“Inherently Bad, and Bad Only”

A History of State-Level Regulation of Cigarettes and Smoking in the United States Since the 1880s

Volume 1

An In-Depth National Study Embedding Ultra-Thick Description of a Representative State (Iowa)

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PART V

THE INCIPIENT NATIONAL MOVEMENT TO AVOID SECONDHAND SMOKE EXPOSURE IN THE 1970S

Now that hardly any area is off-limits for smoking, the sensitive nonsmoker has a real problem. Relief depends partly on the ingenuity and resources of the patient. One man, employed in a large office, has organized the nonsmokers, and these outcasts have grouped their desks together in a corner. Some patients change jobs or even occupations, first making sure that the new position will not involve heavy exposure to smoke. College students may enroll in a school sponsored by a religious group which frowns on tobacco.¹

[M]ake no mistake about it, the antismoking zealots desparately [sic] want to bring about the death of this industry. And I can tell you here and now that this productive industry and its productive people are not about to lay [sic] down and die. We will not let them drive us off the farm and out of the factory and into the growing ranks of the unemployed.

Our adversaries and their bureaucratic and legislative allies have imagination and persistence. But we have every bit as much as they do. We also have one other quality, often lacking on the other side—an abiding interest in and respect for facts and truth.²

Between the time of the Surgeon General’s discussion of involuntary smoking in 1972 and the first Surgeon General’s Report solely on secondhand smoke 14 years later, scientific understanding and citizen action increased but not necessarily in that order.³

Non-Smokers’ Widespread Aversion, Science, and Legislation Begin to Confront an Entrenched Oligopoly and Its Addicted Customers’ Sense of Entitlement

Passive smoking issue most dangerous industry has ever faced, greater than personal health, taxes, anything else.¹

The first feeble legislative attempts at reducing nonsmokers’ exposure to secondhand smoke in Iowa during the 1970s cannot be understood outside of the national and state contexts in which similar efforts were being undertaken. This chapter focuses on: the role played by Surgeon General Jesse Steinfeld in advocating regulatory intervention based on the initial medical-scientific alerts to the health risks linked to exposure; the struggle over the enactment in Arizona in 1973 of the first statewide legislative limitations on public smoking; and the origins of cigarette manufacturers’ campaigns to thwart such regulation. The following chapter is then devoted to the overtoweringly important Minnesota Clean Indoor Air Act of 1975, which was both a model nationally and a legislative lodestar for the 1978 Iowa enactment, which, to be sure, fell far short, in terms of coverage and stringency, of Minnesota’s, which in its own right marked just the incipient stage of protection for nonsmokers because its central feature—the conferral of extraordinary discretion on owners and managers of covered public places to designate areas where smoking was permitted as an exception to the default prohibition of smoking—to a great extent subverted the statutory purpose of shielding the nonsmoking population form exposure to secondhand smoke.

A Pre-History of Scientific-Medical Understanding of and Militant Opposition to Exposure to Secondhand Tobacco Smoke

We have talked, we have pleaded and prayed, and all has had good effect, but we have borne quietly the smoke that envelopes [sic] us. Now we have ceased to permit ourselves to be smoked and from this day women will make smoking universally unpopular.²

¹T.I. ComCom [handwritten notes of Tobacco Institute Communications Committee meeting] (Apr. 10, [1973]) (remark by Horace Kornegay, president, Tobacco Institute).
²Report of the National Woman’s Christian Temperance Union: The Fortieth Annual Convention: Held in the Casino, Asbury Park, New Jersey, Oct. 31-Nov. 5th, 1913, at 274 (Eliza Ingalls, Superintendent of Anti-Narcotics).
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Medical-scientific awareness of and popular aversion to the adverse health impact of nonsmokers’ inhalation of others’ tobacco smoke, as inchoate as they may have been, reach back about a century before their conventional dating in the 1970s. Surprisingly, at least as long ago as 1871, German chemists, in connection with analyzing toxins such as pyridene, picoline, and collidine in (cigar) tobacco smoke, observed the swiftly lethal consequences of exposing a pigeon to picoline fumes. Four years later, the Massachusetts State Board of Health published a report by a physician on the “deleterious effects of the concentrated fumes of tobacco” in railroad smoking cars, who, despite being familiar with the German study, in essence held that you don’t need a chemist to know which way the ill wind blows: “The bad hygienic condition of these moving fumatories must be more or less familiar to all. The fact that the air is irrespirable by most nonsmokers, including the whole female sex, is sufficient to show this without the aid of chemical tests.”

To be sure, the publication, more than half a century later, by the American Journal of Public Health of an editorial with a decidedly mixed message underscored how little scientific-medical research had advanced understanding of the impact of secondhand smoke exposure:

Tobacco smoking in meetings has always...passed unnoticed. There are doubtless a number of persons who object to tobacco smoke and who would prefer to have smoking prohibited, since it is disagreeable to many persons, irritates the throats of others, and sometimes is so thick as to interfere with lantern slide demonstrations.... However, smoking is usually passed by in silence...for several reasons, the chief one being the fear of being considered a crank, while the habit is so general that one feels hopeless of making any change. ... That tobacco is a narcotic poison is...not disputed by anyone in authority. ...

“Scientific evidence is hardly needed to show that to some extent the person breathing a smoke tainted atmosphere is liable to the same evils as the person who is smoking, for the experience of a non-smoker who has spent an evening in the atmosphere of a smoking concert is often that he sustains a disturbance of health similar to that sometimes

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4Theo. Fisher, “Ventilation of Railroad Cars,” in Sixth Annual Report of the State Board of Health of Massachusetts 225-40 at 228-29 (Pub. Doc. No. 30, 1875). Interestingly, Fisher pointed out that smoking cars were a “purely American institution”: whereas in England and France smoking was forbidden in first and second class carriages, in Germany “smoking is so universal that a contrary custom prevails, and smoking is allowed everywhere, except in certain compartments” marked for nonsmokers. Id. at 228.
complained of by the excessive smoker.”

We do not believe this is a major point in sanitary advance, but it is certainly worth our while to consider the facts. 5

Likewise, militant collective opposition to exposure to secondhand tobacco smoke was not a product of the 1970s. Ironically, legislators themselves in almost all legislatures, as detailed above, had already begun to prohibit smoking in their own workplaces early in the nineteenth century. 6 Indeed, various colonial legislatures had banned tobacco smoking in their own chambers in the seventeenth century, 7 at the end of which Pennsylvania enacted a law pursuant to which in Philadelphia and New Castle “no person shall presume to Smoak tobacco in the Streets, either by day or night and every person offending herein, shall forfeit for every such offence twelve pence....” 8 To be sure, the prohibition was designed to foster fire prevention, as was an 1818 Massachusetts enactment of a statutory penalization of smoking or having in possession a lighted pipe or cigar on any street, lane, or passage way or on any wharf in Boston. 9 More relevant, however, is that in 1881, just a year after the Massachusetts legislature had finally repealed that law, 10 it enacted another making it “disorderly conduct”

5“A New View of Smoking,” AJPH 18:1285-6 (1928) (edit.) (quoting Lancet, Apr. 26, 1913 at 1181). In a compendious work on tobacco published in 1939, a German physician devoted a small section to what he called “Passive Smoking,” though the chief adverse health consequences he identified were eye irritations. Fritz Lickint, Tabak und Organismus: Handbuch der gesamten Tabakkunde 260-65 (1939).

6See above ch. 18.

7See above ch. 18.


101880 Mass. Acts ch. 38 at 36. At the time of repeal the press reported that the law was “violated so constantly by those who make as well as by those who execute the law, that its continuance on the statute books is an absurdity.” It had last been enforced 30 years earlier when abolitionists, “eager to harass” a slave-catcher trying to return two slaves to bondage, “had him arrested and fined for smoking in the streets....” “Boston’s Peculiar Law,” Bath Independent (Maine), Feb. 28, 1880 (4:3). In fact, such a warrant had been issued for the slave-catcher in November 1850. See “Hughes, the Slave-Hunter’s Account of His Mission,” Liberator (Boston), Dec. 6, 1850 (3:3-4). The following year a Smokers’ Circle was established in Boston Common: “It is a well-known fact that—while a man may enjoy the weed by inhaling the fragrant fumes of a cigar in any
for anyone who smoked or had in his possession a lighted pipe, cigarette, or cigar in a town, ward, or precinct meeting or a meeting held for an election. In 1887 the Committee on Hygiene and Public Health of the Kansas House of Representatives expanded the protective scope beyond its own precincts by recommending passage of a bill prohibiting the use of cigars or tobacco in “the house of the Lord or any other place of worship.” Four years later a member of the Indiana House of Representatives introduced a bill to prohibit the use of tobacco in churches, schoolrooms, and public halls. That public demand for protection from exposure extended to a much broader universe of public space was reflected in the passage, as detailed earlier, by the lower houses of other city in the Union—in Boston a fine is exacted from any person who presumes to smoke in the streets. Our worthy mayor, sympathizing with the oppressed consumer of the weed, has had a circle of seats arrayed in a shady grove of our beautiful park; and here scores of persons resort each afternoon and evening to inhale the bewitching weed.” “Smokers’ Circle, Boston Common,” Gleason’s Pictorial, Aug. 9, 1851, at 240. See also M. DeWolfe Howe, Boston Common: Scenes from Four Centuries 62 (1910). Despite the contemporaneous statement that by 1880 the law was a dead letter, a large collective tome on the following half-century asserted that in 1880: “People [were] given the right to smoke in public for the first time. Smokers were formerly liable to arrest on the streets and even on the Common, except in the “Smokers’ Circle.” Edith Guerrier (comp.), “A Chronicle of Important and Interesting Events: Incidents in the Life of Boston, 1880-1930,” in Fifty Years of Boston: A Memorial Volume Issued in Commemoration of the Tercentenary of 1930, at 715-50 at 715 (Elisabeth Herlihy ed. 1932).

11 An Act to Aid in Preserving Order at Elections went on to mandate that the meeting moderator or presiding officer order such person to remove the pipe, cigarette, or cigar or withdraw himself from the meeting place; if the smoker refused to do so, the moderator was required to “direct any police officers, constables, or others present, to take him from the meeting, and confine him in some convenient place until the meeting is adjourned.” The smoker was liable to forfeit $20 for each such offense. 1881 Mass. Acts ch. 27, at 597. The law for “the physical purity of elections” was designed to “prevent smoking and drinking at the polls on election days.” “The Legislature,” BDA, May 7, 1881 (1:10). The bill as reported by Committee on Election Laws did not cover cigarettes. Id.


Pennsylvania, Mississippi, Alabama, and Minnesota of bills prohibiting public cigarette smoking.\textsuperscript{14}

Lawmakers may have been in a privileged position to protect themselves, but they constituted far from the only examples of government intervention on behalf of nonsmokers. As long ago as 1890, when the New Orleans City Council adopted an ordinance prohibiting tobacco smoking in street cars on the grounds that the “custom...is a most vile and objectionable one to the majority of our citizens,” it found that it was the only city in the United States that still “allow[ed] such a discomfort to those of its citizens who ride in the public cars.”\textsuperscript{15} In fact, the end of the nineteenth and beginning of the twentieth century witnessed numerous and widespread battles in the United States over the permissibility of smoking in various forms of public transportation.\textsuperscript{16} In upholding the constitutionality of the ordinance and the sentencing of defendant to payment of a $25 fine or 30 days’ imprisonment for each of two separate violations, the Louisiana Supreme Court ruled that:

There is no doubt of the fact that smoking in the street cars in the City of New Orleans had caused to the great majority of people using them material annoyance, inconvenience and discomfort. This is particularly so in the winter season when the cars are closed. There is not only discomfort, but positive danger to health from the contaminated air. The record establishes these facts.\textsuperscript{17}

The court revealed its views as not unbridgeably in advance of the Zeitgeist when it added that: “Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco

\textsuperscript{14}See above chs. 3-4.

\textsuperscript{15}State of Louisiana v Heidenhain, 7 So. 621 (La. 1897) (quoting Council of the City of New Orleans, Ordinance No. 4197 (Jan. 2, 1890)).

\textsuperscript{16}See above ch. 17.

\textsuperscript{17}State of Louisiana v Heidenhain, 7 So. 621 (La. 1897). The Prussian-born defendant, Henry Heidenhain, was a 28-year-old state assessor and a 39-year-old broker at the time of the 1870 and 1880 Population Census, respectively. He had also been a state legislator during various years between the end of the Civil War and 1884. \textit{Membership in the Louisiana House of Representatives 1812-2012}, at 170, 172, 179 (rev. 2010), on http://www.legis.state.la.us/members/h1812-2012.pdf (visited Jan. 7, 2010). Heidenhain, who had been in the Union Army and is listed (together with two other lawyers) as representing himself, was by the 1880s a lawyer and some type of judge.
had authority under Section 7 of the charter to provide for the public health. It can therefore require in public places, theaters, halls, etc., that there shall be ventilation for a supply of fresh and pure air; and in order to preserve the public peace, order and health, and under its general police authority in said Section 7, it can compel the owner of public halls and theaters to provide means to prevent fires and to supply fire escapes in case of fire. And in pursuance of the same power it can, in order to preserve pure and fresh air in crowded halls, and to prevent fire, prohibit smoking in the same.

The same authority and the same reasons apply in the prohibition of smoking in street railway cars.

It is as essential to health and to comfort to have pure air in them as in any other crowded place. 19

In 1891 the Woman’s Christian Temperance Union—which for several years had been campaigning for a smoking ban in waiting rooms and post offices—referring to conditions in its national headquarters city, insisted, apparently without tongue in cheek, that industrial-strength air pollution was a bagatelle compared to the aggregate impact of cigarette smokers:

The last few months there has been a great deal of commotion in Chicago in regard to the chimneys...which belch forth their great clouds of smoke to the greater polluting of the air. [P]roceedings are to be taken compelling the owner of the chimney to put a smoke consumer on the smoke-stack so that the pure air of his neighbors be no longer polluted.

Now, why all this commotion about a little carbon smoke from a few score chimneys when there are tens of thousands of lesser chimneys giving out a far more vile, obnoxious and injurious smoke, against which scarcely a protest is being made! Boys, youths, men, and, alas! even women, are to be seen on the streets...smoking their vile cigarettes, puffing clouds of abominable, acrid smoke, not into the air, but into the very face and lungs of the passer-by; and he who dares to protest is a “crank,” one who would deprive his neighbor...
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of a “legitimate pleasure.”

If the smoke consumer is needed in the one case, where the smoke itself goes largely into the upper clouds to be carried away over the lake and there dispersed, it is certainly much more needed where the passer-by is compelled to inhale and suffer it....

Unsurprisingly, the WCTU did not abandon this quest for smoke-free public air. To its national convention in 1913, Eliza Ingalls, the organization’s redoubtable and irrepressible longtime Superintendent of Anti-Narcotics, reported this “plan” for dealing with the problem that “we are a narcotized people, the men from the use of tobacco, and the women from the inhalation of men’s tobacco”:

If a man smokes in the room, we will leave the room; if he smokes at the counter of a store where we are trading, we will ask that he put out the cigar or himself; if he smokes in the street car, we will insist that the law regarding smoking be enforced....

Too long have we smoked a “good cigar” at second hand. ... Now we will protest, drive the smoker of the species, be it man or woman[,] to the smoking den, the garage or the desert, in all kindness, as self[-]preservation is the first law of nature.

Just such a plan was embodied in a bill on which in 1915 the Legal Affairs Committee of the Massachusetts legislature held a hearing to prohibit all tobacco smoking “at all times” in public places, including in or upon common roads, streets alleys, passageways, parkways, promenades, sidewalks, platforms, waiting or resting places, seats, parks, playgrounds, wharves, docks, landings, and in all common parts, such as the entrances, porticoes, piazzas, vestibules, corridors, lobbies, hallways, stairways, elevators, waiting rooms, offices, halls[,] rooms or apartments

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23The bill (H. 433), accompanied a petition submitted by Fremont LaForest Pugsley, a lawyer and prohibitionist, and 30 others, was sponsored by Representative Fred P. Greenwood of Everett, a 60-year-old retiree who had been in the House since 1911. Petition—House (File stamped No. 293, Jan. 11, 1915) (copy furnished by Massachusetts Archives); Journal of the House of Representatives of the Commonwealth of Massachusetts: 1921, at 55, 1355 (Jan. 12). In Massachusetts, citizens had (and still have) a “right of free petition” to propose legislation, on which, if the proposal is sponsored by a legislator, a committee must hold a public hearing as with every other bill. http://www.mass.gov/legis/lawmng.htm (visited Dec. 21, 2009). For example, on Feb. 8, 1915, when the Legal Affairs Committee held the hearing on Pugsley’s H. 433, dozens of other hearings were also scheduled. “Committee Hearings for Monday,” BET, Feb. 5, 1915 (2:6).
of all building[s], structures or enclosures, and in or upon all common parts of all vehicles 
or conveyances of common carriers of passengers, whether upon land or water, and in all 
other places whatsoever used by persons in common or for public purposes: provided, 
nevertheless, that the smoking of tobacco is permitted in or upon private property, used 
entirely for private purposes, when not objected to by any lawful or rightful occupant 
thereof, or by any occupant of any adjoining property affected or disturbed by such smoke; 
and such smoking is also permitted in any separate and closed building, structure, car, 
cabin, room or apartment, especially designed and set apart for and appropriated entirely 
to smoking, and so constructed as to prevent the escape of smoke to the offense or 
annoyance of any person in rightful proximity to such smoking place.\textsuperscript{24} 

This almost unimaginably extraordinarily capacious indoor and outdoor smoking 
ban,\textsuperscript{25} which almost a century later has still not seen its like implemented 
anywhere in the United States, was a tad much even for the first speaker at the 
hearing, William Shaw,\textsuperscript{26} the general secretary of the United Society of Christian 
Endeavor (and later that year Prohibitionist gubernatorial candidate), who 
nevertheless declared: “‘A smoker has no more right to blow his secondhand, 
dirty smoke in my face than he has to expectorate at me. I can hit him for one 
thing, but in the other instance he may continue to blow noxious fumes into my 
face without consideration.”’\textsuperscript{27} Although Shaw deemed public smoking a public 
nuisance that “should be treated on a par with spitting,” he was apparently not 

\textsuperscript{24}House No. 433, § 1, Commonwealth of Massachusetts (Jan. 12, 1915) (copy 
furnished by Boston Public Library). 

\textsuperscript{25}The bill provided for a five- and ten-dollar fine for the first offense and second 
offense, respectively, and minimum imprisonment for 10 days and a 25-dollar fine for third 
and additional offenses. House No. 433, § 2, Commonwealth of Massachusetts (Jan. 12, 
1915). 

\textsuperscript{26}Bill to Prohibit Smoking in Public,” \textit{USTJ}, vol. 83, Feb. 13, 1915 (9:1). Pugsley 
stated that he would be willing to redraft the bill in line with Shaw’s suggestions. 

\textsuperscript{27}“Bay State May Halt Smoking,” \textit{Elyria Chronicle}, Feb. 10, 1915 (2:2-3). Shaw 
nevertheless opined that the situation was improving in the sense that he could remember 
a time when it had been impossible to attend such a hearing without having to contend with 
smoking by committee members: “‘Public sentiment has done it.’” “Bill to Prohibit 
years later Shaw pooh-poohed claims regarding an anti-tobacco crusade by the Christian 
Endeavor Society. While supporting strict enforcement of laws prohibiting the sale of 
cigarettes to minors, he replied: “‘Tobacco, after all,...is a matter of habit , similar to the 
use of tea and coffee. It can safely be left to the good judgment and mature minds of the 
users. The use of tobacco never ranked with the use of liquor.”’ Tobacco Merchants 
content with his “remedy” of “‘biff[ing]’” tortfeasors. Regarding the “bill to prohibit smoking in any places except what Mr. Shaw termed... ’receptacles made for smokers’” as “a bit too broad,” he argued in favor of one whose restrictions would coincide with existing ones on spitting.28 The first fruits of such demands for statutorily imposed relief from ubiquitous exposure to tobacco smoke were achieved in 1919 and 1921 in Nebraska, North Dakota, and Utah, which enacted legislation banning smoking in eating establishments and some other enclosed public places.29

The Rollback of Laissez-Faire and the Advent of the New Prohibitionism: Surgeon General Jesse Steinfeld’s Role in Launching the Attack on Passive Smoking

During the early 1950’s just about all of my chiefs in the National Cancer Institute smoked and in later years a series of directors of the National Cancer Institute smoked cigarettes, cigars or pipes. It is small wonder that my requests for “no smoking” in meetings, conferences and poorly ventilated areas were quickly, laughingly and overwhelmingly rejected.

Further, during the 1950’s and 1960’s I had the temerity or lack of intelligence to approach the leadership of the American Association for Cancer Research, the American College of Physicians, the American Medical Association and the American Cancer Society and to suggest the desirability of a “no smoking” rule during meetings of those organizations as a standard for the rest of the medical profession and of society. I was not successful.30

28“Opposed to Public Smoking,” BET, Feb. 8, 1915 (2:2). The next day the Committee on Legal Affairs filed a unanimous report with the House opposing the petition. “No Recourse to Blue Laws,” BET, Feb. 9, 1915 (2:2). The committee withdrew the bill. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1915, at 296, 312 (Feb. 9 and 10). Tobacco industry magazines continued to call attention to proposed measures to ban public smoking in Massachusetts. The next year a House member introduced a bill prohibiting the manufacture/sale of cigarettes and smoking in any post office or public building. “Massachusetts Anti-Cigarette Bill,” WTJ, 43(6):4 (Feb. 7, 1916). In 1921, it reported that the Massachusetts legislature had defeated a bill banning smoking or carrying a lighted cigarette or cigar in public. “Jokesmiths Kill Anti-Smoke Bill,” Tobacco, 71(18):1 (Mar. 3, 1921).

29See above ch. 16 and vol. 2.

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The time appears to have come in our free society for nonsmokers to assert their rights.\(^31\)

The campaign for the right of the nonsmoker to breathe pure air has upset the tobacco companies more than anything that has been done medically, educationally, scientifically, by legislation, or by government regulation. The reason for the tobacco merchants’ concern is as simple as it is important: if smoking is unacceptable social behavior—relegated to bathrooms, poolrooms, and barrooms—then the cigarette will follow the spittoon to oblivion. But so long as smoking is regarded as a private form of slow suicide or self-pollution, it will be difficult to generate the societal forces needed to combat what is, after all, a societal problem.\(^32\)

Even in the immediate wake of the individual behavioral and public health disequilibrium caused by the Surgeon General’s 1964 report, which was not concerned with the issue of involuntary smoking, resistance to exposure to others’ smoke received little or no direct scientific support.\(^33\) For example, in connection with the convening of the National Conference on Smoking and Youth that same year, the U.S. Children’s Bureau published a pamphlet directed at helping teenagers make the “very personal” decision about whether to smoke. Astonishingly, the publication, to which the Surgeon General’s Public Health Service contributed and which the Children’s Bureau reprinted as late as 1968, contained the following question and answer:

Can it harm you to breathe the smoke from other people’s cigarettes?

No. It may make your eyes tear or make you cough a bit; but it cannot harm you. The harm in smoking lies in inhaling the hot smoke from the cigarette directly into your own mouth, throat, and lungs.\(^34\)


\(^{33}\)As late as 1967, a reputable historian mocked the refusal of William Allen White, the famed editor of the Emporia Gazette, to allow smoking in the newspaper’s offices as “obsolete” in the same sense as Senator Carter Glass’s distrust of automobiles and Justice James McReynolds’ leaving “the Supreme Court chamber when a woman lawyer came to the bar....” Otis Graham, Jr., An Encore for Reform: The Old Progressives and the New Deal 89 (1967).

Little wonder that for years the cigarette manufacturers never tired of hurling this embarrassing statement back at a medical-scientific establishment whose research advances in the meantime had long superseded it.35

In the late 1960s scattered voices of authority began identifying cigarette smoke as a component of air pollution in urgent need of elimination. Philip Abelson, a renowned physicist and editor of *Science*, pointed out in an editorial in 1967 that concentrations in two of automobiles’ toxic products, carbon monoxide and nitrogen dioxide, were “tiny” compared to those found in cigarette smoke, which, moreover, included toxic agents absent from ordinary air pollution such as hydrogen cyanide; in addition, he highlighted the presence of carcinogens. While smokers themselves bore the brunt of the chief health impacts of their own smoking, Abelson concluded that “when the individual smokes in a poorly ventilated space in the presence of others, he infringes the rights of others and becomes a serious contributor to air pollution.”36

By the end of the decade demands for practical, governmen tally imposed suppression of such exposure in confined transportation spaces began to be raised, most prominently by Ralph Nader.37 Otherwise no ideological comrade, Supreme Court Chief Justice Warren Burger, after exposure to 37 smokers on a literal “red-eye” flight, lent his unique legal prestige to the campaign by writing in a letter to the head of the Federal Aviation Administration: “It is incomprehensible to me that FAA has not long ago ‘segregated’ smokers as was done on railroads as far back as 1840.”38 And although the administrator merely “asked airline presidents to try to restrict smoking on their planes,” a front-page article in the *Wall Street Journal* in January 1970 reported that long-suffering and uncomplaining nonsmokers had opened a “broad new front...in the war against tobacco.” Demonstrating more impressively still how anti-smoking positions could cut across political lines, even (nonsmoking) President Richard Nixon made his contribution by banning smoking at his press conferences (sessions that until his administration had been “traditionally smoky”). While Nader envisioned requesting state governments to prohibit or restrict smoking in hospital and railroad and bus station waiting rooms,39 Representative Andrew Jacobs and

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37See below ch. 25.
38Warren Burger to John Shaffer (Dec. 18, 1969), Bates No. 980075670. The incident had occurred five years earlier.
39Albert Karr, “No Smoking: Pressure Builds to Curb Smokers in Airliners, Other
Senator Mark Hatfield introduced legislation in Congress to confine smoking to specified seats on airplanes, and similar measures were filed in Illinois and Indiana. A New York State senator about to introduce such a bill declared that: “People are becoming aware of their right to have clean air to breathe, uncontaminated by clouds of tobacco smoke.”

Of the more than 500 bills relating to tobacco and health that were introduced in state legislatures between 1950 and 1970, only 45 were enacted (in 24 states), of which only 36, according to the Tobacco Merchants Association of the U.S., were restrictive in nature. Sixteen of the 36 dealt with sales to minors, six to teaching about tobacco in schools, and five to other educational programs, while the remaining nine enactments pertained to smoking (namely, a 1959 Connecticut law banning it on school buses), vending machines, package labeling, study groups, and petitions or memorials.

Perhaps the first new-wave state legislative bills to propose a non-transportational smoking restriction were introduced in 1969 in Illinois by

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43 In 1967 a bill was introduced in the Connecticut legislature to prohibit smoking in theaters and any store handling inflammables. Tobacco Merchants Association of the United States, “Restrictive Legislation Affecting Tobacco Introduced in State Legislatures 1950-1963” (Oct. 1963), Bates No. 968196267/77. Such bans were often based on fire hazards (rather than secondhand smoke exposure), had for years not uncommonly been imposed as local ordinances, and were sometimes not opposed by the cigarette companies. For example, the Tobacco Institute did not oppose S. 1127 (Mass. 1969), which dealt with smoking on certain public conveyances, because the “bill was not designed to discourage smoking but to provide for fire protection.” Frank Welch to Earle Clements (Tobacco Institute president), “Annual Summary Report on State Legislative and Packing, Weights
Chicago Democrat Edward Wolbank, an antique store operator, who would have required restaurants to set aside 25 percent of seats for nonsmokers and empowered cities and counties to prohibit smoking on the premises of any establishment that sold food to be consumed off the premises. The former bill (H.R. 2) was quickly dispatched by a committee “do not pass” recommendation. The cigarette oligopoly, through its disinformation and lobbying arm, the Tobacco Institute, helped kill the bill as the latter’s annual summary of state anti-tobacco legislative activity colorfully described the operation: “We encouraged the Illinois distributors to oppose this bill. As a matter of fact, it was killed by humorous comments by opponents in the House.” (Frank Welch, the TI executive vice president who was in charge of the State Activities Division from its inception in 1962 into the early 1970s and wrote these annual summaries, was academically and governmentally well-connected, having been a member of the National War Labor Board, a director of the Tennessee Valley Authority and the Cleveland Federal Reserve Bank, and dean of the agriculture schools at Mississippi State University and the University of Kentucky before being appointed assistant secretary of agriculture for federal-state relations at the outset of the Kennedy administration.) The other bill, according to the Tobacco Institute, experienced exactly the same kind of death by comical cuts. However, Wolbank, who was also the paladin of the elimination of pay toilets, refused to let his initiative die laughing. Although in March 1970 he told the press that his
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Bill had been beaten 2 to 1 in committee and that “‘[s]ome people said I was 10 years ahead of my time,’” a few weeks later he refiled it, and this time the committee recommended that it “do pass.” Then on May 13, the full House voted 53 to 44 for mandating restaurants to set aside 25 percent of seating for nonsmokers, but since the Yeas fell far short of a constitutional majority of the whole membership, even feckless smoking-free but not smoke-free segregated restaurant seating remained out of reach.  Nevertheless, the bill appears to have become less of a laughing matter for the Tobacco Institute, which laconically reported its status as having “died....”

On the occasion of the sixth anniversary of the issuance of the Surgeon General’s landmark 1964 report, the new (non-smoking) Surgeon General, Dr. Jesse Steinfeld, told The New York Times in January 1970 that he favored “firmer enforcement of no-smoking regulations in places and situations where smoking may involve fire risks and discomfort to nonsmokers.” Soon Steinfeld became the country’s most authoritative, eloquent, and outspoken advocate of public smoking bans. In September 1970, going far beyond his predecessors, he told the first National Conference of the National Interagency Council on Smoking and Health in San Diego that “the time is ripe for government and voluntary groups to mount a more vigorous program on all fronts to portray cigarette smoking as what it really is—a dirty, smelly, foul chronic form of suicide....” As one dimension of that portrayal he announced that federal agencies were limiting smoking areas in hospitals.

Marking the seventh anniversary of his predecessor’s Smoking and Health on

Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

January 11, 1971, Steinfeld, at the very end of a “personal speech”\textsuperscript{55} he was required to give to the National Interagency Council on Smoking and Health\textsuperscript{56} because he was not permitted to summarize the new Surgeon General’s report, which had not yet been cleared by the Office of the Secretary of Health, Education, and Welfare or the Executive Office of the President, made a “call for a nonsmokers’ rights movement,” which that Office did not regard approvingly and which prompted the tobacco industry to name Steinfeld “‘Public Enemy Number One’”\textsuperscript{57}.

Finally, evidence is accumulating that the non-smoker may have untoward effects from the pollution his smoking neighbor forces upon him. Non-smokers have as much right to clean air and wholesome air as smokers have to their so-called right to smoke, which I would redefine as a so-called “right to pollute.” It is high time to ban smoking from all confined public places such as restaurants, theaters, airplanes, trains, and busses. It is time that we interpret the Bill of Rights for the Non-Smoker as well as the Smoker.\textsuperscript{58}

Interestingly, the lengthy account of this speech by the chief science reporter


\textsuperscript{56} The National Interagency Council on Smoking and Health was formed on July 9, 1964, under the guidance of Surgeon General Luther Terry to implement the remedial action proposed by the 1964 surgeon general’s report. Members in addition to the American Cancer Society, American Heart Association, American Public Health Association, and National Tuberculosis Association, included the U.S. Public Health Service, the Children’s Bureau, and the U.S. Office of Education. National Interagency Council on Smoking and Health (1965), Bates No. 70108714. By 1974 the membership had expanded to include many other organizations, including the American Medical Association, the U.S. Department of Defense, and the National Jogging Association. Bill of Rights for Non-Smokers at 2-3 (Jan. 11, 1974), Bates No. 502669802/3-4.


of The New York Times omitted any reference to the call for a public smoking ban, although the Washington, D.C. press turned it into headlines. Nevertheless, two weeks later, the national newspaper of record did report the announcement by the New York City Commissioner of Marine and Aviation, himself a smoker, of a smoking ban on the Staten Island ferries: “The official was said to be acting on the advice of” of Steinfeld, “who recently called for a ban on smoking in confined public places.”

(Asked by a pro-tobacco congressman whether a smoking ban on the ferry decks was “going a little too far,” Steinfeld unabashedly replied: “I wrote them a letter of congratulation.”) Although, as he later recounted, “[w]herever he spoke, Steinfeld...proposed a ban on smoking in such enclosed public places,” these recommendations that were added at the end of the annual Surgeon General reports were “regularly removed” by the Nixon administration Office of Management and Budget.

By 1971 the U.S. Public Health Service, as Steinfeld mentioned to Representative Bill Young in March in applauding the latter’s introduction of a congressional bill to require the Transportation Secretary to issue regulations designating a portion of the seating capacity only for nonsmokers on airplanes, trains, and buses in interstate commerce, was “in the process of developing an assessment of the effect of tobacco smoke from other people’s smoking on the nonsmokers.” Results of that study appeared in the 1972 Surgeon General’s report, which finally synthesized an initial scientific basis for the harm caused by nonsmokers’ involuntary exposure to tobacco smoke and thus for limiting or

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61“Smoking to Be Banned on Staten Island Ferry,” NYT, Jan. 27, 1971 (74).


prohibiting such exposure. The chapter (“Public Exposure to Air Pollution from Tobacco Smoke”) was a brief (10-page) summary of “the present state of evidence concerning the effects of exposure to an atmosphere containing either tobacco smoke or its constituents.” Such knowledge as research had yielded was categorized under four major heads: (1) the extent to which cigarette smoke components contaminated the atmosphere and were absorbed by nonsmokers; (2) the effects of low levels of carbon monoxide on human health; (3) nonsmokers’ allergic and irritative reactions to cigarette smoke; and (4) the harmful effects of passive inhalation of cigarette smoke in animals.

First, the extent of air pollution was highlighted by the finding that “tar” and nicotine levels in sidestream smoke emanating from the cigarette’s burning cone might be significantly higher than those in mainstream smoke, which comes through the mouthpiece and might be harmful to nonsmokers. For example, three times as much benzo(a)pyrene was found in sidestream as in mainstream smoke; unsurprisingly, levels of such compounds in indoor smoky spaces were much higher than in the outside atmosphere.

Second, the carbon monoxide levels to which nonsmokers were exposed and the resulting elevated carboxyhemoglobin levels were observed to have adverse physiological and psychophysiological effects, including “alter[ing] auditory discrimination, visual acuity, and the ability to distinguish relative brightness,” as well as to be associated with impaired performance on psychomotor tests and physiological stress in heart disease patients. In summary:

The level of carbon monoxide attained in experiments using rooms filled with tobacco smoke has been shown to equal, and at times to exceed, the legal limits for maximum air pollution permitted for ambient air quality in several localities and can also exceed the occupational Threshold Limit Value for a normal work period presently in effect for the United States as a whole. The presence of such levels indicates that the effect of exposure to carbon monoxide may on occasion, depending upon the length of exposure, be sufficient to be harmful to the health of an exposed person. This would be particularly significant for people who are already suffering from chronic bronchopulmonary disease and coronary

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Third, generally exposure to tobacco smoke “can contribute to the discomfort of many” people by exerting “complex pharmacologic, irritative, and allergic effects” in addition to exacerbating allergic symptoms in nonsmokers with pre-existing allergies. More specifically, inhaling tobacco smoke was found to cause bronchial constriction, mucus hypersecretion, and ciliary stasis.

Finally, the import of the animal studies, which found that particulate matter and the oxides of nitrogen adversely affected pulmonary and cardiac structure and function, was uncertain because the experimentally inflicted damage was observed “after prolonged exposure to high concentrations of cigarette smoke and the comparability of animal exposure and human exposure in smoke-filled rooms was unknown. Consequently, the report concluded that it was at the time “impossible to be certain from animal experimentation about the extent of the damage that may occur during long-term intermittent exposure to lower concentrations.”

At the outset of his prepared remarks at the press briefing on the report on January 10, 1972, Steinfeld observed that although the number of deaths clearly related to cigarette smoking far exceeded those caused by epidemics of a number of infectious diseases (such as poliomyelitis, cholera, and typhus), the measures taken by government and citizens to combat smoking had fallen far short of those to protect society from communicable diseases: “Of course, the difference is that cigarette smoking is largely a personal thing whereby the cigarette smoker harms only himself”—which he immediately modified parenthetically: “(if one assumes the non-smoker does not have equal rights, and is not subject to any harm from his cigarette-smoking neighbor).” When his commentary reached the report’s

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73 On dogs that inhaled cigarette smoke through tracheostomas, “were ‘smoked’” for 875 days, and either died during the experiment or were “sacrificed” after day 875, see U.S. Department of Health, Education, and Welfare, *The Health Consequences of Smoking: A Report to the Surgeon General: 1971*, at 158 (n.d.).
penultimate chapter Steinfeld in his prepared remarks noted:

As some of you may know, I have very strong feelings that we have too long neglected the rights of the non-smoker. We have exposed him to annoyance and in some cases hazard by subjecting him to other people’s smoke where he works, where he dines, and when he travels. Support for action to give this non-smoker relief is to be found in the 1972 report. Although we cannot say with certainty that exposure to tobacco smoke is causing serious illness in nonsmokers—the long term research necessary for such a finding has not yet been done—it is clear that such exposure can contribute to the discomfort of the nonsmoking individual and can produce exacerbation of allergic symptoms in those who are suffering from allergies of various other causes. There is ample proof that those who complain of discomfort in smoke-filled rooms are not disagreeable malcontents, but can have a legitimate cause for their complaint.\(^76\)

To be sure, these early tentative findings were vast understatements of the cardiovascular, cancer, and respiratory related morbidity and mortality caused by secondhand smoke exposure that scientists and physicians would eventually uncover,\(^77\) and although Steinfeld acknowledged that the average person might not face frequent exposure to these high smoke concentrations for long periods without relief, the conditions were nevertheless dangerous enough—especially for those with pre-existing heart or chronic bronchopulmonary disease—to signal a warning.\(^78\) Previously investigators had not realized that the “so-called passive cigarette smoker” was exposed to such CO levels and build-ups of carboxyhemoglobin as to be associated with such harm. Their significance lay in the fact that all the findings of “all our animal experiments showing effects on the pulmonary system, that is, emphysema and chronic dysplasia, and ultimately


cancers...are similar to that of [should be “on”] the non-smokers, because the
animals exposed to cigarette smoke inhaled it passively, and this is similar to that
of the non-smoker exposed to the smoke by his cigarette-smoking neighbors.”

Asked at press conference whether, in addition to carbon monoxide’s impact,
carcinogens in smoke also had an effect on nonsmokers, Steinfeld characterized
his aforementioned statement as a “left-handed way” of trying to answer that
question because the kinds of experiments performed on animals would be very
difficult to—and he hoped scientists would never—do on humans. Moreover,
neoplasms took a much longer time to develop than carboxyhemoglobin, which
was much easier to measure than carcinogenic hydrocarbons. Nevertheless, even
though science was as yet unable to quantify the impact of tobacco smoke on
nonsmokers in terms of such carcinogens, the surgeon general did, in response to
another question, “make a flat condemnation of the effect of smokers on non-
smokers” as he had with regard to the effect of smoking on smokers. Rephrasing
his declaration from 1971, he still felt that “the non-smoker should have the Bill
of Rights interpreted for him,” and made his small contribution to that project by
reminding the assembled that in contrast to the previous year, in 1972 smoking
was banned in the very auditorium in which the press conference was taking place
and in all HEW auditoriums. Ultimately, Steinfeld hoped that the report’s new
data would stimulate legislative and administrative action to reduce public
smoking. Perpetuating and developing the kind of PR that shaped the industry’s
reputation for having no credibility—by 1978, Brown & Williamson’s general
counsel informed the company’s top brass that “[o]n crucial points in the debate,
the public opinion percentage scores against the industry read like a thermometer
in July. Over 90 do not believe anything we say”—a month later the Tobacco
Institute’s general counsel and senior vice president charged before a wholesale
grocers convention that on the basis of the chapter on secondhand smoke in the
1972 report it was necessary to conclude that “the number one public health
problem is not cigarette smoking, but is the extent to which public health officials
may knowingly mislead the American people.”

Steinfeld [and] Daniel Horn at 6-7 (Jan. 10, 1972), Bates No. 503583217/22-23.
82J. C. Blucher Ehringhaus, Jr., Remarks Before the Annual Convention of Arkansas
Grocers’ Association, Inc. at 6 (Feb. 26, 1972), Bates No. TIMN0131800/5. The cigarette
industry later attacked the 1972 report’s evidence as “hardly convincing. Small, enclosed,
unventilated ‘smoke chambers’ are not normally encountered by Americans in their
The limited character of the progress toward achievement of nonsmokers’ rights was visibly on display the day after Steinfeld’s press conference at the annual meeting of the National Interagency Council on Smoking and Health when Steinfeld expressed his pride in HEW Secretary Elliott Richardson’s having “taken leadership” and a “bold step” in creating nosmoking sections in HEW cafeterias and “asking supervisors...to arrange smoke-free work areas where this can be arranged without undue inconvenience.” As a further sign of the not yet fully propitious times, Richardson’s ban, which covered conference rooms, auditoriums, clinics, and elevators, did not apply to lobbies, corridors, and restrooms where, allegedly, smoking did not present a “‘serious problem’” because ventilation was adequate and “‘enforcement would be very difficult.’”

Nevertheless, Surgeon General Steinfeld had made a unique and outstanding contribution to reconfiguring public discourse about the legitimacy of resistance to and elimination of secondhand smoke exposure. Indeed, the cigarette oligopolists ceaselessly lambasted Steinfeld and his speech of January 11, 1971
for having "created" the “so-called ‘passive smoking’ issue." Self-interestedly suppressing all reference to millions of nonsmokers’ personal experience, in 1974 R. J. Reynolds Tobacco Company grudgingly saluted Steinfeld: “[A]s a result of the 1971 speech and 1972 report, the ‘passive smoking’ issue was created. These two actions were all that anti-smoking forces needed to convince many nonsmokers that their health was also being threatened by exposure to tobacco smoke.” And the”momentum that this anti-smoking movement ha[d] gained in less than three years” was, as far as the company (and presumably the rest of the industry as well) was concerned, "alarming." Two years later—at a time when it was chagrined to concede that during the intervening five years "campaigns to make smoking ‘socially unacceptable’ ha[d] greatly changed public attitudes, and the number of adults who agree that smoking in public should be restricted...[wa]s increasing each year"—Reynolds was still berating Steinfeld for having “created the false issue of harm to the nonsmoker in 1971.”

The cigarette manufacturers managed to camouflage their counterattack on Steinfeld as emanating from a congressional source. The occasion was a hearing on April 26, 1971, before a House Appropriations Committee subcommittee on the next fiscal year’s appropriations for the Department of Health, Education, and Welfare, at which Steinfeld testified. The cigarette oligopoly’s agent on the subcommittee was conservative anti-labor Missouri
Democrat William Raleigh Hull, Jr., who was, conveniently enough, a co-owner of Hull’s Tobacco Warehouse, a tobacco farmer, a cigarette smoker, and an unregenerate and ignorant opponent of the surgeon general’s consensus report of 1964. In an (apparently) unpublished document the Tobacco Institute provided Hull’s prompts, enabling Hull immediately to focus on Steinfeld’s January 11 speech by asking why the alleged accumulating evidence of the adverse impact of smoking on nonsmokers had not been discussed in the 1971 surgeon general’s report. Steinfeld patiently explained that it had taken many years and much research to “convince first the medical community and then the general public about the hazards of cigarette smoking vis-a-vis lung cancer, emphysema, and arteriosclerotic heart disease” for smokers; now that researchers were beginning to collect data on nonsmokers, they were discovering, for example, that children of two smoking parents had more respiratory illnesses. In addition, he mentioned that the fact that carbon monoxide in cigarette smoke had an affinity for hemoglobin 200 times greater than oxygen’s meant that several smokers in a car could generate carbon monoxide levels resulting in carboxyhemoglobin levels “high enough to interfere with driving performance and judgment.” Steinfeld alerted the committee to the existence of a preliminary report and of a whole section on smoking’s impacts on nonsmokers in the following year’s surgeon general’s report. As a parting shot he informed Hull that: “If we used the logic of the Delaney amendment [which prohibited the Food and Drug Administration from approving food additives that had been found to cause cancer in animals or humans] on areas permissible for smoking, we would ban smoking in confined public places, since practically all of our evidence on animals is from studies in the smoking chamber, which is the equivalent of a nonsmoker inhaling the smoke that the smoker puts out.”

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95Departments of Labor and Health, Education, and Welfare Appropriations for
Hull then proceeded to the next question for which the Tobacco Institute had prepped him and which it presumably hoped would plunge the surgeon general into hopeless self-contradiction—namely, concerning the aforementioned government booklet stating that breathing other people’s smoke was not harmful. Instead, Steinfeld calmly pointed out the obvious fact that scientific and medical researchers revised their views as “new knowledge accumulates. I certainly think if we were writing that statement now we would not say it in that way.” The one debating point that Hull managed to score resulted from asking Steinfeld whether he “honestly feel[s] that smoking in public places is a substantial health hazard to a normal health person.” Instead of asking Hull what “substantial” meant, he risked producing propaganda for the cigarette manufacturers by offering this answer to the vague question: “I cannot determine that at this point, nor can anyone else.” Turning to the incidence of heart disease and attacks in males in young life, he speculated that some of nonsmokers’ problem might be “due to inhalation of smoke that others have created,” and then uttered the sentence that the cigarette industry would quote endlessly: “I think we just do not have enough information to make any categorical statement other than that it is unpleasant.” Although the reason for Steinfeld’s choice of words was unfathomable, since even the preliminary findings went far beyond “unpleasant,” the cigarette manufacturers were not content simply to broadcast their propaganda coup; instead, they turned it into yet another vehicle of disinformation in their war of subversion against the incipient anti-public smoking movement by claiming that the surgeon general’s statement constituted a recantation (even after publication of the 1972 report), and had been a response to the question about the booklet and to a question as to whether there was “any effect of smoking on


Because the affinity between hemoglobin and carbon monoxide is 200 times greater than that between hemoglobin and oxygen, CO’s bonding interferes with oxygen transport to the body.


nonsmokers.\textsuperscript{99}

In spite of this verbal contretemps, Steinfeld’s intervention was in no small part responsible, for example, for a report (”Anti-Smoke Movement”) on the “CBS Evening News” in March 1973 culminating in the statement that: “The conclusion in scientific journal after scientific journal: breathing what passes for air in smoke-filled rooms does the same thing to your lungs, your heart and your blood vessels as smoking cigarettes yourself.”\textsuperscript{100} (An enraged cigarette industry knew no better response than hurling back the pseudo-paradox that “the ‘case’ against tobacco smoking has been based almost exclusively on studies of statistics which report the comparative well-being of nonsmokers.”)\textsuperscript{101} In turn, these media accounts were responsible for the fact that, as Philip Morris was aware at the time, surveys revealed that as early as 1974, even before the question had become a focus of intense worldwide scientific study, 46 percent of the U.S. population (including 57 percent of non-smokers and even 30 percent of smokers) believed that environmental tobacco smoke was “probably hazardous.” By 1978—that is, precisely at the end of the initial four-year burst of nationwide state and local anti-smoking legislation—these proportions rose strongly to 58, 69, and 40 percent, respectively.\textsuperscript{102}

Whereas the initial 1964 surgeon general’s report on \textit{Smoking and Health} (and the ongoing outpouring of studies) indisputably became the catalyst for the anti-smoking movement in the United States, and Steinfeld’s efforts in the early 1970s crucially catalyzed the anti-public smoking movement, comparatively little medical/scientific progress in studying the health impacts of involuntarily tobacco smoke exposure was achieved or disseminated to the general public during the remainder of the 1970s.\textsuperscript{103} For example, as late November 1975, the best

\textsuperscript{99}Statement at Hearing of N.Y. City Board of Health (Apr. 18, 1974), Bates No. 503812826/34 (by attorney William Shinn appearing on behalf of Tobacco Institute).

\textsuperscript{100}CBS Evening News (Mar. 28, 1973), Bates No. 500081603 (Radio TV Reports, Inc. transcript).


\textsuperscript{102}JRN, The ETS Issue: Science and Politics (May 1987), Bates No. 2023551401 (data from Roper Surveys and Philip Morris USA). This four-page memo may have been written by John (Jack) R. Nelson, who at the time was manager of public affairs research and issues planning at Corporate Affairs, Philip Morris, Inc., the next month became director of corporate affairs planning, and in 2002 became president for operations and technology of Philip Morris, Inc. Philip Morris Glossary of Names, http://legacy.library.ucsf.edu/glossaries/pm_gloss_n.jsp

\textsuperscript{103}See, e.g., the summary in U.S. Department of Health, Education, and Welfare,
scientific-medical case for state intervention to protect nonsmokers from “actual harm” done by smoking in their presence that Dr. Luther Terry, the surgeon general at the time of the 1964 report, was able to come up with during a radio interview while the Washington D.C. city council was considering an ordinance to prohibit smoking in public places was that there is a certain percentage of the population where it has been very clearly demonstrated that certain persons with allergies or with chronic diseases can definitely be harmed by an inhalation of smoke of others.

I think for the vast majority of our population, however, it is not a question of proven harm, though there may be harm; it’s not as much a proven harm as it is discomfort and just not desiring to be subjected to that sort of experience.\textsuperscript{104}

Consequently, while the scientific underpinnings of the battle against passive smoking stalled, large numbers of nonsmokers, unlike physicians and scientists, were not at all reticent to draw the conclusion that, if firsthand smoke caused lung cancer, obstructive lung disease, and heart disease, then sidestream smoke, which was, gram for gram, even more toxic and carcinogenic than the smoke inhaled by smokers, would too.\textsuperscript{105} Ironically, then, popular resistance to and legislated bans on secondhand exposure spiraled upwards without the benefit of continuously advancing scientific evidence—much to the amazement and annoyance of the cigarette oligopoly.


\textsuperscript{105}In connection with his petition in 1969/70 to ban smoking on buses, Ralph Nader, based on studies showing that children living with adults smokers had a higher incidence of respiratory and other diseases, straightforwardly asserted that “the health hazards present in tobacco smoke affect the individual who inhales the smoke whether or not the inhalation occurs as a result of the individual smoking or as a result of someone else smoking.” “Memorandum: The Inhalation of Smoke as a Hazard to the Health of Non-Smokers” at 7 (1969), Bates No. 03757217/23. In 1974, when he headed the cancer center at the Mayo Clinic in Minnesota, Steinfeld, in a talk at the first annual meeting of that state’s Association for Non-Smokers Rights, tentatively and speculatively suggested that, since research had not yet identified the lowest level at which substances in cigarette smoke could cause lung cancer, it was “‘conceivable’” that a nonsmoker could be exposed to a cancer risk by being present in a smoke-filled room. Lewis Cope, “Steinfeld Cites Several Hazards of Smoke on Non-Smokers,” \textit{MT}, Feb. 24, 1975 (10A:1-8 at 2).
The First Statewide Anti-Smoking Law and the Cigarette Manufacturers’ Opposition in the Early 1970s: Arizona

The campaign drew its real first blood two weeks ago. Arizona enacted a restrictive bill despite every best effort to defeat it.106

In the campaign of the non-smokers, Arizona is special for two reasons. First, it has a large population of health-conscious retirees who moved in from elsewhere to breathe clean air. Second, one of them happens to be Mrs. Betty Carnes, a crusader for nonsmokers’ rights who devotes almost full time to the cause of clean indoor air.107

[If there were to be a monument in this important battleground, it would have to be a statue of Mrs. Betty Carnes, her fist upraised and a squashed pack of cigarettes under her foot.108

From Arizona, the anti-smoking forces have spread their campaign rhetoric across the U.S., basing their ‘game plan’ on the example set here.

To date, over 20 states have enacted legislation to restrict or prohibit smoking in restaurants, stores, and other public places. Twenty states in slightly over two years—not a bad record, is it?109

The U.S. Department of Health, Education, and Welfare erroneously characterized Arizona, which enacted a tobacco smoking control statute in 1973,110 as “the first state to restrict public smoking for health, rather than for fire reasons.”111 In fact, as early as 1919, Nebraska had prohibited smoking in “public
eating places.”

While setting forth that “smoking tobacco in any form” was “a public nuisance and dangerous to public health if done in any elevator, indoor theater, library, art museum, concert hall, or bus which is used by or open to the public”—curiously, the provision did not expressly prohibit smoking, although the bill was titled, “Prohibiting Smoking in Certain Public Areas”—the Arizona law nevertheless permitted smoking in those self-same areas “if the smoking is confined to areas designated as smoking areas.”

