally legitimate utilization of a common gathering place. In those situations where an activity, instrument, or structure does not promote necessary economic progress, the element of recreational enjoyment holds persuasive appeal to courts. Where the act does advance economic progress, the efficacious character of an injunction based on a nuisance threatening recreational practices when paired with a health hazard against a legitimate act of considerable societal worth, may be enjoined justifiably.

Individuals utilize public space, such as parks, as recreational outlets from urban lifestyles ritualistically. No more societal value attaches to the use of these same public areas for "lighting up" than does recreating within them. In fact, a case can be made that the ability to use and enjoy these public places safely is a more meritorious use of the land. In combination with the adverse health effects for which secondhand smoke is responsible, the ability to use pedestrian thoroughfares, parks, outdoor malls, and sidewalk dining areas smoke-free for entertainment purposes bolsters the case for the containment of cigarette smoking, through the doctrine of anticipatory nuisance, with the potential to create a vast refuge from its harmful effects.

E. Location, Location, Location!

The utility, versatility, and popular demand for a particularly unique location within a community setting is not uncommon when the location represents an epicenter of activity. Undoubtedly, opposing interests will conflict over the right to occupy or use such a unique location. Absent clashing interests in an area frequented by the citizenry, the need to utilize the common law action of anticipatory nuisance would be nonexistent in such a context. Courts microanalyze the geographic setting of which a dispute over land use may be a determining factor.

189. Village of Wilsonville, 426 N.E.2d at 830, 838 (pointing to the impairment of recreational functions of a pond, but strongly supporting the injunction granted on the basis of a detriment to the public health).
190. See, e.g., Jamaica Pond Aqueduct Corp., 133 Mass. 361 (the draining of a pond for the improvement, not preservation of a supplemental water supply, was enjoined to preserve recreational uses of the pond and avoid detriment to the public health).
193. See generally Ellickson, supra note 2.
194. Olsen v. Baton Rouge, 247 So. 2d 889, 894 (1971) (recognizing many uses of the area and acknowledging that varying interests were dependent upon the area due to its accessibility).
195. Id. at 891-92.
The relative vicinity of one activity to the next, and the capability of one activity to hamper the existence of an opposing activity, often decide the outcome of the dispute.\textsuperscript{197} The activity, instrument, or structure a court deciphers as more crucial to the operation of a community, in comparison to opposing interests, occupies the location more convenient and suitable to its use.\textsuperscript{198} Other interests, more intrusive than invaluable, are positioned strategically in available peripheral locations so as not to impose upon the viability of that community.\textsuperscript{199} Likewise, in the event that one particular activity may be affected solely in one unparalleled locale within a community, that interest, if acknowledged as valuable to the maintenance of society, will acquire that precise positioning it requires.\textsuperscript{200}

The decision of whether to enjoin a threatening nuisance is based upon the physical properties of the land in the surrounding local.\textsuperscript{201} Often the site for the proposed nuisance is so alarming that a holding will provide an explanation of the geography of the predicament prior to reporting any other facts to the dispute.\textsuperscript{202} On occasion, a judicial analysis turns solely on locale\textsuperscript{203} or revisits the importance of the positioning of the act or structure frequently throughout the opinion.\textsuperscript{204} The judiciary recognizes that in order to preserve the health, wealth, welfare, and safety of the communities they preside over, the exercising of location management is imperative. The dependence of a considerable number of citizens upon a particular location, a specific physical attribute of that location, or its surrounding area may persuade a court to enjoin a threatening nuisance.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{196} Id.
\item \textsuperscript{197} See Goodfield v. Jamison, 544 N.E.2d 1229, 1229-30 (1989) (where the plaintiff proffered an argument that a hog transfer station would retard commercial and residential growth in the vicinity, however, the court declined to enjoin the construction of the station until the plaintiff’s “worst fears” were come true). See generally Tal S. Grinblatt, Offenses to the Olfactory Senses and the Law of Nuisance, 21 LEGAL MED. Q. 1 (1997).
\item \textsuperscript{198} Goodfield, 544 N.E.2d at 1229-30 (stating that the purpose of the transfer station was to service local hog producers by servicing them as rapidly as possible).
\item \textsuperscript{199} Leatherbury v. Gaylord Fuel Corp., 347 A.2d 826, 832 (1975) (holding that the quarry was appropriately positioned in a rural area adjacent to farmland).
\item \textsuperscript{200} Olsen, 247 So. 2d at 891.
\item \textsuperscript{201} Sharp v. 251st St. Landfill, Inc., 925 P. 2d 546, 555 (1996).
\item \textsuperscript{202} Fairview Twp. v. Schaefer, 562 A.2d 989, 990 (1989) (focusing not only on the possession of a tiger but defendant's maintenance of the tiger in a residential neighborhood).
\item \textsuperscript{203} Duff v. Morgantown Energy Assoc., 412 S.E.2d 253, 256 (1992) (stating that in testing whether a particular use of real property constitutes a nuisance, the reasonableness or unreasonableness of use in relation to the particular locality involved is of paramount consideration).
\item \textsuperscript{204} Fairview Twp., 562 A.2d at 989-90, 992 (1989) (revisiting the concern for caging exotic wildlife in a residential area a number of times throughout its analysis); Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824, 827 (1981).
\item \textsuperscript{205} See, e.g., Texas v. Pankey, 441 F.2d 236, 238 (1971) (enjoining farmers' use of a particular pesticide because application would render part of Texas' river system unusable for eleven Texas municipalities).
\end{itemize}
Locating a nuisance in a public gathering place, an epicenter of city life, acts as further persuasive evidence in favor of regulating and designating smoke zones and refusing to specify or contain smoke-free refuges. Public areas are crucial to the smooth operation of an urban society. Therefore, smoke zones should be situated in the periphery or the less traveled areas of a community. The maintenance of society requires precise positioning of smoke zones in lightly trafficked areas. The implications of opting to sanction the existence of a harmful activity in a location susceptible to impurity must be seriously considered. A potential litigant must exploit the value of preserving healthy environments in well-traveled or frequented locations pursuant to the prospect of succeeding or providing an actionable threatening or anticipatory nuisance.

