

March 2015

Clean Indoor Air Act for Indiana, A;Note

Chadwick C. Busk

Joseph F. Cassarino

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

Recommended Citation

Busk, Chadwick C. and Cassarino, Joseph F. (2015) "Clean Indoor Air Act for Indiana, A;Note," *Journal of Legislation*: Vol. 3: Iss. 1, Article 8.

Available at: <http://scholarship.law.nd.edu/jleg/vol3/iss1/8>

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A CLEAN INDOOR AIR ACT FOR INDIANA

Chadwick C. Busk*
Joseph F. Cassarino**

The decadence of Spain began when the Spaniards adopted cigarettes, and if this pernicious practice obtains among adult Americans, the ruin of the Republic is close at hand.¹

Seizing upon what was at best a dubious historical insight, an 1884 *New York Times* editorial so condemned the habit of cigarette smoking. Almost a hundred years later, although the Republic still stands, solid medical evidence is mounting that he who lights up is hurting his own health. Further, evidence indicates that smokers are adversely affecting the health of the non-smokers around them. A 1972 study by the United States Public Health Service, for example, found that the smoke from idling cigarettes contains significantly higher levels of carbon monoxide, tar, and nicotine than smoke resulting from the smoker's own puffing.² The report stated that persons with lung or heart disease are particularly harmed by "passive smoking,"³ and that a significant proportion of non-smokers indicated discomfort and showed respiratory symptoms on exposure to tobacco smoke.⁴

In addition, the 1972 report noted that the dangers of passive smoking to non-smoking persons depended on several factors, including "the ventilation available for the removal or dispersion of the smoke, and the proximity of the individual to the smoker."⁵ These conclusions suggest that the dangers from passive smoking can be reduced by the segregation of smokers and non-smokers. Furthermore, a Public Health Service poll taken in 1970 showed that 56.8% of those surveyed agreed with the statement, "The smoking of cigarettes should be allowed in fewer places than it is now."⁶

With a clear plurality of Americans favoring restrictions on smoking and the medical evidence providing a sound basis for this view, some 24 states have legislated limits on smoking in enclosed public places since 1973.⁷ This article will describe past and present legislative efforts to curtail smoking, examine their foundation in case law, and conclude with a proposed anti-public smoking bill or "Clean Indoor Air Act" for Indiana drafted by the authors.

The earliest rationale behind a law regulating public smoking was safety

*B.A., Hope College, 1974; J.D. Candidate, University of Notre Dame Law School, 1977.

**B.A., California State College, 1974; J.D. Candidate, University of Notre Dame Law School, 1977.

1. As quoted in Banzhaf, John J., "Please Put Your Cigarette Out." *Today's Health*, April, 1972, Vol. 50, p. 38.
2. Health Services and Mental Health Administration, Public Health Service, U.S. Department of Health, Education, and Welfare, *The Health Consequences of Smoking* (1972), at p. 123.
3. *Ibid.*, at p. 131.
4. *Ibid.*, at p. 128.
5. *Ibid.*, at p. 122.
6. Reported in National Clearinghouse for Smoking and Health, Center for Disease Control, Public Health Service, U.S. Department of Health, Education, and Welfare, *Adult Use of Tobacco*, July, 1973.
7. Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Kansas, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, and Washington.

rather than health. A Boston city ordinance prohibiting smoking entirely within public streets and passageways was upheld in a 1847 Massachusetts case which declared that the ban was a reasonable exercise of police power in view of the danger lit tobacco products presented to the wooden structures of that era.⁸

In *Louisiana v. Heidenhain*, 42 La. Ann. 483, 7 So. 621 (1890), the Louisiana Supreme Court upheld the constitutional validity of a New Orleans city ordinance prohibiting smoking in street cars. The court noted the positive danger to health resulting from breathing the contaminated air in cars, especially when their windows were closed during the winter. Further, the court rules that the city council had the power to determine what a public nuisance was and take the necessary legislative steps to eradicate it.

Upholding a complete ban on the sale of cigarettes imposed by a Tennessee statute in 1897, the United States Supreme Court in *Austin v. Tennessee*, 179 U.S. 343 (1900), stated that the law was a valid measure to protect public health and thus within the State's lawful exercise of its police power.

By 1921, 14 states had enacted laws regulating smoking, yet six years later no restrictions would remain.⁹ Many factors accounted for the change in public attitude toward smoking, which in turn had an impact on the legislatures and courts. The distaste for tobacco use and legislative efforts to discourage it became identified with the foolishness of prohibition in many minds. Cigarettes were included in every World War I doughboy's ration; General Pershing once cabled to Washington, "Tobacco is as indispensable as the daily ration; we must have thousands of tons of it without delay."¹⁰ Finally, state legislatures, faced with a scarcity of revenue sources, discovered tobacco as an appropriate article to tax.

The effect of these trends was first reflected on the case law in 1911. When the Barbourville, Kentucky council passed an ordinance outlawing cigarette smoking inside the city limits, the state court of appeals struck it down as an unreasonable invasion of personal liberty.¹¹ The court disapproved of the overly broad scope of the ordinance, which prohibited cigarette smoking in one's own home.