This very restricted coverage and dysfunctional permissiveness did not prevent John Banzhaf, the pioneering anti-smoking leader of Action on Smoking and Health, from celebrating the law as “an historic first statewide legal breakthrough on behalf of America’s nonsmoking majority” and one that “can become a model law.” Although R. J. Reynolds concurred that the law was “a major breakthrough,” which quickly became “the model” for anti-smoking groups, it may have welcomed this particular statutory iteration because at the time the governor signed it the company viewed the Arizona law as “the least harmful of any of the punitive measures introduced to date” precisely because it permitted smoking in...
designated areas.\textsuperscript{117} That this tiny step forward also constituted a sea change was reflected in the judgment of a later surgeon general’s report that “[a]lthough not comprehensive by current [1989] standards, the law was regarded as comprehensive when passed”\textsuperscript{118}—as witnessed by the press’s characterization of it as “sweeping.”\textsuperscript{119} The achievement was further diminished by the fact that smoking had largely already been banned in most of the locations covered by the statute anyway.\textsuperscript{120} Moreover, almost a year after the law had gone into effect, the police in Phoenix had not yet arrested anyone for having violated it. An official explained: “‘We’ve had a few complaints...but it was hard to say whether they were valid. And anyway, no one is looking out for this.’”\textsuperscript{121} According to its chief sponsor, the law “would not mean people ‘would be dragged down to jail or hit with huge fines’ for smoking. Rather, it would help make smokers aware that tobacco smoke is harmful to some people.’”\textsuperscript{122} As late as 1979, the bill’s primary non-legislative sponsor not only knew of no one who had ever been fined, but was “‘not in favor of it.... With all the crime that is rampant today, police have more important things to do than arrest smokers. Whatever has been accomplished in the no-smoking field has been caused by smokers who never before realized they were harming other people.’”\textsuperscript{123}

The Arizona initiative originated in two different but interconnected personal sources. One was Betty Carnes (1905-1987), a former smoker\textsuperscript{124} and an internationally well-known ornithologist whose move (with her nine-year-older

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  \item J. S. Dowdell to C. B. Wade, Jr., “Tobacco and Health Legislation” (May 7, 1973), Bates No. 500061526.
  \item For example, in Tucson many community centers, theaters, and gymnasiums had banned all smoking. “Simply No Smoking,” Star (Tucson), Oct. 6, 1972, Bates No. TCAL0005317.
  \item Max Seigel, “City Health Unit Votes ‘in Principle’ a Ban on Smoking in Public,” NYT, May 17, 1974 (22).
  \item “No Smoking’ Signs to Cost Up to $2.50,” AR, Apr. 4, 1974, Bates No. TCAL0005256 (quoting Stan Turley).
  \item “Enforcement of Ban on Smoking in Minnesota Is No Easy Matter,” NYT, Sept. 9, 1979 (64) (quoting Betty Carnes).
  \item [Tobacco Institute, Background Facts on Women in State and National Anti-Smoking Movement] at 1 (Apr. 11, 1974), Bates No. TIMN0102369.
\end{itemize}
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husband) in 1960 to Scottsdale, Arizona from New Jersey\textsuperscript{125} may have associated her with large numbers of middle-aged and elderly people who emigrated to the state for health reasons and in particular “seeking cures for respiratory ailments”\textsuperscript{126} as well as with others “here seeking clean air.”\textsuperscript{127} To the news media it was “[n]o wonder...that the non-smokers’ rights movement took hold” in a state to which asthmatics and older people with respiratory problems were attracted because they “welcome the dry, relatively smog-free climate around Phoenix and the state.”\textsuperscript{128} Spurred on by a 39-year-old close friend’s death from lung cancer,\textsuperscript{129} Carnes struck out on an activist career, in the course of which, as an obituary noted, she “single-handedly arranged for the first three rows of nonsmoking seats on any scheduled carrier (American Airlines, New York to Phoenix, beginning 8 August 1971), and thus began a world-wide social revolution.”\textsuperscript{130} The New York Times may have been exaggerating when it credited Carnes with having been “almost single-handedly responsible for Arizona’s being the first state to limit public smoking for health, rather than fire, reasons,”\textsuperscript{131} but the Tobacco Institute acted as if she had. For example, a few months later it explained its appeal to Lorillard for assistance on the grounds that: “We need all the help we can get in countering the aggressive activities of Mrs. Betty Carnes in her efforts to expand the coverage in the bill passed this year.”\textsuperscript{132} And following the 1973 session, R. J. Reynolds noted that during her three-year campaign Carnes had “personally interviewed each member of the Arizona legislature and determined their smoking habits and how they would vote on the proposed ban” in addition to having attended every legislative committee meeting in 1972 and 1973. Overall, Carnes’s efforts had “undoubtedly made the most

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\item \textsuperscript{126}“Separate Tables,” \textit{AR}, Mar. 8, 1973 (edit.), Bates No. TCAL0005266.
\item \textsuperscript{127}John Kuhn, “Get Your Ash Out of Arizona, She Said,” Hackensack Record, June 11, 1973, Bates No. TCAL00044746.
\item \textsuperscript{128}CBS Morning News, Dec. 4, 1973, at 2 (transcript), Bates No. TMDA2001312/3.
\item \textsuperscript{129}Patrick McCormack, “If You Love Someone Who Smokes, Do Something!” N&O (Raleigh) (III:11), July 8, 1973, Bates No. TIMN0136397.
\item \textsuperscript{131}“Arizona Curtails Smoking in Public,” \textit{NYT}, Sept. 4, 1973 (16). As noted above, Nebraska’s, Utah’s, and North Dakota’s laws had antedated Arizona’s by more than a half a century.
\item \textsuperscript{132}J. C. B. Ehringhaus and Frank Welch to Bud Bass at 3 (Nov. 9, 1973), Bates No. 85644118/20.
\end{itemize}
significant contribution” to Arizona’s anti-smoking legislation...."133 The organizational form that Carnes gave her activities was the Arizona chapter of Action on Smoking and Health (ASH)—later known as Arizonans Concerned About Smoking—which she founded in 1966 as one of the first nonsmokers’ rights groups in the United States.134

The other person who was instrumental in securing passage of the 1973 law was Stan Turley, a self-professed “blue-nosed Mormon,” a Republican rancher who had entered the House in 1965, already in his second term served as speaker, and in 1971 introduced H.B. 28 to ban smoking only on elevators. As limited as it was, the elevator bill—which Turley regarded as one of only two “really good” things that he did in the legislature—had been several years in the making and arose in his larger environmental imagination. In 1965 or 1966 while attending a House Democratic-Republican coalition meeting at which the smoke was so thick that the ceiling was barely visible, the somewhat asthmatic Turley suddenly realized the irony inherent in the situation that the group of legislators discussing shutting down the copper smelter in Douglas because the population in the vicinity was unable to deal with the smoke was itself spewing out so much tobacco smoke that Turley smelled so bad that his wife would never let him into the house. He decided to deal with the problem by stopping smoking on the elevators. Although he failed to explain then or later how this tiny step could possibly have served that purpose, it fit within his general approach of “an inch at a time rather than jump across the river.” The connection between Turley and


134Stella Bialous and Stanton Glantz, “Tobacco Control in Arizona, 1973-1997” at 7 (1997), on http://repositories.cdlib.org/ctcre/tcpmus/AZ1997 (incorrectly stating the group’s early name and that “[t]he 1973 state law restricted smoking in most public places, such as government buildings, health facilities, public places”). Information on the early name was provided by email from Dr. Leland Fairbanks, president, ACAS to Marc Linder (Jan. 28, 2009). As late as 1973 the group was still referred to in the press as the Arizona chapter of Action on Smoking and Health. “Senators Will Speak About Public Smoking,” Phoenix Republic, Mar. 3, 1973, Bates No. TCAL0004715. Fairbanks, however, stated that by the time he returned to Arizona in July 1970, anti-smoking activities “were referred to publicly as actions of Betty Carnes as President” of ACAS. According to Fairbanks, “early on, in the early 1970’s Betty Carnes was ACAS. She then had followers but not members.” Email from Leland Fairbanks to Marc Linder (Jan. 28, 2009). For a brief mention of the overtopping role played by Betty Carnes in persuading the legislature to act, see Richard Kluger, Ashes to Ashes at 374 (1996). Carnes was, in addition, chair of ASH’s national fund raising. Patricia McCormack, “If You Love Someone Who Smokes, Do Something!” N&O (Raleigh) (III:11), July 8, 1973, Bates No. TIMN0136397.
Carnes—whose single-minded persistence prompted Turley four decades later to call her, good-naturedly, a “nuisance” and a “pest”—came about as a result of her approaching him after she had heard about his interest in introducing legislation.\textsuperscript{135}

Rather than being a case of politics making strange bedfellows, Carnes, a wealthy Republican—her husband was vice president of American Home Products Corporation, a multi-billion-dollar pharmaceutical firm, and a longtime contributor to the Republican Party\textsuperscript{136}—and Turley, a conservative Republican and farm, ranch, and motel owner and banker,\textsuperscript{137} exemplified how the anti-smoking movement defied congruence with liberal or leftist positions.\textsuperscript{138} It may have been easy for even a Barry Goldwater forcefully to back federal Food and Drug Administration intervention to prevent cigarette companies from “hook[ing] another generation” of children,\textsuperscript{139} but for otherwise orthodox glorifiers of free enterprise to advocate overriding property rights and managerial prerogatives and imposing behavioral norms on customers and business owners may have required an ideological compartmentalization (“urgent public health considerations”) to block off a slippery slope to open-ended state control. What is interesting about this early anti-passive smoking campaign is that it encompassed such rigid foes of social engineering even before science and medicine had concluded that secondhand smoke exposure was a major public health concern.\textsuperscript{140}


\textsuperscript{137}Stan Turley, \textit{The Kid from Sundown} 130-31, 137, 139, 158-63 (2002).

\textsuperscript{138}On Turley’s conservative politics, see Stan Turley, \textit{The Kid from Sundown} 164-212 (2002). His political judgment can be gauged by his account of a three-week trip to South Africa at the invitation of the apartheid-era government: after reviewing the flora and fauna, he characterized apartheid as a “difficult system.... It appeared everyone was trying to work out appropriate changes....” \textit{Id.} at 203.

\textsuperscript{139}Barry Goldwater, “Smoke and Fire: Save the Children,” \textit{WSJ}, Aug. 8, 1912 (A12). Goldwater expressly conceded that if smoking were, as the tobacco industry claimed, “a simple matter of individual rights and adult choice...I would be on their side.”

\textsuperscript{140}Turley’s disgust for smoking and cigarette companies appears to have been indelibly molded by an experience some years before his election to the legislature when he was hospitalized after cartridges thrown into a camp fire had exploded and pieces of the shells struck his eye. In the next bed lay a man in his thirties in a coma for three days following an accident that had killed his wife and child. While the man’s mother sat there,
In the interim before he filed the elevator bill in 1971, Turley conducted an “experiment” by successfully banning smoking during the meetings of the House committee he chaired. By the beginning of 1970 Turley’s attitude toward public smoking was sufficiently well known that a proposal he had made in jest “requiring all smokers to wear a fitted plastic bag over their heads” was seemingly taken seriously in a letter to the editor by a man who, having recently been surrounded for 30 minutes in a hematologist’s waiting room by five people smoking cigarettes and a sixth a cigar, imagined that pursuant to Turley’s putative bill smokers “can inhale and reinhale without endangering anyone else. Why not? Think of the money they would save! Three or four cigarettes would give them the same amount of pleasure as one or two packs, meaning a savings of between $75 to $100 a year.”

When Turley finally introduced the bill in 1971, which merely applied to elevators, he and his cosponsor, Democrat Craig Davids, “were laughed off the floor.” Making it unlawful to smoke or carry lighted tobacco in a passenger elevator, the bill imposed a fine of up to $50 for a first offense and up to $100 and/or up to 90 days in jail for additional offenses. In addition to requiring the building owner or manager to post a sign with these terms, Turley required the provision of non-combustible receptacles for the disposal of lighted tobacco at the entrance to every elevator. As far as the political editor of the Arizona Republic was concerned, the bill’s only failing was that it did not “go far enough”: the ban should have been extended to all rooms in public buildings except those set aside as smoking lounges. At a House Judiciary Committee

Turley heard every sound he made as he finally “began to try to articulate. It was a struggle; the first word came out, faintly, but intelligible. What do you think it was—Mother? Wife? Daughter? No, the word was cigarette. And the tobacco companies say it is not addictive.” Stan Turley, The Kid from Sundown 142 (2002).

141Telephone interview with Stan Turley, Mesa AZ (Jan. 24 and 25, 2009).
meeting two weeks later Davids explained that restricting smoking in a “confined space” was “particularly important here in Arizona because so many people are here because of respiratory problems.” Why, in the light of this worthy purpose, the protection was limited to this one location, which represented a trivial proportion of all the time that respiratorily challenged new-Arizonans spent in public confined spaces, Davids did not reveal.

Several weeks later Senate Democrat Joe Castillo, a nonsmoker who was “sick and tired of smelling smoke while trying to eat in public places,” introduced, together with five Democratic and three Republican colleagues, a bill (S.B. 166) that declared smoking in the dining area of public restaurants to be a “public nuisance and dangerous to public health.” It prohibited smoking or carrying lighted tobacco in the dining area of a public restaurant, prohibited owners and managers from permitting such smoking or from providing ash trays in dining areas, made violations misdemeanors punishable by fines ranging from $10 to $100, and required restaurant owners to post no-smoking signs stating that those convicted of violating the law would be subject to those fines. However, Castillo (who presumably sensed that he was venturing out further than a majority vote would support) also authorized the state Board of Health to adopt regulations to “permit smoking in separate dining areas...not to exceed thirty per cent of the total seating capacity when there is adequate ventilation and separation from the principal dining area.” Although Castillo and his cosponsors were not seeking to make smokers quit, but to stop the “‘contamination of other people’s air while they’re eating,’” the bill included a very forceful health-based statement of

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147 Minutes of Meeting, [House] Committee on Judiciary, Suffrage and Elections (Jan. 28, 1971) (copy furnished by Arizona House of Representatives Chief Clerk’s Office). Neither Betty Carnes nor anyone else who could be identified as a proponent or opponent of the bill was listed among the visitors (all of whose affiliations were named). Neither Carnes nor any other plausible proponent or opponent was listed among the visitors to the meeting of the Governmental Relations Committee, which recommended that the bill do pass. Minutes of Meeting, [House] Committee on Governmental Relations (Feb. 22, 1971) (copy furnished by Arizona House of Representatives Chief Clerk’s Office).


151 “Senator Proposes No-Smoking Rule for Restaurants,” Star (Tucson), Feb. 10,
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legislative intent:

The use of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking, but also to the nonsmoking person who is required to breathe such contaminated air. The most pervasive intrusion of the nonsmoker’s right to unpolluted air space is the uncontrolled smoking in public eating places. The legislature intends, by the enactment of this act, to protect the health and atmospheric environment of the nonsmoker by regulating smoking in public restaurants.\(^{152}\)

The Senate Public Health and Welfare Committee (which was chaired by Douglas Holsclaw, a strong anti-smoking advocate), despite the opposition of one member who felt that restaurant owners themselves should achieve the bill’s objective without legislation, recommended passage.\(^{153}\) That S.B. 166 did not cover bars or taverns\(^{154}\) failed to assuage the Rules Committee, where it died.\(^{155}\)

On March 9, “[j]okes, laughter, poetry and statements of outrage preceded”\(^{156}\) House passage of Turley and Davids’s elevator bill by a vote of 43 to 13.\(^{157}\) One opponent opined that the bill was “as foolish a piece of legislation as asking those who do not smoke to hold their breath during an elevator ride or take the stairs.”\(^{158}\) While several representatives vituperated against the bill, calling it unfair, foolish, and undeserving of consideration, Turley, surprisingly, conceded

1971, Bates No. TCAL0005283.

152S.B. 166, § 1 (Feb. 9, 1971, by Castillo et al.).


155Journal of the Senate: Thirtieth Legislature First Regular Session of the State of Arizona: 1971, at 1173. Turley later remarked with regard to the demise of Castillo’s bill that Republicans were not about to let a Democrat run a bill. Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).


that “‘it won’t make much difference whether this bill passes or not...it might cause more understanding from some of those who use tobacco.’”

Despite the large House majority, H.B. 28 died in committees in the Senate. Before the Senate Judiciary Committee Davids stated that the measure “would provide psychological leverage for the protection of nonsmokers caught in the closed space of public elevators. ‘Not too many citizens will the flout the law in the presence of others.’” Then, presumably addressing the concerns of those who eschewed law and favored voluntarism, he added: “‘I can’t conceive of any judge sending anyone to jail.’”

One committee member captured the essence of this kind of hybrid measure: “‘It’s a matter of common courtesy, like a gentleman taking his hat off. Maybe we need a law to enforce it.’” But a five-member majority (including future Supreme Court Justice Sandra O’Connor) of the committee disagreed, defeating the bill. One reason that Turley reportedly encountered such strong resistance was that “[p]rophets of business disaster were convinced that if shoppers had to put out their cigarettes and favorite cigars to ride the elevators to shop on upper floors above the first floor, all businesses located above the first floor would be at tremendous economic disadvantage and possibly face financial disaster from loss of customers.”

In 1972 Castillo (and eight other senators) introduced S.B. 1109, which was virtually identical to his 1971 bill, to ban/limit smoking in restaurants.

Considerable discussion in Holsclaw’s Public Health and Welfare Committee focused on “setting certain areas off rather than prohibiting smoking entirely in restaurants,” but despite Carnes’s support for the bill, the committee held S.B. 1109 rather than recommending passage.

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162 Email from Dr. Leland Fairbanks (pres., Arizonans Concerned About Smoke) to Marc Linder (Jan. 28, 2009).


Labor Committee (of which Castillo was a member) considered the bill, Carnes, representing Action on Smoking and Health, presented material in support of S.B. 1109, but the bill was held for a week after Dave Wynn, the lobbyist for the Hotel and Motel Association of Arizona, an ally of the tobacco industry who stated that restaurant owners opposed the bill based on “operational difficulties,” had requested an opportunity for them to appear before the committee. In the meantime it was suggested that the owners “try to find out the general public preference.” At a meeting three weeks later Castillo presented amendments to his own bill that would have eliminated coverage of small restaurants with a seating capacity of fewer than 75. The Arizona Restaurant Association opposed the bill on the grounds that, as its representative Joe Banks stated, it would be very difficult and expensive for restaurants and the state Public Health Department to enforce. Neither Carnes’s renewed advocacy nor a weakening amendment that would have excluded one-room cafes could prevent the bill’s defeat on a 4 to 3 vote.

Undaunted, though uncertain as to whether the bill would pass in 1973, Turley, now a member of the Senate—of which he became president 10 years later—remained convinced that some day the Arizona legislature would pass a law banning smoking in public places in order to prevent what was at best a public nuisance and at worst harmful to nonsmokers’ health. In the meantime, he was “furious” when someone came to his tiny office to complain about smelter smoke “and all the time he’s blowing tobacco smoke in my face.” In this regard Turley shared a perspective with many Arizonans: “Although a native, Turley, like thousands of persons who came to Arizona for health reasons, has a respiratory problem and finds at times he must leave a committee room when the smoke begins to congeal.”

Arizona Senate Resource Center.

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166 Minutes, Commerce and Labor Committee, Arizona State Senate, 30th Legislature, Second Regular Session (Mar. 6, 1972) (copy furnished by Arizona Senate Resource Center).


170 Bernie Wynn, “Smoking Is Nuisance, Bill’s Sponsor Feels,” AR, Feb. 16, 1973,
The four co-sponsors of S.B. 1313 included Republicans and Democrats and smokers and nonsmokers. The most important co-sponsor was Douglas Holtsclaw, the chair of the Public Health and Welfare Committee—to which the bill was assigned—who was in his mid-70s and had studied at the Harvard Medical School as well as law at the University of Arizona, in addition to operating a successful real estate business. During his seven terms in the House (beginning in 1952) and four terms in the Senate he established a record for having sponsored more than 200 bills that were enacted into law. S.B. 1313 reproduced, virtually verbatim, the aforementioned strong health-focused statement of legislative intent from Castillo’s 1971 and 1972 bills banning smoking in restaurants (which failed to survive Holtsclaw’s committee in 1973).

Despite its tough and forward-looking perspective—which one contemporary commentator linked not to the “‘blue-noses’ or ‘prudes’ or ‘religious cranks’” who at the turn of the century regarded cigarette smoking as “‘sinful,’” but to “the same people who oppose burning trash dumps, smoke belching from smelter stacks, and oily fumes from automobile exhausts”—the bill, which, in addition to elevators, indoor movie and other theaters, libraries, art galleries, museums, concert halls, and buses, also covered restaurants and cafeterias, and made violations a misdemeanor and imposed a fine ranging between $10 and $100, nevertheless did “not prohibit” smoking in any, let alone all, of the aforementioned covered buildings (including elevators) “if the smoking
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is confined to areas separated from those used by the general public.” (During Senate floor debate the language “separated from those used by the general public” was struck; instead, “designated as smoking areas” was inserted.) This fact did not stop R. J. Reynolds from charging that the law “prohibited smoking in any” of those places and holding up the “militant anti-smoking movement in Arizona” as a “prime example of this new era” in which legislators and regulators “at every level are on a hysterical binge of protectionism—a new ‘ism’ where people are trying to force their self-righteousness on the general public through government sanction.”

Emblematic of the kind of resistance that Turley’s bill encountered was an editorial in the Arizona Republic, which, while conceding that the health aspects were “inarguable,” found the sight of the “government’s hand” “bothersome.” The paper insisted that a “more sensible approach” would have been to “see whether private entrepreneurs—now awakened to sizable public approval of protecting nonsmokers—can demonstrate a voluntary willingness to simply accommodate requests of patrons for separate seating.” (Once the bill was passed without restaurant coverage, the newspaper was more than satisfied when two restaurants in Phoenix voluntarily set aside nonsmoking areas, thus instantiating “elective, free choice” so that no restaurant was “forced to segregate patrons, any more than patrons should be forced to patronize certain restaurants.” In fact, after the law went into effect in August an increasing number offered nosmoking sections.)

At the meeting of Holsclaw’s Public Health and Welfare Committee on March 13, after Senator John Roeder had moved to delete restaurants, cafeterias, and elevators, Turley, who was not a committee member, stated that “he had received a lot of correspondence in favor of the bill and they were not crank letters but people who really needed help with the problem.” He added that “one of the biggest problems existed in doctors offices and hospitals, but [he] did not see how this could be legislated as they were private entities” (without explaining how they differed in this regard from covered restaurants). Before voting on the

179Cover Sheet S.B. 1313 (n.d.) (copy furnished by House Chief Clerk’s Office).
motion, the committee heard Carnes and another ASH representative speak of the “urgent need” for the law and Joe Banks of the Arizona Restaurant Association assert that S.B. 1313 “would put the small restaurant owner out of business” because it “would require a tremendous effort on the part of most restaurants” to create separate areas for smokers and nonsmokers. The committee then defeated, on separate votes, the motion to strike eating places and elevators. However, it promptly did an about-face and voted to strike the lengthy, informative, and eloquent legislative intent clause; oddly, not only was there only one No vote, but it was cast by Roeder.

In the full Senate the stand-in for the tobacco industry apparently fared better on March 15: by a standing vote of 18 to 8 the chamber tentatively approved S.B. 1313 after having adopted a floor amendment striking out restaurant coverage authored by none other than Turley himself, “a member of the Church of Jesus Christ of Latter-day Saints and a nonsmoker and teetotaler.” He explained his action on the grounds that, having had “previous experience” with a similar measure in the House, “I knew the bill would have no chance without that exclusion.... It’s not a great thing but it’s something in the right direction.” Even a Republican and smoker who supported the bill bemoaned the Senate’s having “crippled” it, while Holsclaw unsuccessfully “pleaded with his colleagues” not to exclude eating places since, after all, the “federal government is banning smoking in all its employe cafeterias because of health hazards.” Ominously, Democratic minority leader Harold Giss, according to Carnes, “got up on the floor of the Senate and puffed furiously away on his cigarette” denouncing the bill as an invasion of his personal privacy. Exactly one month later he dropped dead of a heart attack, leaving only seven smokers (whose ranks were reduced to

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six a few months later when yet another one succumbed to a heart attack.188

The next day the Senate passed the bill by a vote of 22 (including, this time, Sandra O’Connor) to 8, the opponents being equally divided by party.189 All eight dissenters were smokers.190 Speaking prematurely, on March 29, Tobacco Institute President Kornegay boasted to his board of directors with respect to anti-tobacco measures in state legislatures that “[o]ur record is still clean.”191

At the House Rules Committee hearing on S.B. 1313 on April 5, Carnes held up a “Smoking Kills” sign and urged the committee to protect the state’s two-thirds majority of nonsmokers.192 Underscoring the 80,000 cancer deaths a year caused by tobacco, Turley told the committee that the bill would “create public awareness of a real problem.”193 He also stated that “while he felt it did not go far enough, since they had to strike ‘cafeterias and restaurants’ he still felt it to be an opening wedge to the problem.”194 The proposed amendment by committee chair Peter Kay, reinserting restaurant and cafeteria coverage removed in the Senate, was voted down after one member had cautioned that “[w]e’re liable to lose the whole bill!” if those locations were put back in.195 The committee also

189Journal of the Senate: Thirty-First Legislature First Regular Session of the State of Arizona: 1973, at 323 (Mar. 16). As passed the bill included two floor amendments offered by Turley and Holsclaw. Id. at 802.
192“Bill to Limit Smoking Clears Panel,” AR, Apr. 6, 1973, Bates No. TCAL0004755. Carnes later stated that the survey she had conducted of 18,000 people in Arizona at the time the bill was introduced revealed that fewer than a fourth smoked. “Barry Farber Show” at 3 (WOR, Oct. 18, 1973), Bates No. TIMN0069236/8.
195“Bill to Limit Smoking Clears Panel,” AR, Apr. 6, 1973, Bates No. TCAL0004755. The fact that Turley and Holsclaw included restaurants and cafeterias in the bill as they introduced it makes it very difficult to reconcile the legislative history with the account provided by the current ACAS president: “The early Arizona public opinion polls in those early days (early 1970’s) did not yet show enough widespread support for smoking controls in restaurants to be able to pass in the legislature. Therefore Betty Carnes later said that the ACAS Team did not themselves include the restaurants in their legislative efforts. Betty said that inclusion of restaurants in the 1973 bill was only added as a big
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heard from at least one opponent of the bill, Earl Cunningham, who argued that “‘[a]utos kill a lot more people than cigarettes, but you don’t ban autos.’”196
(Apparently Cunningham was not a good listener: Turley had just stated that tobacco caused 80,000 deaths a year from cancer alone, whereas total traffic fatalities numbered 56,600 in 1972.)197 The press account of the hearing failed to identify Cunningham, but he was the executive secretary of the Arizona Association of Tobacco and Candy Distributors, who the next year would become the cigarette oligopoly’s official lobbyist in Arizona. After the Rules Committee had recommended the bill for passage,198 the House Health and Welfare Committee considered S.B. 1313 at its April 28 meeting, at which Carnes (her affiliation was identified as “citizen”) appealed to the members to pass it for Arizonans’ health and welfare. Before the committee voted to recommend passage, the motion by Jones and seconded by Kunasek to add coverage for restaurants, cafeterias, doctors’ offices, and hospitals carried,199 but the full House on April 28 passed the bill by a vote of 47 to 7200 without the additional covered locations.201

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201 Arizona’s legislative journals make it impossible to reconstruct legislative history,
Looking back, Carnes regretted that eating places had been excluded, but she recognized that many legislators believed that inclusion would have led to the bill’s defeat yet again. Her position that some part of a loaf was better than nothing was, at this critical juncture in launching the anti-passive smoking movement, difficult to criticize, but her more detailed reasoning revealed both how grateful Carnes was for even the slightest restriction on exposure to tobacco smoke and how undeveloped the understanding of the health consequences was in the early 1970s. She was willing to accept a separate section of a dining room rather than a separate room for nonsmokers because: “People would still be able to smell some smoke, but it would be a lot better than having someone blowing smoke right in your face while you are trying to eat.”

How low her initial sights were set was also indicated by her claim that (in the context of continued exposure to tobacco smoke wafting from designated smoking areas and in places excluded from the law altogether) the new law put nonsmokers, who had been “second-class citizens,” “on an equal basis.” Of a piece with these views was her insistence, which would have been quite congenial at the time to some cigarette manufacturing executives, two years later that: “If all smokers were considerate of others...we wouldn’t have any need for these laws.”

The large House majority cast grave doubt on the Tobacco Institute’s intelligence-gathering capacity (as well as the industry’s lobbying competence):


203 John Kuhn, “Get Your Ash Out of Arizona, She Said,” Hackensack Record, June 11, 1973, Bates No. TCAL0004746. Even a decade later, a physician’s (and Arizona anti-smoking activist’s) exaggerated account of the scope of voluntary compliance elided the continued exposure to smoke wafting from smoking to nonsmoking sections by asserting that when “positive peer pressure...remind[ed] a few poorly compliant individuals and facility managers from time to time as to their responsibilities under the law” they “eventually respond when they see that they will be identified as non-compliant...if they do not keep the air clean.” Leland Fairbanks, “Sidestream Smoke: A Mainstream Health Problem—The Arizona Response,” in Proceedings of the Fifth World Conference on Smoking and Health 1:519-21 at 520 (William Forbes et al. eds. 1983).


205 In its first newsletter to appear after the governor had signed the bill into law TI still headlined the news “Smoking Ban on Its Way?” TIN, No. 73, May 8, 1973, at 5, Bates
just three days earlier it had reported to R. J. Reynolds—which had asked TI to keep it informed on the progress of any bills that would prohibit or discriminate against smoking and offered “assistance in working with State Tobacco Wholesalers or others in organizing our position on any type of punitive State legislation”—that Welch, the TI’s vice president for state activities, had personally visited Arizona and “believes that this bill will not be enacted.”

At this time the Tobacco Institute took the disingenuous position for purposes of litigation that, although it was “concerned with anti-tobacco legislation anywhere it occurs, in any state,” “[w]e don’t lobby” (for example) in California because the “people in the state, the tobacco people, the distributors and their organizations, know best how to handle those matters. We do not. It would be officious of us to interject ourselves into the operation in California or any other state.” In fact what TI did, as its president, Kornegay, testified in a deposition, was to pay the California Tobacco and Candy Distributors to hire lobbyists. (Why TI was circumspect about openly lobbying was clear: in April 1973 Welch reported that when the executive director of the California Association of Tobacco and Candy Distributors “got up to speak for us” at a legislative committee hearing on a smoking restriction bill, he was “hissed and booed....”)

At a celebration on May 4, the day the governor signed the bill (which was to go into effect on August 8), Banzhaf, the founder of ASH, lauded Arizona as the first state to “‘guarantee the rights of nonsmokers.’” Refusing to rest on their laurels, the celebrants announced that they would return to the legislature in 1974 to extend coverage to schools, restaurants, cafeterias, food markets, public meeting rooms, hospitals, doctor’s offices, waiting rooms, and interstate buses. To be sure, Turley warned against precipitous action: while agreeing that “the change in public attitudes in a few years that made the new law possible”’ was “‘amazing to see,’” he nevertheless urged his co-celebrants not to seize the momentum: “‘But I caution you not to go too fast in seeking too much

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207 Deposition of Horace Kornegay at 55, 60 (Apr. 16, 1973), Nickloff v Liggett & Myers (No. 71 1123 WMB, USDC CD Cal.).
208 When asked whether TI paid anyone who was a registered lobbyist in California, Kornegay replied: “Let me answer this way: From time to time we have assisted in a financial way the state organization. What they do with the money, I do not know.” Deposition of Horace Kornegay at 56 (Apr. 16, 1973), Nickloff v Liggett & Myers (No. 71 1123 WMB, USDC CD Cal.).
209 T.I. ComCom [handwritten notes of TI Communications Committee meeting] (Apr. 10 [1973]), Bates No. 500081708/10.)
legislation.... The public must be educated first. Don’t develop too much resentment by the public in seeking an expansion of this law—advice that Turley himself ignored as chief sponsor of successful and unsuccessful anti-smoking measures in 1974, 1975, 1976, and 1978. In a post-mortem interview on the bill’s passage in the U.S. Tobacco Journal, Cunningham both proffered various excuses for the industry’s defeat and sought to trivialize the substance of the enactment. While conceding that “[t]he anti-smokers really got to us this time,” he noted that “[w]e’ve been monitoring them all along but they got a lot of help from that Washington group, the National Interagency Council on smoking and health, and we just didn’t think they would muster the strength they did.” Without mentioning Turley by name, he “also attributed the new law to the Mormon religion’s strictures on smoking. ‘There’s a good-sized Mormon segment here and when they go into government they bring their religion with them.’” Cunningham then “minimized” the law’s likely impact, calling it “harassment which probably won’t have any effect on cigarette sales.” Philip Morris’s vice president for PR was less sanguine: a month after the governor had signed the bill, James Bowling, wondering whether “this extension of government control represents further erosion of the private citizen’s ability to exercise freedom of choice,” told a tobacco audience that “we can expect an avalanche of this kind of proposed legislation to continue to be advocated by the anti-smoking forces,” whose arguments were “based on passion and emotion rather than valid scientific data.” Efforts would, he added, nevertheless be made to have the law repealed. R. J. Reynolds, charging that the Arizona legislature had acted “under considerable pressure from militant anti-smoking and environmentalist groups,” appeared to take some solace from the fact the law “did not ban smoking outright....” Revealingly, the only point that the cigarette oligopoly’s representative failed to mention was that, as Democrat

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211 Turley later stated that his filing more bills did not contradict his advice in the sense that he had not regarded those bills as pushing the envelope. Telephone interview with Stan Turley, Mesa, AZ (Feb. 4, 2009).


Larry Bahill had stressed at the House Judiciary Committee hearing, “‘[p]eople are getting sick and tired of having smoke blown in their face and inhaling the used air of other people.’” Cunningham’s reaching out for scapegoats to excuse his own failure to thwart enactment was consistent with Turley’s later judgment that the tobacco industry had not taken his bill seriously because it had not been worried about the likelihood of the measure’s passage or enforcement.\(^{217}\)

The closest Cunningham came to addressing this health issue was his announcement that “‘[w]e’re also coming out with a positive claim that will encourage people to enjoy smoking while considering the non-smokers around them... Our hope is this sort of positive approach will get the anti-smokers off our backs.’”\(^{218}\) Shortly thereafter Cunningham created “cartoons depicting common sense smoker courtesy practices.” Their purpose was “to subtly tell smokers that some non-tobacco users find the habit unpleasant in confined areas such as elevators....” The coordinating director of the Coordinating Board of Tobacco Trade Associations enthusiastically reported to the cigarette manufacturers that “[s]uch a program could have far-reaching public relations possibilities for an industry currently barraged with ‘non-smoker’s rights’ legislative proposals.”\(^{219}\) How the CBTTA imagined reconciling this inculcation of courtesy with its plans to mobilize smokers to “protest the erosion of financial and personal freedoms being suffered by people desiring to use a legitimate product” at the very same time\(^{220}\) it did not explain. (Moreover, Cunningham was

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\(^{217}\)Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).


\(^{219}\)Jack Beaty to American Brands, Inc. et al., Subject: Quarterly Report at 3 (July 11, 1973), Bates No. 680517400/02. The CBTTA, a creature of the cigarette oligopolists, was formed in 1970 to strengthen the tobacco industry at the state level. Deeming the “submissiveness of the tobacco consumer to restriction after restriction and tax after tax...inexplicable,” the CBTTA concluded: “We must wage a campaign which will arouse the natural instincts of the consumer to resist unfair treatment.” Jack Beaty, Confidential Report: Prepared Especially for the Executive Committee of the Tobacco Institute Special Committee on Industrial Coordination at 1, 8 (June 30, 1971), Bates No. 03602097/8/10. Beaty’s contract with the cigarette manufacturers required him to use his “best efforts” to encourage tobacco trade associations to “recognize that their own best interests require them to oppose...the enactment of” “state and municipal legislation to discourage smoking by imposing restrictions on the promotion or sale of cigarettes.” William S. Smith [chairman of the board, R. J. Reynolds Tobacco Co.] to Jack Beaty and Associates (Jan. 21, 1974), Bates No. 502076478.

\(^{220}\)Jack Beaty to Earl Cunningham (May 9, 1973), Bates No. 500034469.
unsure whether the Tobacco Institute would support his initiative because the industry lacked a uniform position on this so-called courtesy tactic. For example, during a discussion of the issue at a TI Communications Committee meeting, John Blalock, the Brown & Williamson PR director, argued both that it was “[d]angerous to preach smoking ethics” and that he “would not want to admonish smokers. They are harrassed [sic] enough.”

Carnes and Turley did not achieve their success as a result of some neglect or failure on the part of cigarette manufacturers to become involved in the legislative process in Arizona. The Tobacco Institute, though scarcely as well funded to lobby in the states as it would be by the late 1970s, let alone the 1980s or 1990s, was nevertheless panoptically observant. Thus as early as 1967 TI, in its annual account of “State Anti-Tobacco Legislative Activity,” noted that it had appraised more than 600 bills that it believed were or might be detrimental to the tobacco industry, none of which was enacted. The report made it clear that it was attentively monitoring developments in Arizona: “No tobacco punitive/restrictive type legislation has been introduced in past session of the Arizona Legislature, and the chief spokesman for the anti-tobacco forces, the State Health Officer, has given no indication that he will seek such legislation next year.”

From the 1969 report it emerged that the Tobacco Institute had engaged in lobbying in at least 21 states and New York City, though in some of them the industry appeared to be operating behind the scenes and without a formal representative. To be sure, at this juncture, when state legislatures had as yet passed scarcely any measures hostile to the tobacco industry, the Tobacco Institute neither was nor needed to be the much feared/admired lobbying machine that it would soon become. The low level of competence and sophistication of which TI was still capable was on display in 1969 in West Virginia, where the organization had not even heard about a certain bill because the (legislative) reporting service had not reported it to the Tobacco Institute until late in the session. More revelatory of the industry’s lack of lobbying prowess was the

221“Anti-Smokers: Do or Die?” USTJ, May 17, 1973, Bates No. TCAL0004653 (edit.).

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comment in the 1970 report about the New York State legislature, which for the previous six years, spearheaded by Republican Senator Edward Speno, had considered “a rash of anti-tobacco bills,” which “covered a wide range [sic] attack on the tobacco industry.” Only after these years of steady onslaught triggered by the surgeon general’s report in 1964 was the Tobacco Institute able to state that: “We are now well organized in Albany with competent legislative assistance, and this year we got more help from other organized groups than we have had heretofore....” Nevertheless, the bill watchers lamented that the “persistence and competency of the adversaries in the New York Legislature make the situation there difficult and pressing.”

Carnes herself stated the day after the Arizona governor had signed the bill into law that: “‘You have no idea how hard it is to fight the large restaurant and tobacco industry lobbies. They have thousands of dollars for the smoking campaigns. I had only time.’” She quickly made it clear that she would be using more of that time to lobby the legislature in 1974 for smoking bans in food stores, hospitals, and doctors’ offices. By the fall of 1973 the Tobacco Institute began preparing to thwart any such legislative expansions in Arizona. On November 9, TI general counsel J. C. B. Ehringhaus and state activities vice president Welch wrote to Lorillard’s vice president for sales requesting “assistance on evolving problems in Arizona....” After mentioning that Turley and another senator had already publicly declared that they intended to introduce a bill in 1974 to cover places not included in what the TI regarded as the “relatively mild” 1973 law, and that proposed coverage might be comprehensive or “fairly limited with better prospects of getting it enacted,” Ehringhaus and Welch revealed that they had spoken to Cunningham and Weldon Hill, the operator of two wholesale tobacco firms in Arizona, who had “agreed to start now in organizing and developing a program of resistance to this prospective proposal.” In addition they had also contacted the aforementioned Dave Wynn, the lobbyist for the Hotel and Motel Association of Arizona, and Joe Banks, the executive secretary of the Arizona Restaurant Association, who both “agreed to

Bates No. 1002909020/79.


mobilize their forces and cooperate with the tobacco industry representatives in
an aggressive campaign to prevent further restrictive legislation in the state.” The
Tobacco Institute requested that Lorillard both deploy its sales representatives in
this battle and contact motor carrier organizations that transported and a
warehouse company that stored most of the cigarettes in Arizona to request that
they offer their services to Cunningham, who would be working with TI’s
“excellent lobbyist” in Arizona, Tom Sullivan. In spite of this meticulously
planned counter-lobbying, in 1976 R. J. Reynolds mendaciously charged, in the
wake of Carnes’s (partial) success in 1974, that: “Her techniques were laudable
in terms of lobbying efforts in that she HAD NO ORGANIZED OPPOSITION
to her crusade. For lack of that, she established a foothold in Arizona’s two
legislative houses.” Even for 1975, Reynolds, suppressing the cigarette
manufacturers’ overridingly important role, claimed that: “Concerned citizens and
local tobacco trade organizations were successful in defeating the restrictive
legislation.”

The enhanced efficacy of the tobacco industry lobby during the 1974 session
of the Arizona legislature can be gauged by comparing the scope of the additional
locations of restricted smoking in S.B. 1213 as introduced by Turley, Holsclaw,
and another senator and the actual expanded scope of covered places that
survived to enactment. The bill encompassed: public lecture halls; waiting
rooms, restrooms, lobbies or hallways of any health care institution; public
waiting rooms of health associated laboratories or facilities; any nonsmoking
patient’s room; public waiting rooms of any physician, dentist, psychologist,
physiotherapist, podiatrist, chiropractor, naturopath, optometrist, or optician;
school buildings; beauty parlors; passenger areas of any intrastate bus, airplane,
or railway coach; the public selling area of any food, drug, or department store;
dining areas in hotels, restaurants, cafes, cafeterias, and theater cafes; and public
waiting lines in buildings containing motor vehicle license offices. To be sure,
as under the 1973 law, smoking was not prohibited in any of these places if it was
confined to designated areas. As passed, S.B. 1213 included only lecture halls,
school buildings, public waiting rooms of the offices of physicians and other

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229 J. C. B. Ehringhaus and Frank Welch to Buss Bass (Nov. 9, 1973), Bates No. 85644118.
health professionals, as well as waiting rooms, rest rooms, lobbies, and hallways of health care institutions. Carnes justified coverage of doctors’ offices, hospitals, and food stores on the grounds that they “‘all are places we must go— we have no choice.’”234 Perversely, however, patient rooms, however, were excluded.235

The demise of the other smoke-free locations was sealed at a one-hour hearing before Holsclaw’s Senate Public Health and Welfare Committee on February 26,236 which was exposed to smoking by two pipe smokers and one cigarette smoker. The committee’s chopping up and watering down of the bill left Carnes “livid, ‘‘furious,’’” and “‘heartbroken,’’” especially at the “‘joking manner in which the subject was handled.’” Many of the additional locations that Turley had included in the bill were struck by close votes on motions by Republican Senator Hal Runyan, a cigarette smoker. These locations included nonsmoking patients’ rooms, beauty parlors, public selling areas of food, drug, or department stores, dining areas, passenger area of intrastate planes or railways, and waiting lines.237 Three days later the Senate passed the scaled-back version by a vote of 20 to 10.238 The significant number of smoking legislators—for example, several members of the House Health and Welfare Committee leaned back in their chairs and began smoking as soon as the bill’s supporters had left the hearing room239—insured that the House Judiciary Committee rejected an amendment by Democratic Representative Elwood Bradford to include the legislative floor and committee rooms as nosmoking areas, especially since even those who favored such inclusion recognized that it would kill the bill.240 During

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239 “No Smoking’ Signs to Cost Up to $2.50,” AR, Apr. 4, 1974, Bates No. TCAL0005256.
debate in the House Committee of the Whole Bradford offered an amendment to segregate smokers in certain areas of the legislative chambers and committee rooms. Surrounded at his chamber desk by several of the House’s heaviest smokers, Bradford observed that nonsmoking representatives “obviously suffered sitting next to those who smoke.” Its defeat on a “surprisingly close” 24 to 26 vote was, ironically, made possible by many of the measure’s strongest supporters, who feared that it would be a bill killer. On final passage S.B. 1213 secured an overwhelming majority of 47 to 11.

At the Tobacco Institute’s annual meeting in January 1975, President Kornegay observed that during the previous year’s state legislative sessions his organization, “with limited resources,” had been “remarkably successful, or lucky, or both” in handling about 100 bills (in addition to several times that number on the local level). Nevertheless, not only did the tobacco industry not always win, it lost “sometimes without even knowing that a measure was being considered,” although he hoped that this “knowledge gap” would be narrowed in the future. Without mentioning Arizona, Kornegay asserted that where TI was involved, its “participation made a difference in the sense that “even when a bill was enacted, it always emerged greatly watered-down. The opposition always received less than they demanded.” The reason for the oligopoly’s barrage of efforts to thwart the passage of additional restrictive legislation was set forth in a simplified example by Reynolds director of field sales: if such laws caused all 56 million smokers to smoke just one fewer cigarette per day, the total annualized sales loss would be $449 million.

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244 *Journal of the House of Representatives: Thirty-First Legislature Second Regular Session of the State of Arizona: 1974*, at 715 (Apr. 23). On a vote of 16 to 11 the Senate then passed the bill after agreeing to Turley’s motion to concur in the House amendment that had watered down the signage provision, which had originally required posting nonsmoking signs in all nonsmoking areas, but now required signs only in smoking areas. *Journal of the Senate: Thirty-First Legislature Second Regular Session of the State of Arizona: 1974*, at 454 (Apr. 26).

245 Horace Kornegay, Annual Meeting at 7, 8 (Jan. 30, 1975), Bates No. TIMN0164824/30/31.

By 1975, resistance organized by the tobacco industry thwarted further legislative action in Arizona at a time when, according to Carnes’s count, only 16 of 60 House members and six of 30 senators smoked. Turley’s vehicle in 1975, S.B. 1101 (which was co-sponsored by six senators and 14 representatives), added the public selling area of any food or drug store and the dining area in any hotel, restaurant, cafe, cafeteria, or theater cafe to the list of covered places. The bill became a symbol for the increasing disarray in which the cigarette oligopolists found themselves. President Kornegay’s summary statement to TI’s executive committee in March about the “extremely well organized anti-smoking activities” on the state legislative level vastly understated the panicky mood that was enveloping the company executives. In a memorandum to the file the next day, Arthur Stevens, Lorillard’s general counsel, described the “sense of urgency” that existed “because the situation has already become extreme”:

The most important matter considered at the meeting relates to the current epidemic-like increase in nationwide state and local smoking prohibitions. The level of activity has already passed the point where the Tobacco Institute staff is physically able to act or respond. We are desperately behind and are losing the battle—both with respect to new bills and ordinances, and also as regards strengthening amendments to existing legislation. (For example, see the attached Arizona bill.)

Stevens attached a statement of the problem by Ehringhaus and TI vice president William Kloepfer, Jr., who highlighted the proliferating “[s]ocial ostracism of smokers” effected by governmental action all over the country and the successful identification of smokers as “[s]ocial menaces” by “[s]elf-appointed spokesmen for the ‘nonsmoking majority,’ backed by well-financed health organizations.” In contrast, the Tobacco Institute, the “only defense and the only organized opposition to this drive,” was unable to “cope with the growing public acceptance of and agreement with the notion that smoking harms the nonsmoker.” Their only legislative recommendation was the articulation by the Institute of a

249 Tobacco Institute, Minutes of the Fifty-Sixth Meeting of the Executive Committee at 3 (Mar. 13, 1975), Bates No. LG6508408/10.
“‘fall-back’ position” of providing for separate areas for smokers and nonsmokers in some public facilities and no smoking in poorly ventilated areas. But even in extremis this tentative compromise manifestly went against the grain of the industry’s inveterate take-no-prisoners’ style: “The Institute staff is aware that this is not without risk, in the sense that it could lead to passage of ‘foot-in-the door’ legislation subject to subsequent strengthening. For this reason, utmost caution would be observed.”

That Turley, Carnes, and the anti-smoking movement were “ecstatic” that the Senate Government Committee recommended that S.B. 1101 pass but with an amendment sharply curtailing coverage of restaurants and cafes may merely have been a function of Turley’s tactic of pushing for more than was achievable in order to be able to agree to a compromise that embodied the provisions for which he had really been aiming. With regard to this particular iteration of the developing law, however, Turley seemed to be adopting an end-of-history view: “I think this may be about as far as we can go on this.... Pretty soon, people are going to fight back.” And the press unpacked “people” to mean cigarette smokers who had “docilely acceded each year to the smoke-haters’ moves to expand the places where smoking is prohibited.” Despite the account that Carnes gave the committee of a party that she and her husband had attended in a smoke-filled restaurant the fumes from which had given her husband a heart attack, coverage of eating places unraveled when several committee members and the cigarette oligopoly’s lobbyist, Ernest Hoffman—ostensibly representing local tobacco wholesalers—argued that the bill might cause enforcement problems, which Hoffman hyperbolically portrayed this way: “You’re going to have to create a department of enforcement which may be about as big as the Department of Public Safety,” especially since the existing law was not being enforced. (In contrast, Carnes maintained that the law had never been designed to facilitate prosecution, but rather was a form of “long-term public education” that gave

254 Telephone interview with Stan Turley, Mesa, AZ (Jan. 24, 2009).
nonsmokers “‘courage to tell off other people who are smoking.’”) Oddly, Hoffman claimed that he had not run an “aggressive campaign to derail” S.B. 1101 because “‘it’s kind of a motherhood bill, it’s tough to argue against it.’” The amendment entailed giving restaurant and cafe owners the choice of (without requiring) setting aside certain areas for nonsmokers which, if posted “no smoking,” would have the force of law. If the original restaurant provision was amended because members deemed it “too severe,” the department, food, and drug store restriction encountered no such obstruction after the spokesman for the Arizona Retailers Association, interestingly focused on cigarettes’ destructiveness of non-animate objects, stated that it “wouldn’t object to being included because of burned carpeting and merchandise.”

On April 1 the Senate passed S.B. 1101 by a vote of 18 to 12, with seven Democrats and five Republicans opposed, but the bill’s passage in the House was less certain from the outset and soon enough its planned death became certain. By the latter part of May the Republican chairs of the House Commerce Committee and Health Committee, James Skelly, a heavy cigarette smoker, and nonsmoking Diane McCarthy, respectively, insisted that “‘you can’t legislate courtesy by enacting no-smoking bills’” and made it clear that the bill had little chance of passage. Indeed, McCarthy, who told the press that she believed that she had the votes to kill the bill in her committee, added that it was “‘extremely doubtful’” that a public hearing would take place. Such legislators and “tobacco industry lobbyists” argued that the successful antismoking campaigns had not only infringed on individual rights, but diminished the state’s cigarette tax revenues. In contrast, the charge made by some of the bill’s supporters that the House Republican leaders had ordered the chairs to “squelch” S. B. 1101 “quietly” came in the wake of the cancellation of the Health Committee’s public hearing on one day’s notice, but also, and more importantly, was based on the fact that the tobacco industry had contributed $1,700 to the election campaigns of 10 of the most influential House Republicans (and one Democrat in addition to

261“Committee Adds Stores to No-Smoking Ordinance,” AR, Mar. 20 [?], 1975, Bates No. TCAL0005246.
$1,385 to seven Senate Republicans and two Democrats). The contributions to nine of the House members were officially made by Earl Cunningham, the industry’s lobbyist in 1974. To be sure, such funding did not guarantee pro-industry votes: in 1975, half of the Senate Republicans who took money nevertheless voted for S.B. 1101, including Turley himself, who received $150.\textsuperscript{264}

In Turley’s case, he accepted the contribution because he never turned down money from any source (except the John Birch Society); as to what would have motivated the cigarette companies to help finance the reelection of their greatest legislative thorn in Arizona, Turley later explained that he had been friends with Cunningham and in general had liked lobbyists.\textsuperscript{265}

On May 26, Mike Hendley, the president of the Tobacco, Candy Wholesalers Association of Arizona, Hoffman’s ostensible client, issued a press release, much of which the Phoenix Gazette published in the guise of an article, albeit one that contained virtually none of the paper’s own words, let alone the slightest hint of criticism or even a question. The release asserted that S.B. 1101 was emblematic of the situation of the day in which one group, bereft of “good scientific evidence,” was seeking to “make illegal a wide spread [sic] and long-standing social practice of another group of people they find annoying.” Asserting that the tobacco industry could “live with” the existing Arizona laws (which, astonishingly, the unpublished press release called “reasonable”), Hendley charged that the 1975 bill brought on a “whole new dimension” revealing that the Arizona nonsmoking movement’s real mission was not to protect the nonsmoker from the smoker, but the latter from himself. Drifting off into rhetoric redolent of canned Tobacco Institute material, he insisted that further restrictions “could ultimately negate all our freedoms.” Then, finally focusing on the immediate threat to the industry’s profitability, Hendley argued that the anti-smoking bills enacted had “already accomplished their purpose” in the sense that “Arizona leads all States in the decline of packages sold of cigarettes. For the first nine months of the...1974-75 fiscal year, some six million less packs have been sold than the previous year.” Whereas in the country as a whole sales had risen by 3 percent, Arizona recorded the greatest decline (3 percent). Finally, seeking to persuade both nonsmokers and legislators that they were beneficiaries of the significant contribution that tobacco taxes made to financing the state government, he urged them to “give clear thought to where will the monies come

\textsuperscript{264}Steven Tragash, “Antismoking Bill Expected to Die in House Panels,” AR, May 25, 1975, Bates No. TCAL0005239/40.

\textsuperscript{265}Telephone interview with Stan Turley, Mesa, AZ (Feb. 4, 2009). Given the low cost of election campaigns at the time (he spent only $1,300 on his first and often ran unopposed), Turley stated that even $150 was a significant contribution.
from if the tobacco industry were not in Arizona.”

In the event, the House committee chairs never did hold hearings—McCarthy insisted that “private enterprise” could deal with the smoking issue, whereas Carnes pointed out that business owners were afraid to ban smoking privately lest they lose customers—and thus succeeded in killing the bill. Hoffman self-congratutorily hailed S.B. 1101’s death a “significant victory,” especially since it had been considered “a sure winner...and was done by the anti-tobacco forces to make Arizona once again the ‘model anti-smoking law’ State.” He nevertheless admonished tobacco interests not to rest on their laurels merely because they had gotten through one session “unscathed”: more bills would be introduced in 1976—a prediction with which Turley definitely agreed. And Carnes went a step further, confidently assuring the world that the public would continue to insist on the expansion of coverage of the anti-public smoking law, which would eventually be legislatively ratified.

The struggle over regulation did not even wait for the next legislative session: instead, the scene shifted to Tucson, where by August anti-smokers (and at least one council member and the mayor) were attempting to expand the city’s May 1972 ordinance, which banned smoking in public theaters, movie houses, and various auditoriums, to include department stores and sections of all eating

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266 Tobacco, Candy Wholesalers Association of Arizona, “Smoking Bill Infringes on Basic Rights of Individuals” (May 26, 1975), Bates No. 500011146/7-8; “Crusade Against Tobacco Claimed,” PG, May 26, 1975, Bates No. TCAL0005238. Hendley claimed that the taxes amounted to about $60 million, but this sum included $18.6 million in federal excise taxes. A separate memorandum that appears to have been written in the name of the same organization made clear that only $38 million of those taxes “stayed in Arizona” and stated that “S.B. 1101 seeks to discourage an economic activity that has paid over $400 million to Arizona governments in the past ten years” and constituted the fifth largest item in Arizona’s general fund revenue. Memorandum on Senate Bill 1101 (1975), Bates No. 500011128/29-30.


270 Ernest Hoffman to Tobacco Interests, Anti-Smoking Bill in Arizona Fails (June 11, 1975), Bates No. 501791670/2.

places. In September Hoffman reported to Ehringhaus at the Tobacco Institute that he was “deeply involved again...‘holding the fort’” at the Tucson city council before which the expanded ordinance was being raised four times a month. He emphasized that only by a tenuous 4 to 3 majority were the pro-tobacco forces able to keep tabling motions; if one vote switched, “we are in trouble. A public hearing would absolutely create a new ordinance, as I understand the Carnes’ [sic] forces are prepared to take over City Hall if that matter comes before the Council.” Against the background of this democratic groundswell for further government intervention, the only suggestion that Hoffman had for his customer was spending money on an ad campaign “to create the proper pressure on the Council.” In order to apply the proper pressure on the cigarette oligopoly, he observed that the “significance of losing here is that it would set a precedence [sic] for Phoenix to follow the same course.” Having prepared the ground, he then made an indirect pitch to renegotiate his contract: “It frankly has turned out to be a full-time effort on our part and certainly I did not bargain for this when I came aboard the tobacco band wagon.”