IV. OPEN-ACCESS PUBLIC SPACE ZONES

In order to deal with chronic street nuisances defined as behavior that violates—over a period of time—community norms governing proper conduct in particular public spaces that either create minor annoyances to passersby or, alternatively, have the cumulative effect of annoying, Robert C. Ellickson has proposed a scheme to divide urban public land spaces within cities into zones thereby regulating levels of conduct within them.\(^\text{206}\) As with typical traffic light colors of red, yellow and green, he suggests a red zone be marked as utilizing five percent of city space, a yellow zone comprising ninety percent and a green zone utilizing five percent.

In the red zone of the city’s downtown area, a relaxed standard of conduct would be tolerated where sidewalk behaviors—otherwise considered disorderly elsewhere (for example, public drunkenness, loud noise making)—would be seen as not violating any rules of the road.\(^\text{207}\) Public decorum would be more strict in the yellow zone than in the red zone for it is here that the great majority of citizens would mix with one another. Chronic panhandling would not be allowed in the yellow zone, but it would be allowed in the red zone.\(^\text{208}\) Episodic panhandling and bench squatting would be permitted, however, in both the red and yellow zones (which encompasses ninety-five per-

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\(^{206}\) Ellickson, supra note 2, at 1184-85 ("A person perpetuates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same space.").

\(^{207}\) Id. at 1220-21. But see Stephan R. Munzer, Ellickson on “Chronic Misconduct” in Urban Spaces: Of Panhandlers, Bench Squatters and Day Laborers, 32 HARV. CIVIL RIGHTS—CIVIL LIBERTIES L. REV. 1, 14, 15 (1997) (maintaining Ellickson’s tiered zoning system is flawed because it fails to account for various social dysfunctions which would be permitted within the red zone).

\(^{208}\) Ellickson, supra note 2, at 1220-21.
cent of all downtown space). It is within the green zone where strict regulations of disruptive behavior (for example, radio playing and other street nuisances) would be enforced so that pleasant environmental conditions would allow a refuge, of sorts, for sensitive citizens such as the frail, elderly and children of grade school age.

While cigarette and other forms of smoking, do not, as with episodic incidents panhandling or bench squatting, necessarily create or give rise to a true sense of urban disorder, severe aggravation may—and, indeed, often does—arise when annoying and unhealthy secondhand smoke smothers hundreds of pedestrians each hour as they use the public streets to conduct and advance social and business pursuits.

Public smoking, pan handling, bench squatting, street drunkenness, loud “music” or radio noise played indiscriminately, sidewalk bicyclists and skateboard “artists” using the public by ways and thoroughfares discourage—unquestionably—the same use of public spaces by ordinary, peaceable citizens. If unable to experience pleasant conditions that do not aggravate in town areas while shopping socially and transacting business activities, relocations by businesses and customers alike are made to other safer, more hospitable areas outside the inner city which, in turn, add to the decline of the vibrancy of the urban areas themselves.

Put simply, public spaces are incalculable community assets and cannot be squandered on aggravating and noxious patterns of incivility which destroy the peace of the streets. The liberty interests of the offenders thus become secondary to the majoritarian rights to communal enjoyment. While a liberal society must guarantee, ideally, that the most humble have access to open public spaces, societies must impose for use of such space rules of the road.

209. Id. at 1222. See also Sanchez, supra note 29 (reporting on efforts by major U.S. cities—notably San Francisco, Philadelphia, Santa Monica, and Santa Cruz—to restrict panhandling areas and homeless shelters).

210. Ellickson, supra note 2, at 1222. But see Robert L. Rabin, Some Thoughts on Smoking Regulation, 43 STAN. L. REV. 475, 488 (1991) (asserting that nuisance law is “a matter of thresholds” and, consequently, intermittent disturbances that cigarette smoke, when non smokers are subjected to it, falls well below the threshold point at which the general public deems behavior noxious. As such, Rabin refuses to acknowledge Ellickson’s chronic street nuisance theory and thereby fails to accept the fact that while one isolated exposure to second hand smoke presents infinitesimal harm to a street user, repetitious subjection to second hand smoke proves as offensive as a factory that emits constantly an offensive odor. Indeed, coupled with substantiated health risks, second hand smoke causes, the Rabin “threshold” is surpassable).

211. Elickson, supra note 2, at 1177. See Doug Levy, Smokers Fight Back Against Local Cigarette Laws, USA TODAY, Oct. 27, 1997, at 5D (discussing various innovations in anti smoking strategies including smoking lounges in shopping malls and in airports).