Three years later, the Illinois Supreme Court likewise invalidated a city ordinance making illegal smoking in the parks, streets, and public buildings of the town as being too broad. As the court stated:

Recognizing that tobacco smoke is offensive to many persons, and in exceptional cases harmful to some, we have no doubt that power exists to prohibit smoking in certain public places, such as street cars, theaters, and like places where large numbers of persons are crowded together in a small place. But this is quite a different matter from prohibiting smoking on the open streets and in parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare.¹²

When evaluating these two cases, it is important to remember that both courts did not repudiate the power of the legislature to regulate smoking; rather, they condemned the too pervasive, clumsy manner in which the power was exercised. It was the "shotgun to kill the fly" approach that the courts deplored,

8. *Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847).

9. Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

10. As quoted in Wagner, *Cigarette Country: Tobacco in American History and Politics*, 36-37 (1971), at p. 44.

11. *Hershberg v. Barbourville*, 142 Ky. 60, 133 S.W. 985 (1911).

12. *Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914), at p. 837.

thereby affirming the validity of well-aimed, exact legislative bullets directed to curtail the harmful effects of indoor passive smoking on the non-smoker.

Thus, confronted with a sufficiently narrow and reasonable anti-public smoking law, there is little chance that opponents will succeed in overturning it in court. For the case law is such that the states are allowed wide latitude in the exercise of their police power, i.e., the power to regulate the health, safety, and welfare of the people. The classic criteria for the proper exercise of the police power was given by the U.S. Supreme Court in *Lawton v. Steele*, 152 U.S. 133, 137 (1894), and affirmed in *Goldblatt v. Town of Hempstead*, 360 U.S. 590 (1962), as still valid:

To justify the state in . . . interposing its authority in behalf of the public, it must appear— First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

Using this judicial yardstick, the Supreme Court has upheld a wide magnitude of state actions to insure the people's well-being. *Mugler v. Kansas*, 123 U.S. 623 (1887), affirmed a state's right to prohibit the manufacture and sale of intoxicating liquors. *Jackson v. Massachusetts*, 197 U.S. 11 (1905), held that it is within the police power of a state to enact a compulsory vaccination law and that the legislature, not the courts, has the initial power to determine whether vaccination is or is not the best mode to prevent disease and protect the public health.

Finally, *dicta* in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), is relevant to the consideration of laws regulating public smoking. This case upheld the city of Detroit's smoke abatement ordinance as applied to ships operating in interstate commerce and subject to federal government inspection. The court stated, "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power."

There is obviously little difference and none deserving of any legal distinction if the air we breathe is polluted from a factory smokestack miles away or a smoker puffing a few feet away in an indoor public place. Both have been proven to be a significant health hazard. Both demand regulation.

Anti-public smoking laws recently enacted in many states uniformly provide that smoking may be permitted only in designated smoking areas in indoor public places and that these areas be separated by ventilation or distance from non-smoking areas.

Opponents of these laws often argue that restrictions on smoking in an enclosed public place infringe their "right to privacy." However, this rationale is not credible for two reasons. First, all the laws regulating smoking currently in force permit smoking in the public area where so designated by signs. Second, the very fact that smoking is not a private act limited to adversely affecting the smoker's own health, but affects non-smokers as well, militates against the view that smoking is safeguarded from regulation because of one's right to privacy.

Even so, the smoker is not unreasonably oppressed; he is advised that he may indulge where allowed, but only where his habit does not substantially affect the health of others around him. This contingent prohibition is certainly justified by the non-smoking public's right to also indulge, that is, indulge in the life-prolonging practice of breathing clean air. To this end, the following proposal is offered as a model for states seeking to protect non-smokers.

“An Act limiting smoking in public places and public vehicles.”

BE IT ENACTED by the Legislature of the State of Indiana:

Section 1. (PUBLIC POLICY) The purpose of this Act is to protect the public health, comfort, and environment by prohibiting smoking in public places and in public vehicles except in designated smoking areas.

Section 2. (SMOKING IN PUBLIC PLACES AND PUBLIC VEHICLES PROHIBITED) No person shall smoke in a public place or in a public vehicle except in a designated smoking area. This prohibition does not apply where an entire room or a hall is used for a private social function. This prohibition may be extended to any private area where the proprietor or owner so designates.

Section 3. (DEFINITIONS)

a. SMOKING includes but is not limited to any lit cigarette, cigar, or pipe.

b. PUBLIC PLACE is any enclosed indoor area used by the public to include but not limited to restaurants, retail stores, professional waiting room offices, offices and other commercial establishments, educational facilities, hospitals, nursing homes, auditoriums, theaters, arenas, meeting rooms, elevators, libraries, and museums.

c. PUBLIC VEHICLE is any vehicle used in public transportation whether or not publicly owned.

Section 4. (DESIGNATED SMOKING AREAS) Smoking areas may be designated by the proprietor or owner of a public place except where prohibited by the fire marshal. The areas so designated must be conspicuously marked and physically separated except where the public area consists of one room. In such a case, the provisions of this statute will be met if one side of the room is designated as a smoking area.

Section 5. (EXCEPTIONS) The following are exceptions to this statute:

a. Any restaurant or bar may be designated as a smoking area in its entirety. If a restaurant or bar is so designated, this designation shall be conspicuously posted on all entrances normally used by the public.

b. Performers upon stage in a theatrical production.

Section 6. (PENALTIES)

Persons in violation of this Act shall be guilty of a misdemeanor and subject to a fine of not less than \$25.00 and not more than \$1,000.00.

Section 7. (STANDING)

The State and/or local board of health or any affected party may institute an action in any court with jurisdiction to effect a remedy under this Act.

“This Act should be referred to as the Indiana Clean Indoor Air Act.”