Off this wagon Hoffman had definitely not fallen, as a memo he directed to Dowdell at R. J. Reynolds later in 1975 revealed. In commenting on an enclosed article from the previous day’s New York Times (“Warning: Cigarette Smoking May Be Hazardous to Your Social Standing”) he presented himself as a true believer, whom such anti-tobacco press accounts “frankly nauseate....” Expressing more outrage than his interlocutor at the country’s biggest cigarette manufacturer, he took the opportunity to “expouse [sic] my strong feelings again—that is, the TOBACCO INDUSTRY IS LOSING BY DEFAULT.” In seeming disbelief he insisted that: “Surely with a joint industry of some $16 billion, there must be some way we can get back to the general public with our message. ... Our national efforts are a drop in the bucket compared to what we should be doing in the industry.” And if Dowdell failed to grasp his meaning, Hoffman ominously warned that unless “our people...come up with some type” of counter-campaign, he expected that what they were witnessing “may be the beginning of the end for the industry.”

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274Ernest Hoffman to J. C. B. Ehringhaus (Sept. 11, 1975), Bates No. 500011132/3.
275Ernie Hoffman to James Dowdell (Nov. 12, 1975), Bates No. 500011119.
Two weeks later, Hendley, the president of the state tobacco wholesalers association, sought to reinforce Hoffman’s plea for more “financial assistance” by opening his letter to Dowdell, the director of R. J. Reynolds’ state legislative relations, with the bald exclamation: “We’re in trouble in Arizona!” While differing from Hoffman in stating that he had expected a decline in the anti-smoking movement after the end of the legislative session, he sounded the alarm that “we are on the verge of having our allies crumble under the pressure of Mrs. Carnes and A.S.H.”276 (For his troubles, Hendley received fulsome praise a few months later for defeating S.B. 1101 from Reynolds’ director of field sales, who told his association’s annual convention that without “Hendley and a few other men of courage like him” and if the association had not hired Hoffman as its lobbyist, “there is no question that you would have even more discriminatory, more restrictive laws...today” and “the segregation of smokers from non-smokers would have been more complete...in a land that was founded on the principle that men could go where they wanted to go when they wanted to.”)277

By mid-January 1976 the press reported that the Tucson city council was moving toward adoption of an ordinance that would ban smoking in food, drug, and department stores with 15 or more employees (supposedly because long check-out lines and crowding made smoking more offensive there) and in 70 percent of dining areas in restaurants, cafes, cafeterias, and hotels. Penalties for violations would be set at a maximum of $300 and/or six months in jail.278 Despite the fact that the ordinance proposed by the “zealots” was “in essence...the same one defeated last year at the State Legislature only with more severity,” Hoffman could hardly contain himself when he reported to the Tobacco Wholesalers Association that, although he had been trying to convince the restaurants, innkeepers, and liquor associations since June 1975 that if certain city councilmen were defeated, the associations would be “in trouble”—and in fact those defeats wound up giving anti-smokers a 4 to 3 majority—when he addressed them a few days before the city council vote, “for the first time, they are alarmed!” Hoffmann’s pessimism was reinforced by the lack of opposition to the ordinance by the grocery or department store owners.279

276Mike Hendley to James Dowdell (Sept. 23, 1975), Bates No. 500011131.
279Ernest Hoffman to Tobacco, Candy Wholesalers Association of Arizona, Subject:
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

Even before the council voted, R. J. Reynolds waxed indignant over the “efforts to enforce a broader ban on smoking in Tucson [which] went...far beyond anything undertaken in our country, where freedom and human rights are the cornerstone of our government.” Even in the area of tactics, the master of dirty tricks was “appalled to learn that ASH wasn’t content in hauling hundreds of senior citizens, in advanced stages of all the diseases that afflict the aged, to pack the halls when the city council met. As if that wasn’t deplorable enough, they established picket lines around Ernie Hoffman’s home and subjected his wife and daughters to an unheard-of degree of harassment and abuse. I ask you and the rest of the citizens of Arizona—was this Arizona in 1975 or Germany in 1937?”

In the meantime, Turley had introduced yet another bill (S.B. 1149, co-sponsored by four other senators and five representatives). To the Senate Government Committee hearing on February 25, Hoffman did not come to praise Arizona for holding “the distinction of leading the states in the decline in smoking,” but rather to warn senators about the millions of dollars in cigarette tax revenue that the state stood to lose if smoking continued to decline. In the event, the committee recommended the bill’s passage with an amendment striking coverage of eating places but leaving intact the smoking ban in selling areas of department, grocery, and drug stores. The timidity of Carnes’ type of advocacy was nicely encapsulated by her response that the “drastic drop” of two million dollars in state tobacco tax revenue assailed by cigarette lobbyists was “not because [sic] of the no-smoking law, but because of the education of a non-informed public, aware of the dangers of smoking.”

Her unwillingness to give credence to the oligopoly’s empirically eminently plausible gloomy predictions of reductions in the number of cigarettes smoked brought about by governmentally imposed restrictions and bans on public places available for smoking, let alone to admit that that outcome was, together with protecting non-smokers from exposure to secondhand smoke, one of the anti-smoking

Anti-Smoking Bill Tucson City Council (Jan. 19, 1976), Bates No. 501791681.


movement’s driving forces, underscored how circumscribed its goals were precisely because it tacitly accepted smokers’ alleged freedom and autonomy and cigarette manufacturers’ right to continue to profit handsomely from hawking uniquely lethal commodities.

On the Senate floor, Republican Stephen Davis, a smoker, sought to subvert the law in its entirety by offering an amendment to eliminate its mandatory character by eliminating all existing designated no-smoking areas and, instead, conferring legal backing on any no-smoking regime that any public or private manager or owner voluntarily created. He purported to have chosen this approach to offer greater flexibility because anti-smoking advocates kept requesting the addition of new banned locations, but he also hyperbolically claimed that it was also “‘the only valid way to go if the legislature wants to continue the right to private ownership.’” Turley, who argued that the proposal would merely create confusion and more problems than it would solve, addressed Davis’s claim by stating that he would not introduce more bills in future sessions seeking additional smoke-free locations if S.B. 1149 were enacted, but vowed to return to continue his campaign with greater vigor if it failed since “[s]ome people are unable to go to public places where they should be able to go because of heavy smoking.” The Senate’s defeat of Davis’s amendment by a vote of 9 to 19 signaled the vote on final passage: the next day the Senate once again passed S.B. 1149 by a vote of 18 to 10 (with seven Democrats casting Nays).

The bond between Davis and R. J. Reynolds was tight enough that a few months later Dowdell planned for him to meet corporate CEO William Hobbs and other officials during a trip to North Carolina. Although Davis’s own scheduling initially prevented the meeting from taking place, Dowdell informed Hoffman that he was hoping Davis could get back to Winston-Salem “so that some of our people may have an opportunity to let him know how much we all appreciate his outstanding support in the Arizona Senate.” Dowdell did, however, have an opportunity to speak to Davis, who reported, as Dowdell approvingly told

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Hoffman, that “between the two of you you came very close to getting your permissive legislation through. Maybe it’s something you should consider introducing early in the next session. The very thought of repealing the restrictive smoking laws now on the books and leaving it up to the proprietor of an establishment to decide whether or not smoking would be permitted would, I believe, be the strongest possible deterrent to any additional legislation extending your present no-smoking laws.” Otherwise he lamented that he was unable to give Hoffman any further information about new efforts to resist passage of additional anti-smoking legislation. Emblematic of the difficulties that the Tobacco Institute was encountering was that it was not even able to “line up some qualified scientists who can speak with conviction on the passive smoking issue.”

Anti-public-smoking forces were, in the meantime, coordinating progress toward a stricter ordinance in Tucson with developments in the legislature. Holsclaw, no longer a state senator but now a member of Citizens Concerned About Smoking and Health, announced that the group had decided to ask the city council to eliminate restaurants from the proposed ordinance’s list of additional regulated places. Instead, CCASH, which had scaled back its demands in order to conform the scope of the ordinance to that of the now reduced reach of S.B. 1149, agreed to ask restaurant owners voluntarily to set aside no-smoking sections. In turn, the Southern Arizona Restaurant Association’s executive secretary proffered his “solemn promise” that every member would be asked to provide such areas. Whether anti-smokers’ willingness to acquiesce in the tobacco industry’s free enterprise circumvention of the problem of smoke exposure was a reaction to the association’s survey of restaurant customers, which revealed that fewer than half favored no-smoking sections, is unclear.

Unfazed by the Tucson Chamber of Commerce’s claims of a “constitutional right” of a business owner to determine whether to permit smoking in his establishment and of a person to smoke during his daily shopping and eating, 291

289 J. S. Dowdell to Ernest Hoffman (July 15, 1976), Bates No. 500003859.
in March a 5 to 2 majority of the Tucson city council did vote to ban smoking in
grocery, drug, and department stores, but defeated coverage of eating places and
reduced the maximum fine from $300 to $100.\footnote{292}

Almost seven weeks after the Senate had passed S.B. 1149, the House
Government Operations Committee “overwhelmingly” recommended passage of
S.B. 1149 in spite of the tobacco industry’s strong opposition. Turley’s argument
that “[o]ur right to breathe fresh air is superior to the right of smokers to pollute
the air”
apparently prevailed over Hoffman’s advocacy of “voluntary
compliance” in stores.\footnote{293} Hoffman, the only witness to oppose the bill, also
contradicted Carnes’s assertion that cigarette consumption in Arizona had
continued to rise since enactment of the original law in 1973: while tobacco tax
revenues may have risen as a result of an increase in the tax rate, consumption
had dropped by 4.2 percent.\footnote{294}

The bill, which had received the backing of the state-level cancer, lung, heart,
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

and medical associations, then stalled in the House Health Committee, whose chair, Diane McCarthy, was expected, once again, to kill it, but this time she worked her legislative euthanasia by assigning it to a subcommittee to study how much it would cost store owners to post no-smoking signs. At a full committee hearing on April 29, the almost 80 tobacco industry supporters in attendance had, Hoffman, boasted, “a marked effect on the Health Committee.” However, as Hoffman also well knew, their presence was not a prerequisite for favorable action since, “unbeknownst” to the anti-smoking forces—to whom McCarthy had proclaimed that, after the subcommittee had made a few needed changes, S.B. 1149 would be returned to the full committee’s agenda—she in fact, as a political commentator put it, “sen[t] the bill to the chain-smoking buddy of the tobacco lobbyist, who has been fighting the legislation tooth and nail”: it turned out that Hoffman was not only the “close personal friend” of Republican subcommittee chair Tom Goodwin, but also his campaign manager. It was, therefore, a risible understatement for Hoffman to report to his clients that “[i]n its current subcommittee it is highly unlikely that it [S.B. 1149] will be reported out…. Moreover, he knew that he could rely on McCarthy—whose hobby horse was the threat to freedom posed by state and federal regulatory agencies, especially the Environmental Protection Agency, and who admonished corporations to “do a better job of telling citizens of the benefits of the free market system as it relates to individual welfare and freedom”—to deny that she was “‘sandbagging’” S.B. 1149 “by shuttling it off to a hostile subcommittee,” though she openly admitted that she regarded the bill as unnecessary. (The Arizona Republican Party’s prioritizing the tobacco lobby above the state’s nonsmoking majority in general and McCarthy’s “complete disregard for the health and welfare of Arizona citizens” in particular prompted Carnes’s husband, a longtime contributor to the national, state, and local Republican Party, to become “so disgusted with the

297 Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.
299 Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.
actions of leading Republicans...in Arizona that I have decided to withdraw my financial support for the G.O.P. everywhere until there is a change in their attitude in the state."

To be sure, the cigarette oligopoly’s lobbyist also knew that Goodwin and McCarthy’s unwavering allegiance to his client did not insure victory because: “The danger now lies in a floor amendment to another bill! As long as the Arizona statute Title 36 [public health and safety] is being debated...(and there are 36 bills with that title) we are vulnerable to a surprise amendment from either the Senate or House and we can expect such a move before” the legislature adjourned in early June. To his paymasters Hoffman did not conceal the fact that the real danger was majority rule: “The support for the bill is enough to pass in either House.”

Unsurprisingly, on June 4 Goodwin’s subcommittee unanimously voted to give a “do not pass” recommendation to the bill, endorsing instead a “voluntary” program of posting nosmoking signs. Dr. Glenn Friedman, a pediatrician, pointed out at the hearing that such a regime would not work because, while it might be voluntary for smokers, it was not for nonsmokers. He was also forced to instruct the chain-smoking subcommittee chairman, who pontificated that everyone had the right to do whatever he wanted with his own body, that nonsmokers lacked the complete control over their own health that smokers possessed. Carnes did not soften these “sharp exchanges” by testifying that: “Smokers have no idea of what they do to nonsmokers. God help them for they know not what they do.” As the world would learn later, in the 1970s neither Carnes nor science knew either.

The danger that Hoffman had foreseen emerged on June 10, when the Senate, by a vote of 17 to 7, adopted Turley’s floor amendment to a House bill (on hospital districts) that was almost identical to S.B. 1149. Turley motivated his action on the grounds that, having been “kicked around in the House...he wanted the amendment ‘to send it back to them in a form they will understand.’” Davis, by now virtually the senator from Winston-Salem and purportedly angered by the move, asked Turley why he had not attached a $250,000 appropriation to pay for no-smoking signs in stores. In reaction to Turley’s dismissal of his question as fallacious, Davis, doubtless racking up further bonus points with R. J. Reynolds, upbraided S.B. 1149’s backers for their “outrageous behavior” and slammed his...

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302 Ernest Hoffman to Members Association, Subject: Tobacco Legislation (May 6, 1976), Bates No. 501791683.  
Non-Smokers’ Aversion, Science, and Legislation Confront an Entrenched Oligopoly

In June, having insured the demise of S.B. 1149,305 anti-anti-smoking Republicans, including House Majority Leader Barton Barr,306 joined with the Arizona Retailers Association and the Retail Grocers Association of Arizona to displace legislative intervention altogether by implementing the cigarette companies’ “voluntary program” the basis of which was “simple courtesy.”307 The retailers’ groups rejected the bill as “an attempt to mandate by law actions that properly fall under the purview of management.... In effect management was to be deprived of its right to manage.”308 The “businessmen’s response to legislation that is both unnecessary and unenforceable”—the country’s first of its kind statewide voluntary program—was a sign that “says simply, ‘As a courtesy to others, thank you for not smoking.’”309 By 1977, McCarthy, who as chair of the House Health Committee held a hearing to conclude that the program was working, asserted that: “‘You can’t legislate courtesy by enacting a no smoking bill’” because the “‘wide resentment’ would foster ‘delight in breaking it’,” whereas the “‘volunteer [sic] program appeals to people’s sense of manners.’”310

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308 [No Author], Background Information on Voluntary “No Smoking” Program (n.d. [rec’d June 24, [1976]), Bates No. 501791686. This document stated that it had been agreed at a recent meeting of the two retailers’ organizations, Arizona ASH, and the House of Representatives that “industry would voluntarily undertake a program to discourage smoking in the retail stores in question.” The retailers’ aforementioned press release did not mention ASH involvement.


310 “In Arizona Capital: Lawmakers Balk at Smoking Bans,” Tobacco Observer, Feb. 1977, at 3, Bates No. 1000283344/6. Ironically, McCarthy and Turley agreed that “courtesy” was the key concept; what separated them was Turley’s view that it was “unfortunate ‘we have to legislate matters of courtesy’” (because the department stores were not voluntarily posting nosmoking signs). Steven Tragash, “Panel Is Appointed to
Two days after the November 1976 election Hoffman jubilantly wrote to Dowdell that: “It certainly paid off working on the political scene as we did this past summer and fall. We swept many liberal-type politicians out of office and I can see a more conservative approach to State government in the next two years. The liberal movement, without exception, were [sic] the ones sponsoring the anti-tobacco legislation in Arizona.” In fact, no progress was made in the Arizona legislature in restricting public smoking for many years (although numerous local ordinances were adopted). On a letter he had received from Hoffman in 1977 Dowdell handwrote an annotation that summed up the reversal that concerted lobbying had effectuated: “Arizona is where it started. Thanks to Hoffman, bills to further restrict smoking have been defeated in the past two legislative sessions. The battle now is in Tucson, and the ‘opinion poll’ attached is being conducted there by Ernie, who used the same tactics to defeat a Phoenix ordinance last year.” The next year brought another victory for the cigarette oligopoly over Turley’s bill that would have extended coverage to grocery, drug, and department stores and any waiting line in which people were in close contact. Turley admitted that he was “not under any illusions it will be easy to pass”; he thought that he had a “fair chance in the Senate,” but he doubted whether it had “much chance in the House where two committee chairmen have killed past attempts to kill the law.” The bill went nowhere, and Turley stopped introducing anti-smoking bills both because he began focusing on other issues and because other legislators took up the slack. No substantive expansion of coverage occurred

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311 Ernest Hoffman to J. S. Dowdell (Nov. 4, 1976), Bates No. 500003827. Hoffman did add: “Now we must proceed further in trying to come up with another campaign for four candidates to replace those under recall for our [Tucson] City Council.”


313 JSD to FHC (Sept. 26, [1977]), on Ernest Hoffman to James Dowdell (Sept. 21, 1977), Bates No. 500000860.

314 S.B. 1110 (Jan. 18, 1978, by Turley). In 1977 a bill was introduced in the House to prohibit smoking in certain areas of state buildings, which had six cosponsors in the House and 12 in the Senate including Turley, but it never made it out of committee (including the Health Committee). Journal of the House of Representatives: Thirty-Third Legislature First Regular Session of the State of Arizona: 1977, at 180, 1293 (Feb. 14) (H.B. 2218 (by Rallif et al.).

until 1991, when the law was applied to state buildings, and not until the passage of Proposition 201 in 2006 did Arizona reemerge in the forefront of statewide anti-public smoking legislation, although by the early 1990s localities with 90 percent of the state’s population had already adopted smoking control ordinances.

Regardless of later legislative stagnation in Arizona, by 1975, success there had prompted enactment of similar measures in at least 20 other states. Although most shared the timidity of the Arizona law—which by this time R.J. Reynolds Tobacco Company placed in the second tier of state laws (“Less Severe But Above Average Restrictions”)—in permitting huge exceptions that effectively maintained nonsmokers’ exposure to secondhand smoke, a very few went further in certain respects. For example, Massachusetts banned smoking in supermarkets outright, while Nevada uniquely permitted designation of smoking areas only “where it is possible to confine the smoke to such areas.”

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320 [James]. S. Dowdell, “Smoking Restrictions” at 3 (Nov. 15, 1976), Bates No. 500656976/8. For Dowdell’s authorship, see J. S. Dowdell to D. W. Grout et al. (Nov. 15, 1976), Bates No. 500656975. Dowdell was director of corporate affairs at R.J. Reynolds Tobacco Co.
322 1975 Nev. Stat. ch. 326, § 3.2(b) at 462. A 1975 Washington State Board of Health regulation did outright ban smoking in several public places such as museums, concert halls, theaters, and indoor sports arenas (in all of which smoking was permitted in physically separate lobbies), hallways and waiting rooms of health care facilities, office reception areas and waiting rooms of government buildings (except the state legislature), public areas of retail stores and financial institutions, classrooms and lecture halls of schools, colleges, and universities, and public meeting rooms (except in the state legislature). Wash. Adm. Code. § 248-152-030(3)-(9) (1975). To be sure, these regulations were not enforceable and had to “depend on the willingness of the general public to abide by its provisions....” WAC § 248-152-050 (1975).
The Battle over the New York City Ordinance

The Tobacco Institute represents our interests in opposing both state and local attempts to restrict smoking. [T]hey can...even provide expert medical and scientific witnesses to testify convincingly that there is little hazard to non-smokers.323

State legislatures were not the only bodies that intervened to restrict indoor smoke exposure. Inspired, perhaps, by the Model Ordinance Prohibiting Smoking in Public Places drafted by the National Institute of Municipal Law Officers,324 numerous cities and counties, including Arlington and Newton, Massachusetts, Duluth, Minnesota, Fort Lauderdale, St. Petersburg, and Dade County, Florida, and Culver City, Davis, Sacramento, Orange County, and San Diego, California passed nosmoking ordinances between 1973 and 1975.325

The highest profile campaign took place in New York City in 1974, when Dr. Lowell Bellin, the city health commissioner and chairman of the Board of Health, proposed ““apartheid of smokers,””326 not ““for the comfort of nonsmokers, but for their health.”327 The proposal prohibited smoking—except in smoking areas designated by the owner—in theaters, opera houses, concert halls, restaurants, hospitals, nursing homes, museums, libraries, lecture halls, or any other enclosed spaces in which 25 or more people gathered for social, political, recreational, or religious purposes.” Only elevators were off limits to the designation of smoking areas.328 However, the ““most dramatic”” impact of the proposed segregation of smokers and nonsmokers in various public places, which Bellin expected to trigger considerable opposition both from outside of and on the Board itself, was

323 W. R. Bauer [R. J. Reynolds Tobacco Co. director of field sales], (untitled speech in Arizona), Bates No. 500074962/72-3 (1976).
324 NIMLO Model Ordinance Service, Vol. 1, §§ 8-1901 to 8-1911 (1981). Unfortunately, this compilation failed to state the original date of publication.
327 “City May Segregate Smokers in Public,” NYT, Mar. 31, 1974 (1:5, 54:4-6).
328 Max Seigel, “City Smoker-Segregation Bill May Be Eased,” NYT, Apr. 19, 1974 (42); Resolution of the Board of Health of the Department of Health of the City of New York (1974), Bates No. HK01142062.
anticipated in restaurants. Nevertheless, Vincent Sardi, the celebrated Broadway restaurateur and nonsmoking president of the Restaurant League of New York, regarded the proposal as a good idea that would not pose a major problem for the industry.\textsuperscript{329}

At the end of 1972, William Kloepfer, Jr., a one-time press secretary to Vice President Richard Nixon and a senior vice president of and, since 1967, in charge since of the Tobacco Institute’s PR—\textsuperscript{330}—the sole product of the cigarette manufacturers’ disinformation and lobbying arm—wrote to Charles Wade, a Reynolds senior vice president, about some matters that Kloepfer believed the TI communications committee should discuss after the organization’s powerful executive committee had directed it “to come up with alternatives” to the “highvisibility ad series about smoking and health in tony magazines, on the ground it would kindle new regulatory efforts.” Kloepfer bluntly admitted that “[w]e’re very low on two major counts—scientific credibility, [sic] and the ability to generate news. Conversely, our adversaries are high on both.”\textsuperscript{331} A year later TI was manifestly seeking to raise both profiles in marshalling considerable resources in an effort to defeat the New York City measure, which was the subject of a public hearing on April 18, to which it dispatched several witnesses, including a physician, a pharmacologist, a chemist, and a lawyer, the burden of whose testimony was the lack of any evidence of the harmful effect of tobacco smoke exposure to nonsmokers.\textsuperscript{332} Interestingly, the account of the hearing in \textit{The New York Times} failed to mention them at all.\textsuperscript{333} Domingo Aviado, a pharmacology professor at the University of Pennsylvania, who made a career of being a highly paid cigarette company consultant,\textsuperscript{334} revealed his mercenary bias

\begin{itemize}
\item \textsuperscript{329}“City May Segregate Smokers in Public,” \textit{NYT}, Mar. 31, 1974 (1:5, 54:4-6).
\item \textsuperscript{330}Biographical Notes William Kloepfer Jr. Senior Vice President - Public Relations (1973), Bates No.521045014.
\item \textsuperscript{331}William Kloepfer, Jr. to Charles Wade (Dec. 29, 1972), Bates No. 500081660. This letter is in large part identical with another document, which appears to have been erroneously dated on the Legacy website because of an irrelevant handwritten date on the page. Points for Discussion (May 7, 1973), Bates No. 501470103.
\item \textsuperscript{332}Tobacco Institute, Before the New York City Board of Health in the Matter of a Proposed Resolution Amending Article 181 of the New York City Health Code (June 1974), Bates No. 03595255.
\item \textsuperscript{333}Max Seigel, “City Smoker-Segregation Bill May Be Eased,” \textit{NYT}, Apr. 19, 1974 (42).
\item \textsuperscript{334}A few months later, after Aviado had testified as the industry’s principal witness before the Health Board in the State of Washington, the TI president praised Aviado for having “done yeoman services for us. While we have every indication that he will

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by testifying, in an area remote from his expertise and without the slightest empirical evidence, that: “Since tobacco smoking first became a part of our lives, smokers and nonsmokers have co-existed with little, if any, friction, between them.” The industry’s arrogance was visibly on display in the testimony of William Shinn (of Shook, Hardy, and Bacon), one of its leading lawyers and Aviado’s handler, who allowed as: “While...there are those who would prefer to live in a non-smoking world, this prospect appears remote and impractical.”

Following the three-hour hearing, Bellin said that he was prepared to “soften” the measure, in particular with regard to its application to small restaurants, whose “valid economic concerns” prompted him to contemplate compromise: “And although the public health is paramount, we’ll try to see if we can meet both problems.” One possibility was increasing the coverage threshold from 25 to 50 persons. When the Board of Health considered the proposal a month later, it in fact unanimously approved in principle a provision merely requiring restaurants with 51 or more seats to set aside at least 20 percent of them for nonsmokers; at the same time it endorsed an absolute prohibition on smoking in supermarkets. In June the Board ultimately rejected segregated seating in restaurants altogether, but otherwise amended the Health Code largely in accordance with the previous version of the proposed resolution. Outvoted by the Board, Bellin conceded that “enforcement might be a problem,” but he hoped to “create a climate in which the smoker is uneasy” and to be able to rely on the public for help.
The Cigarette Manufacturers Are Made to See “the handwriting...on the wall”340—and Try to Erase It

No product has ever been so thoroughly assaulted from so many respected sources as has ours. Popular indoctrination against it is widespread and steadily reinforced.

... Our credibility is weak because our motive is assumed to be personal profit.341

From the early 1950s on the cigarette oligopolists had been preparing themselves for public disclosure of the fact that, as “Philip Morris and everyone else in the industry knew...cigarette smoke did contain cancer causing elements.”342 The manufacturers had even put forward the names of two of the ten members of the Surgeon General’s Advisory Committee on Smoking and Health343 which in 1964 published the report that produced the upheaval whose repercussions still reverberate in the twenty-first century. In sharp contrast, however, the companies were not only taken by surprise by the inexorably spreading nationwide rebellion against enforced exposure to their customers’ tobacco smoke, but even after top management had finally been persuaded by their somewhat more socially attuned subordinates and the Tobacco Institute to grasp and acknowledge the movement’s current and potential gravity, years passed before the industry was able to formulate and implement a coherent counter-strategy, albeit one that ultimately failed to thwart what became a worldwide science-based mass struggle against tobacco’s lethality. The following sections shed light on the initial stages of that evolving response.

R. J. Reynolds’ “Restrictive Smoking Activities Project”

Organized anti-tobacco forces in our country have begun a new national campaign to restrict smoking and cause a decrease in U.S. tobacco consumption. The objective of the new crusade is to convince the public that tobacco smoke is harmful to nonsmokers and,

341 [Tobacco Institute Communications Committee], “The Role of the The Tobacco Institute in Public Communications” at 1-2 (Dec. 29, 1972), Bates No. 500081670-1.
343 Richard Kluger, Ashes to Ashes 244-45 (1996).
therefore, laws should be enacted to prevent smoking in public.344

Among the cigarette manufacturing firms R. J. Reynolds Tobacco Company was especially aggressive in pushing early on for the industry to combat the anti-secondhand smoking movement. At the time and for many years Reynolds had held the largest domestic market share, which was not seized by Philip Morris until 1983.345 During the period under review (1970-82), the six largest producers accounted for 100 percent of sales, with Reynolds accounting for about one-third throughout and Philip Morris doubling its share from about one-sixth to one-third.346 During the summer of 1973, several of Reynolds’ marketing officials, having become especially concerned about the proliferation and success of anti-smoking initiatives, developed a plan to alert the company’s top executives to what they viewed as an alarming process and galvanize them and, through the Tobacco Institute, the other cigarette manufacturers, to intervene and roll that movement back. To be sure, higher management was not totally clueless, although it is unclear whether even these executives grasped the potential seriousness of the trend. For example, in mid-August, Charles B. Wade, Jr., Reynolds’ senior vice president, third highest ranking official, and “the house intellectual,”347 having seen many letters to the editor recently on “[p]assive smoking” in the Washington Post, suggested to TI Vice President William

344R. J. Reynolds Tobacco Co. to Our Customers (Jan. 30, 1974), Bates No. 500016597.

345On how Reynolds staved off losing its first-place position to Philip Morris for several years by means of “trade-loading,” which bulked up its apparent market share, but in fact merely simulated net sales, some of which constituted gross revenues that would be diminished by buy-backs of wholesalers’ unsold inventory, see Richard Kluger, Ashes to Ashes 515 (1996).

346In 1970 the oligopolists sold the following percentages of all cigarettes in the United States: Reynolds (31.8); American (19.3); Brown & Williamson (16.9); Philip Morris (16.8); Lorillard (8.7); Liggett (6.5); in 1982 the figures were: Reynolds (33.55); Philip Morris (32.85); Brown & Williamson (13.37); American (8.77); Lorillard (8.55); Liggett (3.17). In 1983 Philip Morris finally overtook Reynolds: their shares were 34.4 and 31.5, respectively. Irwin Kellner, “The American Cigarette Industry: A Reexamination” tab. XVII at 90 (Ph.D. diss., New School for Social Research, 1973), Bates No. 00137423/528; R. J. Reynolds Tobacco Monthly Performance Analysis—Dec. 1982 (Feb. 11, 1983), Bates No. 501261717/22; Overview of U.S. Cigarette Market (Mar. 1984), Bates No. 2500002253/8. By the first decade of the twenty-first century, the industry trended toward duopoly with Philip Morris far outdistancing Reynolds, even after the latter’s acquisition of American and Brown & Williamson.

Kloepfer: “Wouldn’t it be a good idea for us to flood the letters to the editor to such an extent that the paper would tire of the matter and stop publishing on either side! That is the only way I can think of to give less exposure to our adversaries.”

A key figure in the early counter-movement at Reynolds was Clifford Perry, Jr., of the marketing research department, who by August 1973 was working on the Restrictive Smoking Activities Project (MRD # 73-0221). On August 15, he and R. A. Blevins, the director of marketing planning, and James Dowdell, the company’s PR head, visited the Tobacco Institute with the “purpose” of emphasizing the company’s “concern over recent activities to restrict cigarette smoking” as well as of using information compiled by TI to fashion a chronological history of such activities since the (1964) surgeon general’s report; determine how their nature and frequency had changed; determine the reasons that anti-smokers had used to affect restrictions in various situations and how these activities were initiated; and (the literal bottom line) “[d]etermine whether or not such restrictive activities have adversely affected [sic] sales or the social acceptance of smoking.” The urgent motivation for their pilgrimage to a repository of source materials was the feeling that “restrictions proposed by anti-smoking forces as a result of the ‘passive smoking’ issue could represent the most serious health threat to the cigarette industry since the 1964 Surgeon General’s Report.” The new attack’s obviously heightened significance was that “both smokers and non-smokers are now directly involved....” Moreover, a review of the Institute’s files reinforced the Reynolds employees’ concerns based on the considerable headstart that their opponents had achieved: whereas anti-smoking groups had been able to secure “extensive” publicity for this issue in the form of editorials, letters, and feature articles in almost every state in support of their position and (more importantly) to propose and “in numerous cases” to enact restrictions for “almost every type of public place,” “arguments supporting the tobacco industry’s position have appeared infrequently and are usually deemed ‘self-serving.”

While Perry and his cohorts were launching their project, Reynolds and the

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350 Clifford W. Perry, Jr. to R. A. Blevins, Jr., Re: Trip Report -- Tobacco Institute (Cigarette Smoking Restrictions) (MRD # 73-0221) (Aug. 27, 1973), Bates No. 501098310. It is unclear why this second report with somewhat different contents was written a week later.
Tobacco Institute were expressing increasing perplexity and dismay about the “real set of problems” posed by smoking restrictions established by local governments, whose agendas were “usually...buried in the press,” thus giving the cigarette companies little time to intervene if they even found out about the proposals. Dowdell and Frank Welch, TI vice president for state activities, had agreed in August that distributors and company sales representatives might be “two logical sources of information,” but Welch doubted the former’s dependability. However, if Reynolds encouraged its sales people to provide “reasonably full coverage,” the Institute would “try to get the other companies to do likewise.”

(In early November Reynolds did inform its field sales representatives of the “obnoxious and unwarranted smoking ban ordinances” that anti-smoking organizations, supported by local chapters of anti-tobacco private health associations, were seeking to enact, and solicited their help in ferreting out advance information in newspapers and newscasts of city councils’ consideration of such measures.)

Although Dowdell believed that the industry should inform local governments (such as Hollywood, Florida) that had passed restrictive ordinances that they were “predicated upon an absolutely false assumption” and that they should be modified to protect smokers’ and non-smokers’ rights, he despaired that “I haven’t any good ideas how at this late date the industry can mount an effective campaign to prevent the spread of smoking restrictions at the local level.” Referring to a strategy that the industry (and especially Philip Morris) in the 1970s and 1980s would successfully implement far beyond his imagination, Dowdell lamented that: “There is no way I can see to mobilize support for preemptive action by any of the State Legislative bodies. ... It doesn’t help much to defeat the issue at the state level only to find local ordinances being enacted that accomplish the same objective.” In the absence of such state-level action barring local governments from restricting smoking in public places, Dowdell saw “no alternative except to establish some form of organization that would provide the Institute with advance information on actions proposed across the nation at the local government level to discriminate against smokers. If such an early warning system could be established, and if it worked properly, the industry could have a representative present when smoking restriction laws were proposed to present the other side of the issue” (though in the case of Hollywood, even Dowdell was constrained to admit that it “could be difficult to get a sympathetic hearing” from

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352 R. J. Reynolds Tobacco Company to All Field Sales Representatives (Nov. 2, 1973), Bates No. 500011113.
the mayor).  

Unmentioned in this context was the logistically far more significant fact that even if the companies were able to secure the requisite information in a timely fashion, even their oligopoly- and addiction-swollen profits were inadequate to counter the growing “agitation for ‘non-smokers rights’...by the anti-tobacco zealots and the environmentalists” in tens of thousands of local communities with the same effectiveness that they had traditionally deployed lobbying resources especially at the federal level and, at least with regard to tobacco taxes, also in the state legislatures (though, as passage of the Arizona anti-public smoking bill in 1973 demonstrated, the industry’s defensive lobbying on health-related legislation in the states as yet lacked potency).  

In mid-October Perry explained to J. H. Sherrill, Jr. of the marketing research department that the smoking bans project had three phases or objectives. First, it was necessary to “[c]onvince management” that statutory smoking restrictions “can have a damaging effect on the cigarette industry” by means of a presentation (which Perry had drafted) of the history and variety of such laws and their potential effect on sales. Second, a program would have to be designed to combat these activities in 1974 in a couple of key test states. Since such a step would require management approval, nothing would be undertaken until after the first phase. And third, Reynolds and other companies would “curtail these restrictive activities throughout the country by means of an effort similar to the state tax program.” A few days later Perry specified to Blevins that in November the aforementioned presentation would be made to management, and that the key states might be California and Illinois.

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355 In a self-congratulatory statement presumably intended only for its member companies and put out at the beginning of 1973, the Tobacco Institute indirectly admitted how far removed its state-level lobbying was from the systematically functioning bureaucratized institution it had created for dealing with Congress: “When state legislative problems now arise, we can move without delay with a rather wide margin of understanding of the political power structure of each of the states and with personal acquaintances and knowledge of individuals and prospective lobbyist in a countermove against proposed anti-tobacco bills.” Tobacco Institute, Defending Tobacco at 3 (Jan. 1973), Bates No. 500014080/3.

356 Clifford Perry, Jr. to J. H. Sherrill, Jr., Re: Restrictive Smoking Activities Project (Oct. 18, 1973), Bates No. 500450656. By 1975 Sherrill was departmental director.

357 Clifford Perry, Jr. to R. A. Blevins, Jr., Re: Restrictive Smoking Activities Project
Then on November 16, the same Reynolds trio that had visited the Tobacco Institute in August, returned to make a “Restrictive Smoking Activities” presentation (which had been reviewed by Reynolds management) to Kornegay and his vice presidents. Afterwards the Reynolds and TI staff discussed a program to combat such legislation, whose most important aspect was securing “a lobbyist or spokesman to act for the tobacco industry in each state.” Importantly, the Tobacco Institute was to determine the number of personnel and the resources needed for implementation (including the creation of a state-level “information feedback system”) and to present these requirements to its executive committee at the end of the month. The RJR presentation, which emphasized the threat to the “[s]ocial acceptability of tobacco products,” included, in addition to data on the growing number of anti-smoking bills in state legislatures and city councils as well as in 522 hospitals and 12 passenger railroads, model calculations on lost profits: based on the number of packs of cigarettes not smoked as a result of the ban ordered by the Washington, D.C., Transit Authority, which purportedly cost the industry $13,500 and Reynolds $4,500 a year, the company made a national projection of lost profits from bans on city transit and in movie theaters and basketball and hockey coliseums of $3,575,000, of which $1,295,000 went to Reynolds’ account. Just one fewer cigarette smoked per week would result in a total industry loss of $8.2 million with Reynolds’ share amounting to $3.0 million.

Kornegay and his staff were, according to Dowdell’s report to Wade, “so deeply impressed” by Blevins and Perry’s work that Kornegay intended to adopt their presentation for his own to the TI executive committee. The Tobacco Institute’s involvement had, according to Kornegay and his vice president Kloepfer, until that time been “minimal because of the objections” of some executive committee members, “specifically,” those of Edwin Finch, the chairman

(Oct. 23, 1973), Bates No. 500450579.

358Clifford Perry, Jr. to F. H. Christopher, Jr., Re: Trip Report—“Restrictive Smoking Activities” Presentation to Tobacco Institute (MRD# 73-0221) (Nov. 28, 1973), Bates No. 500001032.

359R. J. Reynolds Tobacco Co., “Restrictive Smoking Activities” (1973), Bates No. 501343552-67. For somewhat lengthier versions, see [Untitled] ([erroneously dated May 1973]), Bates No. 500450625; [Untitled] (Jan. 1, 1974), Bates No. 500001034. Interestingly, some months later Perry admitted to one of the higher-ups at Reynolds that “[i]t is not possible at this time to determine the effect these [restrictive smoking] measures may have had on cigarette sales.” C. W. Perry, Jr. to F. H. Christopher, Jr., Re: Restrictive Smoking Legislation (MRD# 73-0221) (Apr. 3, 1974).
and CEO of Brown & Williams. After the TI staff had pointed out the increase in the volume of anti-smoking measures submitted to state and local legislative bodies at the executive committee meeting on November 29, Kornegay stated that the Institute planned to recommend an increase in funding for state activities to the budget committee.

By the time the anti-smoking forces achieved their “major breakthrough” in Arizona, some managers at the individual cigarette companies and TI officials began to realize that the industry was facing an unprecedented threat to the acceptability, sales, and profits of cigarettes, of the existence and exigency of which they had to convince the highest corporate executives. One such lower-level advocate actually styled his letter to William S. Smith, chairman of the board of R. J. Reynolds Tobacco and of TI’s board of directors—the same letter was sent to Smith’s counterparts at the other cigarette manufacturers—“a plea for help.” John D. Kelly, the executive director of the California Association of Tobacco and Candy Distributors and the state tobacco lobbyist (and later a TI vice president), wrote to Smith in May 1974 about the “very serious problem...all over the nation” of the “rapid proliferation” of state and local laws prohibiting smoking in various public and privately owned places: “In my judgment, if we don’t do something and very quickly, these laws will have an impact on our industry that will be at least as serious and detrimental as high cigarette tax rates.” The strategic impediment lay in the fact that the industry’s traditional lobbying tools had lost their effectiveness in combating “‘non-smokers’ rights’ bills” and were “not persuasive to most legislative bodies,” seemingly “because ‘everybody knows something is harmful’ or ‘non-smokers have the right not to breath [sic] air polluted by tobacco smokers.’” Ten years after the surgeon general’s consensus report on smoking, “we know these things are not true,” but unfortunately “the general public does not.” Far more troubling (because suggestive that the end-game was in sight) was the perception, according to a survey, “that even smokers are beginning to feel guilty about their smoking practices.” To Kelly it was “obvious...that if smokers find themselves in

360 J. S. Dowdell to C. B. Wade, Jr. (Nov. 23, 1973), Bates No. 500011034. The proposed program to identify political allies at the state and local levels would be based on recommendations made by Martin Haley, which are discussed below.

361 Tobacco Institute, Minutes of the Fifty-First Meeting of the Executive Committee at 2-3 (Nov. 29, 1973), Bates No. TIMN0006763/4-5.

362 [Anonymous], Presentation on Smoking Restrictions for Executives/Employees of Manufacturers at 8 (1974), Bates No. 501800385/94.

363 None of the letters to the others whom Kelly cc’d appears to have been included in the Legacy documents.

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restaurants, public meeting rooms, theaters, etc., where they used to be able to smoke but cannot now, they probably are going to smoke less. Equally important, smokers are going to be constantly reminded and made to feel self-conscious by ‘no-smoking’ signs in these various places. I am convinced that this is the exact goal the various anti-smoking groups are seeking.” In stressing that “the industry is losing this battle and losing it rapidly,” and expressing the hope that manufacturers, “perhaps through the Tobacco Institute,” solve the problem by “creat[ing] the image with which we can counter this trend,” Kelly was careful to point out that he was “not talking about lobbying in the usual sense,” but “the reaction of the general public to our industry.”

Although no reply letter has been found among the millions of documents that the cigarette companies were later forced to disgorge in litigation, the cigarette oligopoly did soon develop and implement a well-funded nationwide counterattack.

On May 19, 1973, in the wake of the passage of the Arizona law, Horace Kornegay, a lawyer and North Carolina congressman in the 1960s who was TI president from 1970 to 1981, addressed the question of the political, social, and economic consequences of antagonizing non-smokers in wide-ranging remarks at its spring meeting at yet another posh luxury resort, The Homestead, in Hot Springs, Virginia. Reflecting the startling rapidity with which anti-smokers had begun to organize, but also, no doubt, in part in an attempt to ward off potential criticism of his own inattentiveness by his bosses, Kornegay reported that his notes for his talk a year earlier had contained no warning of what had turned into the industry’s “number one problem,” which demanded the executives’ “very serious attention.” What he was willing to fault himself (and others) for was having overlooked “the strategic advantage that the passive smoking question provided for the antismoking zealots.” What their antagonists had “going for them” was, on the one hand, the “very logical, visible, direct form of air pollution,” which at the time was galvanizing the country, and, on the other, the “logic...that in conventional wisdom tobacco smoke is harmful to smokers, and therefore how can it be safe for those who inhale it involuntarily?” However, even more powerful and crucial a factor paralyzing the cigarette companies’ ability to fight back and undermine their new opponents’ attack was the

364Jack Kelly to W. S. Smith (May 8, 1974), Bates No. 500799725/6.
365The assistant to the board chairman of American Brands, the successor to the American Tobacco Company, did reply in Robert Heimann’s absence, “recogniz[ing] the potential seriousness of this problem,” and stating that he was circulating Kelly’s letter to executives. Richard Stinnette to John Kelly (May 20, 1974), Bates No. 946219020.
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undisputed fact that “many find tobacco smoke in a subjective sense a profound irritation.” But it was precisely this subjectivity that made it impossible for the tobacco industry to hire scientists and physicians who could assert, as they had done with regard to studies of smoking’s impact on smokers, that they had identified statistical deficiencies or evidentiary gaps. Moreover, Kornegay himself acknowledged that not even all smokers disagreed with non-smokers.\footnote{Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 1-2 (May 19, 1973), Bates No. TIMN0252920/1.}

Though unwilling to admit that “the roof has fallen in,” Kornegay suggested that “the size of the termites in the beams” could be judged by the increasingly favorable press accounts of “the nonsmoker subject,” culminating in the appearance of 50 “bad” editorials and no “good” ones in the latter half of 1972. Worse was the introduction in 1973 of 36 bills in 20 states restricting or prohibiting public smoking both because fewer smoking-permitted places would translate into fewer cigarettes smoked and because “the more the smoker is made to feel that he is socially unacceptable, the more he may consider improving his social standing by ceasing to use tobacco.” In this context the just enacted Arizona law declaring smoking to be a public nuisance and a danger to public health might, Kornegay told his cigarette company bosses, be “relatively modest,” but “its reverberations will show 49 other legislatures that it can be done, and the only question is how many in which it will be done.” Especially worrisome was that the industry’s “traditional—and until now highly successful—responses to proposed punitive legislation are not sufficient.” As an example he mentioned that a California legislative committee chairman had said to a “tobaccoman, ‘Show me one bit of evidence that the tobacco industry has yielded the slightest recognition that nonsmokers have a problem!’”\footnote{Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 3-5 (May 19, 1973), Bates No. TIMN0252920/2-4.}

Kornegay understood that the Tobacco Institute’s and the cigarette manufacturers’ previous lobbying methods were not up to the task of dealing with legislation being urged by a new coalition of populists, scientists, and private and governmental public health advocates, but his proposed “positive ‘handles’ to modify public reaction and oppose restrictive legislation” were not only hardly calculated to “defuse some of the initiatives we are seeing in the nonsmoker problem,” but, by focusing on “the annoyance factor,” were doomed to failure once further research revealed that exposure to tobacco smoke subjected nonsmokers to the same range of diseases as smokers. The four conclusions that the Tobacco Institute’s brainstorming came up with included the necessity of: (1) “making every effort possible within our traditional areas of operation to thwart
enactment of unwarranted legislation.” Although Kornegay had just pronounced this approach inadequate, he seemed to believe that its potency would be magnified by “careful use of our new statement...on the origin and substance of the nonsmoker issue as it relates to the health aspect.”

How the statement, a diatribe against (by then) former Surgeon General Steinfeld and the “doctored case of hazard to nonsmokers from tobacco smoke,” which gave short shrift even to “circumstances in which smoke can irritate any person,” would extricate the companies from their predicament Kornegay did not explain; (2) “mount[ing] a public campaign regarding smoking courtesy—a direct bid...for some understanding and recognition among those to whom smoking supposedly is personally offensive.” Although the word “supposedly” suggested that the Tobacco Institute did not even accept the sincerity of the expression of subjective perception and Kornegay admitted that the strategy was a “difficult platform,” he was confident that the campaign, in which smoking would be merely one of “many kinds of social courtesy,” would “reflect credit upon our industry”; (3) considering “endorsement of reasonable voluntary efforts to help assure the comfort of both smokers and nonsmokers and their respect for each other.” Speaking “quite bluntly,” Kornegay boldly asked his paymasters whether they did not “have a great deal more to gain than lose by complimenting [sic] such efforts when they may forestall or supplant government regulations?” and (4) confronting the “mounting involvement of cigarette smoke as a form of air pollution” and fighting back against other industries that were “now in a position to throw the burden of environmental pollution control off their backs and onto ours.”

This proposal appears to have been the origin of the cigarette companies’ on-again-off-again “accommodation” strategy, which they deployed selectively into the 1990s. Neither then nor later were they ever able to explain how this verbal PR ploy could ever achieve its alleged objective, which, even by the then underdeveloped understanding of exposure, would have required precisely the types of pariah-like segregation of smokers that would have been unacceptable

369 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 6 (May 19, 1973), Bates No. TIMN0252920/5.
371 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 6-7 (May 19, 1973), Bates No. TIMN0252920/5-6.
373 See below chs. 27.
to the industry because it would, despite Kornegay’s assertion that they did not imply second-class citizenship, have taken smokers out of the socio-cultural mainstream. Thus instead of facilitating “mutually greater comfort of both smokers and nonsmokers in their social encounters” and enhancing the industry’s “credibility” by reducing some of its critics’ “antagonisms” and playing a “constructive role,” so-called accommodation would, even if implemented in the most superficial manner, merely have created the precedent for further denormalization of smoking and, based on nonsmokers’ ever so minor relief, laid the groundwork for additional calls for further-reaching separation—in other words, precisely the scenario that did play itself out and that prompted the cigarette companies to adopt an ambivalent attitude toward their own creation, which at times seemed like their only plausible strategy, and to vacillate between it and a hard-line no-concessions approach.

_Philip Morris Pays a Professor to Dismiss the Dangers of Passive Smoking_

Even before the Tobacco Institute had had a chance to formalize its conclusions, Helmut Wakeham, Philip Morris’s vice president for research and development and chief scientist, intervened with a terminological correction, by means of which he hoped to undermine attacks on his employer and other producers of cigarettes for injuring nonsmokers’ health. On July 3, 1973, Wakeham, who had a doctorate in chemistry from the University of California at Berkeley, wrote to Kornegay (but also to others, including Ernest Wynder, a giant of early research linking smoking to lung cancer who then later had a decades-long unacknowledged financial relationship with Philip Morris) proposing that “we avoid the use of the term passive smoking in reference to smoke exposure in enclosed spaces. We should more simply refer to ‘Effects of

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374 Remarks of Horace Kornegay [at Tobacco Institute Spring Meeting] at 8 (May 19, 1973), Bates No. TIMN0252920/7.
375 For a brief and in parts uncritical discussion of Wakeham, see Richard Kluger, _Ashes to Ashes_ 230-33 (1996).
376 Helmut Wakeham to Ernest Wynder (July 3, 1973), Bates No. 000259806 (“Dear Ernie”).
Tobacco Smoke on Nonsmokers.” Helmut Wakeham claimed as the basis for his coinage a “real serious error” in using “passive smoking”—namely, that the phenomenon in question was neither passive nor smoking. He asserted that the term was contradictory because “smoking applies to a deliberate act..., whereas the term passive implies being subjected to an external act....” Instead of explaining why being compelled to inhale tobacco smoke did not qualify as “smoking,” Wakeham objected to the term because it implied exposure similar to that experienced by smokers, whereas in fact “the smoker gets mainstream smoke...which differs substantially in chemical composition from sidestream smoke generated between puffs and dispersed into the surrounding atmosphere.”

(A month earlier, when his corporate colleague James Bowling had charged before the Burley Tobacco Warehouse Association in Louisville that “‘passive smoking’...is not a scientific term. It is the language of people with a social cause,” that city’s Courier-Journal editorially dismissed his objections to nonsmoker protective legislation as “‘simply too self serving to weigh heavily in any serious debate on this issue.’”) What Wakeham conveniently neglected to mention was the fact, well known since the 1960s, that sidestream smoke contained many compounds (including such carcinogens as aromatic polycyclic hydrocarbons) in much higher concentrations than did mainstream smoke. Wakeham may have failed to persuade Wynder or scientists in general to adopt his ideologically driven and deformed terminology—two years later Wynder co-authored an important article that persisted in using the anathematized term—but Kornegay welcomed the

378 Helmut Wakeham to Horace Kornegay (July 3, 1973), Bates No. 000248668.
380 Quoted in TIN, No. 77, at 5 (July 9, 1973), Bates No. 500081829/33. The editorial alarmed the Tobacco Institute, whose senior vice president, William Kloepfer, Jr., drafted a letter to the editor, which, inter alia, sought to refute the policy of discounting self-serving debaters with the absurd ad absurdum argument that by the same logic Cesar Chavez should “refrain from efforts to improve the lot of migrant farm workers....” William Kloepfer, Jr. to Barry Bingham, Jr. Editor, Louisville Courier-Journal at 2 (July 16, 1973), Bates No. 690018434/5.
verbal fix with open arms. He also added his “feeling,” for which he admitted he lacked evidentiary proof, “that the anti-smoking groups have intentionally and perversively [sic] employed the term ‘passive smoking’ in an effort to create confusion and misunderstanding.”

To be sure, though useful, attaining hegemony over the vocabulary of the struggle over cigarettes’ undermining of nonsmokers’s health was not Wakeham’s only contribution to Philip Morris’s efforts to undermine its opponents’ burgeoning scientific research: more important at this point was his crucial role in securing money to organize a pseudo-scientific conference designed to whitewash secondhand smoke exposure. The workshop was proposed by a Swedish professor, Dr. Ragnar Rylander, who as a researcher in environmental medicine at the University of Geneva was in fact for years a secret consultant-employee of Philip Morris fraudulently pretending to be an independent scientist.  

On July 11 Wakeham informed Philip Morris’s general counsel, Alexander Holtzman, of the workshop, “which would put into proper light the alleged hazards to which nonsmokers are exposed in various situations involving smokers.” Wakeham strongly urged Philip Morris and the other manufacturers to finance the conference (which was to take place in the hardship location of Bermuda) to the tune of $30,000. He touted the conference, which Kornegay was “all for,” as “invaluable in putting some sense into the legislative drive to restrict smoking in public places, and the sooner the better.” Turning legislative analyst, Wakeham closed with the admonition: “Time is important! It is easier to prevent laws than to repeal them!”

Wakeham and Kornegay, however, had not reckoned with rejection by the...
Tobacco Institute’s Committee of Counsel,\textsuperscript{386} which on July 17,\textsuperscript{387} agreed with the (know-nothing) position taken by David Hardy, the industry’s leading trial defense lawyer, “that there were sufficient publications to support the industry position that smoking is harmless to nonsmokers. He argued that there was no need for additional support, so why should the industry run the risk of sponsoring a workshop which might find that there is a hazard to the nonsmoker.” Unwilling to acquiesce in abandonment of the project and being aware of those who disagreed with Hardy, Wakeham advised Rylander that when the latter came to New York on August 29, they would try to convince the lawyer of the workshop’s benefits.\textsuperscript{388} The details of the resolution of the dispute are unclear, but ultimately Philip Morris approved the financial support, which was also “cleared by the legal group.” By February 1974, a month before the workshop was scheduled to take place, Wakeham confided to the technical director of Imperial Tobacco Limited that Philip Morris hoped that it would “provide us with a document we can use to quiet some of the hysteria on the subject. Our main concern is the legislation restricting smokers now being passed in some of the local governments in the U.S.A.”\textsuperscript{390}

Once the workshop had taken place, Rylander informed Wakeham that he had already discussed publication of the manuscripts with the Philip Morris general counsel and Don Hoel, a lawyer from Hardy’s firm, and would engage in further discussion with them and Wakeham in the United States.\textsuperscript{391} Philip Morris’s puppeteering reached its high point when Wakeham informed Hoel, Holtzman, and Rylander that one of the company’s own research center employees, acting as what Wakeham himself called a “ghost writer,” had drafted a summary of the workshop for publication “over the name of Ragnar Rylander” in the “Meetings” section of the prestigious Science. Wakeham, incredibly, characterized the summary as representing “a very nice compromise between the opposing points of view on the topic” and hoped that Rylander would “find it acceptable without substantial modifications.”\textsuperscript{392} At the conclusion of the exoneration of

\textsuperscript{386}“The primary purpose” of the Committee of Counsel, which was composed of the general counsel of the cigarette companies that financed the Tobacco Institute, was, in the words of one of them, to “‘circle the wagons.’” United States v. Philip Morris USA, Inc., 449 F. Supp. 1, 77, 78 (D.D.C. 2006).