214. Ellickson, supra note 2, at 1173.
As such, these rules that set standards for proper behavior on the streets should not be viewed as impediments to freedom, but rather, as foundations for its perpetuation. Without reasonable codes for street conduct, social control in urban areas will dissipate and the frequency of criminal activity will increase or multiply correspondingly. The central-most question becomes, then, whether the so-called “minor” episodic street nuisance of tobacco smoking is a part of contemporary American culture of the streets or whether such conduct is a public health hazard that needs either to be regulated or be banned totally as public nuisances. Each community needs to assess the extent to which it will validate the typical reactions of those exposed to second hand tobacco smoke as “reasonable” and “culturally acceptable” when such physical responses include “...burning, itching, and tearing eyes, sore throat and hoarseness, persistent cough, blocked sinuses, headaches, nasal irritation,” and allergic reactions such as “dizziness, nausea, blackouts, memory loss, difficulty in concentration, cold sweats, aches and pains, skin eruptions and even vomiting.”

Ellickson’s public space zones are creative, but, because of the proven health hazards of passive smoking, should be expanded to include smoking as a chronic nuisance. As such, only within the red zone should it be tolerated publicly—and, then, only in smoke rooms provided by the city and certainly not in open areas such as public parks or the streets. Much as public restrooms are provided by local governments and major downtown businesses, contained public smoke rooms could be made available in the red zone for the downtown shoppers, businessmen and other nicotine addicted pedestrians. Here, such people could smoke until their heart’s content without restrictions.

Ideally, smoking should only be done in the privacy of one’s home and receive very limited First Amendment protections. As a practical matter, however, tobacco smoking is such a part of the cultural milieu that it can never be banned totally. Yet—if it can be prohibited in restaurants and office buildings, why not the public streets? Accommodation of the smoking interest groups could be done in the public smoke rooms. Already such rooms are made available in major airports.

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215. Id. at 1174.
216. See id. at 1171.
217. Ezra, supra note 3, at 1064.
218. Ellickson, supra note 2, at 1229-31.
219. See Lois Romano, Lightening Up: As Politicians Weigh Tougher Tobacco Dead, Many Businesses Make Room for Smokers, WASH. POST, Sept. 22, 1997, at A1 (reporting on the variety of responses taken by airports—such as those at Chicago O’Hare, Dallas/Fort Worth—in building smoking rooms and outside shelter to accommodate smoking travelers, employees, and visitors, and the city of Des Moines, Iowa, that went so far to build a 4,000 square foot smoking club in a downtown mall called Puffs “where people pay 50 cents to duck in for a smoke or $1.25 for a day pass”).
A. Governmental Responses

Since 1996, federal "agencies have spent at least $19.7 million dollars for standard self-standing smoking shelters."220 The Government Services Administration (GSA) has determined that in the fiscal year 2000, at least $8.3 million dollars have been expended for these projects.221 The Defense Department alone has, since 1996, spent at least $17.9 million dollars for the construction of smoking shelters.222 Typically, these shelters "resemble bus-stop shelters with clear plastic walls, [and] range in price from $2,000 to $20,000."223 Prompted in 1992 by the Environmental Protection Agency's classification of environmental tobacco smoke as a Group A carcinogen224 and President Clinton's August 9, 1997 Executive Order barring indoor smoking in federal buildings,225 the governmental agencies had had little choice other than to expend large amounts of money to combat the effects of environmental tobacco smoking.

V. RESTRICTED ENVIRONMENTS

A. Private Dwellings

Even though the "privacy of the home" and, indeed, its "sanctity," are imbedded in the early tradition of the American Republic226 and guaranteed by the "substantive rights of personhood,"227 contemporary concerns of public health issues are modifying—if not compromising—these time-honored traditions. The central task, then, becomes one of balancing the rights of smokers to pursue behavior patterns "whose pleasures and pains are mainly theirs"228 against the rights of nonsmokers to be free from proven health hazards associated with passive smoking in their homes and places of work. Finding an appropriate balance or accommodation of these two rights is the challenge for a lawful, contemporary society.

Lipsman v. McPherson, a 1991 case decided by Middlesex County, Massachusetts, appears to have been the first reported case brought by an apartment dweller whose unit was polluted by a neighbor's smoke which seeped into the

221. Saffir, supra note 220.
222. Id.
223. Id.
225. Id.
226. TRIBE, supra note 5, 1412.
227. Id. at 1413.
plaintiff's apartment and caused him not only annoyance and discomfort but increased the risks of ultimate physical harm to him. While the plaintiff did not prevail, this case bore witness to numerous other similar cases—all litigated with but modest success.

50-58 Gainsborough St. Realty Trust v. Haile carries the honor of being "the first-ever written decision on the subject." Decided in June 1998, a Boston housing court judge determined that a landlord was liable for $4,350.00 in damages for failing "to prevent smoke from a bar directly beneath [the plaintiff's] apartment from coming through the fireplace and the electrical outlets." It was held that this condition breached the landlord's covenant of quiet enjoyment made to the complaining tenant.

Breach of the covenant of quiet enjoyment, the warranty of habitability, the duty of care to maintain safe premises and—of course—nuisance, are the principal weapons in a tenant's arsenal to combat unwanted tobacco smoking in dwellings. Essentially, all of these remedies involve proving the offending tenant and landlord are acting unreasonably by creating an unhealthy interference with the use and enjoyment of a moving plaintiff's dwelling unit.

In Utah, by statutory enactment, "tobacco smoke that drifts into any residential unit a person rents, leases, or owns, from another residential or commercial unit... in each of two or more consecutive seven-day period" is

230. Id.
231. Id.
232. Id.
233. Id. See also Dworkin v. Pally 638 N.E. 2d 636 (Ohio Ct. App. 1994)
234. David B. Ezra, "Get Your Ashes out of My Living Room!" Controlling Tobacco Smoke in Multi-Unit Residential Housing, 54 RUTGERS L. REV. 135, 159 (arguing that it is legal for property owners and housing managers to pass regulations that have the effect of prohibiting smoking in residential settings).
defined as a nuisance. Yet, if the lease or purchase agreement for the unit acknowledges smoking is allowed in the other building units and may, thus, drift into his unit, the signature of the renter, lessee or buyer to the acquisition instrument serves as a waiver of any nuisance rights which might otherwise accrue under the statute.

A co-op board in a 452 unit building near Lincoln Center, in New York City, took a bold, first of a kind action in 2002, by setting a policy not only prohibiting new buyers from smoking in their dwelling units, but also requiring them to declare whether or not they are smokers—an admission which "could lead to the rejection of their applications." Concern was expressed by the Executive Director of the New York Civil Liberties Union that this policy goes too far and regulates private behavior and thus has the effect of discriminating in housing based on disability (since smoking is thought to be, for some, an addictive condition).

The Americans with Disabilities Act (ADA), together with similar laws in the states, protect against discrimination among individuals with disabilities and allows them "reasonable accommodation’ in places of public accommodations." While not protecting nonsmokers as a group, the ADA allows a nonsmoker protection only when ETS limits, in a substantial way, major life activities such as breathing and working.

The addicted or heavy smoker would probably not qualify for ADA protection either. This conclusion is drawn from the fact that the law states succinctly: "Nothing in this chapter will be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment . . . or in places of public accommodation."

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239. Id.


B. Workplaces

It is estimated that seventy percent of the U.S. workforce is now covered by smoke free policies.\textsuperscript{244} Recently, two more states—Idaho\textsuperscript{245} and Massachusetts\textsuperscript{246}—enacted legislation prohibiting smoke in all workplaces.

One recent and very significant medical study on the effects of a six month city ban on indoor smoking for workplaces and other public environments validates the positive effects of such bans on public health.\textsuperscript{247} This six month study during 2002 of the population of Helena, Montana, numbering 68,140 residents, found the number of heart attack victims in the city decreased by forty percent during the time a city ordinance was in effect banning indoor smoking.\textsuperscript{248} After a challenge to the law was sustained, and the law was subsequently invalidated, the former level of myocardial infarctions among the population returned.\textsuperscript{249}

C. Employment Discrimination?

In 1995, in the case of \textit{City of North Miami v. Kurtz},\textsuperscript{250} the Florida Supreme Court held the state government had a valid constitutional right to "discriminate" against those using tobacco within the workplace setting before their employment. More specifically, it was held that, as a pre-condition of employment, it was valid for the city to require all applicants to execute an affidavit affirming that they had been free from tobacco use for twelve months prior to their application. Since the ordinance was designed, specifi-


\textsuperscript{245} IDAHO CODE ANN. § 39-5501 (2006).


\textsuperscript{248} Id.

\textsuperscript{249} Id.

\textsuperscript{250} 653 So.2d 1025 (Fla. 1995).
ally, to reduce medical insurance costs and increase productivity, and these
goals represent a valid compelling state interest, it was held this validated the
regulation under the ordinance. Once hired, however, the court determined
the regulation was unenforceable. Furthermore, regarding Kurtz's claim
that his right of privacy was abridged by the ordinance, the Court held such a
claim was warrantless because the ordinance did not "intrude into an aspect of
Kurtz's life in which she has a legitimate expectation of privacy . . . [because]
in today's society, smokers are constantly required to reveal whether they
smoke."

The city government of a small community of 19,000 in Florida, called
St. Cloud, determined on March 25, 2002 that any present or prospective mu-
unicipal employee having a nicotine habit will not be employed. Relying on
the ruling in Kurtz and, at the same time expanding its reasoning, the St.
Cloud ordinance requires "new hires to submit to medical tests at manage-
ment's discretion to prove they aren't sneaking a smoke on the sly after
hours." Indeed, new employees in city government are required to "sign an
affidavit swearing they have been tobacco-free for 12 months."

Extending the reasoning of Kurtz to include random medical testing is
both novel and controversial. It also captures and defines the central issue:
the extent to which "tobacco users have a federally protected constitutional
right to use tobacco, an activity that is currently legal, and maintain a job at

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251. It was determined that, in 1981, the city spent as much as $4,611.00 per year over what
it incurs for nonsmoking employees. Id. at 1027.

252. Id. at 1028. See generally Elizabeth B. Thompson, The Constitutionality of an Off-Duty
Smoking Ban for Public Employees: Should the State Butt Out?, 43 VAND. L. REV 491, 493 n.14, 512-
15 (1990) (listing a number of municipalities which have banned police officers and fire fighters
from smoking). But see Lisa L. Frye, Comment, You've Come a Long Way, Smokers: North Carolina
Preserves the Employee's Rights to Smoke Off the Job in General Statutes Section 95-283, 71 N.C. L. REV.

253. Approximately twenty-five states have enacted legislation which prevents employers
from dismissing workers who smoke off duty. See Stephanie Armour & Julie Appleby, Off-duty
Behavior Can Affect Job, USA TODAY, June 13, 2005, at 4B. Yet, some companies are imposing a
health care premium surcharge on workers using tobacco products (for example Northwest
Airlines and General Mills Corp.) and others are refusing to provide health insurance if either
spouses or domestic partners have access to such tobacco products at work. Neal Gendler,
NW'A Smokers Face Health Care Surcharge, MINN. STAR TRIB., Oct. 19, 2005, at 2D.