\textsuperscript{387}Helmut Wakeham to C. H. Goldsmith (July 20, 1973), Bates No. 1004863279.

\textsuperscript{388}H. Wakeham to Ragnar Rylander (Aug. 10, 1973), Bates No. 1004863273.

\textsuperscript{389}H. Wakeham to Max Hauserman (Sept. 12, 1973), Bates No. 1000257859

\textsuperscript{390}H. Wakeham to Herbert Bentley (Feb. 26, 1974), Bates No. 1004864121/5.

\textsuperscript{391}Ragnar Rylander to H. Wakeham (May 16, 1974), Bates No. 10000259703.

\textsuperscript{392}H Wakeham to Don Hoel, Alex Holtzman and HW to Ragnar (Aug. 16, 1974),
environmental tobacco smoke (apart from irritation of some people “for reason(s) not yet clear”) Philip Morris had inserted this transparently self-regarding laissez-faire policy judgment, which was the pay-off for the company’s having shelled out $30,000: “Within such a scientific vacuum one may legitimately question the wisdom of taking such drastic steps as the arbitrary banning or segregation of smokers in public places. Until more reliable information becomes available, the best course of action is to urge smokers to exercise appropriate courtesies and to inform them of the irritating nature smoke can have in certain circumstances for some persons.” Being saddled with this piece of corporate pandering was too much even for Rylander, who, after having deleted it from the draft that he and two participants (who had presumably not been informed of Philip Morris’ role) had prepared and that he had amalgamated with Philip Morris’s,394 and after having been asked by Raymond Fagan, the company’s principal scientist, to add it,395 replied on October 3 that although he “sympathize[d]” with the policy statement and “opinions concerning public health administrative matters” and understood the company’s “desire especially from the lawyers’ view included [sic] in the Science article,” he regarded its inclusion as “extremely unfortunate” (for the pragmatic reason) that it “would with certainty evoke reactions from at least one, probably several participants in the workshop. They would probably by some kind of publicity try to disconnect themselves from this view and state differently. This would...mean that the whole concept behind the workshop would be endangered and the document would not represent something that was more or less completely agreed upon by individual participants.”396

The apparent lack of further correspondence and the fact that in the end Science refused to publish the summary leave it unclear as to how exactly this dispute was resolved, but Philip Morris was nevertheless presumably satisfied that it had gotten what it paid for in the form of Rylander’s acquittal of secondhand smoke in his summary of the meeting (“Workshop Results”) that

Bates No. 1000260215.

393 Ragnar Rylander, “Environmental Tobacco Smoke and the Non-Smoker” at 7 (n.d. [Aug. 16, 1974]), Bates No. 10000260216/22 (the estimated date of Mar. 27, 1974 on the Legacy website document is presumably mistaken since it marked the first day of the workshop).


395 Raymond Fagan to Ragnar Rylander (Sept. 12, 1974), Bates No. 1004863736.


appeared with the individual contributions in a supplement to the *Scandinavian Journal of Respiratory Diseases*398 (as well as in book form published by the University of Geneva): “[A] personal conclusion is that the risk for the development of chronic pulmonary effects due to environmental tobacco smoke exposure is non-existent among the population in general.”399 Indeed, Wakeham may have felt that his employer (and the rest of the industry as a free rider) had gotten its money’s worth when three years later he was able to quote this very sentence to an editorialist for the *Los Angeles Times.*400 In to the bargain Philip Morris got Rylander’s belittlement of “[a]nnoyance reactions” as self-fulfilling prophecies of ideologically biased minds: “Some people may believe that exposure to environmental tobacco smoke affects their health. In addition to dislike of the odor such beliefs may be an additional source of annoyance. These reactions are influenced by underlying attitudes, socio-economic conditions and other factors.... It is possible that such psychological influences might, in certain cases, contribute to the development of acute upper respiratory symptoms; of asthmatic origin, for example, where psychosomatic factors are known to contribute.”401 Even earlier Rylander’s report received some legitimacy in a setting of supreme importance to Philip Morris: in 1975, in response to a request by a Wisconsin state legislator who was advocating a House Joint Resolution to study the effects of tobacco in confined spaces for information on the effect of tobacco smoke on nonsmokers, the Wisconsin Legislative Council prepared a memorandum, which included a section summarizing three reports of panels of experts. The memo devoted more space to the conclusions of the Rylander colloquium (which was the most recent of them) than to the 1972 surgeon general’s report. To be sure, the staff member who wrote the memo was thorough

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400Helmut Wakeham to Ernest Conine (Aug. 8, 1977), Bates No. 1000217977. In opposition to passage of the Washington Clean Indoor Air Act of 1985, Rylander was one of the “impartial experts” quoted by the Tobacco Institute in support of its claim that there was no persuasive scientific evidence that environmental tobacco smoke was a health hazard to nonsmokers. Tobacco Institute, “Analysis: Washington State Senate Bill No. 3039” at 3 (Feb. 1985), Bates No. TNWL0043571/5.

enough to have noted that the conference had been supported by a grant from Fabriques de Tabac Réunies and that one participant had been a former consultant to the Council for Tobacco Research who had “recently published an article challenging the contention that cigarette smoke has been proven to cause serious diseases in the smokers themselves,” but the staffer nevertheless not only did not dismiss the Rylander publication, but melded its information in his conclusion that “tobacco smoke at levels commonly encountered in public places is distressing and physically irritating to some people.” Two weeks later Philip Morris and cigarette manufacturers generally got even more mileage out of the Rylander escapade when the lobbyist for the Minnesota Restaurant Association submitted the Wisconsin memo as an exhibit at a hearing on the proposed regulations to implement the Minnesota Clean Indoor Air Act. Yet another bonus for Philip Morris was a laissez-faire policy recommendation—that two of Rylander’s Bermuda workshop cohorts (including Morton Corn, who two years later would become the administrator of the Occupational Safety and Health Administration) joined him in supporting—that “smokers be made aware of...pockets of high concentrations [of tobacco smoke] and that some people are unduly sensitive. Their smoking should then be adjusted accordingly.”

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**Ramping Up the Tobacco Institute’s State Legislative Lobbying**

We are meeting here today shortly after the tenth anniversary of the opening of official hostilities between our industry and the Federal Government. On January 11, 1964 the United States Public Health Service became the official spear carrier for an assortment of individuals and interests who wanted then—as they want now—to make the world safe from cigarette smoking. ...

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402 Wisconsin Legislative Council Staff Memorandum, Ed Applebaum to Representative Edward Jackamonis, “The Effects of Tobacco Smoke on Nonsmokers” at 6, 7 (Nov. 17, 1975), Bates No. 500040600/5/6. The participant was Dr. Domingo Aviado, whose publications “illustrate[d] a common tobacco industry technique to bootstrap its consultants’ work into scientific authority that is used to influence legislation and smoking policy.” His papers at tobacco company-sponsored symposia “were then cited in congressional testimony and other forums without featuring the fact that the symposium...was industry funded.” Stanton Glantz et al., The Cigarette Papers 310 (1996).

403 Exhibit 24, Health Department, MSA, MHS, 112.H.18.3(B).

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At the executive committee meeting in November, we...warned that the movement [to prohibit smoking in public places] could lead to the virtual elimination of cigarette smoking. 405

The immediate consequence of Kornegay’s initiative of May 19, 1973, appears to have been the downgrading by TI’s executive committee of his “proposed ‘policy’ statement” to a “‘guideline’ statement,” which the Tobacco Institute would not issue or use as a document or release as a statement, but which was “designed to give structure to the Industry’s position and to create a context in which the problem can be responded to and otherwise discussed.” 406 So minimalist was this proposal that Kornegay hastened to explain to the cigarette companies’ top executives that the staff did not even intend to use the guidelines publicly per se, but merely to “treat them in proper context as part of our effort to discourage governmental efforts to prohibit smoking in various places.” Nevertheless, he needed his bosses’ approval before TI could make any use of them. The four guidelines encompassed the assertions that: (1) many “adults enjoy tobacco products”; (2) no “[v]alid scientific evidence” supported the claim that tobacco smoke harmed nonsmokers (just as science had not found that smoking harmed smokers); (3) “[f]or the comfort of smokers and nonsmokers...it is practical, sensible and traditional to provide areas in public facilities for those who wish to smoke and those who do not. In small, crowded, poorly ventilated places, smoking is inappropriate”; and (4) “[v]oluntary efforts and exercise of personal regard and consideration will assure the comfort of smokers and nonsmokers. Laws and governmental regulations, which are both intrusive on personal rights and impractical, if not impossible to enforce, are neither required nor justified.” 407 The first two points represented no concession of any sort—David Hardy having suggested that his clients “not...concede anything on” the claim that smoking harmed smokers—whereas the third sought to suggest (counterfactually) that public no-smoking areas were not an innovation. The final

405 H[orace]R[.]K[ornegay], Statement at Annual Meeting of Tobacco Institute at 1, 3 (Jan. 31, 1974), Bates No. TIMN0136556/8.

406 Arthur Stevens to P. R. Tisch and C. H. Judge, Tobacco Institute -- Executive Committee Meeting -- July 26, 1973 (July 27, 1973), Bates No. 03769103 (Lorillard general counsel’s memorandum to company’s top executives).

407 Horace Kornegay to William S. Smith (July 30, 1973), Bates No. 501470082. For a draft of the guidelines, see [untitled] (July 17, 1973), Bates No. 680239461.

408 [Untitled handwritten notes on the TI executive committee meeting, presumably made by Arthur Stevens, Lorillard’s general counsel] (July 26, 1973), Bates No. 03769107.
point embodied the crucial issue for the cigarette oligopoly because the absence of government intervention insured the feebleness of any such initiative and, consequently, that it would not proliferate.

The corporate heads on the TI executive committee weighed in with comments ranging from “Excellent” to “Satisfactory.” Philip Morris failed to respond, and only one executive, Raymond Mulligan, the CEO of Liggett & Myers, offered substantive suggestions—namely, to water down the third guideline even further by inserting “some” before “public facilities” and to change “is” to “may be” before “appropriate.” Obediently, the Tobacco Institute incorporated the dilutions of its already very thin soup.409

To be sure, by the beginning of September 1973 Kornegay had already succeeded in having a letter to the editor published in The New York Times, which, in the course of responding to a three-month-old op-ed by a psychiatrist who had opined that smokers should have both their heads and their lungs examined and sarcastically wondered why on their early trip to the grave they should be taking nonsmokers down with them,410 broadcast the claim that “[t]he key consideration is comfort. The answer lies in courtesies between those who enjoy tobacco and those who do not. Laws and further Government interventions are overreactions.”411 (Kornegay did not quote the statement of his senior vice president, Kloepfer, who some months earlier had let the cat out of the bag in a letter to Reynold’s senior vice president, Wade, insisting that “[t]here must be a way we can remind smokers to avoid annoying the people who seem to have such a good ability to organize against them....”)412

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409 William Kloepfer, Jr. to Horace Kornegay, Memorandum: Guidelines on nonsmoker issue (Sept. 27, 1973), Bates No. TI04002517/8. A handwritten notation stated that the guidelines were to be resubmitted to the October meeting (of the executive committee), but the minutes do not reflect such a discussion, although they do mention discussion of other non-smoker matters. Tobacco Institute, Minutes of the Fiftieth Meeting of the Executive Committee (Oct. 4, 1973), Bates No. 500799274.


412 William Kloepfer, Jr. to Charles Wade (Dec. 29, 1972), Bates No. 500081668/9. Kornegay failed to reconcile the assertion that smokers were “by and large courteous and considerate about smoking and its possible annoyance to others” with opposition to smoking bans in taxis, restaurants, bars, workplaces, bus and train station, or sporting events. Remarks of Horace R. Kornegay at the Tobacco Association of the United States at 10 (Mar. 1, 1973), Bates No. TIMN0154983/92. In fact, for whatever probative value smokers’ self-reporting about their own smoking behavior possessed, 36 percent of all
smokers and 42 percent of heavy smokers, according to the 1974 Roper survey paid for by TI, admitted that indoors when other people were present they “[l]ight up without thinking about it”; 53 percent of all smokers and 48 percent of heavy smokers claimed that they looked around and then decided, asked others, or just did not smoke. Roper Organization, “A Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry in 1974: Prepared for the Tobacco Institute, 1:49 (1974), Bates No. 85425610/89.

413 United States v Philip Morris USA, Inc. 449 F.Supp. 2d 1, 81 (2006).

414 Leonard Zahn [public relations counsel for Council for Tobacco Research] to H. H. Ramm and W. T. Hoyt (Apr. 23, 1973), Bates No. 10396009. At the meeting Welch “discussed the problems presented by increasing attacks on ‘second-hand smoking.’” Communications Committee Minutes at 2 (Apr. 10), Bates No. LG0233930/1.

415 Communications Committee Minutes (June 26, 1973), Bates No. TIMN0124671.


419 [James S. Dowdell], T.I. Communications Committee at 1 (Sept. 5, 1973), Bates No. 500081660 (handwritten meeting notes). Without indicating the context or implication, Kloepfer reported that “Raskin agreed same anti-smoking people now working passive smoking issue acknowledge failure of past efforts to significantly deter smokers.”
newspaper had been expelled from the University of Minnesota for “‘deliberate and public’ defiance” of a new smoking ban in the university library). Although Kloepfer was annoyed that Raskin had not informed him during their tête-à-tête of the *Times* policy of not publishing op-ed responses to previous op-eds, he told his corporate PR overseers that he and Kornegay saw no reason for “quarreling” over the offer to publish a re-submitted piece as a 400-word letter to the editor—especially since the letter enjoyed the privilege of passing virtually untouched through the hands of the newspaper’s compulsively interventionist top-heavy editorial staff.

Another opportunity for the Tobacco Institute to try out its trivialization campaign presented itself in October, when during a radio debate with Betty Carnes Kornegay claimed that the newly enacted Arizona law had not set off any controversy “because the tobacco industry does not take the position that people ought to smoke in art galleries, on elevators, in churches, or in operating rooms, and places like that.” But, he insisted, there was absolutely nothing specific about smoking here: “there are places where it’s inappropriate to smoke. Just as it’s inappropriate to do a lot of other things, to eat or to drink, that sort of thing.” Although, as always, the point was to “accommodate the comfort of both” smokers and non-smokers, Kornegay had apparently not thought through the question as to why the logic of his preposterous categorization did not require accommodating the comfort of both eaters and non-eaters and drinkers and non-drinkers in churches and operating rooms. That his exhaustion of logic had not exhausted his stock of analogical absurdities was embarrassingly on display in his denial that smoking was addictive: “It’s a custom, a habit, it’s something that you do, you pop your fingernails, you smoke.... I smoke, I enjoy smoking.”

Incipient organizational coordination took shape at the end of February 1974, when, again, under the aegis of the industry leader, Reynolds, the Tobacco Institute, the Tobacco Tax Council, the Coordinating Board of the National Association of Tobacco Distributors, and the Tobacco Growers’ Information Committee fashioned a memorandum of agreement—which, ironically, ignored Wakeham’s terminological admonition—on the “Industry Response to the Passive Smoking Issue,” which assigned responsibility to TI for “coordinating and

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420“Minnesota University Suspends Student for Year for Smoking,” *NYT*, Jan. 15, 1930 (1).

421William Kloepfer, Jr. to Blalock et al. (Sept. 10, 1973), Bates No. 500003419.

422The letter as submitted is Horace Kornegay to Kalman Seigel (Sept. 7, 1973), Bates No. 500003420.

423“Barry Farber Show” at 4 (Oct. 18, 1973, 8:00 p.m., WOR, New York), Bates No. TIFL0518215/8 (Radio TV Reports, Inc.).
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directing opposition to smoking ban proposals” and directed the other associations not to initiate any action at the state or local level without first consulting and obtaining the approval of TI. The “legislative tactics” for defeating anti-smoking measures were to “follow the pattern established for tax legislation, i.e., retention of counsel or legislative lobbyist to represent industry.” Counsel would also be retained in “selected local issues of significant concern.” In accordance with previous internal tactical declarations, the organizations recognized the “need for some appropriate public accommodation between smokers and non-smokers”—if for no other reason, then because “[l]egislative councils...need examples of industry good faith.” The companies’ continued bad faith was blatantly (albeit internally and secretly) on display in the Institute’s unwillingness to do any more than trot out earlier shams such as “campaigns to stress smoking courtesy and non-smoker tolerance....” Lodged in a similar ethical price range was the plan to “counter false health hazard claims...by...exploiting government-sponsored research that exonerates tobacco smoke as potentially injurious.”

Two days later Kornegay warned the Tobacco Association of the United States that “the old antismoking bandwagon is headed backwards—down the discredited road to out-and-out Prohibition.” Smelling a conspiracy, but unwilling to identify the conspirators, he alleged that much of the movement’s “propaganda on the nonsmoker issue...serves the interests of those who would like to see cigarette smoking take the blame for the health hazard associated with air pollution. Indeed, there seems to be taking shape an unholy alliance of more than a few vested interests.” The cigarette oligopoly may not have appreciated (imaginary) conspiracies arrayed against it and aimed at suppressing the super-profitable production of lethal consumer commodities, but it was acutely attentive to identifying disparate potential allies whose assistance in delaying, if not sidetracking, anti-tobacco legislation might be bought if they could not be persuaded that they had a stake in combating the alleged “attempt to make cigarette smoking the scapegoat for the ills of air pollution and occupational hazards”:

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424 Memorandum of Agreement Industry Response to Passive Smoking Issue” (Feb. 27, 1974), Bates No. 500040551/2. Opaque was the solicitation of suggestions to counter anti-smoking groups’ effective use of women to support anti-tobacco legislation.


427 Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco
Now here is an issue which is inherently phony and obnoxious to many more people than just those poor harassed smokers. It ought to infuriate the people who operate restaurants, hotels, motels, theatres, sports arenas, and retail stores. It ought to upset their employees. It ought to depress environmentalists, trying to clean up the atmosphere. It ought to worry union members, struggling to clean up the dust and fumes of mines and mills. And above all, it ought to give serious misgivings to those concerned about the gradual erosion of civil liberties in our land.

Our job—yours and mine—is to tell all these people that the brush fire in the tobacco fields today may burn down their barns tomorrow.\footnote{Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco Association of the United States at 9 (Mar. 1, 1974), Bates No. TIMN0154983/91.}

As speculative and difficult to mobilize as such interests might be, Kornegay knew of many others, occupying the non-vertically integrated segments of the industry, who were only all too aware that "the bell tolls"\footnote{Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco Association of the United States at 11 (Mar. 1, 1974), Bates No. TIMN0154983/93.} for them—namely, the "people who share a common destiny...as in 'we are all in the same boat,' the tobacco community—farmers, warehousemen, dealers, suppliers, manufacturerers, wholesalers and retailers..." With them he pleaded to lend the "weight and reach of large numbers" without which even the (rich and powerful) manufacturing corporations would be unable to fight and win alone.\footnote{Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco Association of the United States at 9 (Mar. 1, 1974), Bates No. TIMN0154983/91.}

Three weeks later a lengthy discussion at a meeting of the TI Communications Committee—attended by two of the industry’s leading lawyers, Stanley Temko of Covington & Burling\footnote{Remarks of Horace R. Kornegay, Pres., The Tobacco Institute, Inc., at the Tobacco Association of the United States at 11-12 (Mar. 1, 1974), Bates No. TIMN0154983/93-4.} and Don Hoel of Shook Hardy—resulted in the group’s advising Kornegay to notify the manufacturing corporations’ chief executives that "authorization is needed for development of a public campaign to respond to those forces who would put restraints upon public smoking."\footnote{[Tobacco Institute] Communications Committee Minutes (Mar. 22, 1974), Bates No. TIMN0124673.} This relatively bland result masked an intense discussion,
some of the fervor of which has been preserved in the notes taken by Dowdell and the memo that Wade (the committee chair) wrote to Reynolds’ CEO.\textsuperscript{433} After mentioning the huge and growing volume of anti-smoking bills introduced in state legislatures in 1974 and the 60 to 70 local ordinances passed, Ehringhaus, TI vice president for state activities, stressed that “[s]ocial unacceptability” was the objective pursued by all the “anti forces.” Kornegay reviewed the history of TI’s attempts to secure the cigarette manufacturers’ support for counter-actions before issuing this cri de coeur: “‘We must have something to combat this campaign.’ ‘The time has come to set the record straight with the average person.’ ‘The battle can’t be fought at the legislative level.’ ‘We call on you for help; the longer we delay, the more difficult the problem. The antis have tasted blood and they want more.’” James Bowling, the Philip Morris PR head, agreed that management was “not sufficiently alarmed,” but speculated that the next Roper public opinion poll might cause management to “see we are being hurt and...do something about it.” If Kornegay was astutely analyzing the legislative corner into which the anti-smoking organizations had painted the companies, Ehringhaus was hardly pointing the way out with his insipid and risible call to imitate other industries by showing that the “smoking public and manufacturers are considerate, responsible groups.” After John Blalock, Brown & Williamson’s PR chief, characterized smoking bans as the “number one priority,” Arthur Stevens, Lorillard’s general counsel, cautioning that he did not think that they should “panic,” asked whether, after all, they were actually being hurt. Ehringhaus agreed, but observed that they were still in the first year and once the anti-smoking groups returned the following year, the tobacco industry had “nothing to give, to fall back on.”\textsuperscript{434}

Offering a broader assessment of the discussion, Wade observed that “for the first time there was unanimous agreement that the Institute, backed by the entire membership, needed to stop procrastinating and get going on the counteroffensive.” The reason that Ehringhaus believed that the problem, which he regarded as “much greater than anyone had anticipated,” could not be “solved

\textsuperscript{433}It is possible that Wade’s memo was in part based on Dowdell’s notes, but in places it differed; since he was also at and chaired the meeting, his version may have been independently written, but since Dowdell’s was actually made contemporaneously, it is preferred where the two are irreconcilable.

\textsuperscript{434}J. S. Dowdell, Subject: T. I. Communications Committee Meeting at [6-8] (Mar. 22, 1974), Bates No. 500081649/54-6. The illegibility of one word in the notes makes it difficult to determine whether Stevens was offering a remarkable concession or merely being facetious, but after agreeing that “[w]e do need fall back,” he added: “Perhaps we should accept [separation ?segregation?] in Greensboro auditorium.” \textit{Id.} at [8].
by the usual legislative tactics” was that, despite the industry’s employing lobbyists and achieving some success, there was simply no way to stop the antitobacco groups from returning for more the following year, especially since “all have not given the lobbyists a fall-back position.” Given Reynolds’ leadership in combating the new wave of legislation, Wade was presumably expecting to score points with his boss for reporting that the representatives of Philip Morris, Brown & Williamson, and Lorillard had all “conceded that their top management may not be sufficiently alarmed.” He also emphasized the general agreement reached that although the newly legislated restrictions had not yet exerted any great impact on sales, “unless something could be developed to slow down the smoking bans, the industry could be seriously damaged in the years ahead.” In light of the overarching mood that, if left unchecked, might prompt the new anti-smoking tactics to trigger the beginning of the end-game, the committee’s timid recommendations appeared scarcely up to the task: (1) that Kornegay explain the “growing seriousness of the problem” to the executive committee and ask for “authority to start immediately to develop a counteroffensive”; and (2) that TI develop the programs needed to help deal with the state legislative problems and “to gain some degree of public understanding and support.”

Overall the impression left by that the cigarette companies’ PR chiefs was that although they had indeed sensed, before their bosses, the import of their adversaries’ skillful turn toward secondhand smoke exposure as the key to galvanizing the nonsmoking majority and overcoming the wealthy manufacturers’ traditional lobbying advantages in state legislatures, they were unable to devise any credible or plausible extra-parliamentary plans that would make any sense to anyone not blinded by unquestioning devotion to saving a lethal consumer industry and his own job. The PR managers were floundering because, while the majority of the population was beginning to recognize both that cigarette smoke was sickening them and that as a vocal majority they were not fated to continue to acquiesce in this decades-old assault, the cigarette producers were disabled from dissuading the requisite number of nonsmokers from believing their own bodies and sensory perceptions because the companies’ increasingly mendacious denials of the murderous impact of firsthand smoking had manifestly disqualified them from participating in any serious public policy debate.

Crucial to understanding the direction in which the cigarette oligopoly at this very juncture moved in order to ward off state-level smoking bans is the set of proposals that political consultant Martin Ryan Haley submitted in 1973-74.

435 Chas B. Wade, Jr. to W. S. Smith (Mar. 26, 1974), Bates No. 500799773-4.

436 One service that Haley performed more publicly on behalf of the cigarette oligopoly was as liaison between Philip Morris and the Vatican in arranging an exhibition of the
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Haley, an early organizer of the so-called right to life movement, played a less visible but no less important role on behalf of tobacco companies’ right to death (of their customers) movement. The Haley connection originated in the cigarette companies’ long-term discussions about merging their Tobacco Tax Council (which lobbied against state tobacco excise taxes) into their Tobacco Institute in order to increase efficiency and reduce duplication. In response to a request in December 1972 from the TI executive committee to study the matter, the TI/TTC study group met on March 27, 1973, at which all the company representatives agreed to ask Haley to attend the group’s next meeting to determine whether he would agree to marshalling facts to present to the TI executive committee. A few days later Haley agreed to meet with the study group in early May. Then on May 10, 1973, the Tobacco Tax Council Operating Committee recommended that the two groups not be formally merged. Instead, as the result of informal discussions of the TI’s and TTC’s “legislative [i.e. lobbying] functions” with an “outside consultant,” this study group recommended that each “explore the feasibility [sic] of retaining such outside consultant to make a report on improving the state legislative efforts of each

437 As liberal Congressman Morris Udall had put it: “I think people are entitled to smoke if they wish to. The Constitution guarantees us all these great freedoms including the freedom to abuse our health and make fools of ourselves if we want to, and I do not intend to deprive people of these great freedoms.” Cigarette Labeling and Advertising—1965: Hearings Before the Committee on Interstate and Foreign Commerce House of Representatives on H.R. 2248, at 24 (89th Cong. 1st Sess. 1965 (statement of Morris Udall).


439 Tobacco Institute, Minutes of the Forty-Eighth Meeting of the Executive Committee at 3 (Dec. 7, 1972), Bates No. 04209485/7; A. H. Galloway to Joseph Cullman et al. (Dec. 26, 1972), Bates No. 03680616.

440 EAV[assalo], TI/TTC Study Group Meeting at 1 (Mar. 27, 1973), Bates No. 501470133. Vassalo was R. J. Reynolds’ representative on the TTC; his internal memorandum appears in large part to have been self-serving and designed to enhance his importance in the eyes of his bosses, who were purportedly strongly in favor of keeping the activities of the TI and TTC entirely separate because they did not want to mix health and tax issues.

441 Richard Robertson [Vice President, Philip Morris] to DeBaun Bryant et al. (Mar. 30, 1973), Bates No. 680239467.
A week later at the TI board of directors meeting, President Kornegay informed the assembled cigarette manufacturing executives and their lawyers that the proliferating non-smokers’ rights activities, especially proposed legislation, were “of serious concern to the Institute....” The overriding point, as far as the minutes reveal, made during the discussion was that since “there was no scientific basis for a claim that cigarette smoking caused deleterious effects to non-smokers...the issue was mainly being advanced on the basis of claimed annoyance to the non-smoker”—hardly a startling conclusion coming from the for-profit stonewallers who were still pretending to be in denial over the health consequences to smokers themselves. Later during the meeting Kornegay (who was himself a member of the study group) read the aforementioned letter about a merger, about which the ensuing discussion “emphasized that no contract had been entered into with the consultant and that all that had been authorized” was to request the consultant to “consider the question and submit a proposal for study.” This consultant was Martin Haley. On July 26 the TI executive committee, after hearing Kornegay’s presentation of Haley’s proposal to analyze the TI’s and TTC’s state legislative activities, finally agreed to authorize TI participation; all the manufacturers present concurred except Lorillard, which abstained.

In his original proposal Haley had estimated that a comprehensive report would take eight months to prepare, but nine and a half months passed before it was submitted at the end of May 1974. (Perhaps the delay was in part attributable to the memorandum that he prepared for the Tobacco Institute in March/April on the aforementioned New York City Health Department proposal to restrict public smoking.) Each numbered copy of Ryan’s report, “A State

442DeBaun Bryant et al. to William S. Smith (May 10, 1973), Bates No. 03769163.
443Tobacco Institute, Minutes of the Thirty-First Meeting of the Board of Directors at 2-3, 5 (May 19, 1973), Bates No. 03769146/7-8/9. The somewhat testy wording may have been linked to a memorandum by Lorillard’s general counsel to the company’s high executives expressing surprise that the study group had suggested retaining a consultant to consider the matter further. A[rthur]. J. Stevens to P[reston]. R. Tisch et al., Tobacco Tax Council-Tobacco Institute Merger (June 5, 1973), Bates No. 03769160.
Legislative Plan for the Tobacco Industry,” bore the warning: “HIGHLY CONFIDENTIAL Disclosure of this Report Could be Damaging.”

Although the report was in part prefigured by an article that Ryan had published at the beginning of 1974 in the *Harvard Business Review* and appended to his report, he made it clear from the outset that, far from engaging in an academic exercise, he recommended “applying continually the axiom that the objective of a state legislative program must be helping to defend the bottom line and, whenever possible, to protect and expand markets.”

En route to recommending against the TI-TTC merger, in large part because the taxation and secondhand smoke issues had to be kept separate in some states in order to avoid the industry’s being “whipsawed by legislators who ask which issue is more important” inasmuch as they would support the cigarette companies on one or the other but not on both, Haley focused on two questions that he felt he had been asked—namely, how the industry could best “conduct its state legislative programs” and how to spend its state legislative budgets. The principal tidings that he brought the cigarette manufacturers were “the tidal wave” of state-level anti-business legislation, which was rooted in the “quiet revolution” in the statehouses,” which was, in turn, based on a number of mutually reinforcing changes: a 250 percent increase in the volume of state legislation in 13 years; an increase from 24 to 43 in the number of legislatures meeting annually in the previous 10 years; an increase in the length of sessions from 60 to 120 days and an increasing number of legislatures meeting virtually year round; increasingly active interim committees between sessions; more hearings resulting from procedural changes sponsored by groups such as Common Cause; a monumental turnover in membership; a drastic decline in legislators’

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and a breakdown in bloc voting, which made it necessary to lobby one member at a time. The overall result was that: “Starting with the Supreme Court’s one-man-one-vote ruling in 1965 accelerated by consumerism, Common Cause, and activism, the New Politics have created New Legislators, who are in the ascendancy—if not already in control—in New Legislatures. These legislatures and their members are simply not business oriented. Hence, abetted by the difficulties of oil, transportation, insurance, and utilities companies, the broadest and most perilous state legislative antibusiness climate in our history is rapidly gaining momentum.”

Without shedding any light on whether or how these new political configurations would affect the cigarette oligopoly differently than other industries, Haley did warn his customer against “the fallacy of establishing state legislative priority according to the size of [the tobacco] market.” The reason that every state had become important was that legislation passed in small states would be conveyed to other states within weeks and not, as had been the case even 10 years earlier, over a period of years. In light of the acceleration of this interstate communication process by the national publication of state model bills, Haley would have not been surprised if some national legislative organization produced a “model non-smoker bill” later in 1974. And, most significantly, since small market states were not only important, but “just as important as a California or New York,” he was in effect urging a 50-state lobbying strategy for the Tobacco Institute. (Unbeknownst to the presentist Haley and his amnesiac customer, in the late nineteenth and early twentieth century the cigarette oligopoly had already adopted such a lobbying and litigation strategy to combat no-cigarette-sales-to-adults statutes in all states regardless of the size of cigarette sales in them precisely because statutory wording wandered from state to state from one session to the next and because litigation, especially in federal courts, automatically nationalized the precedential basis for future rounds of legislation and judicial intervention.)

Whether he fully misunderstood the flow of science, policy, culture, and history or was merely humoring and cynically milking very deep-pocketed

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455See above Parts I-II.
customers, Haley—who must have recognized that advising the companies to prepare for the end-game would have prompted termination of a lucrative contract—urged the cigarette manufacturing executives to regard the “non-smoker campaign” as just another example of “[d]iscriminatory and otherwise adverse legislation” (such as the “pro-abortion effort,” which was personally anathema to Haley) that ran in faddish cycles. Although these cycles allegedly ran in 7 to 15-year cycles, but had become shorter in sync with the aforementioned legislative acceleration, he nevertheless alerted the Tobacco Institute to the need to expect the accelerating anti-smoking campaigns (at least 150 non-smoker bills in more than 40 states in 1975) to continue at least until 1980, but “more likely 1985.”

The real heart of Haley’s strategy-changing recommendations was financial: the tobacco executives had to eliminate the “false economy” that had misled them to dedicate only $135,000 of the Tobacco Institute’s budget to state legislation in 1973, $160,000 at the beginning of 1974, and $250,000 for that year: “Put bluntly, the dimensions and growing momentum of anti-smoking legislation will not permit such economy in 1975.” Since “the handwriting [was] on the wall,” he recommended that the Institute not only expand the state legislative budget to as much as one million dollars, but institute a “crash program” in the summer to put into place an adequate defense by the opening of the legislative session in January 1975. In addition, Haley pointed out that the individual cigarette companies themselves needed to commit the requisite human resources and money to develop state government relations departments befitting large corporations. (Philip Morris and R. J. Reynolds, which never fully trusted their TI hirelings, did eventually create parallel state lobbying regimes.)

At the TI executive committee meeting on July 25, after Haley had presented his analysis and recommendations, vice presidents Ehringshaus and Kloepfer summarized for the assembled corporate top brass various proposals that TI had developed in response to Haley’s report, the most consequential of which was the
deployment of a “modest but effective organization of field representatives,” of whom two were to be in place by the end of the year and six by January 1, 1976. In addition, TI was to become an expanded source of information for expanded state activities. After discussion and questioning of Haley, the heads of the three largest firms, Reynolds, Philip Morris, and Brown & Williamson, expressed agreement with Haley’s viewpoints and the Institute’s program, while Liggett’s and Lorillard’s representatives needed more time to consider the matter.\footnote{Tobacco Institutes, Minutes of the Fifty-Third Meeting of the Executive Committee at 3-4 (July 25, 1974), Bates No. LG0508394/6-7.} In October, Kornegay reported to the executive committee that the first field representative would begin work on November 1.\footnote{Tobacco Institute, Minutes of the Fifty-Fourth Meeting of the Executive Committee at 3 (Oct. 3, 1974), Bates No. LG0406993/5.}

In accordance with Haley’s advice, if not quite so rapidly as he recommended, the Tobacco Institute’s State Activities Department legislative budget was ramped up to $842,111 in 1978 and for 1979—when “a large number of anti-smoking initiatives all over the country” were expected—advanced to $1,170,055 to reflect the opening of numerous state and area manager offices.\footnote{Tobacco Institute, Inc., Proposed Budget for 1979 (Oct. 5, 1978), Bates No. 501518801/8/9; Tobacco Institute, 1980 Budget at 29 (Oct. 31, 1979), Bates No. 2025390157/85.} Sixteen years later, Haley himself, seeking another lucrative contract with the Tobacco Institute (this time to combat congressional proposals to ban cigarette advertising), reminded its president that a “very high proportion of the Recommendations was gradually put to work...by 1975, the overall structure as we know it today was being built.”\footnote{Martin [Haley] to Samuel Chilcote (Nov. 7, 1990), Bates No. TIMN354943.}
The Minnesota Clean Indoor Air Act of 1975:
The Comprehensive Model Statute that
“didn’t prevent anyone from smoking”

Minnesotans who thought the smoking problem would disappear after the law was passed have been disappointed. [E]nactment of the law—although of great importance—was only one step in a lengthy, difficult and most educational process.... [T]here is still a long road ahead. [I]n some restaurants the no-smoking area is next to the kitchen door, is situated in a drafty spot, or consists only of two tables, but an attempt is usually made to comply with the law.2

One reason for the renewed interest in an anti-public smoking law in Iowa in the mid-1970s was the enactment in June 1975 by neighboring Minnesota of a “landmark” “clean indoor air act,” which included the first modern ban on smoking in private workplaces—as early as 1866, Minnesota had enacted an “Act to Prohibit Smoking in Mills, Machine Shops, Stables, or other Buildings where notice prohibiting the same is kept posted”—and quickly became a model for other states,4 including Iowa, which adopted some key provisions verbatim from

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3 It prohibited entering such buildings with a lighted pipe or cigar or lighting or smoking one or the other in such buildings (subject to a ten-dollar penalty), provided that a conspicuous notice at each principal entrance stated that no smoking was allowed. 1866 Minn. Laws ch. 34 at 77. A similar Vermont law enacted toward the end of the century added cigarettes to the types of tobacco that could not be smoked. 1892 Vt. Laws No. 89, at 163. A later West Virginia enactment added mercantile establishments to the list of prohibited sites. 1919 W. Va. Acts ch. 30, § 67-a, at 163, 169. In the wake of the Triangle Waist Company fire in 1911, New York State prohibited smoking in factories, the ban to be enforced by the fire commissioner/marshall. 1912 N.Y. Laws ch. 329, at 658, 659. Three years later the legislature amended the law to authorize the industrial board to “permit smoking in protected portions of a factory or in special classes of occupancies where in its opinion the safety of the employees would not be endangered thereby.” 1915 N.Y. Laws ch. 347, § 4, at 1050, 1053. On the role of the newly founded Tobacco Merchants Association in making regulation more permissive, see above ch. 17.

the Minnesota statute. Cigarette manufacturers immediately labeled the Minnesota law the “Most Severe.”

This chapter offers a detailed account of the background of the Minnesota Clean Indoor Air Act as well as an in-depth analysis of the substance of the law, its implementing regulations, and the latter’s political-economic drafting and lobbying processes. The purpose of this chapter is twofold: first, to capture the broader national context within which anti-smoking legislation was being debated and enacted in the mid-1970s; and second, to shed light on the sources of the 1978 Iowa law, which, in large part, was adopted from the MCIAA, although the Iowa legislature failed to take over many of the more controversial and far-reaching aspects of the Minnesota law, including coverage of privately owned commercial public places, and especially restaurants. Iowa’s failure to create an administrative regulatory-enforcement framework, which, whatever its shortcomings in Minnesota, embodied the possibility not only of expanding the scope of the skeletal statute through rulemaking, but also of permanently driving the anti-public smoking campaign forward institutionally by means of the interaction between the responsible agency’s public health officials and the Association for Non-Smokers Rights, accounted, in large part, for the very slow progress in Iowa, which depended almost wholly on favorable political constellations in the state legislature, unmoored from the pressures of a legally empowered and energized corps of public health officials and an organized popular movement. These dual objectives explain why the focus of the chapter is on developments in Minnesota until the time in 1978 when the Iowa legislature was debating its public smoking law. However, since the Iowa law’s profound weaknesses propelled ongoing debate during the 1980s over amendments to strengthen it, the chapter also devotes some attention to the more stringent regulations promulgated in Minnesota in 1980, which widened still further the gap between the Iowa law and the MCIAA, which, more than ever, became the aspirational model of anti-smokers in Iowa.

Professor Edward Brandt’s Initiative

[S]moke…bothered me…a great deal. 7


6On anti-smoking and anti-cigarette sales legislation in Minnesota in the early twentieth century, see vol. 2.

7Email from Ed Brandt to Marc Linder (Apr. 30, 2007).
The Minnesota Clean Indoor Air Act of 1975

The American Lung Association, which has played the leading role in pushing for nonsmokers’ rights in Minnesota and other states, says its efforts are pro-nonsmoking, not antismoking. ¹⁸

Neither Heart nor Cancer supported the effort. It was not until many years later that they stopped allowing smoking during their board meetings. There was still smoking allowed in the Lung association until at least the 1980’s. ⁹

The initial impetus for passage of the Minnesota Clean Indoor Air Act, whose gestation period lasted from 1973 to 1975, came from Edward Brandt, who had recently completed a doctorate in political science, ¹⁰ was an assistant professor at the College of St. Thomas in St. Paul, and had been a two-term member of the Minnesota House of Representatives (Nonpartisan Election-Conservative Caucus, i.e., a Republican, but a self-professed “liberal...on issues of economic justice”) ¹¹ representing a Minneapolis district including the University of Minnesota from 1969 to 1971. ¹² On the House floor he had had the “misfortune” of being forced to sit among heavy smokers. ¹³ In fact, it was especially this exposure to smoke in the legislature in addition to other personal experience that motivated Brandt’s involvement in ANSR and efforts to secure passage of an anti-smoking law. ¹⁴ As a legislator he had already demonstrated his anti-smoking bona fides by writing a letter to the Federal Highway Administration in March 1970 supporting Ralph Nader’s petition to amend the Motor Carrier Safety regulations to ban smoking on interstate buses: “I do so on the grounds that such smoking represents not only a serious nuisance but a health hazard to other occupants. Most smokers have little idea as to what acute discomfort they cause to some non-smokers, especially

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⁹Jeanne Weigum (executive director, Association for Non-Smokers-Minnesota) to Marc Linder (Apr. 19, 2007).

¹⁰Edward R. Brandt, “Confidence and Crises of Confidence in International Relations: A Case Study of West German Political Attitudes Towards the United States During the Postwar Period” (Ph.D. diss., U. Minnesota, 1970).


¹³Telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007).

¹⁴Email from Ed Brandt to Marc Linder (Nov. 5, 2009).
those who may be suffering from temporary or permanent nasal difficulties of even a minor nature.” Brandt concluded by calling adoption of the amendment “a small but important step in promoting more civilized human behavior.”

As early as 1971 Brandt drafted an anti-smoking bill, but decided not to introduce it because he was not “sure...whether the public climate was strong enough at the time for its passage....” His electoral support came largely from Democrats in Northeast Minneapolis who, like Brandt himself, “were upset by the radicals who had gained control over the party apparatus. .... My announcement stated that I was running on behalf of the Humphrey Democrats and Republicans, in contrast to the radical McCarthy Democrats, who were the most radical group among students and some faculty in the university area.” A self-professed “unpaid citizen lobbyist,” Brandt may not have received the enduring public credit that he deserved for his role in instigating the Minnesota law, but those who were leading figures in the first half of the 1970s have unambiguously acknowledged his leadership. For example, Phyllis Kahn, the legislator who in 1973 introduced an anti-smoking resolution that Brandt had drafted and continued, more than any other Minnesota legislator, to be identified with anti-smoking initiatives for the next 35 years, observed that he had been “the initiator” and approached her about sponsoring his bill draft. When Brandt left Minnesota

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15Edward R. Brandt to Kenneth L. Pierson (Mar. 18, 1970), Bates No. 03757187. Brandt’s letter may have been prompted by an aggressive press release of the Minnesota Highway Department, which, after stating that “[i]f you are one of those bus passengers who is nauseated by smoke from cigarettes, you may be in for some relief soon,” explained to whom comments could be directed. Minnesota Highway Department, Ban on Smoking in Buses Proposed (Mar. 13, 1970), Bates No. 03757189.

16Email from Ed Brandt to Marc Linder (May 2, 2007); [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).

17Email from Ed Brandt to Marc Linder (Feb. 14, 2009).


19Telephone interview with Phyllis Kahn, Minneapolis (May 8, 2007). A comparative study of anti-smoking legislation in several states published by RAND completely misunderstood the dynamics of the passage of the MCIAA, giving all the credit to Kahn (“the driving force behind the bill was a single legislator”) and none to ANSR (the influence of the anti-smoking coalition was ranked as “absent”). Peter Jacobson, Jeffrey Wasserman, and Kristiana Raube, The Political Evolution of Anti-Smoking Legislation 58, 15 (1992). Hyman Berman, a labor historian at the University of Minnesota who sold his services to the cigarette manufacturer-defendants in the pivotal suit brought by the State of Minnesota as an alleged expert witness on the history of the public’s awareness of the dangers of tobacco smoking, erroneously testified that “the primary mover of the
in 1976, the staff of the newsletter of the organization he helped create and led proclaimed that without his “tireless efforts” there would have been no organization or MCIAA.\textsuperscript{20} And Robin Derrickson, who had been with the Lung Association in Minnesota since 1972 as a respiratory therapist working with chronic lung disease patients\textsuperscript{21} and spent much time at the state legislature from 1973 to 1975 attending committee meetings, stated in 1978 simply that: “The success of nonsmokers rights legislation in Minnesota should be attributed to Ed Brandt.”\textsuperscript{22}

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Minnesota Indoor Air Act was representative Phyllis Kahn...she was very instrumental in arranging coalitions,...getting the advocacy groups to support the bill....” He then identified these advocacy groups as the Cancer, Lung, and Heart organizations, “plus informal groups like Committee for a Smoke-Free Society, a group headed by Jean Rosenbloom called Committee for Non-smokers Rights and things of that nature.” He failed to mention ANSR. State of Minnesota v. Philip Morris Inc., Transcript of Proceedings, Vol. 47, Pages 9095-9371 at 9307-9308 (File No. C1-94-8565, Minn. Dist. Ct 2d Jud. Dist., Mar. 25, 1998), Bates No. 525470931/1143-4. Neither Ed Brandt, ANSR president at the time of the MCIAA’s passage, nor Jeanne Weigum, its current president and a leading member since 1975, ever heard of Rosenbloom. Weigum opined: “Clearly he got his history wrong.” Email from Jeanne Weigum to Marc Linder (Nov. 16, 2009).


\textsuperscript{21}Email from Robin Derrickson to Marc Linder (Feb. 14, 2009).

\textsuperscript{22}Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR). In delineating his roles, Brandt disavowed having been “the chief lobbyist. I drafted the law, found the individual chief authors [i.e., legislative sponsors], and testified before committees, but I was not the one who spent time contacting individual legislators.” In addition, “as an ex-legislator...I had more credibility and I was the one who knew what amendments I had to accept in order to give the bill its best chances.” The chief (unpaid) lobbyist, according to Brandt, was Glenna Mills Johnson, an ANSR member, whom Brandt regarded as “one of the most important of the ‘forgotten heroes.’” Email from Ed Brandt to Marc Linder (Apr. 30, 2007). Johnson was an M.F.A. student in photography at the University of Minnesota from 1974 to 1976 and received her degree in 1978. Email from Nancy Johnston, University of Minnesota, to Marc Linder (Feb. 25, 2009). Thirty-five years later Johnson’s intensity as an advocate of the MCIAA was so deeply etched in the memory of the associate administrator of the University of Minnesota Art Department that she was still unable to go to a restaurant without remembering that she owed its non-smoky air to Johnson. Telephone interview with Evonne Lindberg, Minneapolis (Feb. 24, 2009). A fellow ANSR member, Johnson’s self-proclaimed “right-hand man,” recalled her as “the mover and shaker” and “the person in the state” who initially made the law work. Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Although more than three decades later Mills had no recollection of having lobbied and stated that she had
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The Formation of the Association for Non-Smokers Rights (ANSR) and the First Failed Legislative Initiative in 1973

Kahn says...“I’ve never been as concerned with the suicidal tendencies of smokers.... Smoking is an appropriate activity to be conducted among consenting adults in private, just like adultery, fornication or homosexuality.... My major objection is damage to the innocent public.”

Don’t mix up anti-smoking with non-smokers’ rights. (Others have a right to smoke. You have a right to smoke-free air.)

To be sure, Brandt hardly imagined himself to be a lone wolf: a former legislator, foreign service officer in the U.S. Information Agency, and self-conscious political scientist, he realized that no legislative goals were attainable without an organization, a movement, and a strategy. Indeed, he was not even present at the founding of that organization on December 20, 1972, when seven people met under the name, as the minutes put it, “Ad Hoc Committee on Non-Smokers Rights (for lack of a better name).”

The Respiratory Disease Association of Hennepin County (Minneapolis)—on whose letterhead the minutes were typed and on whose board of directors Brandt sat—had, together

never lobbied, a non-ANSR-member friend who had accompanied her on lobbying excursions did remember (when Mills asked her in 2009). Telephone interview with Glenna Mills, Oakland (Nov. 1, 2009); email from Glenna Mills to Marc Linder (Nov. 5, 2009).

Jim Shoop, “3-Cent Tax Boost Sought on Higher-Tar Cigarettes,” Minneapolis Star, Jan. 25, 1979, Bates No. TIMN0462285/6 (quoting Rep. Phyllis Kahn). Kahn relished the phrase as evidenced by her public use of it three years earlier, when she told a public health meeting that the MCIAA “didn’t even go as far as my favorite statement about how smoking should be considered—as a practice to be engaged in only in private among consenting adults, in the same light as adultery, sodomy, and fornication.” Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 5-6 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B).

Program Perspectives,” ANSR, Fall 1982, n.p. [2].

Ad Hoc Committee on Non-Smokers Rights, Minutes (Dec. 20, 1972) (copy from Ed Brandt’s papers furnished by ANSR).

The minutes were typed on Hennepin County RDA letterhead because Julie Shaw, the minute taker, was employed by that organization.

Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR).
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with the counterpart organization in Ramsey County (St. Paul), initiated the meeting, each providing the group with a thousand dollars in start-up funding. (The National Tuberculosis and Respiratory Disease Association, which in 1960 had declared cigarette smoking to be a major cause of lung cancer and in 1968 urged its local chapters “to develop and sponsor an active program to prevent young people from becoming smokers, and to convince smokers that they should stop smoking,” changed its name to the American Lung Association in 1973.)

The organization’s then-executive director, Gerald Orr, having decided to create the group because “you could do a lot more radical things” outside of the old and established lung association—one of the more radical things that could not be done at the Hennepin County association was, as Brandt noted, to “have the courage to ask its (one?) smoker in the office to quit” smoking in the office—assigned Julie Shaw, a program associate in smoking deterrence/program administrator in smoking education at Hennepin County RDA, to found it. (As early as January 1969 the organization’s board of directors had decided to create Minnesota’s first staff position of anti-smoking coordinator.)

Shaw, whose staff time RDA was lending to the new group,

28 Another attendee, Karyn Diehl, represented the Respiratory Disease Association of Ramsey County. Diehl indicated that some inter-organizational rivalry characterized the relationship between the two groups; 36 years later she still recalled one occasion on which she saw Julie Shaw, her counterpart, cutting off the bottom corner of a sheet of paper that was to be distributed to the legislature and contained the name and address of the Ramsey County group. Diehl left both the Lung Association and ANSR in 1974. Telephone interview with Karyn Diehl, St. Paul (Mar. 2 and 3, 2009).


30 Telephone interview with Gerald Orr, Burnsville, MN (Feb. 16, 2009). Interestingly, Orr was, according to a program director at the RDA of Hennepin County at the time, a big cigar smoker. Telephone interview with Robert McNattin (Feb. 15, 2009).

31 Email from Ed Brandt to Marc Linder (Apr. 30, 2007).


opened the meeting by explaining RDA’s reasons for being “interested in helping to organize a citizen’s action group to work for the rights of the non-smoker....” Emblematic of the perverse prevalence of smoking at the time, Shaw listed as the first reason “to put pressure on hospitals” (and other public places) “to better control indiscriminate smoking in order to protect the health, safety and comfort of non-smokers.” In addition, RDA wanted to educate the public about tobacco smoke’s health effects on nonsmokers in enclosed environments and make smokers aware of the “appropriate and inappropriate places for smoking.” After Shaw had outlined the activities of similar groups elsewhere in the United States, those present “decided that the group must have a positive image—being ‘anti’ anything would only make progress difficult.”

Brandt decided to attend the group’s second meeting on January 9, 1973—at which the name, Association for Non-Smokers Rights, was adopted—after state Senator Mel Hansen, who two months later would introduce the first anti-smoking bill and with whom he was a member of the Lung Association-inspired outdoor air pollution-focused Metro Clean Air Committee, had told him about the new organization, whose focus on indoor tobacco smoke was of greater concern to Brandt. The agenda stated that the first item of new business would be presented by Brandt and dealt with a “bill regarding non-smokers’ rights.” Handwritten notes on the agenda (presumably by Brandt) suggested that the group’s anti-anti approach was already flourishing. A proposal for the motto of a button read: “I like smokers. I don’t like smoke.” Equally non-confrontational was the admonition: “ANSR asks you to be considerate.” Bending over backwards not to antagonize smokers was also exemplified by the formulation of one of the group’s objectives as “encourag[ing] establishment of appropriate ventilated places for those who choose to smoke.”

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35 Ad Hoc Committee on Non-Smokers Rights, Minutes (Dec. 20, 1972) (copy from Ed Brandt’s papers furnished by ANSR).
36 [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); telephone interview with Ed Brandt, St. Paul (Feb. 14, 2009). Hansen, a founder of the Metro Clean Air Committee, was chairman of its policy committee in the early 1970s as well as a member of the executive board of the Hennepin County Respiratory Disease Association. The Minnesota Legislative Manual 1971-1972, at 48 (Larry Andersen ed. n.d.). MCAC supported the anti-smoking bill H.F. 2801 in 1974 because subjecting people to smoke indoors would have defeated the purpose of cleaning up outdoor air. Testimony of Metro Clean Air Committee before the Subcommittee of the House Committee on Health and Welfare Friday, Feb. 22, 1974—HF-2801, in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3.(B).
At the January 9 meeting, attended by eight members, the first questions that arose dealt with the organization’s objectives, name, and relationship to the anti-air pollution movement. With respect to the last named, Shaw, whom the first issue of ANSR’s newsletter presumably meant to praise for having “the drive of a General Motors executive,” explained that “our particular group is being formed to deal with the problem of indoor pollution resulting from cigarette smoking and as far as the Respiratory Disease Association is concerned, will come under its Smoking Deterrence Program.” In response to a suggestion that the group be called IDS for “I don’t smoke” another member stated that that “name implies attacking and that we should perhaps be attacking smoke and not necessarily the smoker—a more positive approach might be easier to put across.”