255. Id.

256. Id.
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the same time.\textsuperscript{257} Civil rights activists assert the right of privacy is being abridged by ordinances of the nature as that passed in St. Cloud.\textsuperscript{258} Others maintain a balance must be struck between the rights to a healthy working environment for all employees and the individual rights of certain tobacco addicted employees to enjoy reasonable rights of behavioral privacy while working.\textsuperscript{259}

VI. LOCAL ORDINANCES: THE MOST EFFECTIVE APPROACH TO SMOKING REGULATION

A. Early Beginnings

In 1993, Davis, California became the unquestioned leader in the vanguard movement among local communities to restrict smoking.\textsuperscript{260} Designed
to not only "protect the health and welfare of Davis residents, employees and visitors,"261 the City Council identified, implicitly, its new smoking law as an anticipatory nuisance ordinance by using the justification for the enactment of the reduction of the "annoyance to nonsmokers who preferred to be free of environmental smoke."262

Though couched mainly in terms of public health concerns,263 it is obvious from the content of the Davis ordinance that the City Council had, as one of its primary objectives, the elimination of a public nuisance. The preamble to the ordinance only justifies secondarily the restrictions by pointing to the annoyance cigarette smoke causes to nonsmokers (and then only in the context of enjoying meals and travel smoke-free).264 The ordinance, however, goes to great lengths to restrict smoking activities that could only cause annoyance, and not health concerns, to others.265 One can only speculate that the City Council believed such intrusions into personal "freedom" could only be justified, or, more likely, supported by their constituents, by concern for the public health.

The Davis ordinance casts a wide net in defining the extent to which "public" areas would be protected from smoking266 and augmented indoor smoking restrictions in outdoor areas as well.267 Accordingly, in the following outdoor areas, smoking is prohibited:

[At] public events including . . . sports events, entertainment, speaking performances, ceremonies, pageants, and fairs. Seating provided by eating establishments and bars. Entrances and exits to enclosed public areas. Within the entryway of any enclosed public area . . .

Within courtyards and other areas where air circulation may be im-

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261. Letter from Bette Racki, Davis City Clerk, to Business Owners/Employers of Davis, California (March 2, 1993) (on file with author).
262. See Davis Ordinance, supra note 260 ("WHEREAS, studies have shown some nonsmokers cannot dine in restaurants because of adverse reaction or annoyance from [ETS]; and . . . a majority of travelers prefer nonsmoking sections in airplanes, buses, and trains.").
263. See id. Of the eleven justifications for the ordinance listed in the preamble, eight may be deemed "health" concerns, two "nuisance" concerns, and one an "economic" concern. See id.
265. See, e.g., Davis Ordinance, supra note 260, at § 23A-9(x)-(x)(2), (4), (8), (9), (11), (12) (prohibiting smoking within twenty feet of a restricted space, at outdoors events (such as parades, football games, and fairs), in outdoor bars and restaurants, at entrances to public areas, while waiting for a pay phone on the street, near street hot dog stands, in parks, and near open windows of public areas, respectively).
266. Id. at § 34.02.010(f)-(w).
267. Id. at § 34.02.010.
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... Areas not open to the sky. Any place where people are using or waiting for a service, entry, or transaction, including... [Automated Teller Machines], bank teller windows, telephones, ticket lines, bus stops, and cab stands. Any place where food and/or drink is offered for sale. Children’s play areas. Public gardens. Open windows of any enclosed public area.268

Honolulu, Hawaii’s tobacco control ordinance, also enacted in 1993, is in most respects much more conservative than that of Davis, California; it is especially concerned with keeping certain outdoor parks and recreation facilities smoke free.269 Indeed, the stated goals of this ordinance are the reduction of litter, prevention of the nuisance created by tobacco smoke, and the limitation of health risks.270 Since much of the city’s revenue is generated by tourism, which itself is driven by the natural beauty of the island, the maintenance of the aesthetics of the city’s parks and beaches is crucial not only to the psychological well-being of citizens and visitors who visit them, it is crucial to the economy of the city. The ordinance prohibits smoking, except in designated areas, in the Honolulu Zoo, Hanauma Bay Beach and Nature Park, and Koko Crater Botanical Garden.271

B. Continuing Legislative Efforts

Since the enactment of the Davis and Honolulu ordinances there has been a new trend toward more sweeping regulations being crafted which ban smoking in all indoor public establishments—and, again, led by California in 1994 with its own legislation banning smoking in all publicly accessible build-

268. Id. Mesa, Arizona, was also a leader in 1996 in placing limits on the permitted use of cigarettes in public places. MESA PUB. HEALTH & SAFETY CODE, Ch. 11, § 6-11-1 (2000). The full purpose of the ordinance reads:

Since the active smoking of tobacco and the inhalation of environmental tobacco smoke (ETS) are dangers to human health and the most prevalent cause of preventable death, disease, and disability, as well as are annoyances, inconveniences, discomforts, and general health hazards to those who are involuntarily exposed to such, and in order to serve the public health, safety, and welfare, the declared purpose of this Chapter is to protect people from dangerous, unnecessary, and/or involuntary health risks by prohibiting the smoking of tobacco or any other plant in the City or public spaces and places of employment, as defined in this Chapter.

Id.

269. See HONOLULU, HAW. REV. ORDINANCES ch. 41, art. 21 (1993).


Similarly, the City of Bellaire, Texas, passed an ordinance forbidding smoking in the city’s public parks. See Tyler, supra note 228, at 805, n.173 (citing CBS Evening Newscast, June 8, 1996). The ban was justified on the grounds that the parks were used primarily by small children who should not be exposed to the harms of cigarette smoke on the influence of smokers. Id.
This law pertained to such areas as office buildings and hospitals, as well as all public restaurants. Similarly, in 1995 New York City passed an ordinance which prohibited smoking in most places of employment. As with the California law, the New York City law applied to office buildings and restaurants, but also included some outdoor venues such as sports stadiums. And, by the end of 1995, over 1,000 local tobacco control ordinances were in place throughout the country.

C. New Initiatives

1. Santa Monica's Beaches

Following the initial lead of Honolulu, Hawaii, in 1993, to prohibit smoking on its beaches, Santa Monica, California, passed an ordinance on April 27, 2004, that restricts smoking on its public beaches. The statute seeks to address a serious environmental problem: cigarette butts litter the beaches and, when swept into the ocean, they become a biohazard for aquatic life when the toxic chemicals in the cigarettes are released into the oceans.

Defining smoke or smoking as, "[t]he carrying or holding of a lighted pipe, cigar, cigarette, or any other lighted smoking product or equipment used..."
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to burn any tobacco product. . . .”\textsuperscript{279} the Santa Monica ordinance prohibits such use in elevators, public parks, public beaches, “[a]nywhere on the Santa Monica Pier; except in designated areas,” outdoor service areas, inside public buildings, “or within 2 feet of any entrance, exit or window of a public building.”\textsuperscript{280} Violations are punishable by a $250.00 fine.\textsuperscript{281}

Forever seen as the trend setting state,\textsuperscript{282} California appears to honor this characterization by its current efforts to restrict smoking on all the beaches—not just Santa Monica—in the state’s 1,100 mile coastline by making them smoke-free.\textsuperscript{283} Other initiatives are aimed at raising the smoking age from eighteen to twenty-one and pressing Hollywood to assign an “R” or restricted, movie ratings for those movies featuring smoking scenes.\textsuperscript{284}

For years, California has led most states by “prohibit[ing] smoking in virtually every indoor public place.”\textsuperscript{285} While the East and West Coasts have led the movement toward smoking curtailment, the American Lung Association of California, has found nearly half of the states—particularly those in the Midwest and the South—are lagging in their efforts here.\textsuperscript{286}

2. Calabasas, California

In February, 2006, the Calabasas City Council, representing a community of 25,000 people outside of Los Angeles, enacted an ordinance which now ranks as one of the toughest anti-smoking laws in the nation. Yet, the Council prefers to label the ordinance a secondhand smoke exposure law rather than a smoking ban.\textsuperscript{287} As such, Calabasas is now among more than 700 cities which have ordinances limiting, to some degree, outdoor smoking.\textsuperscript{288}

The Calabasas ordinance not only prohibits smoking in all public places (indoors and outdoors) where one might be exposed to secondhand smoke—such as parks, sidewalks, outdoor cafes, bus stops, and athletic fields—but in one’s own car if the windows are open and, thus, exposing others to the secondary smoke.\textsuperscript{289} For recidivists who choose not to respect anti-smoking

\textsuperscript{279} SANTA MONICA MUNICIPAL CODE § 4.44.010 (2006).
\textsuperscript{280} SANTA MONICA MUNICIPAL CODE § 4.44.020 (2006).
\textsuperscript{281} Id.
\textsuperscript{282} Ritter, supra note 278.
\textsuperscript{283} Id. See Reid, supra note 82 (providing an analysis of the California anti-smoking campaign).
\textsuperscript{284} Ritter, supra note 278.
\textsuperscript{285} Id. See also CAL. GOV’T CODE §§ 19,994.30-.35 (West 1994).
\textsuperscript{286} Ritter, supra note 278. For a survey of state case and statutory law regulating smoking in the fifty states, see How Are States Regulating Smoking in Public Places?, 3 YALE J. HEALTH POL’Y, L. & ETHICS157 (2002).
\textsuperscript{288} John M. Broder, Smoking Ban Takes Effect, Indoors and Outdoors, N.Y. TIMES, Mar. 19, 2006, at 18.
\textsuperscript{289} Id.
Model ordinances have been proposed by national organizations—with perhaps the most prominent being the Americans for Non-smokers’ Rights. In each of these, a balance is struck in defining regulated and nonregulated areas in the workplace and in public spaces, imposing signage or “No Smoking” restrictions and structuring enforcement mechanisms. To a very large degree, the AMA ordinance parallels, and indeed incorporates, the significant provisions of the Non-smokers’ Rights Ordinance. In fact, the Non-smokers’ Ordinance has become the model for most jurisdictions tackling the smoking issue.

VII. CLARITY AND PRECISION IN DRAFTMANSHIP: TOWARD A MODEL STATUTE

Presently, nearly every state has some form of restriction governing smoking in public places, and countless municipalities have enacted similar restrictions. Indeed, at the start of 2004, some 281 municipalities in twenty-three states had specific smoking bans in place for workplaces, as well as restaurants and bars—with five states, California, Connecticut, Delaware, Maine, and New York, being listed as smoke-free.
Interestingly, as of April, 2006, 461 municipalities in thirty-three states and the District of Columbia had adopted one-hundred percent smoke-free coverage in restaurants, bars or workplaces; and 135 municipalities had one-hundred percent coverage in all three of these. And, since 2004, ten more states passed legislation thereby qualifying for listing as totally smoke-free or smoke-free in one of the three categories.