As soon as Brandt suggested ANSR, the group excitedly embraced it and proceeded to formulate four major objectives: (1) educating the general public about tobacco smoke’s health and safety hazards in enclosed environments, “especially as it affects the non-smoker”; (2) insuring nonsmokers a smoke-free environment and encouraging creation of “appropriately ventilated areas for those who choose to smoke”; (3) putting “pressure on public places including healthcare facilities, public meeting rooms, recreation areas and vehicles of public transportation to better control indiscriminate smoking in order to protect the health, safety and comfort of all persons”; and (4) supporting and encouraging public policies, legislation, and appropriations to promote the first three objectives. Shaw then “explained the structure of ANSR in its beginning stages” as comprising three circles: the inner core of the founding members charged with initiating action and policies and with organizing the outer circles; an intermediate second circle of key people in the community, such as media personalities, legislators, and prominent political, educational, and medical people, who would offer to help publicize and organize ANSR; and an outer circle of people who would respond to publicity drives and become “‘card-carrying’ members.” Finally, Brandt presented his resolution to be submitted to the Minnesota House of Representatives on limiting smoking in public places. Offered mainly for its “educational value,” the resolution, if it interested the community in such legislation, could help ANSR to prepare more a “meaningful” measure later.  

39 Association for Non-Smokers’ Rights (ANSR), Minutes at 1-2 (Jan. 9, 1973), American Lung Association of Minnesota, Association Records, 1907-1994, MHS Mss Coll., 149.B.17.12F. Of the 11 members of ANSR’s executive board during 1973-74, four were paid employees or volunteers at the Respiratory Disease Association of Hennepin and Ramsey County, five had business backgrounds, one was a professor, and one was a high
At the third meeting on January 25, Brandt reported on his legislative resolution, which Senator Hansen had tentatively agreed to introduce. Although Brandt emphasized that the resolution would have no legal effect, it would “open the door for preparation of something with legal hold.” A week later Brandt informed the group that in the House Democratic-Farmer-Labor Phyllis Kahn had agreed to sponsor his resolution, which would be co-sponsored by Jim Swanson (DFL), chair of the Health and Welfare Committee, who would hold a hearing on it. The following week Brandt related that he had approved Kahn’s making a minor change to emphasize “the environmental issue.” Promising was Kahn’s revelation to him that “the other legislators were ‘clamoring to have their names on the bill.’”

Brandt and Kahn, who had just been elected to his old seat, were, given the “vast gap between our ideological perspectives,” an odd couple, but he “knew how the legislature functioned and knew that only a bill with a chief author who was a member of the majority had any chance of passing.” Kahn, a Jew from Brooklyn, New York, with a doctorate in biophysics from Yale, in her first term representing the district that encompassed the University of Minnesota, at which she had been a research associate in genetics and cell biology before being elected, was arguably the most left-wing member of the legislature. Indeed, at least one Hennepin County Republican told Brandt that “he wished I had found another sponsor, since Phyllis was seen as belonging to the far left in those days.” Kahn’s fit for her role as chief sponsor was in part a function of the fact that until she entered the legislature she had “never really [been] bothered by other people’s cigarette smoke.... ‘I really led a very sheltered life.... I was a...
research scientist (in biochemical genetics and microbiology) at the University of Minnesota for 10 years and we had very strict nonsmoking rules. There are some very delicate instruments used in our work that were affected by cigarette smoke. We needed the cleanest atmosphere possible. So when I was shoved into these committee rooms at the Legislature and at DFL meetings, they were just choked with smoke. When there are 30 people in a room and half of them are smoking, you can’t find a place to sit where somebody isn’t blowing smoke in your face.”

A preview of the legislative struggle over an anti-public smoking measure was offered by the battle over smoking in the Senate itself in February. When Nicholas Coleman, the first Democratic Senate Majority Leader in 114 years—even 1973 marked the first time in the twentieth century that the DFL controlled the Senate, House, and governorship—a heavy smoker, and chairman of the Rules Committee, reported the committee report on the Senate’s permanent rules for the 1973 session on February 8, Rule 77 read: “No Senator or officer of the Senate, or other person, shall be permitted to smoke in the Senate Chamber. There shall be no smoking in the visitors section of the galleries.” This rule constituted a significant expansion of the rule as it had existed in 1971, which had banned smoking in the Senate chamber only during a memorial service—a rare occasion. Four days later, on February 12, DFL Senator Edward Novak, a St. Paul lawyer, former FBI investigator, and a smoker, moved to amend the Senate rules, inter alia, by reinserting the stricken words, “during the Memorial Service.” The Senate adopted the amendment, thus

48http://www.leg.state.mn.us/legdb/fuldetail.asp?ID=10107
54http://www.leg.state.mn.us/legdb/fuldetail.asp?ID=10470
55Email from (ex-Sen.) George Conzemius to Marc Linder (Mar. 23, 2009).
reinstating smoking senators’ virtually complete freedom to inundate their nonsmoking colleagues with tobacco smoke. That Novak was one of Coleman’s “most trusted colleagues” prompted Coleman’s biographer to conjecture that the majority leader might have sensed that it would be hard to stop the rule change in committee and therefore had Novak kill it on the floor. Later that same day, however, Senator David Schaaf, a newly elected florist who was plagued by a cigar-smoking colleague who sat in front of him and in 1974 would be the Senate sponsor of ANSR’s anti-smoking bill, moved to strike the reinserted restrictive wording, and the Senate adopted his amendment, thus restoring the new ban.

However, the struggle over clean air in the Senate chamber was not over yet. On April 18, Majority Leader Coleman’s motion that Rule 77 be suspended for the evening session prevailed. Then on May 1, the motion by cigar-smoking

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57 Email from (ex-Sen.) John Milton to Marc Linder (Mar. 11, 2009).
58 Telephone interview with Robert Brown (former senator), St. Paul, Mar. 11, 2009. The senator in question, Win Borden, was, Schaaf later explained, “a very good friend—however he chain-smoked cigars! He sat close to me and one day I was looking for a pen in his desk in which I found a couple dozen cigar butts. During the debate I referred to him as ‘bonfire Borden’....” Email from David Schaaf to Marc Linder (Mar. 11, 2009).
60 A newspaper article appearing on April 15 gave an account of the banning of smoking in the Senate chamber (without mentioning any date), according to which DFL Senator Ed Schrom, an ex-smoker, was the chief advocate, and the 33-28 vote was “strictly nonpartisan. It was the smokers versus the nonsmokers. Fifteen minutes later, ashtrays in the Senate chamber were picked up. Some nicotine-crazy senators resorted to chewing on unlit cigars or making frequent trips to the hallways or bathrooms to smoke. The bathrooms got so smoky that nonsmoking senators thought of requesting their own bathroom.” Peg Meier, “Nonsmokers Stand Up for Rights,” MT, Apr. 15, 1973 (1E:1-2). Oddly, Schrom voted on May 1 to suspend the rule for the remainder of the session. See below.
62 Email from John Milton (ex-state senator) to Marc Linder (Mar. 7, 2009).
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DFL Senator Charles “Baldy” Hansen\(^63\) that the first sentence of Rule 77 be suspended for the rest of the session received 36 affirmative votes as against only 24 negative votes (including those cast by Mel Hansen and Schaaf), but, lacking a two-thirds majority, it failed to prevail. Only five of the 24 senators who voted against suspending the no-smoking rule voted against the Minnesota Clean Indoor Air Act in 1975, whereas 17 voted for it (and two did not vote); in contrast, 12 of the 36 senators voting to suspend the no-smoking rule voted for the MCIAA, whereas 20 voted against it (and four did not vote). Nor can the voting pattern be accurately characterized as a caucus vote, even though a significant party-line difference was discernible: whereas almost two-thirds of the DFL voted (23-12) to suspend, just over one-half of Republicans did (13-12).\(^64\) Whatever might shed light on how and why this 36-24 vote in favor of smoking in senators’ own workplace morphed into a 36-28 vote against smoking statewide two years later\(^65\) would be even harder put to explain why the very next day, May 2, Republican Minority Leader Robert Ashbach’s identical motion prevailed.\(^66\)

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\(^63\)Hansen, a banker and “very conservative” DFL’er— it would have been difficult for a Republican to be elected from the big “meatpacking” town of Austin— was closely allied with Victor Jude, a former senator who owned a tobacco distributorship and was a lobbyist in 1975 (see below). Typical of the low regard in which he was held was the comment by one colleague that he was “one of the worst legislators” he had ever known. Email from Robert North to Marc Linder (Mar. 14, 2009). Another remarked that Jude and Hansen were “the closest we came in my days to Chicago-style corruption....” Email from John Milton to Marc Linder (Mar. 14, 2009). In 1975 he chaired the Labor and Commerce Committee, which “many Capitol observers refer to as the ‘Forest Lawn’ of the Senate,” because its conservative stance led to the demise of so many bills. Gary Dawson, “Senate Gives Labor Bill Last Rites,” \textit{St. Paul Pioneer Press}, Apr. 30, 1975 (15:5-8). A reporter who covered the legislature in 1975 characterized Jude as a sleazy lobbyist, who had operated virtually directly out of Hansen’s office, where many lobbyists hung out who had business before the committee chaired by Hansen, who was close to them. Telephone interview with Steven Dornfeld, Minneapolis, Minneapolis (Mar. 13, 2009).


\(^65\)\textit{Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975}, at 2281 (May 14). Schaaf, who did not regard the setback as ominous because it suspended rather than repealed the rule, explained the suspension as a function of the end-of-session rush that generated long floor sessions, more stress, and less time for heavy smokers to leave the chamber to smoke; in turn, some anti-smokers were themselves too stressed and distracted by the press of the proceedings to argue over it. Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009). Ed Brandt offered conjecture to the same effect. Email from Ed Brandt to Marc Linder (Mar. 6, 2009).

\(^66\)\textit{Journal of the Senate, Sixty-Eighth Legislature, First Session, Legislature, State of
On March 5, Brandt’s resolution was introduced in the House and a very weak bill was introduced in both chambers. The House concurrent resolution (“relating to smoking; urging limitations on smoking in places of public resort”), which Kahn and four other representatives sponsored, did indeed embed public indoor tobacco smoking deeply in the burgeoning national environmental concerns:

WHEREAS, the legislature recognizes the fundamental right of each person to the preservation and nondegradation of the natural resources of the earth including the air; and
WHEREAS, each person has the responsibility to contribute to the protection, preservation and enhancement thereof; and
WHEREAS, industry must shut off its smoke stacks when outside pollution reaches alert levels; and
WHEREAS, studies indicate readings taken in bars, committee rooms, homes, and even hospitals have reached pollution levels far greater than alerts for industry.

Only then did the resolution recite the U.S. Public Health Service showing that smoking was detrimental to nonsmokers’ health inasmuch as it caused them “acute discomfort...and sometimes even...illness....” The practical resolution then embodied “state policy to discourage smoking in any enclosed public facility, including public buildings and vehicles used for public transportation, except for rooms or sections specifically set aside for smoking in those instances where comparable alternative facilities are available for nonsmokers.” Even if the resolution had had legal force, its use of “discourage” would still have deprived it of any real-world power to protect nonsmokers. The resolution’s timidity flowed from what Brandt decades later revealed as his own world view: “I am conservative in my views as to how quickly you can get human beings to change their behavior. That is why ANSR was very cautious in its approach and why in

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67House Concurrent Resolution No. 7 (Mar. 5, 1973, by Phyllis Kahn (DFL), Bill Kelly (DFL), Paul McCarron (DFL), Jim Swanson (DFL), and Gerald Knickerbocker (Rep.) (copy furnished by MHS).


69House Concurrent Resolution 7 (Mar. 5, 1973, by Kahn, Kelly, McCarron, Swanson, and Knickerbocker)***
1973 it pushed only for a resolution. In that sense, ANSR was very patient in its approach, but not because of thoughts about pressure by lobbyists. Rather, the question was how much public support we could count on.\textsuperscript{70}

To compensate for the non-binding character of the resolution, Brandt and ANSR also arranged for some of the same legislators to introduce identical bills in both houses. Senate File 917, as introduced by Mel Hansen, and House File 966, as introduced by House Republican Gerald Knickerbocker (whose participation was impelled by his experience of exposure to tobacco smoke inside and outside the legislature)\textsuperscript{71} and four other representatives (including Kahn), simply provided that: “All public buildings, public places and public means of transportation having public areas with room for 40 or more people shall have separately designated smoking and nonsmoking sections in such areas except that separately designated areas shall not be required when more than five square feet is normally available per person.”\textsuperscript{72} Apart from the lack of any enforcement or penalty provision, which rendered the bill purely aspirational, the quantitative space cut-offs would have excluded vast numbers of places and left huge numbers of nonsmokers unprotected—if being surrounded by all of five square feet of floor space could be taken seriously as per se conferring any protection whatsoever from tobacco smoke on nonsmokers.

The same day ANSR complemented this legislative action with a news conference in the State Capitol Building, covered by all four television stations, which featured Representative Kahn announcing the introduction of the resolution and Dr. Charles Mayo II (grandson of the co-founder of the Mayo Clinic and a prominent Cancer Society official).\textsuperscript{73} Perhaps in a bid to appeal to

\textsuperscript{70}Email from Ed Brandt to Marc Linder (Apr. 29, 2007).

\textsuperscript{71}Telephone interview with Gerald Knickerbocker (Apr. 26, 2007). That the House and Senate bills were identical and filed on the same day renders implausible Knickerbocker’s much later statement that he had drafted the House bill before and not in sync with Hansen.


\textsuperscript{73}Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); ANSR, “A News Conference to Announce a Resolution, Pollution Research, and Hospital Policies in Support of the Rights of the Non-
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corporate hierarchies, Kahn stressed that: “Along with increasing desires to protect our environment from industrial pollution, comes the realization that the air quality in the executive committee room of an industrial plant may be in even poorer condition than the air quality near its smokestacks.” She also made it clear that ANSR did “not seek to eliminate smoking,” but only “to establish the right to breathe clean air as a fundamental public right.”

In the immediate aftermath of the day’s events an average of 20 people a day became ANSR members and media exposure proliferated. In connection with its hearing on April 12, Julie Shaw submitted testimony to the Health Subcommittee of the Senate Health and Welfare Committee on S.F. 917 in her dual capacity as chairman of ANSR—which at this point already had a membership of more than 600—and as a program administrator at the Hennepin County RDA. Shaw devoted some of her testimony to medical-scientific findings that in part went beyond those of the 1972 surgeon general’s report. For example, she noted that cigarette smoke caused the “natural cleansing mechanism of the lungs to shut down. The bronchial cilia are paralyzed by high concentrations of cigarette smoke in the air.” She also quantified the prevalence of tobacco smoke-induced eye irritation among nonsmokers at 70 to 80 percent. The annual combustion into the air of 573 billion cigarettes and seven billion cigars—that is, the burning of one billion tons of tobacco—she characterized as “certainly a major pollutant in our environment!” Accurately calling the bill a “very modest first step toward remedying a major air pollution problem,” Shaw pointed out that it did not even “require the smoker to stop smoking when danger levels are reached. It only requires separation of smokers and non-smokers so that the pollutants will be somewhat diluted before they reach the non-smoker’s lungs.” As timid an initial solution as S.F. 917 was, ANSR hoped to make “stronger and more comprehensive legislation available” to the legislature in 1974.


76ANSR, Testimony from the Respiratory Disease Association of Hennepin County and from the Association for Non-Smokers Rights: For the Health Sub-Committee of the Senate Health and Welfare Committee on SF 917, Relating to Regulating Smoking in Enclosed Public Places (Apr. 12, 1973) (copy furnished by ANSR). It is not clear whether
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Two weeks later the Senate Health, Welfare and Corrections Committee adopted S.F. 917 with amendments increasing the exclusion level to 10 square feet of space for nonsmokers. However, the bill failed to make it to the Senate floor before adjournment. Since Hansen was a Republican and therefore in the minority in 1973, it was clear to Brandt that legislative party politics had made it very unlikely that his bill would pass. In contrast, neither H.F. 966 nor House Concurrent Resolution 7 was considered by a committee. In retrospect the House bill’s chief sponsor, Knickerbocker, concluded that although H.F. 966 had been introduced before its time, it did help pave the way to enactment of the Minnesota Clean Indoor Air Act two years later.

On April 15, ANSR’s public profile was enhanced by a full-page inside cover advertisement soliciting members in the television supplement to the Sunday Minneapolis Tribune, half of the cost of which was paid for by Rudy Boschwitz, a Jewish refugee from Nazi Germany and future Republican U.S. senator from Minnesota, who at the time owned Plywood Minnesota, a home improvement chain. The text, which bent over backwards to avoid attacks and to stress the objective of one big happy family of smokers and nonsmokers, focused on a nonsmoker people called Goofy George who liked smokers (except, presumably, Shaw presented this statement orally, since a week later an ANSR report noted that Hansen’s bill had been “passed through sub-committee without testimony from ANSR.” ANSR, “Progress Report: Current ANSR Activities” at 2 (Apr. 20, 1973) (copy furnished by ANSR). Shaw offered the same testimony in ANSR, Testimony from the Respiratory Disease Association of Hennepin County and from the Association for Non-Smokers Rights: For the Health & Welfare Committee of the Minnesota House of Representatives on House Concurrent Resolution #7 relating to regulating smoking in enclosed public places (Apr. 18, 1973).


ANSR, Legislative Summary at 1 (Bills Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR).

Email from Ed Brandt to Marc Linder (Feb. 14, 2009).

ANSR, Legislative Summary at 1 (Bills Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR).

Telephone interview with Gerald Knickerbocker, Minnetonka (Apr. 26, 2007).

Although Boschwitz “felt lukewarm about this issue,” he paid for the ad for Brandt’s sake because they knew each other personally. Brandt’s later recollection was that the lung association paid the other half since ANSR at that point lacked the membership or funds to pay. Email from Ed Brandt to Marc Linder (Feb. 16, 2009).
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the “office bullies [who] blew smoke in his face”), but not their smoke. Unwilling to put up with inhaling it, one day he hung a “Thank You For Not Smoking Sign” in his office, began carrying around air freshener spray cans, and refused to enter smoke-filled conference rooms. After he had met other nonsmokers and formed ANSR, people stopped smoking in his office and car, and “[r]estaurants, offices, and other public places offices began to set up separate, well ventilated places for people who smoke, and clear air places for people who don’t. Everyone was healthier, and, in the end, non-smokers and smokers lived happily ever after.”

About the same time both a Minnesota Poll revealing that three-fourths of respondents stated that they believed that nonsmokers had a right to a smoke-free environment and feature articles in the news media on nonsmokers’ rights reinforced interest in the group, triggering daily accessions to membership of 60 to 100. Although the Poll, covering 600 people 18 years of age and older and published on the front page of the Family section of the Minneapolis Tribune, showed that smokers, who composed 37 percent of the respondents (but 47 percent of those under 30 years of age), “answered the question [as to nonsmokers’ right to a smoke-free environment] the same way,” only 60 percent of them stated that they ever had misgivings about smoking in nonsmokers’ presence—the same proportion of smokers who replied that they had ever been bothered by other people’s smoke.4 An article on the same page on nonsmokers’ rights that highlighted ANSR stated that individual memberships cost one dollar and that ANSR wanted “to keep peace” between smokers and nonsmokers, for example, by recommending that well-ventilated areas be provided for smokers.85 As a result of this publicity, by April 20, paid (individual, family, and business) membership had reached 1,100 (including a $100 membership from the large

83"Legend of the Non-Smoker,” MT, Apr. 15, 1973 (copy furnished by ANSR).
84"Minnesota Poll: Does Smoke Annoy You? Don’t Suffer—Speak Out,” MT, Apr. 15, 1974 (1E:3-4, 4E:2) (quote); [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt); telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007). A year later, when the Minnesota Poll determined that virtually the same proportion (59 percent) of nonsmokers reported that they had been bothered by smoking, 63 percent of women but only 54 percent of men expressed that view; by age, the younger the nonsmokers the more likely they were to be bothered, ranging from 76 percent of those 18 to 25 to 40 percent of those over 65. “Minnesota Poll: Most Non-Smokers Admit that Smoking by Others Sometimes Chokes Them Up,” MT, Apr. 7, 1974, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).
retailer, Dayton-Hudson Corporation)\textsuperscript{86} and a month later rose to 1,543\textsuperscript{87}—a far cry from the 10,000 members Shaw wanted to have by June 1, but still a good start for a group begun with “a couple thousand dollars of Twin Cities Easter Seal money,” \textsuperscript{88} especially when by September 15 memberships reached 4,356 representing almost 7,000 people.\textsuperscript{89} ANSR’s aspiration of expanding to 50,000 members, thus becoming Minnesota’s largest organization and positioned to “work on much needed projects for clean air in hospitals, restaurants, motels, lunch rooms, homes, etc.,” by March 1974 (marking a full year of “selling memberships”)\textsuperscript{90} would remain out of reach, in spite of its “philosophy of...quietly and patiently objecting to smoke—not the smoker,” who “may be our friend and neighbor” or family member.\textsuperscript{91}

On April 26, the day on which the Senate Health and Welfare Committee adopted S.F. 917, Democrat Willard Munger, the life-long non-smoking\textsuperscript{92} chairman of the House Environmental Preservation and Natural Resources Committee from Duluth (who had been a House member since 1955 and at his death in 1999 was its longest serving member ever)\textsuperscript{93} and four others (including Kahn, a Democratic physician and two Republicans) introduced a much more

\textsuperscript{86} ANSR, “Progress Report: Current ANSR Activities” at 2 (Apr. 20, 1973) (copy furnished by ANSR). Richard Cesario, an ANSR member since March, chair of its policy committee, and elected vice-chairman of its executive board in June, was a Dayton-Hudson lawyer. \textit{ANSR} 1(2):[2] (July [1973]); ANSR, “Executive Board Roster 1973-74” at 1 (n.d.) (copy furnished by Ed Brandt). Brandt later surmised that his prior work at the Dayton-Hudson Foundation was the reason for the $100 corporate membership. Email from Ed Brandt to Marc Linder (Nov. 6, 2009).

\textsuperscript{87} ANSR, “Current Activities Report” (May 21, 1973) (copy furnished by ANSR).


\textsuperscript{91} Telephone interview with Will Munger, Jr., Duluth (Apr. 8, 2009); Patricia Lehr, Duluth (Apr. 11, 2009) (Munger’s daughter).

\textsuperscript{92} Telephone interview with Will Munger, Jr., Duluth (Apr. 8, 2009); Patricia Lehr, Duluth (Apr. 11, 2009) (Munger’s daughter).

\textsuperscript{93} http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10443

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comprehensive bill (H.F. 2384), which was not only enforceable, but in one central respect was also more radical than any that would become law anywhere in the state or country for years.94 “It would, according to Brandt, “be more accurate to call Munger’s bill the Don Ternes bill.” Ternes, whom Brandt also characterized as “the key member of the Duluth chapter of ANSR,”95 was a recent college graduate from Duluth, an environmental activist, and very active in the DFL. The fact that “I couldn’t breathe” at many of the political meetings he attended was one of the main drivers of his intense interest in securing passage of a nosmoking bill in Minnesota. Unable 36 years later to state with certainty whether he had drafted the bill, Ternes was nevertheless willing to accept credit for having been its “catalyst”: he had sought out and received copies of anti-smoking laws and bills from around the country from John Banzhaf at Action on Smoking and Health (who had supported the bill that became the first statewide smoking restriction law in Arizona in 1973) and approached a number of legislators including Munger in an effort to persuade them to support anti-smoking legislation.96

H.F. 2384’s preamble was stronger than S.F. 917’s in noting that tobacco smoking had been found to be “a significant health hazard” to nonsmokers breathing tobacco smoke-contaminated air; in view of the “significant harm to the public” caused by tobacco smoking, the bill declared Minnesota’s public policy that “there is a right to be free from tobacco smoke which transcends any right to smoke tobacco and which must, in the interest of public health, prevail over the latter whenever the two are in conflict.” More generally the bill’s purpose was to protect the nonsmoker’s health and environment “by preventing infringement on the right to be free from tobacco smoke to the maximum extent reasonably possible.”97 The scope of coverage of enclosed indoor public places “made available to the general public” included restaurants, retail stores, grocery stores, public conveyances, public school buildings, and commercial establishments. Ironically, given ANSR’s original focus on hospitals, they were subject to an exception for rooms or areas not housing nonsmoking patients “as permitted by


95 Email from Ed Brandt to Marc Linder (Feb. 17, 2009). Ironically, 36 years later Ternes was unable to recall whether he had belonged to ANSR at all, though he did not dispute the possibility. Telephone interview with Don Ternes, Maplewood, MN (Apr. 15, 2009).

96 Telephone interview with Don Ternes, Maplewood, MN (Apr. 15, 2009).

physicians” as well as to an exclusion of “enclosed offices not ordinarily frequented by the general public.” The bill’s most radical provision straightforwardly prohibited smoking in all covered public places instead of conferring discretion, as was and would be universally the case in the United States for many years, on owners/managers to designate separate smoking-permitted sections. Those in charge of such public places were required to post signs outside each entrance stating that smoking was prohibited and to provide fireproof receptacles at each entrance for disposing of lighted tobacco; violators were subject to a $10 to $100 fine; and complaints could be filed with the state health department. Those responsible for covered public places (and their employees) were prohibited from willfully or knowingly permitting smoking or providing ash trays. The state board of health was charged with issuing regulations needed to carry out the law’s purposes, including the creation of a uniform citation and complaint system; with the local boards of health and county and local enforcement agencies the state board of health shared enforcement powers; the boards of health were also empowered to seek judicial injunctions for prohibiting or preventing violations. Finally, violators of any of the law’s provisions were subject to the aforementioned $10 to $100 fine.

ANSR was not certain, in Brandt’s words, “whether the public political climate was strong enough at the time” for passage of H.F. 2384—“just as I had drafted a bill in 1971 but did not introduce it for the same reason.” “The only problem with Munger’s bill,” as Brandt ironically observed decades later, “was that it had no chance of being adopted by the legislature.” Raising popular consciousness may have been one of Munger’s priorities, but in order to close the gap between aspiration and reality ANSR decided to back Munger’s bill but with significant amendments, to which Munger—who had been “Mr. Environment” in the legislature for many decades—he himself agreed. In June Shaw met with Munger to discuss proposed amendments to his bill to substitute a separation of smokers for the flat ban on smoking; Munger agreed not only to this (radical) change, but also to add a section on employee rights. In mid-June

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102 Email from Ed Brandt to Marc Linder (May 2, 2007).
103 Telephone interview with Dr. Harold Leppink, Boca Raton, FL (Apr. 12, 2009). Leppink had been the executive officer of St. Louis County Health Department in Duluth and worked with Munger for many years.
104 See Mark Munger, Mr. Environment: The Willard Munger Story (2009).
Brandt’s ANSR legislative committee decided that a separate back-up bill regarding only hospitals should be prepared in case Munger’s failed. Revealing an apparent division of opinion with ANSR, its executive board engaged in “considerable discussion...about whether or not this legislation was sufficiently strong to provide the results we are seeking,” but in the end decided that responsibility for legislative activities should reside with Brandt’s committee, on whose expertise and advice the board should rely.105 Brandt’s committee then decided to support Munger’s bill with the aforementioned changes, which was both “more comprehensive than any we have seen so far” and provided for enforcement.106 Oddly, Munger’s bill disappeared in the second session in 1974 and Munger became a cosponsor of ANSR’s identical House and Senate bills.107 Shaw’s departure from the RDA and ANSR in June and Brandt’s election as chairman of the executive board marked the transition from full-time lung association leadership to volunteers.108

ANSR’s Bill Dies in 1974

ANSR...is a new organization...formed not to get smokers to quit but to get everyone into his own corner. ...

105 ANSR, ANSR Executive Committee Meeting Minutes at 2 (June 21, 1973) (copy furnished by ANSR).

106 ANSR, “Current Activities Report” at 2 (June 29, 1973). Julie Shaw’s report failed to make it clear to members that the original bill had been much more capacious. Julie Shaw, “Current Activities Report,” ANSR 1(2):n.p. [2] (July [1973]). See also ANSR, “Election of ANSR Board Chairman” (July 2, 1973) (News Release) (stating that the ANSR board had approved its Legislative Committee’s proposal to “give full support” to Munger’s bill, “which will provide broad requirements for separate areas for non-smokers in all public places....”

107 See below. In ANSR’s papers is found an undated page titled, “Amend H.F. 2384 to read as follows,” which provided, inter alia, that: “Smoking shall be prohibited in all public places, except where separate facilities are provided for smokers and non-smokers so as to protect the non-smokers’ right to breathe clean air.” Such “separate facilities” were defined as meaning “separate rooms divided from each other by a wall or a partition within a single room which will prevent smoke from filtering through to the maximum feasible extent.”

108 ANSR, “Current Activities Report” at 1 (June 29, 1973) (copy furnished by ANSR); Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).
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“We want to get the puffers on one side and the breathers on the other.... All we are asking is the right to breathe somewhere, sometime. ... All we really want is for smokers to be more courteous.”

Part of the group’s activities in the Twin Cities includes a campaign to get all restaurants, where feasible, to cordon off areas for smokers and designate them as such.109

In spite of the bills’ deaths, a special ANSR legislative subcommittee chaired by Brandt intensified the group’s efforts at the Capitol during the interim until the opening of the 1974 session. The issues that the subcommittee planned to deal with included: (1) improved smoking control in hospitals and health care facilities, and food preparation and/or sales businesses; (2) creation of smoking/nonsmoking areas in public places; (3) encouraging employers to provide nonsmoking employees with “clean and healthful working environments”; and (4) prohibiting discrimination against employees who petitioned for nonsmoking working areas.110

For the 1974 session Brandt’s legislative committee, aided by friendly legislators, worked out a more comprehensive bill, which included enforcement and penalty provisions. He then asked Representative Kahn and Senator Schaaf to sponsor ANSR’s bill.111 The Minnesota Clean Indoor Air Act, House File 2801, introduced on January 16 by Kahn and four others,112 and Senate File 2889, introduced by Schaaf two weeks later,113 was thus based on ANSR


110 ANSR, Legislative Summary at 2 (Bill Relating to Use of Tobacco) (n.d. [1973]) (copy furnished by ANSR). In October ANSR leadership bemoaned that there had been “little progress” on hospitals since the summer, but mentioned that the Minnesota Medical Association was “behind us and we can use them to help the Hospital Association Effort.”

111 Telephone interview with Ed Brandt, Minneapolis (Apr. 26, 2007); email from Ed Brandt (Apr. 29, 2007); telephone interview with David Schaaf, McGregor, MN (May 12, 2007).

112 H.F. 2801 (Jan. 16, 1974, by Kahn, Swanson, Munger, Dale Erdahl (Rep.), Richard Andersen (Rep.)).

recommendations.114 Earlier in the month Kahn had been thrown onto the defensive, in her dual capacity as legislator and ANSR member, by Minneapolis Tribune columnist Will Jones, who had recounted his repeated encounters in downtown Minneapolis movie theaters with illegal smoking and management’s feckless attempts to put a stop to it. Jones urged nonsmokers sharing his attitude to “speak up now. Don’t wait for organizations like the Association for Non Smokers Rights to help you. The association collects money and spins wheels with surveys and makes pious noises about seeking legislation to require no-smoking areas in public places, but there’s no action.”115 Two days later Kahn stressed in a letter to Jones, who had “denigrat[ed]” ANSR’s efforts, that since 1973 “we have rewritten our bill, with one eye on what other states have done and also on what is politically feasible.”116

Jones’s criticism was consistent with the complaint voiced internally in October 1973 by Hugh Morgan, the chairman of ANSR’s Public Awareness Committee “that there were not enough signs of action....” In response to his felt “need for something to report on,” the group’s leaders “agreed that we may be trying to do much and we should zero in on just a few targets. There are still only a small number of activist volunteers so we must limit our priorities.”117 Years later Ed Brandt acknowledged that, although Will Jones became “very supportive of ANSR and the MCIAA,” at the beginning of 1974 “ANSR had existed for less than a year, so we couldn’t possibly have achieved much, in terms of concrete

115Will Jones, “After Last Night,” MT, Jan. 7, 1974 (1B:7, at 2B:7). It was already illegal (presumably in Minneapolis), according to Jones, to smoke in theaters, “except for certain approved, designated smoking areas,” public elevators, city buses, and retail stores: “If we could just get the slobs to obey the law in the places where smoking already is banned, we’d be a giant step ahead in the struggle for clean, breathable air.” Spurred on by a survey done at the Upper Midwest Hospitality Conference showing that 49 of 73 restaurant and hotel managers stated that they would support legislation separating smokers and nonsmokers, ANSR leaders agreed that “our major project” between October and December 1973 “would be to personally survey and report on the metropolitan area restaurants. The restaurants agreeing to separate smoking areas would receive free publicity in our Newsletter and ANSR members could see actual results regarding action taken by the organization.” ANSR, Progress Review Minutes (Oct. 12, 1973) (copy furnished by Ed Brandt).
116Phyllis Kahn to Will Jones (Jan. 9, 1974), Legislature, House, Kahn (Rep. Phyllis), Files, in MSA, MHS, 118.F.8.3(B).
results, by then.\textsuperscript{118}

In the meantime, the Tobacco Institute was panoptically monitoring state anti-public smoking bills. At the meeting of its executive committee on November 29, 1973, vice president and counsel Ehringhaus gave an overview,\textsuperscript{119} explaining that the first element of what the staff believed could be “the most effective program to combat” such legislation was the need to “concentrate our efforts and resources in those states in which we expect the problem to be the most acute next year, and to thereby measure the longer range effectiveness of our efforts.” At that juncture the staff identified those priority states in 1974 as California, Massachusetts, Illinois, Arizona, Connecticut, Michigan, Texas, Florida, and New York. The omission of Minnesota was presumably based on the judgment that no “prompt and authoritative information”\textsuperscript{120} from the state had alerted TI to the emergence of developing problems that should have altered the view that the 1973 bill had not posed a significant risk of passage. That the cigarette oligopoly’s intelligence network did not collect and disseminate publicly available legislative filings instantaneously was revealed by the fact that on January 17, 1974 (the day after Kahn had filed the MCIAA), Dowdell informed Wade at R.J. Reynolds that anti-public smoking bills had been introduced or were being held from 1973 in California, Indiana, Maryland, Nebraska, and South Carolina, while measures had been drafted but not yet introduced in Arizona, Illinois, and South Dakota. Moreover, in all of these states TI’s state activities department had “arranged to have industry representatives appear in opposition” to them.\textsuperscript{121} (A month later Dowdell added Minnesota to the list of 16 states in which smoking restriction bills were pending.)\textsuperscript{122} And even two weeks later, when President Kornegay addressed the Tobacco Institute’s annual meeting, he vastly (and perhaps ignorantly) understated the threat in Minnesota (where Kahn’s bill far exceeded the scope of the Arizona law) while covering himself before his assembled bosses with an assurance that TI was fully prepared and equipped to deal with the looming catastrophe:

At the executive committee meeting in November, we called attention to one aspect

\textsuperscript{118}Email from Ed Brandt to Marc Linder (Nov. 15, 2009).

\textsuperscript{119}Tobacco Institute, Minutes of the Fifty-First Meeting of the Executive Committee at 2 (Nov. 29, 1973), Bates No. TIMN0013429/30.

\textsuperscript{120}[Untitled typescript of presentation at TI EC meeting] at 16, 17 (Nov. 29, 1973), Bates No. LG0312489/505/6.

\textsuperscript{121}J. S. Dowdell to C. B. Wade, Jr., Update on Smoking Ban Activities (Jan. 17, 1974), Bates No. 500061504.

\textsuperscript{122}J. S. Dowdell to C. B. Wade, Jr., Subject: Smoking Ban Legislation (Feb. 15, 1974).
of the new agenda: Specifically, the successful efforts made in 1973 to prohibit smoking in public places. We illustrated the potential impact on sales and warned that the movement could lead to the virtual elimination of cigarette smoking.

Two months later, we can report that the threat was not understated nor underestimated. If we erred in our earlier views, it was only in our guess as to where and in what order the attack would be mounted.

For your information, measures largely similar to the Arizona bill have been introduced since January first in the legislatures of Pennsylvania, California, Washington, South Dakota, South Carolina, Nebraska, Indiana, Massachusetts, Maryland, Kansas, Minnesota and Michigan. ... 

In November, we also listed nine states as prime targets for attack. Of the nine, four are now in the acute stage—that is, bills have been introduced, committee hearings held or in immediate prospect and floor action threatened. All the necessary countermeasures are being taken in these states. In non-target states where bills have been introduced, appropriate action is underway. I should warn you, however, that this effort may well cause us to call for more and more help from your sales personnel.

In accord with our assurance in November, we are attempting to get as much help as possible from the restaurant, hotel, trucking, retail and other business groups. Not surprisingly, we encounter reluctance on their parts because of fears of boycott, retaliation or whatnot. We have begun to pick some holes in those arguments and are starting to get some favorable responses. ...

So you can see these last two months have been devoted both to intense preparation for and active response to punitive legislation. ... The employment of industry spokesmen in the various states is progressing, a bit slowly sometimes because of problems which are the responsibility of the Tobacco Tax Council. These will be worked out promptly so that always industry interests will be protected. We would be less than candid, however, if we did not tell you that the disparity in expenditures in the past raises serious problems in some crucial areas. 123

The MCIAA, of which the Tobacco Institute quickly took note,124 was shorn of the previous year’s elaborate public policy preamble, which instead merely stated the bill’s purpose as “protect[ing] the public health, comfort and environment by prohibiting smoking in public places and at public meetings except in designated smoking areas”125—this last phrase revealing the crucial dilution of Munger’s bill. The regulatory scheme’s spatial scope was indicated by the definition of “public place” as encompassing “any enclosed, indoor area used by the general public or serving as a place of work, including restaurants,

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124 TIN, No. 91, at 4 (Feb. 4, 1974).

125 H.F. 2801, § 1 (Jan. 16, 1974).
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retail stores, offices and other commercial establishments, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas and meeting rooms.” 126 Here the crucial innovation was the introduction of general coverage of workplaces. The bill then proceeded to prohibit smoking in such places “except in designated smoking areas,” which might be designated by proprietors, state and local health boards, and local and county law enforcement officials, provided that such areas were “separate, of adequate size and with adequate ventilation” to fulfill the bill’s purpose. 127 Anyone who smoked in violation of the prohibition was subject to a $10 to $100 fine, while the fine for proprietors who failed to enforce the prohibition ranged between $100 and $300, each day constituting a separate offense. 128 Finally, the ANSR bill empowered state and local health boards to seek court injunctions against repeated violations. 129

Schaaf introduced S.F. 2889 a week after the Senate had killed Hansen’s 1973 bill S.F. 917. On January 23 the Senate as the Committee of the Whole (a procedural device used by legislative bodies to engage in freer and more informal debate) recommended that S.F. 917 be re-referred to the Health, Welfare and Corrections Committee subject to a motion by Hansen himself to amend his bill in a number of respects. First, he specified that the smoking ban on public means of transportation apply whether they were publicly or privately owned. Second, he excluded from coverage “lobbies, hallways, skyways or any other public structure used mainly as a thoroughfare.” And third, he deleted entirely the provision not requiring a nosmoking section when more than 10 square feet was available per person. The motion having prevailed and the amendment having been adopted, the Committee of the Whole then re-referred the bill to the Health, Welfare, and Corrections Committee. 130 As decoded by the press the following day, this opaquely worded procedure in fact meant that the Senate had killed the bill: “Majority Leader Nicholas Coleman, a cigarette smoker, called the proposal a ‘pious hope’ and said it would be unenforceable.” 131 Brandt further explained that “a combination of senators who wanted no non-smokers rights bill and those who wanted a stronger bill” had done S.F. 917 in. 132

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126 H.F. 2801, § 2(1) (Jan. 16, 1974).
127 H.F. 2801, §§ 2(2) and (3) (Jan. 16, 1974).
128 H.F. 2801, § 3(3) (Jan. 16, 1974).
131 “No-Smoking Bill Killed by Senate,” Minneapolis Star, Jan. 24, 1974 (16B:5).
By mid-February ANSR judged that passage of MCIAA looked “less than hopeful, since the house and senate can’t even agree to ban smoking in their own chambers.”

The high point of the legislative process was the nearly hour-long hearing that the Health Subcommittee of the House Health and Welfare Committee held on February 22, at which former Surgeon General Jesse Steinfeld, who in the meantime had become head of the Mayo Clinic’s cancer treatment program in Rochester, Minnesota, testified in support of the bill. In her opening remarks before the subcommittee Kahn expressed the hope that H.F. 2801 was “fairly non-controversial,” declaring later that it was “a very, very mild bill” (so much so that chain-smoking House Speaker Martin Sabo “almost went on as a co-author”). Calling it a “first step in securing a cleaner, safer environment, she bemoaned that: “For years nonsmokers have sat quietly and politely while smokers blew smoke in their faces, on their food, or fouled the air of their homes.” To be sure, her bill would not apply to those homes, in which children were exposed to smoke who were “brought up by smoking parents” and were therefore “far more prone to respiratory diseases and asthmatic attacks,” any more than it would deal with fatal fires in homes (and the concomitant increase in insurance premiums for all). Indeed, Kahn stressed that “[w]e are not seeking


134The Minnesota Historical Society, the sole repository of the minutes of committee meetings of this vintage, did not have the subcommittee minutes. Email from Steve Nielsen to Marc Linder (Feb. 18, 2009). In addition, MHS had had the original (and only) audio tapes of committee hearings (and floor debates) from 1973 to 1990, but destroyed them. Id.; email from Elizabeth Lincoln (Minnesota Legislative Reference Library) to Marc Linder (Feb. 18, 2009); email from Robert Horton (director MHS) to Marc Linder (Feb. 19, 2009). However, the tobacco company defendants in the suit filed against them by the State of Minnesota in the 1990s did introduce a non-official copy of the transcript, which was presumably made on the basis of an audio tape that had not yet been destroyed. The State’s lawyer objected to its admission on the grounds that it was not official and that its accuracy was therefore not verifiable, but the judge admitted it provisionally on the defense lawyer’s assurance that it would be checked against the official transcript. Whether such an official transcript existed is unclear. State of Minnesota v. Philip Morris Inc., Transcript of Proceedings, Vol. 47, Pages 9095-9371 at 9309-10 (File No. C1-94-8565, Minn. Dist. Ct 2d Jud. Dist., Mar. 25, 1998), Bates No. BERMANH032598. The chair mentioned at the outset of consideration of the bill that “close to half an hour” would be devoted to it, but after its advocates had testified, he noted that a half-hour was left. State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 1, 7 (unofficial transcript), Bates No. EXHIBBYB000482.
in this bill to eliminate smoking” without explaining how, in spite of that self-imposed restriction, it could possibly achieve its goal of “establish[ing] the right to breathe clean air as a fundamental right.” For the time being, the main beneficiaries of this right would be adults “subject to watery eyes, sore throats and sordid [sic] degrees of distastes or discomfort in smoke-filled rooms.”

Ironically, as Kahn herself recollected three years later, as she was speaking to the Health Committee in 1974, “‘three of the committee members sitting at the table were puffing away so furiously...that there was practically a smoke screen between us.’”

Finally released from the Nixon administration’s censorship, the former surgeon general was at last free, positioned on a future perch, to look back “‘with horror and amazement’” on smoking as slow-motion suicide that also imposed a “‘noxious environment’” on nonsmokers. In extraordinarily expansive terms, Steinfeld excoriated the greedy cigarette manufacturers and governments that derived revenue from taxes, without which “our [...] primitive, unhealthy, unintelligent era” would be “inexplicable.” Focusing on the impact of carbon monoxide on hemoglobin, he directed the legislators to recent data showing “a clear-cut physiologic and pharmacologic effect on the non-smoker who is subject to smoking products in unventilated or poorly ventilated areas.” (While noting that “[m]ost rooms are inadequately ventilated,” ironically Steinfeld pointed to the modern jet airplane as “about the only adequately ventilated public areas....”

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136Larry Adcock, “Do Smokers Have a Right to Make You Sick?” Mpls, July 1977, at 24-27 at 25, Bates No. TITX0032082/3. Kahn went on to note that one of the “enormous” intervening changes had been that self-same committee’s having forbidden smoking. Id. Yet, in a film made in 1976 about the passage of a bill in Minnesota smoking was prevalent not only at committee hearings, but virtually everywhere else except in the House chamber. The First Branch of Government: From Grass Roots to Law (1976), on http://www.leg.state.mn.us/lrl/lrl.asp.
He also mentioned a new finding that the surgeon general would probably soon publish that “the air exchange in most private and public buildings is inadequate to remove the harmful constituents of cigarette smoke within any reasonable period of time.” He sought to impress upon the subcommittee the seriousness of secondhand smoke exposure, despite the lower level than that to which smokers subjected themselves, by noting the absence of any scientific demonstration of a threshold effect for chemical carcinogens—a fact that underlay the congressional Delaney amendment’s ban on any food additive that caused cancer when fed in any amount to any animal species. Clinching his argument, the former surgeon general drove home the point that “if one applied the same reasoning to cigarette smoking,” it “would be outlawed completely since no safe level has either been shown to the smoker himself or his non-smoking companions who were forced to breathe the polluted air which the smoker pours into the environment.” To be sure, prompted by a question from a DFL legislator as to whether tobacco smoke harmed mainly people with certain ailments or everyone to some extent, Steinfeld was constrained to admit that “we haven’t been able to demonstrate the harm to everyone, that would have to be by inference on the basis of the fact that there are over a thousand constituents that have been identified...in cigarette smoke,” some of which were “definite carcinogens in animals....” The contribution that Steinfeld, whose testimony and letters Kahn later singled out as having been “particularly useful” for passage of the MCIAA—the subcommittee’s discussion of which he regarded as “a

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137State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 2, 3 (unofficial transcript), Bates No. BYB000482. Stein stated that it was “likely” that the finding would be published in the 1975 “Health Consequences of Smoking,” but it appears not to have been included in the chapter on involuntary smoking. Despite Steinfeld’s aforementioned direct statement to the contrary and his observation that the bill’s objective was to “provide areas for the non-smoker where he can breathe air inside somewhat comparable to that which he breathes outside,” J. B. Clifford, a Republican opponent of the bill, charged that the bill prohibited smoking in restaurants, offices, and other commercial establishments “where generally the ventilation is such to keep the smoke out...and that to me is the kind of thing that the Volstad [sic] Act did...” Id. at 5.


139Phyllis Kahn to Mildred Jeffrey (UAW) (Sept. 30, 1975), in Legislation, House,
giant step forward in this country"—made was not limited to this testimony: he was constantly talking to people, including legislators, about the importance of enacting the bill. (Steinfeld refrained from divulging to the subcommittee a target at which he directed his blunt talk in his speech the next day at ANSR’s first annual meeting: since surveys showed that “the educated, intelligent population has largely discarded smoking,” he predicted that for “the future we will see the diseases associated with smoking restricted largely to the unintelligent and the uninformed.”)

After the subcommittee had had an opportunity to question Steinfeld, a series of restaurant and hotel representatives mounted “[m]ajor opposition” to the measure on various grounds. A spokesman for the hospitality industry argued that the bill was superfluous because, as a business that was “frankly based on...trying to please people...the Hospitality Industry will accede to the demands of the public.” It would “provide for relief in this matter voluntarily. ... Yeah, we’ll clean up the air when the public asks for it”—thus implying that no such demand had yet come forth. While calling H.F. 2801 a “fine bill,” the representative of the Minnesota and the City of Minneapolis Hotel and Restaurant

Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).


Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009) (Minneapolis Tribune’s medicine and science reporter in 1974-75).


Ironically, when Republican Gary Laidig asked whether, without H.F. 2801, if someone sat down near his table and began smoking and he asked the maitre d’ to stop the smoking, the latter could so, Johnson replied that the maitre d’ should ask the other people whether they “would mind moving to another table,” but he failed to explain what the next step would be if the smokers refused or how the restaurant could “do what the public wants” when “the” public makes conflicting demands. State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 10 (unofficial transcript), Bates No. EXHIBBYB000482. Chum Bohr, representing the state hotel, resort, and restaurant associations, conceded the latter point when he mentioned that “as a maitre d’ finds himself in a very funny position...and we find irate patrons don’t help the hospitality business when we’re trying to do everything to please.” Id. at 12.

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Associations insisted that it did not conform to members’ feeling that “we do operate public places for the smoker and non-smoker alike.” Concretely he complained that the bill failed to define what “adequate size” or “adequate ventilation” meant, adding that whatever the latter’s meaning, it would be “very costly....” The restaurant industry hypothesized that if a majority of customers were smokers, seats in the no-smoking area would remain vacant, causing a loss of revenue to the owner and tax revenue to the municipality and state and prompting “some other state...to capitalize on it.” A member of the board of directors of the Greater Minneapolis Hotel Association who characterized his own smoking as a “nasty habit” nevertheless rejected the law outright “because frankly smoking is not illegal” and imposing restrictions on smokers was “discriminatory.” The executive vice president of the Minnesota Hotel, Resort, and Restaurant Associations, Chum Bohr, who would play a high-profile lobbying role in 1975, based his suggestion of perpetuating a “voluntary” regime on his claim that “the non-smoker rights people have done a pretty good job of discouraging many, many, many people from smoking and maybe one of these days they’ll even get me pretty well convinced because I’m leaning that way somewhat.”

This barrage of criticism caught Kahn off guard. Though she admitted that she “wasn’t quite expecting so much opposition from the hotel and restaurant people,” she was relieved that the manager of a national chain cafeteria in a Twin Cities suburb was willing to break ranks to testify briefly that his institution of a non-smoking section had been well received by smokers and nonsmokers. To be sure, he failed to address the other witnesses’ objections, but Kahn herself

claimed that there was in fact no problem with “empty tables not being put to use” because “[i]f non-smokers come in and...wish to sit in the smoking section, there is nothing to prevent them from doing so. They will be aware that they are going into a smoking section, and they will have a choice of either waiting for an empty table [in the no-smoking section] or taking that table.” Continuing in this vein, which was presumably conjuring up owners’ worst nightmares of customer revolt-driven reduced profitability, she insisted that if newly arrived smoking customers found empty tables only in the nonsmoking section, “they also don’t have terribly much [sic] problem, they can just sit there and eat and not smoke and then go somewhere else for their cigarette break.” Kahn inadvertently revealed just how minimal the progress was that MCIAA might offer when, in order to refute opponents’ claims of vacant nosmoking section seats, she noted that in her experience with airplanes, those sections always filled up first, and then recounted that when six nonsmoking legislators on a recent trip had to take seats in the smoking section to sit together, they were able to make sure that no smokers sat next to any of them.\textsuperscript{151}

In addition to the massively experienced propinquity of smoke in airplanes, Kahn failed to mention that the Civil Aeronautics Board regulations, which had just gone into effect on July 10, 1973, expressly required carriers to “insure that a sufficient number of seats in the ‘no-smoking’ areas of the aircraft are available to accommodate persons who wish to be seated in such areas,”\textsuperscript{152} whereas MCIAA lacked such a mandate. To be sure, it might have been possible to argue that an implication to that effect could be teased out of the bill’s requirement that “[s]moking areas shall be...of adequate size and with adequate ventilation to fulfill the purpose of this act,” which was “to protect the public health, comfort and environment by prohibiting smoking in public places and at public meetings except in designated smoking areas.”\textsuperscript{153} Kahn did not take that position, but Thomas Berg, the subcommittee chair, offered an argument that, although it substantively worked in the diametrically opposite direction, might, by analogy, have served an anti-smoking gap-filling purpose. J. B. Clifford, a Conservative Caucus member and insurance broker,\textsuperscript{154} who offered an allegedly “friendly amendment” to gut the whole bill by removing coverage of all public places, thus


\textsuperscript{153}H.F. 2801, § 2, subd. 3 and § 1 (Jan. 16, 1974).

\textsuperscript{154}http://www.leg.state.mn.us/legdb/fulldetail.asp?id=10105
leaving only public meetings covered, let the cat out of the bag by complaining that “an individual isn’t going to be able to smoke at his desk if he wants to, he isn’t going to be able to smoke in his office unless it’s somehow or another magically designated. I think it’s almost harassment.” Turning more personal, he charged: “Fellas, you don’t say that I can smoke in my office. I cannot. I cannot smoke in a private office within the wording of your bill,” and then competently followed through the bill’s interlocking provisions to arrive at his Q.E.D. At this point DFL lawyer Berg intervened to chastise Clifford for his statutory literal-mindedness and offer him an administrative deus ex machina: “I can appreciate...your concern for...what the words say on the piece of paper, I have long been a believer that we should feel free to ask those kinds of questions in committee regardless of the subject matter. But it seems in this one that, possibly, some of these things could be taken care of by the Health Department with some regulations, would have to implement this as provided in here....”

In the event, no one joined Clifford in voting for his killer amendment—which he announced would be offered during House floor debate—but which now lost by a vote of 6 to 1, only one Conservative Caucus (Republican) member joining five DFLers. The committee then recommended to the full committee that, unamended, H.F. 2801, pass.

Unmentioned until now, but of overriding significance in the context of those contemporaries and later scholars who claimed that that industry did not publicly oppose the bill, the press reported that, “[a] tobacco industry spokesman also voiced objection to the bill because of its intent to cut down smoking.” That

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157 State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 16 (unofficial transcript), Bates No. EXHIBBYB000482. § 3 of the bill did require the Board of Health to issue implementing rules.


159 Robert Milis, “Dr. Steinfeld Boosts Smoker Restriction Measure,” Post Bulletin (Rochester, MN), Feb. 25, 1974, Bates No. TIMN0461983. Thirty-five years later, Milis, who, after having been a reporter became a lawyer and represented Blue Cross in Minnesota litigation against the cigarette manufacturers, was no longer able to remember
the name of the tobacco industry spokesman. Telephone interview with Robert Milis, St. Paul (Feb. 20, 2009). The report doubly contradicted the claim by ANSR’s longtime president (who, to be sure, had not yet become involved in 1975) that the “tobacco industry did not either support or oppose the bill, but indicated they believed it would not hurt them.” Jeanne Weigum, “Passage of the First Comprehensive, State-Wide, Smoking Control Law in the U.S.,” in Proceedings of the Fifth World Conference on Smoking and Health 2:327-31 at 327 (William Forbes et al. eds. 1983). Weigum, who was not involved in ANSR in 1975, based this statement on information from Kahn. Email from Jeanne Weigum to Marc Linder (Apr. 6, 2009). Tantalizingly, a clipping of Milis’s article in Kahn’s papers contains no annotation of surprise or contradiction. Legislation, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

160http://www.spoke.com/info/pEv86SU/JudgeLindberg (visited Nov. 12, 2009). According to Lindberg, he founded the Northwest group with some distributors who split off from Robbie’s group because of Robbie’s absenteeism. Telephone interview with Peter Lindberg, Eden Prairie, MN (Nov. 23, 2009). This account differs from but appears to be more accurate than that provided by Robbie’s (and the Minnesota Candy & Tobacco Distributors Association’s) long-time secretary, according to whom the Northwest group had existed before Lindberg’s departure and consisted of larger firms interested in price cutting; because the smaller firms in Robbie’s group had no such interest, a conflict arose. Telephone interview with Audrey Nessheim, Golden Valley, MN (Nov. 16, 2009).