The overall effectiveness of these regulations has yet to be proven. Once enacted, many restrictions on smoking have been hampered by ineffective implementation and enforcement. There are several reasons for this. First, it has been contended that in most cases, inadequate resources are devoted to enforce anti-smoking laws once they are implemented. Instead, enforcement has been undertaken when complaints were received rather than on an on-going and consistent basis. Additionally, the laws regulating smoking are often written in ambiguous language that fails to address specifically against whom, and to what extent, enforcement is to be undertaken. In order for future regulations to be effective these problems must be addressed by providing specific enforcement provisions, clearly defined sanc-


296. Id.

297. Id.

298. Peter D. Jacobson & Jeffrey Wasserman, *The Implementation and Enforcement of Tobacco Control Laws: Policy Implications for Activists and the Industry*, 24 J. HEALTH POL. POL'V & L. 567, 586 (1999). It has been suggested that failing to enforce anti-smoking laws has been the most significant barrier to such laws being effective. Id.

299. Id. at 585.

300. See id.

301. See id. For example, in California, several city attorneys advised local authorities not to issue citations because ambiguous statutory language would never withstand judicial scrutiny. Id. Additionally, in Flagstaff, Arizona the failure to adequately distinguish between restaurants (where smoking was prohibited) and bars (where smoking was allowed) permitted several local restaurants to be exempt from the ordinance merely by claiming that they were bars rather than restaurants. Id.
tions, and precise language regarding where and when smoking is prohibited.302

A. Seeking Uniformity as a Means to Further Progress

One solution to the barriers currently standing in the way of effective anti-smoking regulations is to create a model statute to serve as the basis for a consistent and fair regulatory standard.303 The current paradigm is one where "[s]moking may be forbidden in certain locations in one municipality but allowed in similar locations in a neighboring municipality."304 A model statute should attempt to alleviate such inconsistency and provide a foundation upon which local representatives of the people could assemble ordinances reasonably tailored to meet the particular needs of their community.

A model statute must be reasonable in order to withstand court challenges. More specifically, the model statute should seek to utilize the police power of state and local governments in a way that is "calculated reasonably to achieve the desired result," which in this case would be protecting the public from the harms of ETS.305 The goal, then, in crafting a model statute should be to provide a sound basis upon which to protect the public health and welfare to the fullest extent possible without unnecessarily infringing upon the liberty of smokers.

To date, the anti-smoking movement has had the greatest impact at the state and local levels.306 As the cause is advanced further, this level of government should remain the critical point of focus. However, in light of the strong opposition likely to be encountered, it would be wise to be armed with a statute that has not only been tested, but is also consistent with other successful regulations already in place. In this regard, a model statute seems an obvious asset. Additionally, current ordinances such as those in New York City,307 and California,308 should be consulted and analyzed in order to formulate a strategic and well thought out plan as the anti-smoking movement edges forward.

302. See id. at 584-87.
304. Id. at 447.
305. Id. at 450. See also Swason v. Tulsa, 633 P.2d 1256, 1258 (Okla. Crim. App. 1981) (upholding a ban which required signs to be posted informing the public where smoking was and was not permitted); Alford v. Newport News, 260 S.E.2d 241, 243 (1979) (requiring smoking ban to provide more language precise enough to allow the ban to have more than an inconsequential effect).
307. See statutes cited supra notes 34, 282-283.
308. See statutes cited supra notes 268, 280-281, 287.
VIII. CONCLUSION

A. Seeking a Balance

The debate over when and to what extent the government may regulate public smoking is a contentious one where, each side holds firm beliefs as to why its position is the appropriate one. It is not entirely clear, at this point, where the line will be drawn with regard to an individual’s right to smoke in public. It may stop at public restaurants and the workplace; or it may reach as far as public stadiums, outdoor gathering spots, and public streets. This line will be defined in time, as the debate continues and additional regulations are adopted.

Regardless of the eventual outcome of this debate, the fact remains that it is a contentious one, which elicits strong emotional responses on both sides. As such, it is imperative that reason and respect prevail as the public welfare consequences of smoking regulations are weighed and debated. A civilized and informed dialogue and debate on the issue must prevail over a raucous display of aggressive advocacy on either side. While it is important that concise and effective regulations are enacted, ultimately, it appears that respecting the rights of all of the individuals involved and making decisions based upon sound data rather than aggressive advocacy of the parties is the best means of ensuring that new regulations are both rational and fair, and therefore more likely to withstand scrutiny and have the positive effects they were intended to provide.

Smoking does affect those who do it and also those who are exposed to it involuntarily. Each of these groups has rights at stake and it is necessary that neither groups’ rights be infringed upon any more than reasonably necessary to protect the public health. This is the best service the government can provide the citizens in this matter. Regardless of where, and to what extent, a regulation is implemented, it must be clear, concise, and free of ambiguity, both effective and enforceable, rationally based, and fair to all who are affected by it. Liberty and personal free will require it, and the rational voice of the people should demand it.


310. Viscusi, supra note 309.

311. Id. See also Hogan, supra note 257.

B. Common Law Foundations and Permutations

As significant as common law reasoning is today in testing the perimeters of contemporary nuisance law, the imprecision of its application in seeking to balance benefits and burdens in ascertaining the extent to which reasonableness of conduct is met dictates that a sounder course of regulatory action is to be found in the enactment of local ordinances and state statutes which seek to codify the specific standards of conduct—or violations of which are considered unreasonable an thus impose legal liability.

That the common law provides the conceptual foundation for most statutes and administrative regulations is a given. It not only provides a framework for all legal decision making, but fills the gaps in public law and thus serves as a guiding presence for courts and agencies in their work of interpreting statutes and applying rules. By codifying the common law tenets of reasonableness—vis a vis the law of nuisance as restructured by the Restatement of Torts—a concrete approach to statutory interpretation is assured. By achieving this combination, law-making thus becomes a more responsive mechanism for resolving complex issues in public health such as cigarette smoking.

By engrafting the new principle of chronic street nuisance onto the settled doctrine of public nuisance, the common law tradition is adapted to the realities of contemporary street culture seen in America. Since recognition of this principle mandates a strict liability test, as with other public nuisances, neither wrongful intent nor negligence is required to sustain an action brought under it. The standard imposed for chronic street nuisances, because it applies to everyone—regardless of their color or economic status—and shaped by strict norms applicable to all ordinary pedestrians, must be seen as a democratic one and without biases.

With a re-invigorated common law of public nuisance linked with wider acceptability and use of the doctrine of anticipatory nuisance, the public health battle against tobacco smoking will take a decisive turn. When these two sets of principles are, in turn, codified into legislative provisions within local ordinances and state statutes that seek to limit the effects of public smoking, a formidable strategy for advancing the public health will be evidenced.

314. Id. at 104.
316. Ellickson, supra note 2, at 1185. Interestingly, the Restatement (Second) of Torts advocates the imposition of strict liability for actions deemed, by statute, to be a public nuisance. § 821 B comts. c & e (1979).
317. Ellickson, supra note 2, at 1185, 1186. But see Hogan, supra note 257.
C. Legislative Framework and Evolving Social Norms

Public health law is tied, inextricably, to environmental law in the areas of tobacco control. And, more and more, the relevance of property law to the development of containment strategies becomes apparent. Indeed, it is within the crucible of the common law doctrine of nuisance that statutory law finds its loadstar. By recognizing and utilizing this synergistic interplay, an effective abatement strategy for tobacco smoking can be designed and implemented.

Tobacco control programs without legislative components are unlikely to succeed. Ultimately, it remains for policy makers to make a choice between efforts undertaken to shape local government policies or, contrariwise, to focus on the enforcement of a national policy restricting the use of tobacco smoking. Inherent in this choice should be a realization that there is unavoidable conflict between the local and national levels of enforcement. If it is determined that local tobacco laws infringe upon the policies of the national government, state regulations restricting cigarette advertisements—for example—will be invalidated.

Most would surely agree that smoking is—by any contemporary standard of social civility—an "unaesthetic condition." As such, it should be classified as an aesthetic public nuisance. Measured by well established standards of both conduct and responsibility—as applied to aural and olfactory confrontations—momentum for banning all public venues for smoking was gained when, in 2000, the United States Public Health Service "urged physicians to treat smoking aggressively just as they would other chronic illnesses."

An inherent part of any hoped-for success in coordinating a state-local-federal policy for tobacco control is the need to change the attitude of the citizenry—through education in the social and working environments as well as the economic and informational ones—to the major health consequences of smoking. In this regard, state-imposed legal sanctions designed to reduce cigarette smoking, "threats of shame" (or self-imposed punishment) and "threats of embarrassment" (or socially imposed punishment) can be as effective—if perhaps not more so—in behavior modification than statutory and
common law prohibitions. At a minimum, behavioral or social constructs can have a salutary effect in reducing "the expected utility of illegal behavior" and thereby "increase the likelihood of compliance with the law."  

If there are to be significant and lasting changes in smoking behavior, then, there must be directional changes in social norms which both acknowledge and mandate smoke-free environments and complimentary or supporting life styles are not only encouraged but, indeed, preferred. Dramatic changes of this nature can occur only over time within the macro context of society acting through family units, the community, cultural constructs, economic and physical environments, formal and informal governmental policy making and prevailing legal norms. Thus far, the disappointing lack of progress in the containment of cigarette smoking is to be seen as more of a failure to implement pre-existing and well-tested strategies rather than an absence of knowledge regarding what actions need to be undertaken.

While no current statewide program for tobacco control that embraces educational, clinical, regulatory, economic, and social modalities can be seen as ideal, the analysis presented in this Article fortifies the need for regulatory action through local lawmaking that essentially codifies the common law standard of reasonable use and conduct found in the doctrine of public nuisance and then implements its application in anti-smoking legislation as seen in Calabasas and Davis, California, Honolulu, Hawaii, and the Americans for Nonsmokers' Rights Model Ordinance. Alternatively, broad state statutes—such as the one seen in California—may be enacted which pre-empt the need for local governments to initiate action, although of course, they would bear ultimate responsibility for implementing these statutes.

One fact is almost certain. If strong frameworks for principled decision making are not developed and followed, the prediction of the World Health Organization may well come to pass—namely, that by 2030, present continued smoking patterns will not only cause fifty million premature deaths, but will also see tobacco become the single leading cause of death worldwide accounting for some ten million deaths per year.

327. Poland, supra note 24, at 184.
328. Id.
329. REDUCING TOBACCO USE, supra note 45.
330. Id. at 373.
331. Id. at 436. Interestingly, a recent poll conducted by the Drug Policy Alliance, an advocacy group, found forty-five percent of Americans are in favor of illegalizing cigarettes. Rob Stein, Drop in Smoking Rates Stalls, WASH. POST, Oct. 27, 2006, at A10.
332. REDUCING TOBACCO USE, supra note 45, at 416, 433.
333. See supra notes 263-291 and accompanying text; Model Ordinance, supra note 291.
334. See supra note 280.
335. Gusfield, supra note 19, at 397.