161Telephone interview with Peter Lindberg, Eden Prairie, MN (Nov. 23, 2009).

162Telephone interview with Stephen Bergerson, Minneapolis (Nov. 16, 2009) (Robbie’s nephew, who rented space in Robbie’s law office after graduation from law
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but was unable, to testify and asked (in vain) subcommittee chair Berg whether
the subcommittee hearing could be “laid over.” Nevertheless, and more
generally, the secretary of the Minnesota Candy and Tobacco Distributors
Association/Robbie’s office manager distinctly remembered 35 years later that
the Tobacco Institute had helped with lobbying.

With a directness absent from any other witness’s testimony, Lindberg made
it clear that the industry’s opposition was total and self-explanatory: “Obviously,
we are opposed to this legislation. ... [A]s an industry, we are obviously opposed
to [this] legislation. Then “setting aside the obvious economic problems to the
industry,” Lindberg pointed to “an economic problem to the state as well. The
tobacco tax brings in about $75 million...revenue to the state every year. This is
something that could be upset by legislation affecting smoking, and its [sic]
nothing to be scoffed at because it’s a major item in the state budget. And it’s an
important situation.”

Lindberg was well versed in delivering such warnings: a decade earlier, at the outset of his lawyer-lobbying career on behalf of the
Minnesota Candy and Tobacco Distributors Association, he had testified before
another House Welfare subcommittee on a bill to label cigarette packages with
warnings of possible health hazards as a means of combating the “catastrophe”
that cigarette smoking had become. Then, too, his organization had opposed the
bill because “it probably would hurt cigarette sales,” causing the state to lose
some of its $30 million in annual tax revenue. (For good measure, back in 1965
Lindberg had thrown in the obfuscatory claim that labels would “‘have no serious
bearing’” anyway since education at home was “‘the key to warning children
about any health hazards.’”)

To the puzzlement of at least one subcommittee member and without further explanation, Lindberg also testified that

163State of Minnesota, House of Representatives, Health Subcommittee of the Health
and Welfare Committee: February 22, 1974, House File 2801 at 13 (unofficial transcript),
Bates No. EXHIBBYB000482. Berg had no recollection of this conversation. Telephone interview with Thomas Berg, Minneapolis (Nov. 17, 2009).

164Telephone interview with Audrey Nessheim, Golden Valley, MN (Nov. 16, 2009).

165State of Minnesota, House of Representatives, Health Subcommittee of the Health
and Welfare Committee: February 22, 1974, House File 2801 at 12 (unofficial transcript),
Bates No. EXHIBBYB000482.

166“Cigarette Smoking Called ‘Catastrophe,’” Minneapolis Star (Mar. 13, 1965), Bates No. TI08741245.

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“constitutional questions” attended the bill in terms of discrimination regarding room size and the definition of “public place.”

Thirty-five years later Lindberg—who had been active in DFL politics and was appointed a state district court judge by the governor two months after he had testified—recalled that because MCIAA had been a “direct shot” at smoking tobacco, his member-distributors, who were “huge” enough to be able to get Philip Morris’s attention, had to testify. Indeed, he observed that it would have been “folly” for them not to do anything. Significantly, he also recalled that the “Tobacco Institute was involved” in 1974, adding that it could also have been engaged in other lobbying, for example, by telephone.

This proof that the tobacco industry was not only not inattentive and did not keep its counsel to itself, but openly testified against the MCIAA in 1974 squarely jibed with the recollections of Robin Derrickson who, as an employee of the Hennepin County Lung Association and ANSR activist, spent a great deal of time at the legislature attending committee meetings from 1973 to 1975. During these years she met three or four out-of-state tobacco lobbyists in hallways and elevators who often spoke to her; without a public presence, they were there to “hold the hands of” and “coach” restaurant and hotel representatives with regard to lobbying. Their opposition to the bill on the grounds that it was designed to cut down on smoking stuck in her memory as one of the statements that they had made to her.

The tobacco spokesperson’s objection was, to be sure, also interesting because it directly contradicted ANSR’s steadfast asseveration that it was “not in the business of convincing people to quit smoking,” but only to protect nonsmokers from secondhand smoke exposure. If in fact, as seems eminently plausible based on its repeated declarations that it sought to improve ventilation

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169 Telephone interview with Robin Derrickson, Prescott, AZ (Aug. 20, 2007). Without being able to recall names, Gene Rosenblum, a St. Paul lawyer and ANSR activist who had lobbied legislators on behalf of MCIAA, when informed that the dominant account was that the industry had been asleep, replied: “I don’t believe that.” He had known that tobacco lobbyists, including those representing cigarette sellers such as distributors and drug stores, were present. Telephone interview with Gene Rosenblum, St. Paul (Nov. 19, 2009).
in places where smokers did smoke, ANSR really did not aspire to reduce smoking, the cigarette companies nevertheless understood how the logic of the endgame would unfold, knowing that restricting the places and times their customers could smoke would inevitably reduce the number of cigarettes sold and smoked and eventually prompt many smokers to bend to social pressure. Significantly, in 1975, Stephen Bergerson, the head of the Minnesota Candy & Tobacco Distributors Association (the Joseph Robbie group that was the chief competitor of Lindberg’s), in an interview with a Tobacco Institute publication expressed the same view to which Lindberg had given voice and that was the cigarette oligopoly’s chief concern with MCIAA and all similar regulation—namely, that it was “inevitable that the law will force down tobacco sales.”

On March 15, the House Committee on Health and Welfare reported back H.F. 2801 with the same recommendation, but only with decisively weakening amendments. First, the committee radically narrowed the definition of a covered “public place” by specifying that it be “publicly owned” and then striking the reference to workplaces and all other individually identified places such as restaurants and retail stores, so that it now encompassed only “any publicly owned enclosed, indoor area used by the general public.” In accordance with this exclusion of privately owned public places, the committee then deleted “proprietors of public places” as authorized designators of smoking areas and as responsible for enforcing the law (thus leaving health boards and law enforcement as the sole agents for both actions and no one as subject to penalty for failing to enforce the nosmoking ban). The House adopted the committee report, including the re-referral to the Appropriations Committee, where the bill died.

What the Tobacco Institute Was Up To in the Meantime

In those days you were never really away from the tobacco lobbyists.

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171See above ch. 23.
173Journal of the House of Representatives, State of Minnesota, Sixty-Eighth Session of the Legislature: 1974, 4:6210 (Mar. 15); H.F. 2801 (first engrossment, Mar. 15, 1974) (copy furnished by MHS). In retrospect Brandt stated that he was glad that the bill with such amendments had died. Email from Ed Brandt to Marc Linder (Feb. 23, 2009).
174Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009). Cope, who had been a medicine/science reporter for the Minneapolis Tribune at the time MCIAA was
Although it may be difficult to argue with success, tobacco industry lobbying in Minnesota in 1974 may not have been optimally effective. In his speech to the spring meeting of the Tobacco Institute in May, President Kornegay was unable to contain his contempt for what he pretended was nonsmokers’ newly invented make-believe complaints about breathing smoke: “A little over two years ago, few were offended or annoyed by cigarette smoke. Seldom did we hear of the non-smoker’s allergies, or aggravated bronchitis or emphysema. ... Suddenly it seems, the nation is shaken by a frenzy of protest. Sixty percent of the country, it is said, is offended, annoyed, sickened and irritated by the cigarette smoking of the other forty percent. People with bronchial and asthmatic problems seem to be coming out of the woodwork, and cancer is alleged to threaten people who do not smoke.”

He scored the result as the filing in 1973 of 53 restrictive bills in 21 states, in which “[w]e lost in two states—Arizona and Oregon.” During the first four months of 1974, 90 such bills had surfaced in 30 states, and “[a]lready we have lost ground in four states” (including South Dakota and Nebraska, which enacted Arizona-like laws, and Arizona itself). Although “our resistance also seems to be effective in preventing passage of measures” to the extent that “we have not been routed, our losses are on the increase. And if the present trend continues unabated, we foresee more losses in more states.” To his assembled bosses—except Philip Morris chairman Joseph F. Cullman, 3rd, to whom Kornegay wrote a fawning missive declaring that “all of us missed you very much...at the business sessions and on the golf course and tennis courts”—Kornegay bragged about the “massive legislative counter-attack” that the Tobacco Institute had mounted against this proposed legislation in 1974. He stressed, however, that they had both won and lost, “not on the merits of the case, but on the politics of the case.” By “politics” Kornegay meant that “[s]o many legislators, just like other people, really believe that smoking is harmful to the non-smoker. Our white paper and other literature giving the facts on the ‘other side’ are met, if not with scorn and ridicule, certainly with little credibility.”

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177 Horace Kornegay to Joseph F. Cullman, 3rd (May 24, 1974), Bates No. 1002907063.
In a fleeting acknowledgment of reality, Kornegay admitted (part of) the reason for the cigarette industry’s lack of believability: “It is a simple fact that our public and political problems are only symptoms of the real malady—unchallenged research finding and unchallenged critics with advanced degrees who keep feeding the anti-smoking fires.” His response was to urge the cigarette oligopolists to buy some credentialed propaganda, that is, to “have available scientific experts to communicate with the community.”

The fact that ANSR’s bill died unceremoniously in 1974 may explain why Kornegay called no attention to Minnesota, but two weeks later, Martin Haley, in his aforementioned report to the Tobacco Institute, directed considerable criticism at lobbying in Minnesota, where it was “obvious that there are problems” largely on account of the existence of two distributors organizations, one run by lawyer Joe Robbie (Minnesota Candy and Tobacco Distributors Association with 20-30 percent of the business) and the other by Lindberg (Northwest Tobacco and Candy Distributors Association with 70-80 percent). From informants Haley had learned that even divided, “the industry is capable of being very effective on selected issues,” but that “the principal legislative work in Minnesota in the past four to six years has been carried by Lindberg in spite of and not because of any assistance that the Robbie group offered.” Although those same sources recommended that lobbyists there “should be more accountable to the industry” and the two entities should be unified, the “problem” became “more complicated” because Lindberg had been appointed to a (state district court) judgeship on May 1; consequently, unification would “perhaps” have to be effected under Lindberg’s (not yet named) successor. Haley’s sources nevertheless believed that even a local industry that was “geared up” would still have only a slight possibility of being effective enough to prohibit tax increases or achieve cuts. Three months later, on August 26, Haley told the first meeting

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180 See above ch. 23.
181 Martin Ryan Haley & Associates, Inc., “A State Legislative Plan for the Tobacco Industry,” Appendix 13-15 (May 29, 1974), Bates No. 03682828/996-8. On Lindberg’s successor as lobbyist, James Erickson, see below this ch. Robbie had a high national profile in the tobacco industry, having been president of the Coordinating Board of Tobacco Trade Distributors. At the group’s mid-year meeting in Bermuda in September 1973, Robbie had argued that, with regard to “the zealous, unreasonable tax increase proponents and anti-smoking forces [w]e can no longer afford the luxury of being reactive when these bombs keep hitting us.... With the change in make-up of state legislatures, the day of the single lobbyist will soon be passe.... Each manufacturer should consider the state association executive as an extension of its own corporate office in that state.”
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of the joint liaison committee of the Tobacco Institute and Tobacco Tax Council that “[a]s a bellweather state in the development of new legislation,” Minnesota was a “likely nominee for a strong anti-smoking drive.” The continued coexistence of the two distributors organizations prompted the committee to agree to “study developments closely.” The cigarette manufacturers, in other words, were acutely aware of the drive for and the correlative need to insure effective lobbying to thwart passage of the Minnesota Clean Indoor Air Act.

Despite the deaths of the anti-public smoking bills in 1974, another development in Minnesota caused TI “serious distress.” In October, John Christopher Blucher Ehringhaus, Jr., the TI’s general counsel (and son of a like-named Depression-era North Carolina governor who had ties to the tobacco corporations), expressed this “distress” in a telephone call to Robbie about the first statewide no-smoking “D-Day,” which had been held on October 7. Although it may be surprising that a successful and politically well-connected millionaire businessman like Robbie, who was chairman of the CBTTA and owner of the Miami Dolphins football team, lacked the acumen to anticipate that the cigarette oligopoly would not abide any company’s or industry’s actively discouraging the purchase of its commodities, once TI spelled out the source of its ire to Robbie, he quickly informed the members of the MCTDA that Ehringhaus had been

“Minnesota’s Joe Robbie Looks at State Tobacco Trade Assns. 10 Years Hence,” USTJ, October 4, 1973, at 6, 17, Bates No. 03769024.


Joseph Robbie (exec. dir. Minnesota Candy & Tobacco Distributors Association, Inc.) to MCTDA members (Oct. 24, 1974), Bates No. TIMN0461875.


According to Stephen Bergerson, Robbie’s nephew and a Minneapolis lawyer who was himself involved in advancing the tobacco industry’s interests, Robbie, whom he idolized as “the most brilliant man I’ve ever known,” had friends in high places in the Democratic Party. Telephone interview with Stephen Bergerson, Minneapolis (Apr. 27, 2007). On Bergerson’s own activity, see below.

See CBTTA letterhead (July 26, 1974), Bates No. 500034486.

Robbie had already incurred R. J. Reynolds’ wrath for comments he had made about cigarette manufacturers’ financing more of the costs of state tobacco associations and defeats inflicted on them regarding state tobacco tax legislation which Reynolds characterized as seeming to be part of a “conspiracy against the manufacturers....” E. A. Vassallo (vice president, R.J. Reynolds) to Jack Beaty at 3-4 (Jan. 21, 1974), Bates No. 502076481/3-4. See also E. A. Vassallo to Jack Beaty at 3-4 (Nov. 23, 1973), Bates No. 502076518.

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particularly concerned that the Minnesota Bankers Association helped sponsor this anti-smoking campaign. Twin City Federal Savings and Loan Association in Minneapolis even ran an advertisement suggesting that smokers refrain from smoking and deposit the money in their savings account. This is a boorish ad using the anti-smoking campaign for crass commercial purposes.

The Northwestern National Bank and First National Bank of Minneapolis were among the main sponsors of this anti-smoking campaign.

It is my suggestion that each of you send me the name of the bank where you do business. I will prepare a resolution and send a copy of it to each bank plus the Minnesota Bankers Association.

It would seem to me that the bankers have as little reason to attempt to damage the business of their tobacco clients as they would to attempt to restore the Volstead Act to bring back Prohibition.

It will also help if any of you wish to mention to your own bankers that the Bankers Association is fighting your business. 188

The D-Day that gave rise to this conflict was devised by Lynn R. Smith, the publisher of the Monticello Times, who at the end of 1972 published a full-page editorial in his paper, “The Tyranny of Smoking,” a manifesto that opened with this post-proletarian appeal: “Non-smokers of the world, unite. You have nothing to lose but your oppression.” Apparently overlooking the millions of children among the nonsmokers who had “long suffered in silence the stings of outrageousness by smokers,” Smith conceded that nonsmokers had “never questioned the right of consenting adults to pollute the air in the privacy of their homes,” but identified “smoking in confined public areas [a]s a different matter.” Bluntly he proclaimed: “Our interest in the entire thing is one of selfishness. The more smokers that swear off, the better off we ourselves will be.” 189 An accomplished publicist, Smith sent off a copy of his editorial to the cigarette oligopolists’ PR agents, inviting them to submit comments that he would publish in his newspaper. 190 His gambit provoked TI to issue a two-page scatter-shot response to his “sermon.” 191

188 Joseph Robbie (exec. dir. Minnesota Candy & Tobacco Distributors Association, Inc.) to MCTDA members (Oct. 24, 1974), Bates No. TIMN0461875. The memo was excerpted in TIN #110, Nov. 11, 1974 at 3, Bates No. 950307814/6.
190 Lynn Smith to Brown & Williamson Public Relations Dept. (Jan. 9, 1973), Bates No. 690018123.
Smith was not content to issue a manifesto. A year later, on January 7, 1974, he organized D-Day, to persuade all the smokers among the 1,700 residents of Monticello (about 40 miles from Minneapolis) to pledge not to smoke that day. Smith published the names of 253 smokers who pledged not to smoke that day and later estimated that 70 to 80 percent of them did in fact quit for the day. The widespread publicity that the event generated caught the attention of the American Cancer Society and other groups, which then organized a statewide Minnesota D-Day on October 7, 1974, which they labeled “the broadest assault on smoking in a single state in the history of the U.S.” The governor signed a proclamation declaring October 7 D-Day, numerous mayors endorsed the campaign, and supervisors in several departments at Minnesota Mutual Life Insurance Company in St. Paul banned smoking for the day. More than 475 businesses with 140,000 employees participated and a total of 400,000 pledge cards were distributed. A spot check by one newspaper at eight stores found that cigarette sales had fallen by 20 percent. Even the Tobacco Institute Newsletter was constrained to admit that the Associated Press had reported that Don’t Smoke Day had been “successful.” Internally, a Lorillard sales manager in Minnesota tried to put the best face on the mass attack on his and their livelihoods by informing corporate higher-ups that: “All reports received indicate that the D-Day activity was ineffective in that it did receive a great deal of publicity for that one day, but the following day it was business as usual. Retailers reported that the sale of cigarettes was lower that day but the volume returned the following day....” Even this apostle of good news was constrained to bring up “one effect...that may result...that could be damaging to us and the industry as a whole”—namely, “talk that this could be a quarterly event or, at the

198TIN, #109, Oct. 29, 1974, at 6, Bates No. 950307818

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very least, an annual happening. It could also spread to other states and eventually turn into a national program.” In fact, D-Day did become an annual statewide event (that Robbie’s Minnesota Candy & Tobacco Distributors Association continued to monitor for the Tobacco Institute) and then in 1977 the American Cancer Society’s nationwide Great American Smokeout.

That the cigarette manufacturers in general and Ehringhaus in particular were chastened by the Minnesota D-Day was underscored at a TI executive committee meeting on April 11, 1975, at which the organization’s officials reported to the companies’ top brass on yet another (hopeless) ad campaign to achieve the twin objectives of, as President Kornegay put it, taking the “first step on the road back to justifiable credibility for this country’s oldest industry and its principal spokesman in public affairs, The Institute” and “stop[ping] the rapidly growing nationwide movement to limit the opportunities for enjoyment of tobacco products, and to diminish the social acceptability of the use of tobacco.” For the time being, however, the Tobacco Institute’s goal was much more exploratory and preliminary—namely, discovering whether it had “the capacity to develop a more reasonable climate” and “the means to stop the continuing erosion in public opinion which is the fertile field from which so many of the unjust legislative weeds and other tribulations are growing.” As millions of people were finally beginning to demand protection from what they perceived to be the poisonous smoke that consumers of billions of cigarettes were spewing at them, the transparently obfuscatory ad text on which the TI was betting the alleged restoration of its masters’ and its own alleged credibility opened with: “The Way Some People talk, eat, drink, smoke, snore, stare, dress, push, whistle, sing, kiss is annoying. We need more courtesy.”

James J. Morgan, Philip Morris’s marketing guru and later its CEO and president, wrote on the cover letter

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200 Audrey Nessheim (MCTDA secretary) to Nancy Parrish (TI) (Oct. 16, 1975), Bates No. TIMN0461910.

201 http://www.cancer.org/docroot/subsite/greatamericans/content/History_of_Smokeout. asp

202 Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 1-3, Bates No. LG0432811/2/3.

203 Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 9, Bates No. LG0432811/20.
accompanying a copy of the text: “THIS IS BAD, BAD, BAD (and dumb!).”\textsuperscript{204}

In case any of the cigarette company executives missed the obvious, TI Executive Vice President Kloepfer pointed out: “We have stayed completely clear of the nonsmoker health issue, deliberately choosing, as a laymen’s organization, not to make our first outing interpretable as non expert propaganda, regardless of our high level of expertise.”\textsuperscript{205} Among the 10 communities in which TI planned to publish these newspapers ads, in Vice President Ehringhaus’s words, “to invade the mind of the public, so to speak,” was “Minneapolis-St. Paul, where anti-cigarette sentiment was especially cultivated last year with a so-far somewhat unique ‘D-Day’, for Don’t-Smoke Day, civic observance, in which all too many local businesses and institutions took part. The presence there of one of our more public-spirited distributors, Joe Robbie, is also a factor in the choice.”\textsuperscript{206}

**Enactment of the Minnesota Clean Indoor Air Act in 1975**

In the last analysis, the clean indoor air legislation can achieve its goal by securing the voluntary cooperation of at least the more considerate smokers, because there is no way the state of Minnesota can hire enough policemen to enforce the law effectively if smokers as a whole remain adamantly hostile. But the law at least ensures that the problem will be discussed and acted upon—not simply ignored, as was so long the case.\textsuperscript{207}

“We get discouraged thinking people are still doing this (smoking where they shouldn’t) despite the law. But travel to other states and you’ll see…. It’s heaven here. Even if you have to point out the law, you can. We have a utopia.”\textsuperscript{208}

In the aftermath of the failure in 1974 even to move MCIAA to the floor of either house—the Kahn bill died at the last committee meeting for lack of a

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204 Alexander Holtzman to J. T. Landry (Apr. 15, 1975), Bates No. 1005110506 (cc: J. Morgan and handwriting initialed “JJM”).

205 Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 10-11, Bates No. LG0432811/21-22.

206 Statements of Horace R. Kornegay, President, and J.C.B. Ehringhaus and William Kloepfer, Senior Vice Presidents, of the Tobacco Institute, to the Institute Executive Committee, April 11, 1975, at 11-12, Bates No. LG0432811/22-23.


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quorum—ANSR decided to execute a tactical retreat for the next effort in 1975. (The Tobacco Institute had already reported in mid-March 1974 that the legislature’s failure to act on the “smoking segregation bill” meant that it had been killed for the session, but “[l]ocal observers expect reintroduction next year.”) As Beverly Schwartz of the Ramsey County Lung Association explained: “The restaurant owners, through their association, absolutely smashed the clean indoor bill the last time, so the next time, we’re taking restaurants out of the proposed legislation…. We don’t want to do that, but we figure that’s the only way we can get a bill passed.” Despite the fact that ANSR received more complaints about smoking in restaurants, which were “definitely the problem area,” than in any other public place, Brandt omitted them from his draft of the 1975 bill based on “input” from or, “more accurate[ly],” as a “concession” to Chum Bohr, the restaurants’ lobbyist, who was “the only staunch opponent” and had “attended ANSR meetings.” Brandt’s “strategy was to pass a bill which I thought could pass and then return to fighting for inclusion of restaurants later.”

As far as supermarkets were concerned, Schwartz pointed out that they were also “tough to crack”: one chain, for example, even had “ash trays in all the aisles.” Hospital administrators may not have been as “adamant” as restaurant owners—and for that reason presumably were not marked for exclusion from the 1975 version of MCIAA—but Brandt was flabbergasted by their lack of vigilance: “They put nonsmoking patients in the same room with smokers. They allow visitors to smoke in rooms and in lounges. They allow doctors and nurses to smoke in rooms…. (Even when the House of Delegates of the Minnesota State Medical Association in mid-1974 voted unanimously for a resolution urging hospitals to prohibit visitors and staff from smoking and expressly cited studies showing harm to nonsmokers from exposure to tobacco smoke, it excepted designated areas and patients who had their doctors’ approval.)

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209 Anonymous untitled undated handwritten draft of [Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 1 (Nov. 6, 1993) (notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).


213 Email from Ed Brandt to Marc Linder (Feb. 18, 2009).


215 Lewis Cope, “Hospitals Urged to Ban Smoking, Sale of Tobacco,” MT, May 18, 1974 (16Y:2-3). The Medical Association also called on hospitals to stop the sale of
hand, the results of a questionnaire that Brandt had sent to about 275 candidates during the run-up to the November legislative elections made him much more optimistic about the prospects of securing many more votes in 1975: almost 99 percent of respondents (half of whom were elected) replied that they would favor a clean indoor air law.  

**Preliminary Battles over Smoking Inside the House Itself**

The legislative prelude to consideration of the 1975 version of MCIAA was the skirmish that Kahn initiated on January 3 when she tangled with the powerful DFL House Speaker, chain-smoking Martin Sabo, in proposing that the Rules and Procedures Subcommittee of the House Rules and Legislative Administration Committee change the House rules to ban smoking altogether in the House chamber, visitors’ section of the galleries, and House committee rooms—which the then assistant health commissioner Dr. Ellen Fifer likened to “smoke-filled

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incinerators.”

Much as would be the case in MCIAA as enacted, under Kahn’s proposal, smoking would, in striking concessions, still have been permitted in private enclosed offices occupied exclusively by smokers as well as in a designated area of committee rooms, because “[p]eople seem to have nicotine fits at the thought of committee meetings without smoking.” When Kahn offered her proposal, “Sabo pointedly lighted a cigarette and began smoking.”

In a prickly confrontation—journalistically captured in the headline, “She Huffs, He Puffs,” which riveted popular attention at the time and remained etched in anti-smokers’ memories more than three decades later—Kahn told Sabo while

\[217\] Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).

\[218\] Two decades later the Minnesota Department of Health still “recognize[d] that it cannot eliminate smoking in an individual’s private office because of Minnesota Statutes, section 144.413, subdivision 2, even if it gives rise to complaints from people in adjacent nonsmoking areas. Only the proprietor of a public place of workplace may eliminate smoking in these areas.” A separate ventilation system would have “[i]deally” alleviated the problem of “smoke spillage” into adjacent areas, but here, too, the statute prohibited the Department from requiring such a system. The most that it was able to propose was a rule requiring that the door to a private enclosed office remain closed while smoking was occurring, which “may help minimize smoke in adjacent areas.” State of Minnesota, Minnesota Department of Health, In the Matter of Proposed Rules of the Minnesota Department of Health Relating to the Clean Indoor Air Act, Minnesota Rules, parts 4620.0050 to 4620.1500 (Mar. 24, 1994), at 18-19 (copy furnished by MDH).

\[219\] Kahn’s two rules read as follows:

IV. Pertaining to health and comfort of members of the House, Employees, and the public.

No smoking in Chamber. No member of the House of Representatives or officer of the House, or other person, shall be permitted to smoke in the House Chamber. There shall be no smoking in the visitors’ section of the galleries.

No smoking in House committee rooms or offices or hallways. Smoking shall be prohibited in committee rooms and halls of the area of the State Capitol complex under the control of the House of Representatives or its employees or officers, but excluding private enclosed offices occupied exclusively by smokers. In addition, by motion and affirmative vote of any committee of the House, a designated smoking area not greater than one half of the room may be allowed during meetings of that committee.


\[220\] Betty Wilson, “Legislative Smoking: She Huffs, He Puffs,” Minneapolis Star, Jan. 4, 1975 (1) (copy of clipping provided by ANSR).

\[221\] E.g., telephone interview with Ed Brandt, St. Paul (Apr. 26, 2007). A legislator
The Minnesota Clean Indoor Air Act of 1975

he “was exhaling cigarette smoke with a broad grin on his face” that “she would go along with allowing smoking at the speaker’s podium ‘if that should be necessary.” 222 During the remainder of the discussion, astringently recorded in the official committee minutes, House Minority Leader Henry Savelkoul moved that the subcommittee “incorporate a provision to prevent smoking in the House Chamber,” 223 but Bernard Brinkman (DFL), owner of a truck stop cum diner/liquor store, 224 spoke against it. A motion to amend Savelkoul’s motion was offered by high school teacher Bruce Vento (DFL) to divide the House chamber into smoking and nonsmoking sections, prompting Savelkoul to withdraw his motion and move that the subcommittee consider certain sections of the chamber as smoking and nonsmoking areas—a motion that carried and concluded the discussion. 225

Three days later Kahn’s proposed ban was rebuffed when the House Rules Committee did not even vote on it because of the obvious lack of a majority, and instead decided, after Sabo had expressed willingness to consider dividing smokers and nonsmokers in assigning seats in order to deal with “the problem smoking causes some people,” to examine the possibility of creating smoking and nonsmoking sections in the chambers. This “compromise” was suggested by

who witnessed the incident and recalled it 34 years later, insisted that Sabo’s exaggerated smoking had been performed tongue in cheek because he lacked the votes to forestall this change. Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). In contrast, then Minority Leader Savelkoul later opined that Sabo could have killed Kahn’s motion if he had really wanted to, but that he recognized that the time had come to restrict smoking. Telephone interview with Henry Savelkoul, Sun City West (Mar. 2, 2009).

222Betty Wilson, “Legislative Smoking: She Huffs, He Puffs,” Minneapolis Star, Jan. 4, 1975 (1) (copy of clipping provided by ANSR). Rather lamely, Sabo later insisted that he had puffed to distract attention from Republicans. Telephone interview with Martin Sabo, Arlington, VA (May 14, 2007).


224Email from Ted Suss to Marc Linder (Mar. 3, 2009). Suss, a cosponsor of H.F. 79 and “a very good friend” of Brinkman at the time, interpreted Brinkman’s votes against H.F. 79 both when the House initially passed it and when it was returned from the Senate as those of “hard core small business.”

225Committee on Rules and Legislative Administration Subcommittee on Rules and Procedures, [Minutes] at 1-1 (Jan. 3, 1975) (copy furnished by Robbie LaFleur, Director, Minnesota Legislative Reference Library). Brinkman was not a member of the subcommittee, although he was a member of the full committee.
DFL member Bruce Vento who said, while “brushing away the clouded air rushing from the end” of Sabo’s cigarette, that “he can tolerate his puffing colleagues.” Indeed, Vento’s tolerance went so far that he opposed a ban on the grounds that it “would drive smokers out of the chambers at important times during deliberations and that such an exodus ‘wouldn’t reflect well on us.’” Vento’s advice—“If smoke bothers you, then don’t sit next to someone who smokes”—was refuted by Republican (and future governor) Arne Carlson, who pointed out that it was “impossible” to prevent the smoke from wafting from one section to another: “‘There are times when you can look up at the ceiling and see a haze. ... If you brought a pollution meter in there, we’d have to close the House down on certain days because of a pollution alert.’” (In crafting a rule implementing MCIAA later that year that certified a location within a covered public place as an “acceptable smoke-free area” if it was merely separated from a smoking-permitted area by four feet, the Health Department would be sorely in need of being reminded of this law of physics.) In contrast, Savelkoul apparently saw smoking, along with members’ reading newspapers and leaving their seats more as detracting from “decorum.” In addition to rejecting Kahn’s main proposal, her colleagues also defeated her proposed ban on smoking in hallways and offices. The Minneapolis Tribune editorially welcomed as “better than nothing” the committee’s nod in the direction of a nonsmoking section, which was a concession on the part of the House’s smoking majority.

ANSR was disgusted by smoking legislators’ selfish rigidity. One of its senior members, Beverly Schwartz, published a blunt letter in the St. Paul Pioneer Press—a newspaper overflowing with large cigarette ads—in which she proceeded from the proposition that the rights of smokers to smoke and of nonsmokers to “breathe the freshest air possible...obviously conflict at times” to

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230 “The House’s Example on Smoking,” MT, Jan. 8, 1975 (4A:1-2) (edit.) The next day the newspaper confessed error for having claimed that a majority of Americans were smokers as well. “Smokers No Majority,” MT, Jan. 9, 1975 (6A:2). Later Brandt doubted that a majority of House members had smoked, though he conceded that perhaps a majority of the committee had. Email from Ed Brandt to Marc Linder (Feb. 23, 2009).
charge that: “House Speaker Sabo...and the rest of the ‘can’t live without it’ smokers refuse to even consider common courtesy or the rights of their co-workers. If they can’t be considerate to people they know, then I am inclined to feel sorry for the ‘common’ people of the state who don’t even have personal contact with their state representatives.”

Anti-smokers, however, did not acquiesce in their defeat at the hands of the Rules Committee. On January 20—later on the same day after Kahn had introduced the new MCIAA—in the course of consideration of the rules for the session by the full House a smoking rule was debated. Kahn (and fellow DFL James Rice) moved to add this new rule: “No member of the House of Representatives or officer of the House, or other person, shall be permitted to smoke in the House Chamber except in designated smoking areas, confined only to the front desk and the legislative retiring room. There shall be no smoking in the visitors’ section of the galleries.” Before a roll call vote could take place, John Tomlinson, a DFL who worked as a chemical engineer at 3M Company, moved to amend Kahn’s proposed rule by including in the designated smoking areas sections 1, 2, and 6 and all of section 5 except the last three rows. After the House, by a vote of 77 to 53, had defeated what the press called an effort to create smoking and nonsmoking sections on the House floor, it also rejected Republican Maurice McCauley’s amendment to designate the last rows in each section of the House Chambers as smoking areas. Then William Kelly (DFL), not “see[ing] why any area of the chambers should be excluded,” moved to amend Kahn’s amendment to exclude the Speaker’s area from the designated smoking area. Kahn sought to defend her exclusion on the grounds that

233 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10668
238 Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 107 (Jan. 20, 1975). In addition to the Speaker’s area, the front desk included the chief clerk and deputy chief clerk. Email from Ed Brandt to Marc
smoking at the speaker’s desk “would be less offensive to the sensibilities” of nonsmokers than smoking elsewhere: “You will notice...that smoke from the speaker rises directly over his head into the ventilation system.” This specious argument quickly prompted Kelly, a high school teacher, to produce a brochure that Kahn herself had distributed and to read off the names of potentially harmful chemical compounds contained in cigarette smoke: “If the other officers at the desk are allowed to smoke, these noxious compounds will go directly by the speaker on their way to the ventilating system and he would be disabled in a short period of time.” Neither Kahn’s curious reply—that she saw “nothing wrong with justice tempered by mercy”—nor her No vote was of any avail: Kelly’s amendment passed on a vote of 89 to 34. On the final House vote of 86 to 42 in favor of Kahn’s motion as amended by Kelly’s only 67 percent of DFLers voted Yea compared to 70 percent of Republicans. The DFL’s two-thirds vote represented the lowest degree of party cohesion on any rules vote during the session. “Once the solidarity of voting with the majority on the rules had been broken,” as Brandt later pointed out, and especially after the “She Huffs, He Puffs” headline, which, by Sabo’s own account, generated “more mail than he had ever received on any other issue, including hot-button issues such as abortion, he was in no position to try to force the caucus to support him.”

Linder (Feb. 26, 2009).

239“Rep. Sabo Smoked Out as House Passes Ban,” Minneapolis Star, Jan. 21, 1975 (6E:3). Brandt did not know whether Kahn’s exclusion was meant as a quid pro quo for Sabo’s sponsorship of the 1975 MCIAA, but intuited that: “At a minimum, she wasn’t taking any chances of losing support.” The difference between Kahn and Kelly was not that the latter was a stricter opponent of smoking, but that “she was wooing votes, while he wasn’t.” Email from Ed Brandt to Marc Linder (Feb. 23, 2009).


243Edward Brandt, “Legislative Voting Behavior in Minnesota,” in Perspectives on Minnesota Government and Politics 202-22 at 211 (Millard Gieske and Edward Brandt ed. 1977). Brandt’s study, which covered only the first 30 days of the session (during which most if not all of the rules votes presumably took place), did not identify the rules votes, but the lowest degree of cohesion was 67 percent and only one vote achieved it.

244Email from Ed Brandt to Marc Linder (Mar. 4, 2009).
Kahn then alone moved to amend the rules to prohibit smoking “in committee rooms and working areas of the part of the State Capitol complex under the control of the House...or its employees or officers, but excluding private enclosed offices occupied exclusively by smokers. In addition, by motion and affirmative vote of any committee of the House, a designated smoking area not greater than one-half of the room may be allowed during meetings of that committee.” Apparently even this modest default rule, which could have been overridden by majority vote of any committee, was too extreme even for most supporters of Kahn’s less-indiscriminate-smoking-in-the-chamber rule: by a vote of 94 to 33 the House voted to refer it to the Rules Committee for further study.\textsuperscript{245}

\textbf{Phyllis Kahn Introduces H.F. 79}

The next iteration of the Minnesota Clean Indoor Air Act (H.F. 79) was introduced by Kahn and four others on January 20,\textsuperscript{246} one week after Governor Wendell Anderson had proclaimed January 11-17 National Education Week on Smoking\textsuperscript{247} and Kahn and Schaaf, flanked by a British poster (“Is it fair to force your baby to smoke cigarettes?”) discouraging pregnant women from smoking, held a press conference to announce that they were sponsoring another bill to regulate smoking in public places.\textsuperscript{248} The proclamation, which ANSR itself had developed,\textsuperscript{249} stressed that “sidestream smoke inhaled by the non-smoker is higher in noxious compounds than the mainstream smoke inhaled by the smokers....”\textsuperscript{250}

\textsuperscript{245}\textit{Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975}, at 108-109 (Jan. 20, 1975); “Minnesota House Votes Partial Ban on Smoking,” \textit{Forum} (Moorehead), Jan. 21, 1975 (copy furnished by ANSR). The motion to refer Kahn’s amendment to the Rules Committee was made by Ray Faricy (DFL), a lawyer who had voted with Kahn on all three roll calls on her first amendment.


\textsuperscript{250}“Proclamation” (Jan. 10, 1975), Bates No. EXHIBBYB0000487 and EXHIBBYB000350. The proclamation misleadingly and/or deceptively asserted that “the
The Minnesota Clean Indoor Air Act of 1975

That two of Kahn’s cosponsors were House Speaker Martin Sabo and Republican Minority Leader Henry Savelkoul enhanced, at least in the judgment of ANSR Chairman Brandt, the bill’s prospects of passage.251 “The public,” according to Kahn, responded with outrage” to Sabo’s behavior: “Sabo’s secretary called to ask Phyllis to drop the clean air issue because of the nasty letters Sabo was receiving. The upshot was that Sabo ended up signing onto the bill as co-author. ... ‘It was very helpful to have a chain smoker supporting the bill.’”252 Brandt’s view that the “unprecedented amount of mail” that Sabo received on account of the “She Huffs, He Puffs” publicity had prompted Sabo to “decide[ ] that it was politically wise to co-sponsor the bill”253 appears considerably more plausible than Sabo’s after-the-fact insistence that he had supported Kahn’s bill in order to stave off passage of the kind of total statewide ban that the legislature enacted in 2007.254 Savelkoul, who noted that his cosponsorship would not have influenced any Republican votes because the bill “was not a caucus issue,” explained his position and involvement as a “basic philosophical thing” in the sense that “I believed basically other people have no right to interfere with the air we’re consuming.” His attitude was in part molded by the incidents that “we all had” of having had tobacco smoke blown in his face.255

The backgrounds of the two other cosponsors, both young members of the large class of DFL House members elected at the post-Watergate elections in November 1974, shed interesting light on supporters’ variegated composition. Burnham (Bud) Philbrook, a 28-year old who had lost two previous elections in

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251 Ed Brandt, “Kahn-Schaaf Bill Protects Right to Smoke-Free Air,” ANSR 2(6):2 (Feb. 1975). In contrast, Bud Philbrook, one of the sponsors, took the position that since the smoking bill was not the kind of legislation that would have prompted a leader to impose party discipline, Sabo’s and Savelkoul’s sponsorship did not signify that passage was a foregone conclusion. Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). A news article stating that Sabo’s decision to co-author the bill was “said” to have enhanced the prospects of passage may have been an unattributed reference to Brandt. Bob Goligoski, “Anti-Smoking Bill to Waft in Soon,” SPPP, Jan. 14, 1975 (11:5-8).


253 Telephone interview with Martin Sabo, Arlington, VA (May 14, 2007). Anti-anti-smoking restaurant lobbyist Chum Bohr remarked that Sabo’s cosponsorship had indicated that he had known “which way the wind was blowing.” Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

255 Telephone interview with Henry Savelkoul, Sun City West, AZ (Mar. 2, 2009).
the state’s most heavily Republican district, had smoked from the age of 16 to 26, but quit two years before entering the legislature. By his own admission still addicted (as he was sure he remained 34 years later), he “gagged” at secondhand smoke. Unaware of Kahn’s earlier bill or her plan to file another in 1975, when Philbrook informed the Speaker’s office early in the session that he wanted to introduce an anti-smoking bill, he was told about Kahn, who, on hearing of Philbrook’s deep interest, asked him to co-sponsor hers.256 Even younger, 25-year old Ted Suss, a Vietnam War Marine,257 when asked 34 years later what had motivated him to become a cosponsor, observed:

Part of what motivated me to become an author was youthful ignorance. I did not realize at the time that authoring a controversial bill can cause problems for you in the future. Thus my willingness to stick my neck out.

As a lifelong non-smoker, my motivation was at least informed by my disgust with sidestream smoke and the smoky atmosphere in so many offices, business places, and public buildings. This disgust opened my mind to trying to do something about the problem. Once I started talking to people, it became apparent that my feelings about smoking were shared by many others. Listening to the public debate on the issue before I was elected to the legislature convinced me that there was a huge public health issue at stake apart from the comfort issue.

Once educated on the public health impact smoking had on non-smokers, I wanted to do something about it. Phyllis’ bill was a very handy tool for me to express my views and make what I considered to be good public policy. I think, this may be giving myself more credit than I deserve, I knew deep down inside that this non-smokers rights and more attention to public health was a direction America needed to go and I wanted to be part of taking the first steps in that direction. I do recall telling someone once, I think at a National Council of State Legislators meeting, that I felt it important for one state to break the ice on this issue to give motivation and perhaps political cover to legislators in other states.

Between election day in November of 1974 and swearing in day in January of 1975, I met Phyllis for the first time and asked if there was any chance of becoming a co-author of her bill. She laughed in response knowing full well that finding five authors for that legislation was not going to be easy.258

A third of a century later Suss still took “great pride in having been an author of this law. For the law itself, but more so for the snowball that this law started rolling down the hill.”259

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256 Telephone interview with Bud Philbrook, St. Paul (Mar 1, 2009).
257 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10642
258 Email from Ted Suss to Marc Linder (Mar. 2, 2009).
259 Email from Ted Suss to Marc Linder (Mar. 2, 2009).
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In language identical to H.F. 2801 (of 1974) and the MCIAA as enacted, H.F. 79’s key prohibition declared that: “No person shall smoke in a public place or at a public meeting except in designated smoking areas.” In later analyses of MCIAA Kahn glossed this provision as making her statute path-breaking or even revolutionary:

Certain other states have listed a greater or lesser number of places where smoking is prohibited. The Minnesota law takes the step of forbidding smoking everywhere unless it is specifically allowed, but this step is psychologically far more difficult for people to understand. This single line in state law required a massive change in cultural attitudes and it is not surprising that it was difficult to get instantaneous comprehension and enforcement.

In fact, however, even the first statewide ban, the 1973 Arizona law, had included the same prohibitory structure perforated by permissively designated smoking areas.

ANSR implemented its aforementioned determination to exclude restaurants from the 1975 bill in order to neutralize its strongest opponents, by the circuitous route of retaining their specific identification in the definition of “public place” while conferring alone on owners of restaurants (and bars) the authority to designate the entire public place a smoking area. In other respects, too, it differed significantly from H.F. 2801. First, the definition of covered “public places” made clear that the list of named public places was illustrative (“not limited to”) rather than exhaustive. Second, it narrowed coverage by expressly “excluding private, enclosed offices occupied exclusively by smokers” (thus forcing co-employees, customers, and visitors to inhale especially concentrated smoke or to forgo contact with the occupants). Third, from the prohibition of smoking

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262 See above ch. 23.
263 Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 9 (2003), on http://repositories.cdlib.org/ctere/tcpmus/MN2003, erroneously asserted that: “The original bill introduced by Representative Phyllis Kahn in 1974 (HF 2801) was introduced again as HF 79 in February 1975.” Replete with gross factual errors, the authors’ legislative history of MCIAA is unreliable. For example, they bizarrely asserted that House File 966 had passed the Senate Health Committee, whereas in fact it was not even considered by a House committee. Id. at 7.
264 H.F. 79, § 3 (Jan. 20, 1975, by Kahn) (copy furnished by MHS).
except in designated smoking areas were excluded “cases where an entire room or hall is used for a private social function” whose seating arrangements were controlled by the sponsor and not the owner.\(^{265}\) Fourth, “persons in charge of public places” were added to proprietors as designators of smoking areas, but both were denied such authority “in places where smoking is prohibited by the fire marshall or by other law, ordinance or regulation.” Fifth, H.F. 79 set forth a complex of controls governing designated smoking areas, providing that “physical barriers shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.” Where, however, a public place consisted of a single room, “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area”\(^{266}\) (suggesting that no physical barriers or ventilation would be required where they were most urgently needed).\(^{267}\) Moreover, restaurants and bars were excluded from the prohibition of designating a public place in its entirety as a smoking area; the only condition attached to designating a restaurant or bar as a smoking area in its entirety was posting this designation conspicuously on all entrances used by the public.\(^{268}\) Sixth, H.F. 79 raised the threshold for prosecution of owners/managers for failing to enforce the law by making only a willful failure a violation.\(^{269}\) And seventh, the new bill conferred on “any affected party” the right to file a court action to enjoin repeated violations of the law.\(^{270}\) Overall, then, Kahn accurately described the bill as “more moderate” than the previous year’s.\(^{271}\)

Soon after the bill’s introduction Brandt was persuaded that it was likely that the legislature would confer at least some protection on nonsmokers because, as noted earlier, 90 of 131 House members present voted to restrict smoking in the House itself on at least one of three roll calls on the House rules and even some

\(^{265}\) H.F. 79, § 3 (Jan. 20, 1975, by Kahn).
\(^{267}\) Although the implementing rules did not expressly address the issue, the chief drafter later observed: “I don’t recall the statutory construction that allowed it but the rules required use of space separation or barriers (minimal as they were) even if the public place consisted of a single room. I don’t know if we were interpreting what it meant to be a ‘side of the room’ or some other provision that needed clarity to implement reasonably. I do know that enforcement required space or barriers, not merely one side of the room defined solely by the proprietor.” Email from Kent Peterson to Marc Linder (Nov. 6, 2009).
of those who voted No would support regulation of public smoking. And while greater uncertainty prevailed concerning senators’ attitudes, the aforementioned vote on the Senate rule in 1974 suggested that they did not differ significantly from those of their House counterparts. Brandt may have concluded that it was unlikely that either chamber would defeat MCIAA, but at the same time he also acknowledged that “the bill may be so weakened by amendments as to be ineffective, unless the public demands a strong bill,” especially since he conceded that “[e]ven as introduced, the bill falls far short of the ideal,” though it “would still represent a great improvement over the existing situation.” Nevertheless, even the results of his own questionnaire indicated that a watered-down bill was a real possibility: of the 47 representatives who told ANSR that they would support a nonsmokers’ rights bill, only 14 voted to restrict smoking on all three roll calls, while 17 did so on two, 6 on only one, and nine on none (suggesting that “the kind of legislation they may be willing to support may not be very adequate”).

The House Health Care Subcommittee Votes to Water Down the Bill

The bill’s first test took place before the Health Care Subcommittee of the House Health and Welfare Committee on February 13, at which in addition to Kahn and Brandt, a representative of the Lung Association, and Dr. Paul B. Johnson, chief of the pulmonary division of St. Paul-Ramsey Hospital, spoke for the bill, while a lobbyist for the Radisson Hotels and the president of the Minnesota Association of Commerce and Industry spoke against H.F. 79. Serendipitously, despite the Minnesota Historical Society’s destruction of all the audio tapes of committee hearings from the 1970s and 1980s, some knowledge of this hearing (and of the full committee hearing on February 25) has been

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273 State of Minnesota, House of Representatives, Committee on Health and Welfare, Subcommittee on Health Care, [Minutes] (Feb. 13, 1975), in MSA, MHS, 129.A12.6F. Dr. Johnson, who “was not an out and out activist,” had been involved in the Lung Association and, as he reconstructed the situation 34 years later, was probably recommended as a witness by that organization. Telephone interview with Paul Johnson, Edina, MN (Nov. 10, 2009). MACI’s public testimony against the bill refutes the later claim by ANSR’s president that “[t]he only opposing organization was the Hotel, Motel and Restaurant Association.” Jeanne Weigum, “Passage of the First Comprehensive, State-Wide, Smoking Control Law in the U.S.,” in Proceedings of the Fifth World Conference on Smoking and Health 2:327-31 at 327 (William Forbes et al. eds. 1983).
preserved for posterity because Honeywell, Inc., which was so eager to press its position that smoking in office workplaces be regulated solely by the Department of Labor and Industry that, in connection with the public hearing on the proposed regulations in December 1975, its corporate employee relations attorney and personnel director assigned the company’s in-house lobbyist to review the tapes of the committee hearings and floor debates “to provide them with some idea of the legislative intent of the ‘No Smoking’ act” in general and especially regarding the adoption of the amendment to place factories, warehouses, and similar workplaces under DLI’s jurisdiction.274

At the subcommittee hearing Kahn emphasized that she was not seeking to eliminate smoking, but “‘only...to establish the right to breathe clean air as a fundamental public right.’”275 Interestingly, instead of admitting that the decision to permit owners to permit smoking everywhere in restaurants, thus watering down the bill compared to her measure in 1974, was simply driven by the need to neutralize the restaurant owners’ opposition that had helped kill the previous year’s bill, Kahn disingenuously and implausibly claimed that she was reacting to the “strong and legitimate criticism” that had been directed at the earlier bill: “Restaurants are a more voluntary place where people go....”276 Brandt insisted that cigarette smoking was the “‘No. 1 air pollution problem.... You get the same amount of pollution standing next to a smoker as you do next to an exhaust pipe of a car.’”277

In contrast, David Kuduk, Radisson’s lobbyist, both called the bill unnecessary and specifically objected to a provision that he argued might result in the Health Department’s requiring businesses to install barriers and ventilation

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274Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations (n.d.), in Health Department, MSA, MHS, 112H.18.3(B). To be sure, the usefulness of the preserved knowledge depends on the accuracy and truthworthiness of Randell’s notes. On Honeywell’s position on the regulations, see below. In addition to transcribing the tapes, Randell as lobbyist had also attended the hearings and debates. Telephone interview with Patsy Randell, Minneapolis (Apr. 4, 2009). Randell was not included in the list of registered lobbyists for 1975. State of Minnesota, State Ethics Commission, Registered Lobbyists (Feb. 11, 1975).


276Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).

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systems.\textsuperscript{278} That the hotel was so adamantly opposed to the law even after restaurant coverage had been removed (so that Chum Bohr, the lobbyist for the combined restaurant-hotel-resort hospitality association, of which Radisson was a member, did not even bother to appear at the House hearing)\textsuperscript{279} suggests, in connection with behind-the-scenes information discussed below concerning the fact that its owner, Curt Carlson, also owned the company that supplied the trading stamps for two of the cigarette manufacturers, the possibility that Radisson was perhaps acting on behalf of the tobacco industry. (Radisson’s hard-line position was underscored when, soon after the law had gone into effect, it posted smoking-permitting signs “throughout the area” at a Minnesota Hairdresser’s Convention at the downtown Radisson at which ANSR ran a booth selling nosmoking signs so that “the level of smoke on the conference floor could have stopped traffic.”)\textsuperscript{280} Finally, before the subcommittee Oliver Perry, the head of MACI, focused on what he called “serious practical problems,” especially for small businessmen” during a recession, when “having to deal with another inspection procedure could possibly be the last straw.”\textsuperscript{281}

Following this testimony, the subcommittee adopted the weakening motion offered by Rep. Howard Smith, a DFL retail businessman and rural conservative,\textsuperscript{282} to amend the bill by adding the word “existing” before “physical barriers and ventilation systems” so that where none existed, owners who chose to designate smoking areas would be under no obligation to use those barriers/systems to minimize the toxic impact of the smoke that wafted over to nonsmoking areas.\textsuperscript{283} That Kahn agreed to this amendment\textsuperscript{284} meant, according

\textsuperscript{278}Bruce Nelson, “Nonsmoking Backers Get Taste of Victory,” \textit{SPPP}, Feb. 14, 1975 (15:1-3). More than 30 years later Kuduk, who by then was a longtime legal services lawyer, did not recall what Radisson’s objections to the bill were, but thought that they probably were related to a fear of loss of sales. Telephone interview with David Kuduk, Grand Rapids, MN (May 22, 2007). Minority Leader Savelkoul conjectured that Radisson might have been especially opposed to the bill because in addition to hotels it also owned an entertainment/convention venue in the Twin Cities area. Telephone interview with Henry Savelkoul, Sun City West, AZ (Mar. 2, 2009).

\textsuperscript{279}Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).


\textsuperscript{282}Email from Ed Brandt to Marc Linder (Feb. 23, 2009).

\textsuperscript{283}State of Minnesota, House of Representatives, Committee on Health and Welfare,
to Ed Brandt, that “she wasn’t sure whether the bill would get out of the sub-committee without Smith’s amendment.” 285 If business owners were in fact adamantly opposed to being forced to spend money on new barriers or ventilation and had the votes in the subcommittee to make the provision a deal-breaker, the Minnesota Health Department’s post-enactment promulgation of a rule that under certain circumstances would nevertheless have imposed precisely such an expenditure suggests just how far the agency went to override at least one of the law’s weaknesses (even though barriers in fact may not have protected nonsmokers at all from exposure to secondhand smoke). 286

The colloquy between Kahn and several antagonists, in particular Republican real estate businessman O. J. Lon Heinitz, 287 who wanted to dilute the bill even further by striking “or serving as a place of work” from the definition of “public place,” thus limiting coverage to public places used by the general public, was instructive. In response to Heinitz’s question as to whether her bill covered factories, Kahn stated that it did, but incorrectly added that “the point here is that you have to designate [smoking] areas or allow smoking breaks,” when in fact H.F. 79 imposed neither duty. Then, when Heinitz explained that he asked in order to find out how the bill related to OSHA and to the fact that “[y]ou can’t move machinery around to accomodate [sic] smokers and non smokers [sic],” Kahn bizarrely back-pedaled, apparently willing to deprive nonsmoking industrial workers of all state protection from exposure to their colleagues’ secondhand smoke: “A factory is not really open to the public in the same sense that a...store is and certainly I would think that if there’s no disagreement among workers, and there’s generally no problem, you could designate the entire place smoking...because a factory might not be generally open to the public I don’t feel this is a problem. Industry can work this out with it’s [sic] workers.” Kahn then reversed herself yet again, in response to Republican John Kaley’s question as

Subcommittee on Health Care, [Minutes] (Feb. 13, 1975), MSA, MHS, 129.A12.6F.


285Email from Ed Brandt to Marc Linder (Mar. 13, 2009). Not recalling that he had attended the hearing, Brandt was reconstructing the logic that must have underlain Kahn’s move.

286See below this ch.

287http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10251 (visited Nov. 10, 2009). Heinitz’s interest in excluding workplaces may have been connected to the fact that earlier in his legislative career he had been president of the employment agency Snelling and Snelling in Minnesota. The Minnesota Legislative Manual 1971-1972, at 77 (Larry Anderson ed.).

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to whether the factory owner had the right under the bill to declare a whole area nonsmoking, by pointing out the obvious—that the owner had no such power and that “working is one of the necessities of life and protection is needed for people who are irritated by smoke and who work.” Kaley’s counter that Kahn’s approach would force a factory owner to reorganize his whole assembly line prompted her to revert to her suggestion of smoking breaks. The two Republicans received reinforcement from Kuduk who, despite being Radisson’s paid lobbyist, suddenly began testifying “[o]n behalf only of myself.” After pointing out correctly that under H.F. 79 workplace coverage did not turn on being open to the public, he insisted that coverage of his 15-employee law office “would be a problem for us....” Prompted by Heinitz to devise an amendment to solve the problem, Kuduk favored deleting “serving as a place of work,” a phrase that made the bill “all inclusive”—and whose function finally dawned on Heinitz. Now Oliver Perry of MACI entered the fray, conjuring up the specter of conflicting jurisdiction with OSHA as well as between the Board of Health and the Department of Labor and Industry. Kahn sought to tamp down this eruption by observing that “[w]e need...higher standards of clean air than OSHA standards.”

That Heinitz’s amendment failed only by a vote of 4 to 5 (both Republicans and two of seven DFL’ers voting Yes), suggested, along with the watered-down designated smoking areas provision, that while the subcommittee was willing to recommend to the full committee that the bill pass as amended, business owners far beyond the restaurant industry (which was exempt) opposed regulation of smoking on their premises and a large majority of the legislature was not about to commit to an expansive law. Heinitz made his motion after Kahn had rejected his proposal to hold the bill over for further study. He sought to exclude workplaces because coverage might create problems for employers unable to provide separate smoking and nonsmoking areas: “‘What would the factory do? ... Have machines for smokers and machines for nonsmokers?’” Kahn simply cut this Gordian knot by pointing out that the bill “would resolve those types of problems by banning smoking in the entire area if facilities could not be established for nonsmokers.” The health justification and poetic justice were clear: “‘For years we have been resolving those kinds of situations in favor of the smoker.... It’s time we begin to resolve them in favor of the nonsmoker.’”

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288 Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1-3 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).
The same day that the House subcommittee acted, the Minnesota Board of Health, which H.F. 79 tasked with writing the implementing regulations for MCIAA, voted 9 to 1 to prohibit smoking at all public meetings held in Minnesota Health Department buildings. The dissenter, insurance agent Robert Willmarth (who by 1976 would be Board chairman), “with cigar in hand, told fellow board members that ‘I don’t drink coffee—I’d like to ban it.’” In response to the distinction drawn by psychologist Michael Keable that coffee drinking did not bother nonsmokers, Willmarth asserted that he did not like the fumes that coffee gave off. When the discussion then veered off onto the smell of perfume and after-shave lotion it became manifest that not all members of the Board, several of whom smoked, had even the slightest grasp of the emerging science of secondhand smoke exposure. The Board’s action was not coincidental: in light of the legislature’s and the Minneapolis city council’s consideration of restricting smoking at public smoking, some Board members stated that they should set an example.

Radisson Hotels as Cigarette Manufacturers’ Secret Agent?

That Radisson was the sole individual corporation to oppose the bill raises the tantalizing possibility that it was acting as a subterranean agent for the cigarette manufacturers, especially since it was a member of the hospitality coalition whose lobbyist, Chum Bohr, was sitting out the hearings because he had already

(15:1-3).

291 Lewis Cope, “State Health Board Restricts Smoking, Leaves Coffee Alone,” MT, Feb. 14, 1975 (1A, 5A), Bates No. TIMN0461954. Recalling the incident many years later, Willmarth—who owed his appointment to having a brother-in-law who was a state legislator—asserted that he had not “really” been opposed to the nosmoking rule, but had made this “newspaper comment” so that the public would understand that people are bothered by various odors. Willmarth’s memory or bona fides were cast in doubt by his claim that he had had no reason to oppose the ban since he did not smoke at Board of Health meetings anyway (which was contradicted by the reporter’s eyewitness observation). Telephone interview with Robert Willmarth, Rochester, MN (Apr. 1, 2009).

292 Lewis Cope, “State Health Board Restricts Smoking, Leaves Coffee Alone,” MT, Feb. 14, 1975 (1A, 5A), Bates No. TIMN0461954. The occupational information came from a telephone interview with Michael Keable, St. Joseph, MN (Mar. 20, 2009). Among the Board members whom he was able to recall 34 years later, Keable identified three smokers including one physician. Member Elizabeth Kalisch identified Bridget Coleman, the wife of then-Senate Majority Leader Nicholas Coleman, as a smoker. Telephone interview with Elizabeth Kalisch, White Bear Lake, MN (Mar. 20, 2009).
achieved privileging restaurants to permit smoking everywhere. Two years earlier Radisson had briefly become the target of the tobacco industry’s ire in response to the company’s announcement in April 1973 that, beginning May 1, it would set aside special space for nonsmokers in banquet and convention facilities at gatherings of 25 or more people. At the time, Radisson owned hotels in Minneapolis, Duluth, and Bloomington, Minnesota as well as in Omaha, Lincoln, Denver, and Tobago.\textsuperscript{293} As soon as the cigarette oligopolists’ panoptically active surveillance of their possible enemies caught wind of this treachery, their agents went into red alert mode to warn the top of the hierarchy.

On May 2, R. Marshall Edelen, the vice president for distribution services at Brown & Williamson, forwarded to Edward Finch, the company’s president, chairman, and CEO, a newspaper clipping with the announcement that a Pittsburgh department manager had included in his weekly letter.\textsuperscript{294} Edelen added that Radisson was owned by Curt Carlson of Minneapolis, who also owned Gold Bond Stamp Company and other affiliated entities that engaged in coupon and promotion programs used by Lorillard and Liggett & Myers.\textsuperscript{295} Two days later, Brown & Williamson’s vice president and general counsel sent a copy of the clipping to his counterparts at Lorillard and Liggett as well as to the Tobacco Institute president, simply mentioning that Carlson owned Radisson.\textsuperscript{296}

Manifestly aware of the cigarette manufacturers’ sensitivity to the slightest slight and constant vigilance to detect any possible threat and prepared to kowtow to avoid offending economically much more potent corporations, Radisson sought to preempt any retaliatory action by writing an abject letter of apology before the manufacturers could even plan their inevitable reprisal. On May 9, Harry Greenough, Carlson’s “top pitchman,”\textsuperscript{297} president of the Carlson entity in charge

\textsuperscript{293}“Radisson Plans Non-Smoker Space,” \textit{MT}, Apr. 18, 1973 (B1:2).


of Gold Bond stamps,\textsuperscript{298} and, conveniently, an “expert in loyalty programs,”\textsuperscript{299} wrote to Curtis Judge, the president of Lorillard, to fill him in on “a dumb thing that happened in our hotel division. Your clipping service will probably send you a copy of an article...which states the Radisson Hotels have initiated a policy of reserving a special space for non-smokers during their banquet and convention activities.” Addressing Judge by his first name, Greenough then sought to disabuse his customer of any suspicion of betrayal by recounting that an (unidentified) convention group had moved into the Radisson in Omaha and requested that smoking be banned from their space: “Of course this was impractical, and our manager was smart enough to counter by suggesting that during their activities certain areas be reserved for smokers and an adjacent area for non-smokers. They accepted this compromise and everything went smoothly. The next thing that happened was that our manager was discussing the situation with some of his staff and one bright sole [sic] got the idea that this could be a possible ‘sell’ for the hotels and rushed off to the newspaper.” Greenough then concluded by groveling: “Our people involved have been duly reprimanded and straightened out; and, as stated, there is no such policy at the Radisson Hotels.”\textsuperscript{300}

Five days later Greenough sent an identical account to the marketing vice president at Liggett & Myers.\textsuperscript{301}

Whether Greenough’s story was factually correct is as unclear as whether it succeeded in propitiating the cigarette companies, since, after all, Greenough had praised his manager, at the very least, for having accommodated a large group of customers (precisely) by reserving a special space for non-smokers during a convention and did not appear to have admonished him never to show such flexibility again. (Interestingly, two years later, in the midst of the Minnesota legislature’s deliberations on the 1975 MCIAA, an article appeared in the \textit{Washington Post}, and was circulated among R. J. Reynolds executives, on antismokers’ growing success in carving out public spaces, at the very end of which the Radisson PR chief to whom Greenough had cc’d his letter to Judge was quoted as commenting on the chain’s having tried and dropped nosmoking sections in their restaurants “because the ban was impossible to enforce and because there was no way to keep smoke from drifting to nonsmoking sections”:

\begin{itemize}
\item \textsuperscript{298}“Harry W. Greenough, “President, Gold Points Plus, Dead at 76,” PR Newswire, July 29, 1997 (Lexis).
\item \textsuperscript{299}Ann Merrill, “Harry W. Greenough, Former President of Carlson Companies, Dies at 76,” \textit{Minneapolis Star Tribune}, July 30, 1997 (6B).
\item \textsuperscript{300}H. W. Greenough to Curtis H. Judge (May 9, 1973), Bates No. 680261889.
\item \textsuperscript{301}H. W. Greenough to Samuel White (May 14, 1973), Bates No. 680261887.
\end{itemize}
“‘We tried it, it was a great idea, everybody loved us, but it didn’t work.’”302 Moreover, especially at a time when the cigarette companies were being inundated with news of metastatizing nosmoking areas on airplanes, trains, buses, and now hotels and restaurants—indeed, the day after Greenough had sent his letter to Judge, the Philadelphia Inquirer published a long article on the subject, a clipping of which was circulating at R. J. Reynolds303—it seems unlikely that they would have appreciated Radisson’s subtle distinction between a policy and a practice.304

That Greenough knew what potential harm he was warding off when he submitted his abject apology became clear the very next day when the head of the Coordinating Board of Tobacco Trade Associations informed R. J. Reynolds that his organization had recently sent an “admonition to state executives in Minnesota, Nebraska and Colorado to think twice before using Radisson Hotels which recently announced plans to set aside ‘special space for non-smokers.’”305 And the corrective action that the manufacturers would have set in motion was hinted at in a memo from Finch at Brown & Williamson to his general counsel Bryant instructing him to discuss the matter with Lorillard and Liggett & Myers, “pointing out what we did with Marriott.”306 Exactly what the cigarette companies did to Marriott is not clear from the industry’s disgorged online documents, but what is known suggests at least the possibility that by April Radisson might already have been aware of what treatment the cigarette oligopoly was meting out to a hotel chain that had ‘crossed’ it, but that, unlike Radisson, was not even its partner in hawking cigarettes.

On February 13—two months before the Radisson press release—Marriott announced that it was making one whole floor of rooms in each of three hotels in Washington, D.C. nonsmoking. As if wanting to poke the cigarette companies in the eye, The New York Times led off its article with: “Nonsmokers have a new hero today. His name is J. Willard Marriott....”307 Opposite the elevator doors on
those floors—which Philip Morris preferred belittling as “isolation wards” and a “sales gimmick”\textsuperscript{308}—huge framed signs declared that tobacco smoking was banned. What Marriott styled an “experiment” the chain’s 27 other hotels would probably hasten to adopt if it proved successful. Giving the cigarette manufacturers a vital incentive to nip this innovation in the bud was the fact that Marriott, which, according to the American Hotel and Motel Association, was “the first to offer such a haven for nonsmokers,” appeared to have “hit upon a popular idea,” which was driven by guests’ comments about smoke odors.\textsuperscript{309} The hotel’s “motive, apparently, ha[d] nothing to do with the principles of the Mormon Marriott family. Profit is the lure”—not only by increasing occupancy rates bulked up by nonsmokers who had been “gagged by the lingering tobacco smell,” but also by cutting the costs caused by frequent cleaning of smoky drapes and cigarette burn damages to carpets and furniture.\textsuperscript{310} (In retrospect, a former president of the Minnesota Restaurant Association and well-known Twin Cities restaurateur who had opposed the MCIAA because smoking was legal admitted that even in the short run the law had been for the best because it had saved him the cost of cleaning windows and wooden paneling twice a week.)\textsuperscript{311} The cigarette manufacturers may not yet have determined whether hotels’ profit motive or principle constituted the greater threat, but they presumably found utterly unforgiveable that former Surgeon General Steinfeld was scheduled to attend the “kickoff.”\textsuperscript{312}

The very same day that the Times articles appeared, John T. Landry, Philip Morris’s group vice president and director of marketing for tobacco and the company’s “resident advertising genius” (especially in relation to Marlboro),\textsuperscript{313} shot off an outraged letter to his “old friend”\textsuperscript{314} Sam Huff, a famous former professional football player who, beginning in the 1950s, had worked for Philip Morris as a salesman for Marlboro (which was heavily advertised on television

\begin{footnotes}
311Telephone interview with Jack Kozlak, Naples, FL (Oct. 15, 2009).
314John T. Landry to Sam Huff (Feb. 14, 1973), Bates No. 1005073633.
\end{footnotes}
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during professional football games)\textsuperscript{315} and in the meantime had become a Marriott vice president of special markets. Venting about Marriott’s “inane publicity release” concerning the nonsmoking floors, Landry complained that the hotel chain had “not only taken a cheap shot at our industry but a very uninformed one.” Not having to bother to explain to a fellow Marlboro hawker of what exactly Marriott was ignorant, he instead relied on Huff’s having “worked very closely with us for some time” and thus being “aware of the great pride we take in our products” to make him understand Landry’s “annoyance.”\textsuperscript{316} (If Landry was merely annoyed, he must have mellowed in the two years since midnight on New Year’s Day 1971 when “[h]e sat home alone by his television set, watched four of his beloved cowboys gallop off into the sunset for the last time, and wept”\textsuperscript{317} as the ban on cigarette advertising went into effect.)

What action the companies took next is unknown, but as late as June Marriott was still anathema to them, when one of its market development officials wrote to Philip Morris President George Weissman urging him to consider an expensive corporate suite in Essex Towers in Manhattan.\textsuperscript{318} Weissman’s terse reply said it all: “In view of the Marriott attitude toward smoking, your letter was obviously misdirected.”\textsuperscript{319} The next critical links in the conflict are missing, but by September Brown & Williamson noted that Marriott had reported the termination of its “‘no smoking’ accommodations because ‘there just wasn’t anybody asking for’ those restricted rooms.”\textsuperscript{320} That lack of demand prompted the abandonment of the initiative seems implausible—after all, in November, the Tobacco Institute noted that whereas “Marriott gave up, apparently the Quality Inn chain is expanding its no-smoking quarters.”\textsuperscript{321} Rather, the real reason, as the Chicago Tribune somewhat opaquely revealed in a review of the growing number of places where smoking had been restricted or banned, had not been difficult to imagine: “Marriott Hotels, gungho for smoking and nonsmoking areas, ushered in the latest no-smoking trend with relish. Since that initial fanfare...the Marriott program has been dropped, apparently because the corporation-to-corporation lobby was as strong as its Springfield [Illinois] contingent,” which “strong tobacco lobby” had

\begin{footnotesize}
\begin{enumerate}
\item Ray Jones, To Our Friends in the Tobacco Industry (Oct. 25, 1960), Bates No. 2012511756.
\item John T. Landry to Sam Huff (Feb. 14, 1973), Bates No. 1005073633.
\item Richard Kluger, \textit{Ashes to Ashes} 335 (1996).
\item Peter Duncan to George Weissman (June 5, 1973), Bates No. 2025015072.
\item George Weissman to Peter Duncan (June 8, 1973), Bates No. 2025015071.
\item [Brown & Williamson], “Smoking and Health—U.S.A.: Quarterly Report” at 19 (Sept. 1973), Bates No. 690020214/47.
\item \textit{TIN}, No. 86, Nov. 12, 1973, at 6, Bates No. 950307081.
\end{enumerate}
\end{footnotesize}
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defeated a bill in the state legislature that session that was more inclusive than the Arizona law.\textsuperscript{322}

The burden of this account of the aforementioned convoluted series of events is to raise the possibility that Carlson’s/Radisson’s direct and open opposition to H.F. 79 may have represented a quid pro quo that they were impelled to perform in order to dispel any lingering suspicion by the cigarette oligopolists that Carlson was biting the hand that fed him and to retain Liggett & Myers and Lorillard’s trading stamp business.

\textit{The House Health and Welfare Committee Recommends Passage of a Diluted H.F. 79}

When the full House Health and Welfare Committee considered H.F. 79 on February 25, only Kahn spoke in support of it, emphasizing that the bill permitted bar and restaurant owners to designate their entire space as smoking areas if they conspicuously posted signs to that effect at all entrances normally used by the public.\textsuperscript{323} The bill’s only opponents were once again Radisson and MACI, which pursued the same tacks as before the subcommittee. Kuduk “argued unsuccessFully that ‘places of work’ should be excluded from the bill,” whereas Perry contended that inside work environments were more properly under the Occupational Safety and Health Administration’s jurisdiction.\textsuperscript{324} The committee then proceeded to accept the subcommittee’s report with its sole amendment of adding “existing” (to qualify “physical barriers and ventilation systems”) as well as two of the author’s (i.e., Kahn’s) further weakening amendments. First, the exclusion of “private, enclosed offices occupied exclusively by smokers” was expanded to apply “even though such offices may be visited by nonsmokers.” And second (despite the press’s aforementioned judgment that the committee had rejected Radisson’s and MACI’s objections), the general prohibition on smoking in public places was relaxed by excluding from its application “factories, warehouses and similar places of work with a ceiling of more than fifteen feet and not usually frequented by the general public, unless the close proximity of

\footnotesize 322 Pat Colander, “If Smoke Gets in Your Eyes,” \textit{CT}, Nov. 1, 1973 (B1, at B3).


\footnotesize 324 Bob Goligoski, “House Panel Approves Bill Regulating Smoking,” \textit{SPPP}, Feb. 26, 1975 (15:1-3). Kahn objected to Kuduk’s proposal because it would “deprive some people of their livelihood or the type of job they want...it is a conflict but we’ve attempted to resolve it in a moderate way.” Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 4 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).
workers or the inadequacy of ventilation creates a problem of smoke pollution.”

Kahn made this turn of events possible by executing yet another about-face, this time acknowledging that a “legitimate problem” had been raised in subcommittee in that the general public did not generally frequent workplaces like factories, “where it would be very difficult to rearrange workers to deal with smokers and non-smokers [sic], such as [on] an assembly line.... It was also a legitimate point that these places are usually large buildings and...generally workers are not that close together....”

(Asked later whether she had offered the latter amendment because it was clear that she would be unable to get the bill out of committee without it, Kahn replied: “I believe so. Or it may have been just to get one group of opponents out of the way for the whole process of the bill.”)

Heinitz, who...
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had almost succeeded in excluding work places altogether in subcommittee, was now able to water down this new provision by securing the committee’s agreement to striking the 15-foot ceiling. In the wake of these dilutions, the committee recommended that the bill pass.328

Beverly Schwartz, the director of ANSR (which by now had 5,000 members and chapters in Duluth and Rochester in addition to the Twin Cities),329 had expected neither the “overwhelming” voice vote nor the ease with which the “controversial bill” had been approved, but now expected that the Senate would pass it as well.330

The Full House Passes a Weakened H.F. 79 by a Solid Majority

On February 28, a week before the full House took up H.F. 79, the Minneapolis City Council intensified the momentum for anti-smoking action by unanimously (12-0) passing an ordinance banning smoking at public meetings of governmental bodies covered by the state open-meeting law. Backed by a $100 fine, the ordinance required those conducting meetings to inform those in attendance of the ban.331 (At the end of 1974 Duluth had passed an even broader

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328 State of Minnesota, House of Representatives, Committee on Health and Welfare, [Minutes] at 9-10 (Feb. 25, 1975), in Legislature, House Committee Minutes—Health & Welfare, MSA, MHS, 129.A.12.5(B); Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 354-55 (Feb. 27); H.F. No. 79, First Engrossment (Feb. 27, 1975). It is unclear how the statute could have been interpreted in this sense, but Kahn supposedly “said if the work space is small enough so as to make it uncomfortable for the nonsmoker, the rights of the nonsmoker should be recognized.” “Non-Smokers Rights,” Thief River Falls Times, Apr. 16, 1975 (copy of clipping furnished by ANSR).


anti-public smoking ordinance, which, however, the Lung Association of Northeast Minnesota did not regard as “‘the most effective,’” but merely a “step in the right direction.”) Before the House gave preliminary approval to H.F. 79 on March 6, Kahn, definitively abandoning the logic of the scientist she had been and adopting the politician’s meaningless hyperbole, called the bill “the ‘most moderate bill that will ever appear before this body....” By the huge majority of 103 to 19, the House, sitting as the Committee of the Whole, struck the provision that made guilty of a misdemeanor any proprietor or person in charge of a covered public place who willfully failed to enforce the act. (While admitting that this amendment weakened the bill, Brandt noted that through the “cumbersome procedure” of a court injunction the bill still made it possible to require owners to protect nonsmokers’ rights.) The objection to “forcing private citizens to enforce the measure” was driven by the scenario that several legislators had depicted of high school principals’ being charged for having failed to stop students from smoking. Kahn voted against the amendment, but was joined by only a few stalwarts, who did not even include two of the bill’s cosponsors. The Committee of the Whole then recommended passage of the amended bill to the House by a vote of 88 to 38. With the DFL controlling the House by the almost equally huge majority of 104 to 30, alone the 71 DFL caucus members who voted Yea would have sufficed for the motion to prevail. Their 72 percent Yea-
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vote (71-27) surpassed the 61 percent among Republicans (17-11). When the
bill came up for final passage four days later, Kahn stressed that it did “not
prohibit smoking,” but was “just a separation of smokers and nonsmokers to
protect the health of everyone alike.” The House passed the bill by a vote of
78 to 54 with 64 percent (65 of 102) of the DFL caucus but only 43 percent (13
of 30) of the Republicans voting Yea. Republicans, who made up 22 percent of
the House membership, accounted for 31 percent of the Nays compared to only
19 percent of the Nays cast against the ban on smoking in the House chamber on
January 20. The Republicans’ 17-13 split against the bill revealed, in Brandt’s
view, “very weak caucus pressure at most,” thus confirming Savelkoul’s
aforementioned account. Objections, according to one press account, came from
“smokers on the floor of the House claim[ing] that the proposed legislation was
an infringement on some sort of inalienable right” and other opponents who
insisted that H.F. 79 “was impractical and lent itself to possible harassment of
smokers.”

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340 Ed Brandt tallied the party vote on an untitled and undated sheet that was included in copies of his papers that ANSR made available.


342 Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 512-13, 108 (Mar. 10); Brandt’s tally of party votes. Brandt characterized the fact that 20 representatives had switched their votes (“fluidity of legislative sentiment”) as demonstrating why it was critical for voters to contact their legislators. Ed Brandt, “H.F. 79 Passes Houses,” ANSR 3(1):2 (Apr. 1975). For the bill text as the House passed it, see H.F. 79 (second engrossment) (copy furnished by MHS). Of the 54 House members who voted against H.F. 79 26 had also voted against Kahn’s motion to ban smoking in the House chamber.

343 Email from Ed Brandt to Marc Linder (Oct. 26, 2009).

344 “Tokin’ Bill,” St. Cloud Times, Mar. 18, 1975 (copy of clipping provided by ANSR). Press coverage of the floor debate was very skimpy. E.g., Steven Dornfeld, “At the Capitol,” MT, Mar. 11, 1975 (2B:1). The wholly inadequate press reporting on all the floor debates together with the aforementioned destruction of the audio tapes of all floor debates (and committee meetings) from their inception in 1973 through the 1980s makes robust legislative history for this period impossible. Even when news reporting on (unrelated) floor debates was less unsatisfactory, one former House member vividly recalled thinking when reading accounts of debates in which he had participated: “I must have been in the Wisconsin legislature.” Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009).
The Tobacco Institute Propaganda Tour Comes to the Twin Cities

In April, as the focus of legislative action shifted to the Senate, the Minneapolis Tribune, without explaining the context or newsworthiness of devoting 10 column inches to an interview with an assistant to the president of the Tobacco Institute visiting Minneapolis (for no identified purpose), permitted Constance (Connie) Drath to regurgitate the cigarette oligopoly’s cliché that “laws restricting smoking in public places are ‘unnecessary’” because most smokers were courteous, denounce the “‘segregation’” of “forc[ing] smokers to sit in the rear of airliners,” and insist that smokers’ “‘civil rights’ should be respected.”345 In fact, the Tribune failed to inform its readers that it was allowing itself to be used as a small component of a large-scale propaganda campaign in which the cigarette manufacturers were engaged.346 Drath, whom the press dubbed the industry’s “‘Smokes Person,’”347 had been newly added to the “public relations staff” of the Tobacco Institute (as if the TI were anything but one gigantic PR operation) to travel around the United States to speak to live and broadcast audiences.348 Drath’s special mission coincided with state legislative sessions: she was, for example, in Texas, as the Dallas Morning News was at least open enough to admit in interviewing her, “crusading” against the public smoking bill then pending in the legislature.349 Just a few days before the Iowa Senate Human Resources Committee took up S.F. 106,350 Drath flew into Des Moines for a 15-minute appearance on television, a possible newspaper interview, and as a guest for an entire hour of call-ins on a radio show on the state’s most important

345Lewis Cope, “Tobacco Industry Calls Most Smokers Courteous, Says They Also Have Rights,” MT, Apr. 9, 1975 (B4:2-5).
346Decades later the reporter, who had covered medicine and science, vaguely recalled the interview and criticized himself for having failed to explain why the interviewee had been in Minnesota (he strongly surmised that she had had other interviews scheduled as well). He observed that in the context of the tobacco industry’s constantly urging him (and other reporters) to present its side of the story, he viewed this particular interview as “being easy enough.” Telephone interview with Lewis Cope, Minneapolis (Mar. 12, 2009).
350See below ch. 25.
radio station. With H.F. 79 having passed the House and now in the Senate, it was Minnesota’s turn. Stanton Glantz and colleagues incorrectly asserted that: “It was not until 1976, after the Act [MCIAA] was being implemented, that the Tobacco Institute began to respond. In response to the American Lung Association’s support and promotion of nonsmokers’ rights, the Tobacco Institute sent out Public Relations representatives across the country, spreading the message that the nonsmokers’ rights were ‘an infringement on smokers’ rights.’” This error is closely linked to their other mistaken claim that MCIAA’s “evolution and ultimate passage...occurred without interference from the tobacco industry” and that “the first indication of the tobacco industry’s involvement came in 1976....”) The TI and its bosses were immensely self-congratulatory about the impact of Drath’s “standard speech,” which she delivered to the likes of the Lions Club and which, 11 years after the surgeon general’s initial report, repeated the manufacturers’ mendacious allegation that “controversy” still surrounded smoking’s health impacts in addition to blasting government attempts to “regulate social conduct” and to “subject the tobacco consumer to a lifelong criminal record” for smoking in an “unthinking moment” in a prohibited place. Such drivel prompted Arthur Stevens, Lorillard’s otherwise dour general counsel and the chairman of the industry’s mighty Committee of Counsel, in May to praise the results Drath had already achieved as “totally unreal. We could not have ever hoped to have attracted such highly qualified spokespersons.” Stevens was referring to TI’s board of trustees meeting two days earlier at the posh Greenbrier in White Sulphur Springs, the minutes of which recorded: “The

351 Connie Drath to Kloepfer and Ehringhaus (Feb. 28, 1975), Bates No. TIMN0261698 (memorandum laying out her schedule for “[m]y debut” for the TI in the Midwest).

352 For a map of her appearances, see William Kloepfer at 44 (Sept. 24, 1975) (untitled), Bates No. TIMN0075481/7.


354 William Kloepfer to Ave et al. (Mar. 14, 1975), Bates No. ZN22935.

355 Text of Remarks by Connie Drath Assistant to the President of the Tobacco Institute Inc. Before the Lions Club of Tyler, Texas Monday, Mar 10, 1975, at 5-7, Bates No. ZN22936/40-42.

356 Arthur Stevens to William Kloepfer (May 23, 1975), Bates No. 03766622 (referring also to another PR person).
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meeting was then shown film clips and heard tapes of various presentations by Ms. Drath and Mr. Dwyer. This was followed by short talks by the two spokespersons. The presentations were received with a spontaneous and prolonged round of applause.”

This vision of the masters of the cigarette killing machine wildly cheering what they knew to be nothing but their own elaborately scripted obfuscation designed to “get across the idea still that there is a—a—a cigarette controversy” and delivered by someone hired without scientific knowledge of tobacco or health matters who then “received a two-week orientation course” consisting of lectures by TI executives and a field trip to a cigarette factory and whose shtick was that she purported to be a nonsmoker who “likes the smell of cigarettes” demonstrated how desperate and clueless they were in the face of an anti-secondhand smoke movement that was proving to be their commodity’s undoing.

The Restoration of Restaurant Coverage at the Senate Health, Welfare, and Corrections Committee Meeting on April 29: Double-Cross or Lobbyists’ Comedy of Errors?

The crucial step in Senate consideration of H.F. 79 took place on April 29 (an event overshadowed by the world-historical surrender of the South Vietnamese government and evacuation of the remaining U.S. presence) at the Health,


361 For a vivid sense of Drath’s pathetically primitive thinking and the cigarette industry’s preposterous propaganda even for its own employees (role playing to learn to spit out canned replies to critics), see “Louisville Tobacco College Drath Socratic Method” (Nov. 14, 1979), Bates No. TKYLTAP03 (http://www.archive.org/details/tobacco_hdq91f00). See also http://www.archive.org/details/tobacco_tfw27a00.

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Welfare, and Corrections Committee meeting, of which, unfortunately, press coverage ranged from nonexistent to extremely meager and the minutes have not been preserved. The notable amendments that the committee adopted included: (1) striking from the exclusion of factories and warehouses not usually frequented by the general public the provision “unless the close proximity of workers or the inadequacy of ventilation causes smoke pollution,” thus making the exclusion absolute; (2) striking restaurants from the provision excepting only restaurants and bars from the ban on declaring a covered public place as a smoking area in its entirety; (3) re-establishing the responsibilities of proprietors or other persons in charge of public places by requiring them to “make reasonable efforts to prevent smoking in the public place by (a) posting appropriate signs; (b) arranging seating to provide a smoke-free area; (c) asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or (d) any other means which may be appropriate”; and (4) conferring discretion on the state board of health, “upon request, [to] waive the provisions of this act if it determines there are compelling reasons to do so and a waiver will not significantly affect the health and comfort of nonsmokers.”

362“Legislative Update,” Minneapolis Star, Apr. 29, 1975 (7C:1), stated merely that the committee had amended the bill to “prevent owners of restaurants from designating their entire establishments as smoking areas” and to “spell out a proprietor’s obligations to enforce the law” without shedding any light on positions taken or participation by lobbyists. The Minneapolis Tribune merely stated that the committee had approved the bill without mentioning any amendments. Jack Coffman, “Party-Designation Requirement Included in House Primary Bill,” MT, Apr. 30, 1975 (2B:1). The St. Paul Pioneer Press failed to allude to the bill at all. Of the extremely scanty coverage of the hearing Brandt archly observed: “[I]f [lobbyist] Chum Bohr slept on his job, could you really have expected more from our newspapers?” Email from Ed Brandt to Marc Linder (Mar. 2, 2009).

363The minutes were lacking at the only two institutions at which committee minutes are archived—the Minnesota Legislative Reference Library and the Minnesota Historical Society/State Archives. Email from Robbie LaFleur, director, Minnesota Legislative Reference Library, to Marc Linder (Feb. 27, 2009); telephone interview with former state Representative Steve Trimble, St. Paul (Apr. 18, 2009) (Trimble searched the box with the committee’s papers for 1975). Honeywell’s lobbyist, as noted above, reviewed the tapes of the Senate committee meeting (which the Minnesota Historical Society later destroyed), but took no notes because “[t]here was little discussion....” Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 1 (n.d.), in Health Department, MSA, MHS, 112H.18.3(B).

364Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975, at 1502-1503 (May 1). As odd as it seems, the use of “or” (between (3)(c) and (d)), which remained in the final enactment (§ 6), presumably signaled the legislature’s intent to limit
The committee meeting was remarkable both for what happened and did not happen. As noted earlier, in order to eliminate the opposition of restaurants and to improve the bill’s prospects of passage, Brandt, on behalf of ANSR, had agreed with Wencel (Chum) Bohr, the lobbyist for the Minnesota Restaurant Association, Minnesota Hotel and Motor Hotel Association, and Minnesota Resort Association (combined under the umbrella organization, Minnesota Hospitality Group, of which he was the chief staff executive from 1968 to 1978, when he stopped lobbying), that ANSR would remove coverage of restaurants from the 1975 version of the anti-smoking bill. Bohr later charged that ANSR had agreed to insure that the bill would not be amended to reestablish such coverage. These charges were presumably designed to explain why Bohr had made the fatal lobbying error of failing to appear at the Senate committee hearing on April 29, at which the Episcopal minister Robert North (DFL), not seeing any reason why restaurants should be excluded, moved to amend the bill to cover them.

Some time earlier the committee had informally discussed the bill,
because it regarded smoking as a big issue like abortion or the death penalty. Committee chair George Conzemius—a nonsmoker who had himself drafted an anti-smoking bill, but dropped it when Schaaf introduced S.F. 602—recalled (more than three decades later) that the committee, many of whose members were “idealists,” overwhelmingly supported North’s amendment and the bill, which he, nevertheless, did not think would pass the legislature.\textsuperscript{368} Schaaf, who agreed that the committee was “very liberal,” while also distinctly recalling North’s intervention, nevertheless offered a very different account, according to which North, rather than moving to amend, spontaneously questioned Schaaf as to why his bill did not cover restaurants and asked why the committee would not pass a “clean” bill. Schaaf, for his part, agreed that the bill was not perfect, but called it a tremendous first step. In his recollection, he offered author’s amendments that (must have) included restaurant coverage, though he admitted that if he had brought such amendments to the committee, North would have had no reason to raise the issue of restaurant coverage.\textsuperscript{369}

\textsuperscript{368} Telephone interview with George Conzemius, Cannon Falls, MN (Mar 1, 2009). Conzemius opined that no one took Kahn, who “comes up with some really flaky and weird stuff,” seriously either back then or in 2009 in her 37th year in the House. In contrast, anti-smoking lobbyist Chum Bohr sought to explain the success of Kahn’s bill on the grounds that in the House she “could get away with murder.” Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

\textsuperscript{369} Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009). Given the disappearance of the committee minutes, the destruction of the audio tapes, and the lack of any detailed press coverage, reconstruction of what happened at the hearing based on
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The convoluted and internally inconsistent story that Bohr told to excuse his absence at the Senate committee hearing began in the summer between the 1974 and 1975 sessions, when he was invited to a meeting at which “they” (ANSR) were going to “go after smoking” to the extent that they had drafted 150 bills from which they would “take from the middle of the pile” one and introduce it and if it failed, keep introducing weaker and weaker ones until it passed. 370 As implausible, bizarre, and directly contradicted by ANSR as this assertion may be, 371 Bohr insisted that “they” told him to “get behind the bill,” but he responded that he was unable to do so both because decisions about smoking in restaurants were driven by the market and because owners were in no position to act as policemen since they already had their hands full under the dram shop law. 372

Although Bohr failed to explain why ANSR deleted restaurant coverage, the fact, as already noted, is that ANSR did. Perhaps his knowledge that H.F 79 as introduced on January 20, 1975, permitted restaurant owners to permit smoking everywhere was responsible for his having failed to state the very next day on his lobbyist registration cards that he would be lobbying on the issue of “smoking in public places,” as the two Radisson Hotel lobbyists stated when they registered on January 23. 373

When asked many years later why he had failed to lobby against restaurant coverage in the Senate, Bohr replied that “we didn’t get much of a chance” because he had asked for, but did not get notice of, the Senate (Health and Welfare) Committee hearing on the bill. As to why the committee had not given him notice, he simply said: “I was declared the enemy.” Instead of trying to explain on what basis a committee chair owed a lobbyist a duty to inform him individually and personally of a committee meeting date when such information was publicly posted in the legislature and available to all and especially to

the 34-year-old memories of Brandt, Conzemius, and Schaaf (who was “almost positive” that he had submitted author’s amendments) is the unsatisfactory alternative. 370 Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

371 Edward Brandt, while agreeing that Bohr had attended one ANSR meeting, stated that at most ANSR had drafted a total of two bills. Telephone interview with Edward Brandt, St. Paul (Mar. 4, 2009).

372 Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009).

373 State of Minnesota, State Ethics Commission, Registered Lobbyists 11, 91 (Feb. 11, 1975) (William Fern Brooks, Jr. and John Michael Tancabel). David Kuduk, who actually did lobby for Radisson on this issue before the House Health and Welfare Committee, was a registered lobbyist, but not for Radisson (though he was registered for Carlson’s Gold Bond Stamps) or on this issue. Id. at 47-48. Kuduk worked at the law firm of Chestnut & Brooks.
lobbyists as well as announced in a publication to which lobbyists subscribed.\textsuperscript{374} Bohr circuitously responded with a very long and incoherent story about a free medical study in which he had participated during the Nixon administration, the chief point of which appeared to be the advice not to smoke. (Bohr, who had smoked in the 1970s, remained as late as 2009 in a state of denial about smoking’s adverse health impacts.) In other words, the “enemy” was tobacco, with which the committee associated him. If the committee associated Bohr with the tobacco industry, it was not alone: at the time many in the anti-smoking movement perceived him as a “puppet” lobbying for it and tobacco lobbyists as very clearly working and speaking through him and the restaurant and hospitality industry in general.\textsuperscript{375} Ignorant of the fact that H.F. 79 would be discussed on April 29, Bohr instead attended a hearing on unemployment insurance elsewhere in the capitol; as he left that hearing, someone asked him why he had not attended the other committee hearing, thus giving him a first inkling that H.F. 79 had been discussed.\textsuperscript{376}

This much of reality may have been reflected in Bohr’s account: that the committee chairman, George Conzemius, himself had not known that H.F. 79 would be on the committee’s agenda on April 29 because its chief sponsor, Senator David Schaaf, had failed to bring H.F. 79, which had passed the House more than seven weeks earlier, to the committee. Indeed, Conzemius had advised Schaaf that the legislature would soon adjourn and that if he failed to present the bill to the committee by April 29, he would have to wait until the 1976 session for action on it. In the event, five minutes before the meeting was to end, Schaaf appeared and the meeting ran 10 to 15 minutes late in order to deal with the

\textsuperscript{374}Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 4, 2009).

\textsuperscript{375}For example, a week after the Board of Health hearing on MCIAA rules an ANSR activist who had spoken at the hearing wrote a lengthy follow-up letter to the hearing officer stating that: “I hope the panel will recognize that our opposition came from people who were paid lobbyists. No doubt with connections to the mighty, devious Tobacco Inst, ever present, not always visible.” Faye Mowers Topliff to Kent [Peterson] (Dec. 9, 1975), Health Dept., MSA, MHS, 112.H.18.3(B). Decades later Topliff and another former ANSR activist from Duluth independently offered this perspective. Telephone interview with Faye Topliff, Duluth (May 9, 2009) (quote); telephone interview with Betty Christensen, Duluth (May 11, 2009).

\textsuperscript{376}Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 4, 2009). Both Brandt and Schaaf opined that the unemployment hearing would have been more important for Bohr’s client, Brandt going to the extent of claiming that even if Bohr had known about the scheduling conflict between both hearings, he would still not have attended the MCIAA hearing. Telephone interview with Ed Brandt, St. Paul (Mar. 2009); telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
To be sure, the accuracy of Conzemius’s memory (not to mention Bohr’s probity) is strongly called into question by the fact that the daily column in the St. Paul Pioneer Press publishing the agendas of that day’s legislative committee meetings stated that “smoking in public places” was one of seven bills with which the Senate Health, Welfare and Corrections Committee was scheduled to deal at 8 a.m. Conzemius was not certain as to why Schaaf had not presented the bill earlier, but Schaaf had told him that he had been trying to mobilize support for it among his colleagues. Alternatively, committee member Robert North later noted that Schaaf had not enjoyed a reputation for being the chamber’s “hardest working member.” Schaaf himself, while unable to offer a reason for the lateness, did note that MCIAA had not been “at the top of my agenda”; on the contrary, it was about his sixteenth priority among 17 bills. For this very reason, perhaps, during April Kahn had been suggesting to Minnesotans who had written to her in support of her bill that they urge Schaaf and Conzemius finally to schedule a hearing on S. F. 602.

The day after the hearing Brandt “got a call from Chum Bohr...asking what I had done to him, to which I honestly replied, ‘Nothing.’” North acted on his own. There was no testimony before the committee and no one approached him, or any other committee member, in any way whatsoever.” Bohr nevertheless remained “bitter about the way the measure was enacted. ‘At first we were told...”

377 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1 and 4, 2009).
378 “Legislature Today,” SPPP, Apr. 29, 1975 (14:3). Possibly this agenda did not become known until relatively late since the previous day’s corresponding column in the Minneapolis Tribune stated that the committee’s agenda was not available. “At the Capitol,” MT, Apr. 28, 1975 (2B:1).
379 Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1, 2009); telephone interview with Robert North, Galena, IL (Mar. 2, 2009). Brandt also observed that Schaaf was not as effective a legislator as Kahn. Telephone interview with Edward Brandt, St. Paul (Apr. 26, 2007).
380 Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
381 Phyllis Kahn to Louise Udden (Apr. 3, 1975), and Phyllis Kahn to David Carr (Apr. 16, 1975), in Legislation, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).
382 Email from Ed Brandt to Marc Linder (Mar. 5, 2009). According to Kahn, the (unnamed) restaurant lobbyist also went back to her and “complained, ‘You promised me you weren’t going to have restaurants in there.... You have to go to the conference committee and take them out.’” Phyllis explained that she had removed restaurants from the House version of the bill but she had not said anything about the Senate version. It was the lobbyist’s job, not hers, to lobby the Senate.” Billie Young and Nancy Ankeny, Minnesota Women in Politics: Stories of the Journey 49 (2000).
that restrictions on smoking would not apply to restaurants.... But at the last minute they slipped restaurants in. This caught us unawares.”” However, Kahn “denied there was any trickery involved. ‘The restaurant people are just trying to cover up their own sloppy lobbying.... The House did vote to exempt restaurants, but the Senate put restaurants back in. The restaurant people should have been watching the bill all the way; they didn’t follow through.’” And an unusually thorough piece in the St. Louis Post-Dispatch agreed that the 800-member Minnesota Restaurant Association was simply “not effective in lobbying against” the MCIAA.383 For his part, Bohr, instead of fessing up to his incompetence, sought self-exculpation in the story, published in the Tobacco Institute’s own house organ, that ANSR was “a one-issue lobby ‘which tied itself to motherhood and apple pie’ in an election year when the legislature was especially sensitive.”384

In seeking to draw lessons from the course of ANSR’s efforts to secure MCIAA’s passage, Brandt later classified this incorporation of restaurant coverage as a result of a lobbyist’s absence as an example of the “influence of accidental factors.”385 But even Brandt was unaware of the fact that Bohr’s

383Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (cont. at 20A), Bates No. TIMN0240663/4. The restaurant lobby, as a nearly contemporaneous University of Minnesota graduate school paper put it, “was so confident of their success that they left their lobbying posts.” Susan Goodwin Gerberich, “Prevention Through Legislation: University of Minnesota-ANSR Project” at 5 (PH-5-502, Spring 1976) (copy furnished by ANSR).

384“Stringent No-Smoking Law Failing,” TO 1(2):1, 9 (Nov. 1976), Bates No. 01418984/92. In a statement that he filed (but did not deliver orally) during the Health Department’s public hearing on its proposed regulations in 1975, Bohr, in an incompetent attempt to prove that “the circumstances of how the bill became law only assumes [sic] legislative intent based on one sided testimony,” asserted that, because restaurants (and other businesses) had been exempted from H.F. 79 as introduced, “our industry and many other industries informed the author in the House that we wouldn’t oppose the bill in testimony. When the bill passed the House and went to the Senate, assuming the bill would stand as is, we put our efforts to other bills of importance to our industry. Then lo and behold, we learned the exemptions were pulled. Unfortunately, it was too late to get a hearing. The bill passed the Senate and passed the House without a conference committee discussion during the last hectic day of the legislative session thus preventing intelligent discussion that could have resulted in a law we could live with to better serve all of our customers.” [Chum Bohr, untitled], Exhibit 23 [Public Hearing Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975 (Dec. 2, 1975)], in Health Department, MSA, MHS, 112.H.18.3(B).

385[Ed Brandt], “Highlights of the Early Years: ANSR, 1973-76” at 2 (Nov. 6, 1993)
accidental absence was inextricably linked to the accidental silence of another anti-MCIAA lobbyist who was in fact present.

The mystery of the failure of any anti-smoking-regulation lobbyist to speak up at the April 29 meeting is deepened by the fact that the prominent lobbyist who was present had stated on his lobbyist registration card that he would be lobbying on the issue of smoking in public places on behalf of the Radisson Hotel Corp. Associated for years with the DFL power structure, William Brooks, Jr., of the law firm Chestnut, Brooks, & Burkhard, prominent and high-powered lobbyists, represented many other large corporate entities and business associations, including Carlson's Gold Bond Stamp Co. Brooks appeared at the April 29 hearing pursuant to instructions from Curt Carlson, who, however, had also directed him not to speak unless and until a representative of the hospitality industry also showed up and spoke. (Brooks's presence at the hearing may have been fortuitous in the sense that he was there to oppose another Schaaf-sponsored bill banning public pay toilets.) Carlson arranged for such a person to appear, but Bohr did not show up, thus leaving Brooks mute. Brooks never found out why Bohr had not shown up, but suspected that his absence was intentional and a result of some "deal" that Brooks was never able to unravel. Brooks also claimed that he had spoken privately to committee members, counted votes, and had therefore known that if Bohr (and Brooks) had spoken up, the committee would have killed the bill. This last claim flatly contradicts

(Notes that Brandt made for a talk he gave) (copy furnished by Ed Brandt).

388Craig Grau, "Lobbying the Minnesota Legislature," Perspectives in Minnesota Government and Politics 223-30 at 227 (Millard Gieske and Edward Brandt, 1977); Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
390Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007).
391Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
392Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007). To be sure, Brooks's judgment and/or memory was called into question by his claim that no lobbying had taken place in the House because Kahn had that chamber under control, whereas in fact Brooks's own associate, the aforementioned David Kuduk, testified twice before House committees. Confronted later with the information about Kuduk's House testimony, Brooks merely observed that his instruction had pertained only to the Senate.
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chairman Conzemius’s characterization of the committee and its vote as well as the statement by Brandt, an eyewitness, that the vote was overwhelmingly or unanimously in favor of H.F. 79, although Schaaf, who had not been a committee member, later commented that Brooks’s claim about the head count might have been accurate. The fact, however, that four of the committee’s 16 members then voted against the bill (while one did not vote) on the Senate floor two weeks later suggests the possibility that Bohr or someone else had lobbied them in the interim.

Carlson never explained to Brooks why he did not want Radisson to go out on a limb in testifying before the Senate committee, though Brooks observed that without any doubt hotels had been opposed to the bill. He also purported not to know whether tobacco companies had ever approached Carlson about opposing the bill, but he also volunteered the opinion that if they had, Carlson would have told them to go “jump in the lake.” In light of the aforementioned documents

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393 Email from Ed Brandt to Marc Linder (Mar. 5, 2009). Brandt also speculated that it was not clear that Bohr would have been able to thwart adoption of the amendment had he been there. On the other hand, he also opined that if MCIAA had been enacted without restaurant coverage: “In view of the fact that I was in Harrisburg from mid-1976 to mid-1978, it is unlikely that we could have passed a bill including restaurants within a few years. At the minimum, it would have taken until Jeanne Weigum had several years as executive director [of ANSR] behind her before this would have had a reasonable chance of happening. By that time, partisanship had increased greatly, which certainly would have complicated things.” Email from Ed Brandt to Marc Linder (Mar. 16, 2009).

394 Telephone interview with David Schaaf, McGregor, MN (May 12, 2007).

395 Journal of the Senate, State of Minnesota, Sixty-Ninth Legislature: 1975, at 2281 (May 14). The four Nays were cast by Robert Lewis (DFL), George Perpich (DFL), Earl Renneke (R), and Sam Solon (DFL). Committee membership was taken from http://www.leg.state.mn.us/legdb/committeeresults.asp?search. Perpich, a smoking dentist, conjectured many years later that he must have voted against the bill as a favor to (nonsmoking) Solon, whose restaurant-owning constituents must have been bugging him. Telephone interview with George Perpich, St. Paul (Mar. 7, 2009). Lewis, the Senate’s first black member, smoked and died of a heart attack at 47. http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=10374; email from John Milton to Marc Linder (Mar. 6, 2009). Renneke, according to Perpich, did not smoke.

396 Telephone interviews with William Brooks, Jr., Minneapolis (May 14 and 25,
revealing Radisson’s supine attitude toward cigarette manufacturers, Brooks’s view of his customer’s independence should be judged skeptically.

The factually false contention that restaurant coverage had been “tacked on to the bill at what one official of the Minnesota Restaurant Association called ‘the twelfth hour’”397 notwithstanding—more than two weeks remained before the full Senate voted on the bill and the House on repassage—Bohr was later unable to explain why he had failed to lobby against the bill during that interim.398 Instead, he assailed the tobacco industry for having “sat on its hands,” especially since he had “called the tobacco companies and warned them well in advance” of the bill. Purporting not to know why they had failed to lobby, he could only conjecture that perhaps their strategy had been that if they just kept quiet, the anti-smokers would leave them alone.399

Overall, then, under the Senate Health committee amendments, whereas the factory/warehouse provision weakened the law, those dealing with restaurants and owners’ duties strengthened it; the health board’s power to issue waivers was manifestly designed to create administrative flexibility so long as the effect on nonsmokers was significant—to the extent that prohibiting smoking in (but not the wafting of smoke into) certain areas significantly improved their health and comfort in the first place. Two days later the Senate adopted the committee report.400

The Full Senate Upholds Inclusion of Restaurants and the House Concurs

When the full Senate took up H.F. 79 on May 14, it adopted the motion by

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397“Minnesota: No Smocking.” Newsweek, Dec. 8, 1975, at 35, Bates No. TIMN0461865. Presumably Bohr was that unidentified official.

398Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009). Conzemius stated that a lobbyist could have requested the Rules Committee to send the bill back to committee on the grounds that the lobbyist had been deprived of an opportunity to speak about it, but Conzemius saw no basis for it in this case and would have opposed such a move. Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 4, 2009).

399Telephone interview with Wencel (Chum) Bohr, St. Paul (Mar. 4, 2009). After the legislature had passed the bill, the tobacco companies did call him about the administrative regulations, but never admitted that they had caused the problem by having failed to lobby.

Senator Robert Brown, a professor of education at the College of St. Thomas and chairman of the Minnesota Republican Party, to amend the committee amendment by reinserting the aforementioned factory/warehouse language, but now the provision would be administratively regulated: “except that the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” Brown grounded the need for this amendment, which the committee had been unable to work out, in the inappropriateness of having the Board of Health “interfere” and two agencies in a workplace in which the public normally was not involved. Schaaf accepted the amendment, which he believed had been worked out with Brandt of ANSR and MACI.

After several senators had spoken against the bill, Al Kowalczyk, a very conservative Republican senator who had otherwise never spoken on the floor, made an impassioned plea for the bill because his asthmatic son reacted violently to smoke and was forced to leave restaurants. North, the Episcopalian minister

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402 Patsy Randell to W. C. Viitala, Subject: Clean Indoor Air Act Rules and Regulations at 4-5 (n.d.), in Health Department, 112H.18.3(B), MSA, MHS (notes of floor debate based on audio tape). Schaaf later stated that the amendment was an attempt by the person who offered it to “cut down on the bureaucracy and not have 27 inspectors coming into a single business place. And we thought it was reasonable on its face. So I think that smoke in the blue collar situation can be looked at as an occupational hazard, and hopefully [sic] work together with the other occupational hazards on a reasonable basis.” Board of Health Hearing Transcript at 46-47 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). In the event, no such protective regime unfolded. See below this ch. While concerned about the rules proposed (and promulgated) by the Department of Labor and Industry, Schaaf nevertheless acquiesced in a bifurcated regulatory universe: “I think that where people take a job, they have to realize there are many different kinds of hazards that present themselves. If you are going into police work or something like that, that is going to be hazardous to your health. And I guess you realize that when you take the position. But I don’t think that...employers should unnecessarily...allow a situation [sic] develop that they can avoid. I think the office, or so-called white collar situation, is one that’s clearly avoidable. ... And I can see instances, if we’re talking about serving food or something like that, if you’re going to promulgate the rules and then say that you are going to have a smoking area, if a waitress...maybe ought to have a choice of working in a smoking or a non-smoking area. But if they don’t, that’s a condition of employment.” Board of Health Hearing Transcript at 45-46 (Dec. 2, 1975), in Health Department, MSA, MHS 112.H.18.3(B).
who had seized the opportunity in committee to propose the insertion of restaurant coverage and who even at this late moment was not certain that the bill would pass, experienced Kowalczyk’s intervention as one of the rare occasions when a floor speech actually changed votes.403

On its third and final reading, the bill passed by a vote of 36 to 28404 (two more Yes votes than the constitutionally required majority of all 67 elected senators).405 Not only was the result much closer than in the House—prompting Brandt to speculate that the closeness might have been a function of Bohr’s having lobbied the full Senate after all406—but the DFL approval vote itself at 57 percent was both much more closely divided and almost identical to the Republicans’ 55-percent Yea-rate: whereas Democrats supported the bill by a vote of 20 to 15, Republicans approved 16 to 13.407 The closely divided DFL vote

403 Telephone interview with Robert North, Galena, IL (Mar. 2, 2009). Senator Jerald Anderson also recalled Kowalczyk’s speech. Telephone interview with Jerald Anderson, Sun City West, AZ (Mar. 23, 2009). Senator Jack Davies, who was also an academic specialist on the legislative process, observed that “personal appeals” had often been very effective in the Senate. Telephone interview with John Davies, Minneapolis (Mar. 23, 2009). Senator John Milton, who was chair of the Health subcommittee of the Senate Health Welfare Committee of which Kowalczyk was a member, found it “amusing” that Kowalczyk had given such a speech because: “In my dealings with self-styled conservative politicians, they’re against everything except where they have a personal interest.” Email from John Milton to Marc Linder (Mar. 11, 2009). The account of the proceedings is based on senators’ personal recollections 34 years later because, astonishingly, the press virtually ignored the bill’s passage. For example, none of the five articles on the legislature that the Minneapolis Tribune ran on May 15 even mentioned the bill, whereas the minuscule filler in the Pioneer Press presented no information on the debate. “Senate Advances Smoking-Area Bill,” SPPP, May 15, 1975 (25:6). In this sense Brandt’s judgment is puzzling that: “The media have given good coverage to the bill. From inception to enactment to implementation, the media have kept a watchful eye on the law and have done an adequate job in informing Minnesotans about the law’s provisions.” Ed Brandt and Mary Jo Matczynski, “This Is Clean Indoor Air Country,” American Lung Association Bulletin, Jan.-Feb. 1976, at 11-13 at 13.


406 Email from Ed Brandt to Marc Linder (Mar. 5, 2009). To be sure, early lobbying is more effective before momentum has built up: “Fewer members are involved in decisions at the start of the process so the task of persuading decision makers is less difficult.” Jack Davies, Legislative Law and Process in a Nutshell 23 (1975).

demonstrated that it was not a so-called caucus vote because Majority Leader Coleman was able, as Brandt noted, to “win or defeat any bill, if he was determined to do so.” In fact, Coleman, as his biographer and former state Senator John Milton put it, “preferred not to make votes on controversial issues ‘caucus votes’—abortion, gun control, ban-the-can, ban on smoking, gay rights, et. al., for two reasons: he didn’t like some of them, but more importantly he knew that his DFL caucus was more conservative than us ‘dreamers’ wanted to accept, and that there were on some issues more votes to be harvested from the Republicans.” More plausibly, the narrower Senate vote may simply have stemmed from the new coverage of restaurants, which made the bill much more intrusive and irritated many restaurant owners who may have possessed some local political power that they could bring to bear against incumbents. Impressive was the fact that whereas Brandt was unable to perceive any commonality among the 15 DFLers who had voted against the bill in terms of ideology, occupation, or the make-up of their districts, 11 of the 15, according to a reconstruction by two of their DFL senatorial colleagues, smoked. Among the few nonsmoking DFLers who, surprisingly, voted against H.F. 79 principle was not the motivating force. For example, Jerald Anderson, a dentist whom Milton recalled as “very public health conscious,” voted No because “my wife smoked a pack a day at the time. It was as simple as that.” The Nay cast by Jack Davies, a liberal and law professor, surprised not only Brandt more than any

(May 14); http://www.leg.state.mn.us/legdb/ (party affiliation). According to Brandt’s contemporaneous roll-call analysis, the majority in favor of the bill among Twin Cities metropolitan area senators was as striking as the majority against it in the rest of the state. Email from Ed Brandt to Marc Linder (Nov. 1 and 5, 2009). 408 Email from Ed Brandt to Marc Linder (Mar. 2, 2009). 409 Email from John Milton to Marc Linder (Mar. 10, 2009). In contrast: “Those that were virtually automatic (follow the leader/trust the leader) were: conference committee reports on all major spending bills, election-related issues, and, of course, a motion by the Majority Leader to adjourn. You followed Nick on these or you paid the price!” 410 Telephone interview with Rolf Nelson (a Republican Senator in 1975 who was a member of the Health and Welfare Committee), Minneapolis (Mar. 14, 2009). 411 Email from Ed Brandt to Marc Linder (Mar. 23, 2009). 412 Email from John Milton to Marc Linder (Mar. 23, 2009); telephone interview with John Davies, Minneapolis (Mar. 23, 2009). The smoking senators were Borden, Chenoweth, Kleinbaum, Laufenburger, Lewis, H. Olson, G. Perpich, Purfeerst, Schrom, Solon, Stokowski; the non-smokers were Anderson, Davies, A. Olson, and Willet. 413 Email from John Milton to Marc Linder (Mar. 23, 2009). 414 Telephone interview with Jerald Anderson, Sun City West, AZ (Mar. 23, 2009).
of the others,\textsuperscript{415} but Davies himself, who 34 years later, after having served as a judge on the Minnesota Court of Appeals for a decade, good-naturedly and self-deprecatingly confessed: “I’d chalk it up to dumbness.”\textsuperscript{416} The best that the lifelong nonsmoker, who in 1975 had published a book on the legislative process,\textsuperscript{417} was able to “make up” was “my disbelief that it was going to work”—of which he was then very quickly disabused.\textsuperscript{418}

The difference in voting patterns between the two houses may, in the view of Burnham (Bud) Philbrook, one of the House sponsors of H.F. 79, have been a function of the fact that because the entire House had stood for election in 1974 in the immediate aftermath of the Watergate scandal, the DFL not only secured a huge majority, but its expanded caucus was replete with more liberal/progressive members, a phenomenon lacking in the Senate, none of whose members had stood for election in 1974.\textsuperscript{419} In contrast, Senator Conzemius, the chair of the Health and Welfare Committee, conjectured that the reduced majority for the bill in the Senate may have been accounted for by the fact that once the bill had passed both the House and his committee, those opposed to smoking regulation intensified their lobbying efforts in the full Senate.\textsuperscript{420}

After Senate passage Bohr reminded Kahn that she “had agreed to not put restaurants in. But I told him I had never agreed to take it out once the Senate put it in.”\textsuperscript{421} Bohr insisted that her agreement with the restaurant association meant that, even if Kahn had nothing to do with the Senate’s action, she was still obligated to see to it that the bill went to a conference committee and to oppose restaurant coverage on behalf of the House, but she refused.\textsuperscript{422} Just as North’s committee amendment to cover restaurants had, according to Brandt, been “totally spontaneous,” on the bill’s return to the House two days later (May 16), “Kahn was only too glad to move that the House adopt the Senate bill, instead of sending it to a conference committee. But I had nothing to do with that either. I know only because Kahn told me so.”\textsuperscript{423} (With only three days left in the

\textsuperscript{415}Email from Ed Brandt to Marc Linder (Mar 22, 2009).
\textsuperscript{416}Telephone interview with Jack Davies, Minneapolis (Mar. 23, 2009).
\textsuperscript{417}Jack Davies, \textit{Legislative Law and Process in a Nutshell} (1975).
\textsuperscript{418}Telephone interview with Jack Davies, Minneapolis (Mar. 23, 2009).
\textsuperscript{419}Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). The entire legislature stood for election in 1972, but four-year senatorial terms (in contrast to the two-year House terms) meant that senators did not campaign in 1974.
\textsuperscript{420}Telephone interview with George Conzemius, Cannon Falls, MN (Mar. 1, 2009).
\textsuperscript{421}Email from Phyllis Kahn to Marc Linder (Mar. 23, 2009).
\textsuperscript{422}Email from Phyllis Kahn to Marc Linder (Apr. 21, 2009).
\textsuperscript{423}Email from Ed Brandt to Marc Linder (Mar. 5, 2009).
session, sending it to conference would presumably have killed it for 1975; opponents’ failure to make such a motion was presumably a function of their knowing that they lacked the requisite votes.) Sounding a triumphant note at the ANSR annual meeting 10 years after the MCIAA’s passage, Kahn observed of her own tactic in 1975: “To appease the Restaurant Association, I agreed to take the restaurants out of the bill, and it initially passed the House in that form. However, they forgot that bills go through the Senate too and that body added protection in restaurants back and I simply accepted the Senate version for final passage.”

Kahn’s motion that the chamber concur in the Senate amendments and repass H.F. 79 prevailed. By a vote of 96 to 31 the House then repassed the bill. The inter-party differential intensified, with 80 percent of the DFL voting Yea compared to only 61 percent of Republicans.

Was the Tobacco Industry Really Asleep?

“It’s offensive to me to say it,” Rep. Phyllis Kahn, its author, told the Los Angeles Times, “but nobody took us seriously. The tobacco lobby knew about it but didn’t consider it a serious threat since it didn’t actually prohibit smoking.... Nobody’s been able to do it since, and the reason is because of our success.” ...

“Basically I think the law is effective...[b]ut when people choose to ignore it, there is no question they ignore it with impunity.”

Despite the striking firsthand evidence presented earlier of the presence and involvement of tobacco lobbyists in the legislative process, the dominant narrative in the literature on the MCIAA, which lacks any evidentiary basis, denies any cigarette industry participation. Ashes to Ashes, Richard Kluger’s influential panorama of cigarette manufacturers’ conspiracy to conceal the truth about the lethal consequences of smoking, forged the mould for this story by


425 Journal of the House of Representatives, Sixty-Ninth Session of the Legislature, State of Minnesota: 1975, at 2878 (May 16); Brandt’s tally of party votes. The press’s lack of understanding of the bill was reflected in the claim that the Senate’s addition of restaurant coverage and removal of the penalty of $300 and 90 days’ imprisonment were “relatively minor changes.” “Capitol Approach,” SPPP, May 17, 1975 (8:2).

claiming that after the enactment of the Minnesota law, “[b]elatedly, the tobacco industry awoke to this new threat at the state level. Its lobbyists flocked to state capitals and argued that smoking restrictions were unfair, unjustified by scientific findings, and unenforceable.... Throughout the 1970s, though, the antismoking effort was hardly a groundswell as the industry installed an effective political apparatus at the state level. While Utah, Nebraska, and Montana passed clean-air laws in the wake of the Minnesota statute, theirs were less comprehensive....”

Citing Kluger, Stanton Glantz and Edith Balbach, two leading anti-smoking advocates, wrote that the “Minnesota law was the last time that clean indoor air legislation would pass without vigorous opposition from the tobacco industry.” (Ironically, Glantz may have merely been citing himself: although Kluger, as was the case with the vast majority of his factual claims, failed to provide a source for this statement, he had interviewed Glantz, who told him that the Minnesota Clean Indoor Air Act had been enacted in 1975 “’largely because nobody was paying att.,’ it came out of nowhere & caught industry by surprise....”) In a monograph devoted to tobacco politics in Minnesota Glantz repeated this by then received wisdom, insisting, based on sources that had absolutely nothing to do with the assertion, that the law “was enacted without any overt opposition from the tobacco industry.... something that would never happen again. The tobacco industry was caught off-guard.... Minnesota’s experience in passing a Clean Indoor Air Act was the last time that the tobacco industry did not play a major role to defeat such activities. In the early to mid 1970s, the tobacco industry did not interfere with tobacco control efforts in Minnesota.”


429Stanton A. Glantz [interviewed by Richard Kluger] (July 18, 1989), Bates No. 83724526.

430Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 1, 6 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. In support of the assertion that MCIAA “was enacted without any overt opposition from the tobacco industry” the authors cited “Association for Nonsmokers Rights. *Minnesota Clean Indoor [Air] Act Becomes Law. The ANSR. 1975;3(2) [June 1975]“ and “Association for Nonsmokers Rights [Ed Brandt]. Kahn-Schaaf Bill Protects Right to Smoke-Free Air. The ANSR. 1975;2(6) [Feb. 1975].” Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, “Shifting Tides: Minnesota Tobacco Politics” at 1, 4 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. Neither the first reference (which was not an article but a headline encompassing more or less the entire issue of the newsletter) nor the second (which was published right after the bill had been introduced and before a subcommittee had even dealt with it) mentioned anything about tobacco
Scholars were hardly alone in denying cigarette companies’ agency. The American Lung Association in Minneapolis was distorting history when its public information director, Maggie Vertin, later claimed that “in 1975, the tobacco industry was ‘not yet on to the wave of non-smoking sentiment sweeping the country.’” So Ms. Kahn’s bill ‘really did slip through.’” Indeed, in 1980 the Tobacco Institute itself demonstrably disseminated disinformation by claiming that it had been “caught off guard” by the passage of the MCIAA in 1975, which “‘was long before we knew of this [i.e., nonsmokers’ rights laws] as an issue. We were kind of absent from that fight.’” In point of fact, the Tobacco Institute and its member companies were, as already recounted in detail, deeply immersed, if not submerged and drowning, in those waves all over the United States.

Kahn herself—who had not been surprised and did not at the time think about what she perceived as an absence of tobacco lobbying—took a different tack, acknowledging that “[t]he tobacco lobby knew about it but didn’t consider it a serious threat since it didn’t actually prohibit smoking.”

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433 See above ch. 23.

434 Telephone interview with Phyllis Kahn, Minneapolis (May 8, 2007).

435 William Endicott, “No-Smoking Law Is Only Puffing Along,” Courier-Journal (Louisville), Oct. 12, 1978, Bates No. TCAL0002504. Kahn emphasized that the bill engendered little opposition not only because it did not ban smoking, but also because it imposed no significant penalties. Telephone interview with John Diehl, St. Paul (May 3,
formulation that would be repeated many times over the years, Kahn mentioned during a discussion of the law’s legislative history at ANSR’s annual meeting on February 2, 1976, a “fact she believe[d] actually helped gain passage of the Bill: ‘they laughed the Bill all the way to the Governor’s office—then they sat up and read it.’”436 To be sure, this view was not compelling since MCIAA did not differ from the scores of other bills and ordinances opposed by the industry opposed at the time that also failed to prohibit (rather than) restrict smoking.

Such claims, unsupported as they are by contemporaneous sources, need to be tested empirically. In light of the considerable resources that the cigarette companies devoted to combating (and defeating) anti-smoking bills in Arizona (and elsewhere) in 1973, 1974, and 1975,437 their alleged failure to lobby in Minnesota in 1975 would have been anomalous, especially since the Tobacco Institute was closely monitoring the course of the bill in Minnesota, noting when it was introduced and when it passed the House, and that Americans for Non-Smokers Rights, headquartered in Minneapolis, was “pushing for ‘the Minnesota Clean Indoor Air Act.’”438 Moreover, according to Charles Wasker, a long-time tobacco lobbyist in Iowa, a competent lobbyist did represent the tobacco industry in the Minnesota legislature in 1975.439

More importantly, a number of participants with firsthand knowledge independently and more than 30 years after the events had taken place stated that one particular tobacco lobbyist had lobbied against the bill. Victor Jude both owned a wholesale tobacco distributorship (Jude Candy and Tobacco Co.) and was a director of the Minnesota Candy & Tobacco Distributors Association.440 In addition, he was a DFL member of the Minnesota House from 1957 to 1966

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436“Annual Meeting—Many Attend, Learn ANSR Ready to Go the Second Mile,” ANSR 4(1):1 (Apr. 1976). See also Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” in Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 310 (William Forbes et al. eds 1983): “I...believe that the bill passed in part because it was not taken very seriously by its opponents. They thought it was such a ridiculous thing to do that they kept laughing at it all the way to the Governor’s office.”

437See above ch. 23.

438TIN, No. 91, Feb. 4, 1974, at 4, Bates No. 950307982; TIN, No. 120, Apr. 8, 1975, at 1, 3 (quote), Bates No. 950307736.

439Telephone interview with Charles Wasker, Des Moines (Mar. 30, 2007).

440E.g., Joseph Robbie to MCTDA Members (Oct. 24, 1974), Bates No., TIMN461875 (letterhead).
and of the Senate from 1967 to 1972, after which he became a lobbyist. Although his lobbyist registration for 1975 listed the Minnesota Railroads Association as the only entity for which he would be lobbying, Ted Suss, a cosponsor of H.F. 79, remembered 34 years later that Jude had been “active lobbying against the bill”; possibly Jude was “freelancing on that issue” when “he was making points about its negative effect,” prompting Suss at the time to think about Jude’s own business’s being harmed by the measure. Even Brandt, who steadfastly denied that the Tobacco Institute ever lobbied during the bill’s pendency, admitted that Jude was “[t]he local representative of the tobacco industry at the time....” Radisson’s anti-MCIAA lobbyist, William Brooks, stated with certitude that Jude had been lobbying against the public smoking bill in 1975. Similarly, Senate Health and Welfare Committee chairman Conzemius observed that because Jude worked behind the scenes, he did not have personal knowledge of Jude’s lobbying, but he was sure that Jude opposed and lobbied against the bill. House Minority Leader Savelkoul remarked that he

441 http://www.leg.state.mn.us/legdb/fulldetail.asp?ID=12423

442 State of Minnesota, State Ethics Commission, Registered Lobbyists 43 (Feb. 11, 1975). His son Thaddeus Jude, who entered the legislature in 1973, was alone in his insistence that his father had lobbied only for railroads in 1975. He stated that Joseph Robbie, the executive director of the MCTDA, had been a tobacco lobbyist in the 1960s, and that James Erickson was a tobacco lobbyist from 1975 on, but that he was unable to recall who the lobbyist was from 1970 to 1975. Telephone interview with Thaddeus Jude, Minneapolis (Apr. 26, 2007).

443 Email from Ted Suss to Marc Linder (Mar. 2, 2009).

444 Email from Ed Brandt to Marc Linder (Feb. 18, 2009). Several years after the MCIAA’s passage Brandt asserted that “the lobbyist for Minnesota tobacco dealers did not testify on the Minnesota bill as it went through the legislative process, since the people whom he represented had concluded that it would not affect them. They were right.” Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland], Bates No. TI03870504/09. In fact, they were wrong and so was Brandt. Later, when asked whether Jude had actually made such a statement to him, Brandt was unable to recall and then shifted to a different argument: “He [Jude] may well have decided that a ban on indoor smoking would not hurt his sales. Inasmuch as non-compliance remained a serious issue for many years, he probably was right.” Email from Ed Brandt to Marc Linder (Mar. 11, 2009).

445 Telephone interview with William Brooks, Jr., Minneapolis (May 12, 2007).

446 Telephone interview with George Conzemius, Cannon Falls (Mar. 1, 2009).
would be surprised if Jude had not lobbied against the bill “behind the scenes.”—a description that virtually all informants offered as his modus operandi. Schaa, the bill’s chief sponsor in the Senate, later observed that he had been surprised at the time that he had seen no tobacco lobbyists; he conjectured that wholesalers had not lobbied because they did not believe that the law would depress cigarette sales. At the same time, he assumed that the tobacco industry believed that the bill could be handled by the restaurant lobbyists.

The most undeniable evidence of lobbying by the tobacco industry stemmed from its one registered lobbyist in Minnesota in 1975, James Erickson. A multi-client lawyer-lobbyist who had been graduated from law school in 1972 and was just beginning his lobbying career in 1974-75, Erickson was registered as lobbyist for the Northwest Tobacco & Candy Distributors (the rival to Robbie’s organization), but, unlike Radisson’s lobbyists, did not specifically mention smoking in public places as one of his issues; instead he merely referred to “[i]tems of general interest to the tobacco and candy distributors.” Asked in 2009 about his lobbying on the MCIAA in 1975, Erickson immediately insisted that the cigarette manufacturers were “the lead dogs,” whereas the distributors organization took a “back seat” and merely followed the “signals called” by the national tobacco companies.

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447 Telephone interview with Henry Savelkoul, Sun City West (Mar. 2, 2009).
448 For example, former Senator Jerome Hughes (1967-92), one of the MCIAA sponsors in 1975, characterized Jude in particular as a “low-key” lobbyist and added that tobacco lobbyists had been around but in the background in 1975. DFL Senator Steve Keefe (1973-80) recalled Jude as a tobacco lobbyist, but emphasized that tobacco lobbyists lobbied only people they thought might be sympathetic (among whom the young left-winger Keefe was not one). Telephone interview with Steve Keefe, Minneapolis (Mar. 7, 2009). David Kuduk, Radisson’s lobbyist, years later did not recall any tobacco lobbyists lobbying on the issue, though he did remember that Jude and James Erickson were around the legislature. He also reported that many people at the time had believed that the bill would not pass. Telephone interview with David Kuduk, Grand Rapids, MN (May 22, 2007).
449 Telephone interview with David Schaaf, McGregor, MN (May 12, 2007).
450 Telephone interview with David Schaaf, Roseville, MN (Mar. 8, 2009).
452 Telephone interview with James Erickson, Minneapolis (Apr. 20, 2009).
Finally, the fact that internal cigarette manufacturing company documents reveal that early in 1976 the Tobacco Institute was working closely with the hospitality industry (through Bohr) and MACI (through Perry) to challenge the MCIAA in court or to amend it legislatively strongly suggests that whatever lobbying strategy the tobacco companies had been pursuing in 1975 that dictated concealing their involvement, Bohr and Perry may have been its primary executors. Indeed, once Peter Lindberg, the industry’s chief lobbyist during the first half of the 1970s, had been appointed a state district court judge for Hennepin County in 1974 and was thus no longer available for public lobbying on behalf of the cigarette industry, the oligopoly may have decided that more experienced non-tobacco lobbyists Bohr and Perry would, given burgeoning anti-tobacco public opinion in Minnesota, better serve its interests.

The Minnesota Clean Indoor Air Act: An Overview and Evaluation

Nonsmokers who sit near the smoking section say they have little benefit.

“Tell them in Des Moines we think this law is stupid.”

Three weeks passed before Erickson, who had broken off the interview because he had to speak to a congressman, found the time to resume it. After receiving an email with background information as to the basis for the interviewer’s interest in his lobbying, Erickson told a different story: while observing that cigarette manufacturers “certainly would and should have been involved” in lobbying in 1975, he had no recollection of their having lobbied or of his own involvement; if the NT&CD had asked him to lobby on the MCIAA, he was certain that he would have remembered lobbying and, he boasted, “my prints would have been all over that bill.” Though unable to remember their names, Erickson was quite confident that the cigarette manufacturers had their own lobbyists and was surprised to be told that he was the only tobacco industry lobbyist included on the list of registered lobbyists for 1975. Telephone interview with James Erickson, Minneapolis (Apr. 20, 2009).

See below this ch. That a Legacy Tobacco Documents Library search identified no materials from 1975 suggesting contacts between the tobacco industry and Bohr or Perry (or other lobbyists) does not mean that none exist(ed).


Bonnie Wittenburg, “No-Smoking Law Stirs Good-Natured Minnesota Fuming,” DMR, Aug. 2, 1975, Bates No. TIMN0462047 (quoting smoking customer of barbershop,
As approved by the governor on June 2 and as it went into effect on August 1, MCIAA, whose purpose was to “protect the public health, comfort and environment,” prohibited smoking in public meetings and public places, defined as “any enclosed, indoor area used by the general public or serving as a place of work, including, but not limited to, restaurants, retail stores, offices and other commercial establishments, public conveyances, educational facilities, hospitals, nursing homes, auditoriums, arenas and meeting rooms, but excluding private, enclosed offices occupied exclusively by smokers even though such offices may be visited by nonsmokers.” The relatively capacious scope of the prohibition was, however, subverted by the same huge exception that severely limited the usefulness of virtually all public smoking laws of the period: “No person shall smoke in a public place or at a public meeting except in designated smoking areas.” And even this mere segregation of smokers but not of their smoke did not apply at all to “factories, warehouses and similar places of work not usually frequented by the general public....” Although this wording suggested that coverage of workplaces was a mere consequence of the principal purpose of protecting the public, the legislature did go on to require the state department of labor and industry, in consultation with the state board of health, to “establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” The designation of smoking areas was entrusted to proprietors or others in charge of public places, whose discretion was limited in only two respects: they were not permitted to designate as smoking areas places in which the fire marshall or other law prohibited it; and, except for a bar—which, if designated as one entire smoking area, had to be conspicuously posted to that effect at all normal entrances—no public place could be designated as a smoking area in its

whose nonsmoking owner asked rhetorically where he could designate a smoking area in a four-chair shop that reeked of smoke).

437 For background on the law, see Mark Wolfson, The Fight Against Big Tobacco: The Movement, the State, and the Public’s Health 49-67, 152-54 (2001).

438 1975 Minn. Laws ch. 211, § 2, at 633.

439 1975 Minn. Laws ch. 211, § 3 subd. 2, at 633.

440 1975 Minn. Laws ch. 211, § 4, at 634.

441 Several months after the law had gone into effect but before the administrative rules had been promulgated, Kahn told a St. Louis alderman seeking her advice about a proposed city ordinance that “I can’t give you any good reasons for the separate category for bars in our law except a gut feeling that we had that the clientele of bars are probably less sensitive to a smoky atmosphere than those of cafeterias or better restaurants or most
entirety. Where a public place consisted of a single room, the legislature, in a less than transparent manner, declared that “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no-smoking area,” thus raising the question both as to what “one side” encompassed and whether merely reserving no-smoking areas wherever the proprietor desired (as was permissible in multi-room public places) was also lawful. In addition, owners were not required to make any physical changes to protect nonsmokers from smoke: only already “existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.”

Interestingly, in 1988, when the legislature amended a statute governing the administration of state buildings to regulate smoking, it required every state agency to adopt a smoking policy that either prohibited smoking entirely or permitted smoking in designated areas only, “providing that existing physical barriers and ventilation systems can be used to prevent or substantially minimize any other place. I think our original rationale was as a compromise with the Restaurant Association.” Phyllis Kahn to Bruce Sommer at 1-2 (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Kahn’s account was not accurate insofar as the compromise with the Restaurant Association entailed exempting bars and restaurants; the Senate committee’s elimination of restaurants’ exemption was not only not the result of a compromise with their association, but took place without Bohr’s knowledge and against his will. See above this ch.

1975 Minn. Laws ch. 211, § 5, at 634.

To the aforementioned St. Louis alderman Kahn explained with regard to the “one side” of a single room language that “we ran into some trouble with the lack of a definition of the word ‘side.’ When the bill was written, we obviously meant ‘side’ to be at least a [sic] half a room or very close to a half, but the Department of Health has ignored this and has just defined it as a continuous [sic; should be “contiguous”] section.” Phyllis Kahn to Bruce Sommer at 1 (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Nevertheless, in an internal guideline the Health Department characterized the “one side” of a single room language as the MCIAA’s “only standard for size of the designated area....” Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 3 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

While noting that “[n]othing in the law requires a proprietor to designate a portion of the establishment as a ‘smoking permitted’ area,” the Health Department merely specified that “the proprietor should use his/her own judgment on the size of the smoking permitted area if any smoking area is permitted.” Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 2, 3 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

1975 Minn. Laws ch. 211, § 5, at 634.
The Minnesota Clean Indoor Air Act of 1975

the toxic effect of smoke in adjacent nonsmoking areas.” In other words, if existing barriers and ventilation could not be so used, the agency was required to prohibit smoking entirely.

The severe constraints imposed on what on its face appeared to be an expansive prohibition fully confirmed ANSR’s analysis of the final bill text as an illustration of “the difficulty of working within the nature of the political process—which is a compromising process.” Just how far the initial legal regime was from ANSR’s aspirational end goal was made clear by the group’s director, who informed the press the following year that: “Our thinking is that smoking should be considered socially unacceptable and limited to consenting adults in private.” By the same token, however, ANSR correctly stressed that MCIAA’s “intent is to prohibit smoking unless there is a designated smoking area. Smoking is the exception, not the rule. ... The intent of the law is not to designate no-smoking areas, but to establish smoking permitted, i.e. SMOKING IS TO BE PERMITTED.”

To the extent that the Minnesota legislature focused enforcement on owners, the “reasonable efforts to prevent smoking in the public place” required of them were potentially capacious but ambiguous so that it was difficult to discern whether proponents imagined effective compliance resulting from them. Posting signs was helpful, but “arranging seating to provide a smoke-free area”—a much more expansive term than “no-smoking area” and one that should have been interpreted to mandate protection from exposure to smoke drifting from designated smoking areas—could have formed the core of an administrative rule with a powerful protective bite. Similarly, requiring owners to “ask smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke” did not limit owners’ responsibility to addressing smokers

4461988 Minn. Laws ch. 613, § 9, at 726, 730 (italics added).
447A bill filed by Kahn would have conferred these additional protections on all employees, but it failed to survive consideration by the House Health Committee. “State Employees Get Additional Protection,” ANSR Bulletin 2(2):1 (May 1988).
451In fact, the Health Department’s rule drained the provision of all such potential by interpreting “smoke-free area” to mean merely “acceptable smoke-free area.” See below this ch.
4521975 Minn. Laws ch. 211, § 6, at 634.
who were violating the law in the sense of smoking in nonsmoking areas, but would have encompassed smokers whose smoke was drifting from smoking into nonsmoking areas. At the same time, however, owner intervention was completely complaint driven: even if an owner saw people smoking in a nonsmoking area, he was under no obligation even to ask them to stop so long as no “client” or employee complained; moreover, even when he did respond to a request and asked smokers to stop, he was also under no obligation to report this violation to any law-enforcement authority. Thus, although the Minnesota statute made it a petty misdemeanor to smoke in a nonsmoking area, the real-world mechanism by which a prosecution could take place remained unexplained. Apparently, the legislature must have intended enforcement to be effected at best indirectly, since the only court action that an “affected party” or the state or local board of health was entitled to institute was for an injunction of “repeated violations” of an owner’s responsibilities to post signs, arrange seating, or ask smokers to stop smoking. Finally, although the statute required the state board of health to adopt rules and regulations “necessary and reasonable to implement” MCIAA, it also conferred discretion on the health board, “upon request, [to] waive the provisions” of MCIAA if the board “determines there are compelling reasons to do so and a waiver will not significantly affect the health and comfort of nonsmokers.”

MCIAA cost its supporters $75,000, including $20,000 in ANSR expenses from February 1973 through August 1975 and $20,000 and $35,000 in Hennepin and Ramsey County Lung Association staff salaries and program staff time, respectively. In light of this relatively modest financial outlay, Kahn offered six reasons to explain “[w]hy we were able to pass this fairly stringent restriction

451 1975 Minn. Laws ch. 211, § 7 subd. 2, at 635.
452 1975 Minn. Laws ch. 211, § 7.3, at 635.
453 1975 Minn. Laws ch. 211, § 7.1, at 634-35.
454 Robin Derrickson, Untitled Typescript at 1 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR). To be sure, Jeanne Weigum, who by 1983 was the president of ANSR but who had not been involved in the organization or the campaign for MCIAA in 1975, offered a radically lower estimate: ANSR and the three Minnesota lung associations invested less than $10,000 (largely for staff time), while the opposition spent “in the neighborhood of $500.” Jeanne Weigum, “Passage of the First Comprehensive, State-Wide, Smoking Control Law in the U.S.,” in Proceedings of the Fifth World Conference on Smoking and Health 2:327-31 at 327 (William Forbes et al. eds. 1983). It is unclear how Weigum could have determined how much the opponents had spent. That she incorrectly believed that the Hotel, Motel and Restaurant Association was the only opposing organization may in part account for this implausibly low figure.
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on what people have considered to be their right for certainly the past 30 years i.e., [the] right to smoke tobacco in any form, in any place whatsoever...” First, as a “persistent and devoted non-smokers rights group” ANSR “gave extreme support during the entire process,” including drafting the bill, mobilizing witnesses to testify before committees, “writing continual [sic] letters” and “putting tremendous pressures on the legislative process at every moment.” Second, a “sound body of scientific knowledge,” in particular the surgeon general’s report detailing tobacco smoke’s effects on nonsmokers and its translation by an American Lung Association popular pamphlet “into words that not only the public, but even legislators could understand” were especially helpful. Third, virtually every health organization in Minnesota lent its support. Fourth, “a dramatic change in the composition in [sic] the legislature...around 1972” that produced “a majority that had not only decreased in age and increased in educational experience but also went from a majority of smokers to a majority of non-smokers.” Fifth, whereas Wisconsin with a small tobacco industry had been unable to pass any tobacco control measure in recent years, Minnesota lacked “any sizeable tobacco industry.” And sixth, the fact that MCIAA appeared to everyone to be “utter[ly] reasonable[ ]” undercut opposition.457

Despite the spatial comprehensiveness that the law achieved in comparison to that of other states, it still did not, as Brandt explained one of MCIAA’s deficiencies “in layman’s terms,” “specify what portion of a public place may be designated as a smoking area,” although the question was “a possible subject for regulations to be adopted by the State Board of Health.” Similarly, until DLI issued the relevant rules, MCIAA established “no legally binding restriction on smoking” applicable to “places used chiefly by employees” rather than the general public.458 Even in the interim between the gubernatorial signing ceremony and the law’s effective date the lung associations in Minnesota reported that two problems had cropped up: restaurant owners purportedly “fear a loss of customers and wasted space if segregated smoking and nonsmoking areas are

457Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 4-5 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Earlier, to a St. Louis alderman Kahn made light of the opponents of the bill apart from the Restaurant Association: “to a lesser extent” opposition came from the “Minnesota Association of Commerce and Industry, who claimed that all the business [sic] would move out of the state so that their workers could smoke” and “to an even lesser extent from the Association of Retailers, who claimed that all the shoppers will be going to Wisconsin so that they’ll be able to smoke.” Phyllis Kahn to Bruce Sommer (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B).

mandated”; and DLI “fears it is currently considered impossible to enforce such regulations in the work place.”459 Nevertheless, the law, as Time reminded its readers as soon as MCIAA went into effect, “shifts the balance of power between smoker and non-smoker” by “put[ting] the burden on the smoker to find a smoking area, rather than on the non-smoker to find a spot of clean air.”460 It may not have been apparent to ANSR at the time, but even this power shift, like segregation on airplanes, offered such minimal (to non-existent) immunity from tobacco smoke that it could not possibly appease nonsmokers or create even a temporary social-political equilibrium—a prospect of the slippery slope to the endgame that never ceased to agitate the cigarette oligopolists.461

459“An Explanation of the Minnesota ‘Clean Air Act,’” ANSR, July 1975, Appendix II at 4, Bates No. 85646234/7. The source of this information is difficult to identify; the statement cited in the text was tacked on to a re-typed version of Ed Brandt, “Bill in Layman’s Terms,” ANSR 3(2):1-2 (June 1975) (no issue appeared in July 1975).


461See, e.g., the tobacco lobbyist’s aforementioned statement that the industry opposed the bill because of its intent to reduce smoking. Robert Milis, “Dr. Steinfeld Boosts Smoker Restriction Measure,” Post Bulletin (Rochester, MN), Feb. 25, 1974, Bates No. TIMN0461983. According to a Minnesota Poll, whereas 37 percent of state residents had said that they smoked cigarettes in 1975, two years later only 31 percent did. “Minnesota Poll: Cigarette Smoking Declines in Minnesota in Last 2 Years,” MT, July 17, 1977, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). The poll did not explore MCIAA’s impact on this decline, but in 1976 Kahn offered the speculative/anecdotal argument that although the law “was not aimed at individual smoking deterrence,...its [sic] had an interesting effect on smokers. This is probably why the tobacco industry became so interested in it albeit belatedly. It turns out that as smoking is considered socially and legally unacceptable and also as it becomes more difficult to smoke, people smoke far less. Legislators have told me that with the passage of the no-smoking rule on the floor of the House, their cigarette consumption has gone way down just because of the additional effort it takes to go someplace else to smoke.” Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 7 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). Despite cigarette manufacturers’ fears, as late as 1979, Brandt remained extremely skeptical that MCIAA would reduce cigarette sales or smoking: “[C]onsidering the limited impact that tremendous publicity about the harmfulness of smoking to the smoker had on tobacco consumption, it seems inconceivable to me that publicity about the harmful effects of smoking on the non-smoker could lead to more than very marginal changes.... Logically, there is no reason why requiring separate smoking and no smoking sections should lead to any significant decrease in smoking.” Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues
In light of the significant advance that MCIAA represented beyond all previous state laws, President Kornegay’s failure even to allude to it in his report on state legislation to TI’s annual meeting in January 1976 was astonishing. Pooh-poohing “the Banzhafs of this world,” who “boast[ed] of legislative successes” in 1975 and gave “the impression that smoking and the tobacco industry are on the run,” Kornegay gamely tried to convince his bosses that “we did lose some, but we struck some counter blows, and the effect is beginning to tell. The important point is that we won more often than we lost—and most of the losses were close contests.” Pretending that the rich and powerful cigarette oligopoly was the underdog (but at the same time inadvertently revealing just how unpopular the tobacco industry had become), he stressed that “we have gone into every contest with the initial odds greatly against us and with hostile public sentiment whipping up the press and activist clamor being generally supportive of the restrictive measures.” Purporting to “tick off the states where the anti-smokers are claiming ‘victory’ [and] we can see their public claims of success might be tinged with private frustration,” but in fact cherry-picking nine states in which smoking restrictions/bans were very narrow in scope (applying, for example, only to elevators), Kornegay boasted that these enactments had hardly been victories, though “they could have been if our spokesmen[,] our field men and our legislative representatives had not beaten back the fires, dampened the public uproar and convinced legislators to soften measures that could not be laid to rest.” Where MCIAA fit into this heroic Goliath and David yarn was nowhere in evidence.

Enforcement and Compliance Before the Administrative Rules Went into Effect

I say if they [smokers] can even sit two tables away from me I’d consider it a victory.\footnote{Remarks of Horace R. Kornegay at the Tobacco Institute Annual Meeting at 8-9 (Jan. 29, 1976), Bates No. TIMN0136525/32-33.}

Letting people smoke in one end of the room and not the other end, does very little good

\footnote{State of Minnesota, House of Representatives, Health Subcommittee of the Health and Welfare Committee: February 22, 1974, House File 2801 at 10 (unofficial transcript) (unidentified speaker), Bates No. BYB000482.}
as that smoke carries right to the other end of the room. The smaller the room the quicker it gets there.\(^{464}\)

Passing the country’s then-strictest anti-public smoking law had been difficult enough, but putting it into practice might prove to be much more arduous. On no one was this concern less lost than the bill’s most energetic and ardent legislative sponsor, Phyllis Kahn. Unlike many, if not most legislators, who, either holding to a rigid view of the separation of powers or perhaps simply not wanting to spend any more political capital on the issue, regard enforcement, even of their own pet legislation, as belonging entirely to the administrative agency on which the legislature conferred such exclusive authority, Kahn, though perhaps not acting as a one-person compliance officer, nevertheless, even before MCIAA went into force on August 1, took a very hands-on and even personal approach.

By mid-July she had already begun bugging the commissioner of the Department of Administration—who was in charge of buildings in which she spent considerable time—about “what steps you are taking to enforce” MCIAA when it became effective in the State Building Complex, almost every area of which was covered by the broad definition of “public places.”\(^{465}\) Even after the commissioner had replied, Kahn did not let him forget that although the Board of Health rules (when they were issued)\(^{466}\) would help him in designating smoking areas, this prospect did “not relieve proprietors [sic] of the responsibility of [sic] the immediate enforcement” of the MCIAA,” which, it was her interpretation and the attorney general’s, went into effect on August 1 with or without the implementing rules.\(^{467}\) (The Health Department, which was in charge of drafting rules and enforcing the law, took the same position.)\(^{468}\) Three weeks after that date, she once again reminded the commissioner that “the law did not have a

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\(^{464}\) Ralph Brown to Dr. Warren Lawson (Nov. 20, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\(^{465}\) Phyllis Kahn to Richard Brubacher (July 14, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

\(^{466}\) The Board of Health filed the final rules with the Department of State on Apr. 2, 1976. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six at 9, in Health Department, MSA, MHS, 112.H.18.3(B) (file stamps).

\(^{467}\) Phyllis Kahn to Richard Brubacher (July 30, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

\(^{468}\) Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 1 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).
provision for delay of adherence until after the drafting of regulations,” although this time she did acknowledge that he had “made a good start on adherence” by posting signs in cafeterias and conference and meeting rooms in state buildings. As for the prohibition of smoking except in designated areas, Kahn was not at all shy about suggesting that smoking be prohibited in corridors, lobbies, passageways, and registration lines because “it would be impossible to designate a smoking area in anyone [sic] of these and maintain a smoke-free area for the general public.”469

While also making certain to convey her one-person legislative intent to the Health Department as it drafted the crucial implementing regulations,470 Kahn intervened wherever she deemed it necessary to remind violators of their duties. Thus, already on August 1, she wrote to Commissioner Thomas Ticen, the chairman of the Hennepin County (Minneapolis) Board, that she had noticed that it had voted that week to permit smoking at its meetings in the belief that MCIAA permitted public bodies to designate smoking areas in public buildings. Because, however, as Kahn pointed out, the act expressly excepted places in which smoking was “prohibited by the fire marshall or by other law, ordinance or regulation” from the general grant of authority to owners to designate smoking areas, and the Board’s public meetings in the City of Minneapolis were governed by the latter’s (aforementioned) ordinance banning smoking in such places, “you are not allowed to set up designated smoking areas.” Kahn, who closed by instructionally expressing her expectation that the Board would “rescind this illegal action” at its next meeting, was unable to resist enjoying her triumph over attorney and fellow DFL member Ticen, who had himself been a state legislator (smoked, earlier in the year had resisted the applicability of the city ordinance to the Board, and eventually died of lung cancer): “...am somewhat perplexed that among the large and well-paid staff of Hennepin County, there is no one who is able to correctly interpret one of our less complex state laws.”471


470 For example, Kahn informed the MDH official charged with drafting the rules that she was “somewhat concerned with the definition of ‘private social function.’ The legislative intent of this exclusion was not to get into the business of legislating conduct at weddings, confirmations, and the like; and I am not sure that your definition recognizes this desire.” Phyllis Kahn to Kent Peterson (Sept. 29, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3.(B).

Ten days later, in response to a letter from a non-constituent (who had tried to secure passage of a nosmoking bill in student model legislation programs), Kahn “strongly recommend[ed] membership in ANSR,” adding that nonsmokers’ diligence would certainly be required to educate owners about their responsibility to prohibit smoking, especially since her own observations while traveling had made it clear to her that enforcement was “spotty, particularly out of the Twin Cities area....”472 (Against this background of uninhibited interventionism it seemed out of character that in October she not only merely requested that an official of the Northwestern Bell Telephone Company who was also chairman of the State Information Services Advisory Council at their next meeting “either ban smoking entirely or else reschedule it in a room that has somewhat more area and more adequate ventilation,” but even politely wondered whether she was “[p]erhaps...being unduly sensitive” and superfluously added that she did “not think that the smoke-filled room adds anything to the atmosphere.”)473 In November Kahn informed the associate dean of the University of Minneapolis Veterinary Hospital (with a copy to the university president) of a “flagrant violation of the law” that she had witnessed on a recent visit to the clinic with her cat: when she pointed out to a receptionist who was smoking at the desk that she was violating the MCIAA—Kahn did not mention to the dean whether the receptionist recognized the university area’s legislative representative or whether Kahn identified herself and her unique authority regarding the MCIAA—and that a sign on the door expressly prohibited smoking except in designated areas, “she replied that the entire waiting room was a designated smoking area.” Kahn then admonished the dean for “such a cavalier regard for the health of the public” displayed by an “agency dealing with public health.”474 The Health Department received only 23 complaints from nonsmokers by the


473Phyllis Kahn to Gilbert Holmes (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). Ironically, her closing expression of willingness to schedule their meetings in the State Office building revealed that the MCIAA itself created only second-best outcomes: even a room there would only “allow for adequate separation and better protection of the lungs of non-smokers.”

474Phyllis Kahn to Dr. Timothy Brasmer (Nov. 7, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B),
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beginning of October, but Kahn was under no illusions as to state health inspectors’ ability to “police this law effectively, even if they add a smoking check on their yearly visit.” Nevertheless, despite knowing that violations had taken place, she was “by and large...satisfied with the present situation,” which was just a “first step.”

H.F. 79’s cosponsor Bud Philbrook experienced first-hand the extent of compliance in rural small-town Minnesota in the summer of 1975 when a House colleague invited him to visit his hometown of 300 to 400 after the new law had gone into effect. When they walked into a restaurant, Philbrook reminded his host of the new law; the colleague in turn explained to the waitress that Philbrook had been one of the new law’s chief sponsors and that they wanted to sit in the no-smoking section, thus prompting her to guide them into, through, and out of the kitchen into a space near the rear entrance where a table had been set up. Still smiling, she announced: “This is our no smoking table.” Having gotten the point of the exercise, Philbrook and his friend retreated to the restaurant, where they would be exposed to smoke as if the bill had never passed.

Restaurant owners did not reserve such treatment exclusively as punishment for state legislators nor was the practice confined to the boondocks. For example, shortly after the Health Department’s public hearing on its proposed rules a resident of Minneapolis submitted a comment to the principal drafter, Kent Peterson, about asking for the non-smoking section at a restaurant and being “told to pick any table and that would be my non-smoking table.”


476 Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (1), Bates No. TIMN0240663.

477 Telephone interview with Bud Philbrook, St. Paul (Mar. 1, 2009). The scene was exquisitely captured by a cartoon of a waiter ostentatiously showing customers to their nonsmoking table in a garbage-strewn back alley. “Table For Two Non-Smokers, This Way, Please,” Minneapolis Star, Aug. 2, 1975 (4A), Bates No. TI47350692. For a contemporaneous account of the haphazard and disparate compliance with MCIAA as it went into effect in Rochester, see “Businesses Here Try to Abide by New Law, Butt...,” Post-Bulletin (Rochester), Aug. 1, 1975 (1), Bates No. TIMN0462144.


479 Earl Schleske to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Schleske had been active in ANSR. Telephone interview with Earl Schleske, Minneapolis (Oct. 10, 2009). As late as December 1975 the editor of one Twin Cities daily blamed “the nonsmoking majority of Minnesotans” for not “demanding the
years later the best light in which the president of the Minnesota Restaurant Association could cast compliance was that “most Minnesota restaurants have at least a nominal area for nonsmokers....” At the same time, however, he acknowledged the make-believe character of compliance in “small restaurants that do not have enough room to substantially separate smokers and nonsmokers.”

Immediately after the law had gone into effect on August 1, the Health Department revealed, albeit only within the agency, how limited its enforcement activities would be:

The Minnesota Department of Health does intend to enforce this law. The legislation had no appropriation for an administrative or investigatory staff for enforcement of the Act; therefore, the Department of Health must limit its enforcement activity to inspection of places where Health Department staff currently go, namely, restaurants, hotels, resorts and health care facilities. Beyond these places, the Department will refer complaints to local Boards of Health or issue a warning through telephone or written communications.

Even more suggestive of the modest niche that the Health Department had carved out for itself as well as of the reputation that ANSR had gained as an effective and reliable partner was the Department’s recommendation to the public that, if an owner refused to comply with MCIAA, the “affected party” contact either Glenna Johnson (telephone number included), the chairperson of the Public Awareness Committee of ANSR (which was “pursuing a program to inform proprietors of the requirements of the law and will advise proprietors on ways to assure clean air for the non-smokers”) or the MDH itself, which would follow up on complaints “as appropriate”—meaning by means of inspectors in the aforementioned types of businesses, referral to local health boards, telephone or letter, or, in the case of “repeated violations,” seeking a court injunction.

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481 Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 3-4 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

482 Guidelines Regarding Implementation and Enforcement of Minnesota Clean Air Act, Laws of Minnesota, 1975 Chapter 211 (For Internal MDH Use Only) at 4-5 (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).
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preferred modus operandi included pushing restaurant owners beyond their statutory duties by rhetorically asking them with respect to the four-foot-wide space: “How’s that going to stop the smoke?” Telephone interview with Glenna Mills, Oakland, CA (Nov. 1, 2009).

Johnson, as noted earlier, was, according to Brandt, “the forgotten hero” of the MCIAA campaign.


The legislature made smoking in violation of the MCIAA a petty misdemeanor (with a fine up to $100), but did not provide for any fine for owners’ violations; the law did, however, authorize the state and local boards of health as well as “any affected party” to institute an action to enjoin such violations. H.F. 79 § 7. Presumably ANSR qua mere ersatz-jawboner was not such an affected party.

Chum Bohr, the executive vice president of the Minnesota Restaurant Association, may have been an incompetent lobbyist whose absence from the crucial Senate committee hearing had made possible restaurant coverage (which otherwise might not have secured a legislative majority for some years), but once the law was in force he charged that “[t]here’s a lot of ambiguity in the law”

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and ambiguously stated that restaurants would “adjust the smoking and nonsmoking space to fit the needs of the day.” Kahn’s outright refutation that that position was “entirely incorrect,” inasmuch as “any restaurant, whether or not it sells liquor, must offer a smoke-free section or room,” did not faze the Minnesota Restaurant Association, which, literally on the eve of the MCIAA’s effective date, distributed a legal opinion claiming that “any restaurant selling liquor, wine or beer may call itself a bar and avoid having to set aside a special smoking area”—a contention that Bohr himself propagated. His semantic shenanigans prompted a Twin Cities columnist to acknowledge that his “dinosaur mentality” at least had the “virtue of candor” in saying that MRA members “reserve[d] the right to comply or ignore at their discretion.” An especially absurd instance of restaurant owners’ trying to circumvent the law by proclaiming themselves exempt bars was reported to various officials, including the head of the Minnesota Health Department, by three women who, on asking for seats in the nosmoking section of a Howard Johnson’s Restaurant in the Minneapolis suburb of Bloomington, were told by the general manager that, as a bar, Howard Johnson’s was not required to provide a nosmoking section. Unable to reconcile this claim with either Howard Johnson’s self-advertising as a family restaurant or the presence of children on the premises, they left.

Drafting the Department of Health Rules

Those of us in the non-smokers’ rights movement tend to be impatient, action oriented people who do not take time to measure conditions before and after. Clever researchers would have studied the Minnesota scene as soon as the law passed and would have continued sampling as years went by. No such thing happened. Unfortunately, we do not
even have Health Department Statistics of the number of Minnesota smokers or the number of cigarettes smoked per smoker pre MCIAA.  

Initial and Preliminary Drafting Not Fully Embodied in Publicly Accessible Drafts

By early summer the state Health Department had initiated the process of drafting a set of proposed implementing rules. Notice was given to “all interested persons and groups” of the Board of Health’s intent to “obtain information on these rules from non-agency sources.” Among the parties from whom staff “sought input into preparation” of the rules were legislators who authored the bill, ANSR, “other voluntary health organizations which supported the Act,” and “associations of restaurants, office building managers, retail stores,” and other establishments that would be affected by the new law. Kent Peterson, the chief drafter, “met with any group that made a request,” including Minneapolis building owners (who “saw the issues of the debate,” whereas businesses outside of the Twin Cities metropolitan area “could just ignore the whole issue”); “even more meetings” took place with the Minnesota Restaurant Association as well as with Representative Kahn and ANSR members, who were “quite involved.” Exactly when the Health Department turned out its first draft, is unknown, but the earliest MCIAA document labeled “draft” extant in the Department’s files at the Minnesota State Archives or at the Department itself was dated July 7. Of its

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496 Email from Kent Peterson to Marc Linder (Oct. 13, 2009).

497 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B). Some mystery attends the authorship of this draft, which, in light of the scattered topics it addressed and unmediated beginning, presumably represented responses to an already existing draft. The only name on the draft, “Kist” (written in the same handwriting as the date), was presumably that of Anthony Kist, who had been chief of health facilities standards and compliance until shortly before the date of the memo, when he was transferred to another division following revelations of his involvement in a large nursing home scandal. Elizabeth Emerson, *Public Health Is People: A History of the Minnesota Department of Health 1949 to 1999*, at 232 (n.d.), on http://www.health.state.mn.us/
small number of definitional provisions fleshing out statutory terms two were noteworthy. First, an interlinear handwritten addition to the typewritten definition of a “single room” public place (reserving “one side” of which as a nonsmoking area MCIAA declared to be lawful)\(^{498}\) required the nonsmoking area to consist of “not less than \(\frac{1}{2}\)” of the total area.\(^{499}\) The Department’s failure to include such a definition in the final rules was,\(^{500}\) as noted below, a disappointment to many anti-smokers, including Kahn, but this early insertion suggests controversy within the Department as well.\(^{501}\)

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\(^{498}\) 1975 Minn. Stat. ch. 211, § 5, at 633, 634.

\(^{499}\) Based on the handwriting, Peterson guessed that this comment had been written by Deputy Commissioner Dr. Ellen Fifer. Email from Kent Peterson to Marc Linder (Oct. 15, 2009).

\(^{500}\) The Health Department rejected a definition in terms of a “particular percentage of the room...because it would not be reasonable for all public places,” especially since the Department chose the vague definition “to provide reasonable implementation of the law in public places which consist of a single room and therefore have less flexibility to separate smoking and nonsmoking areas.” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 12 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112H.18.3(B).

\(^{501}\) Two months later, Special Assistant Attorney General Terry O’Brien, who was assigned to advise the Health Department on MCIAA rulemaking, commented to chief drafter Kent Peterson that “[g]iven the Legislature’s decision to use this term [“one side of the room”], I think your proposed definition is as precise as one can establish.” Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 3 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B). Apparently, the definition was “a contiguous portion of the room, including any seating arrangements.” Regulations for Implementation of Minnesota Clean Indoor
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The lack of agency unanimity was also reflected in the penciled comment (in another handwriting), “Not need” to the typescript’s requirement of “reserved for no-smoking” signs every 10 feet marking the boundary of that area—another mandate that was not adopted. In an incompetently drafted section implementing owners’ statutorily imposed duty to minimize the toxic effect of smoke in adjacent nosmoking areas, the typescript provided that they “shall” do A “and/or” B without explaining under what circumstances one would suffice. The first involved using “existing physical barriers such as walls and partitions to the extent feasible and extending any existing booth partitions to a minimum height of 60 inches,” whereas the second meant “[p]roviding an isle [sic] space buffer of at least 4 feet,” but subject to the proviso that “the ventilation system(s) in the public place...have ample air handling capacity which will assure that smoke will not be carried by air movement from the ‘smoking permitted’ area to the ‘no-smoking’ area(s).” The proposed height of the barriers was four inches higher than the Department’s ultimate specification, the reason for which change is discussed below. The mandatory extension of existing booth partitions (which a handwritten comment, inserted by Peterson, rejected) seemed oddly compulsory since a public place without walls, partitions, or booths would have been subject to no barrier requirement at all. Moreover, the weasel phrase “to the extent feasible” opened up the interpretive possibility that some owners would be freed from this mandate altogether (and thus, correlatively, nonsmokers freely exposed to smoke). In contrast, the four-foot buffer zone, which, like the five-foot barrier, made its first appearance in this draft, was not only not subject to any such feasibility standard, but was attached to a ventilation standard that would have been virtually impossible to satisfy. Since the statute merely provided that “[w]here smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas,” and thus imposed absolutely no protective duties on owners whose public places lacked such barriers or ventilation, the proposed rule presumably also lacked any such authority. Whether the Health Department was

Air Act, Rule 2.f) (Draft, Sept. 9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

502 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B).

503 1975 Minn. Stat. ch. 211, § 5, at 633, 634.
empowered to weaken the requirement on the basis of feasibility or, conversely, to impose the four-foot space requirement on owners with or without barriers or ventilation both was unclear and, at least as to the latter issue, would soon be contested. Finally, without attending to the complication created by the “and/or” provision, an infelicitously worded, handwritten insertion (by Peterson) added yet another method for minimizing smoke’s toxic effect—“rearrangement of business equipment and customer seating as reasonable to not have smoke”—which would, as discussed later, in somewhat altered form, play an important but complex and ambiguous part in the array of protections embodied in the final rules.

ANSR had also been occupied with drafting its own proposed rules, the earliest set of which it submitted to the Health Department at the end of July. In sync with the times, ANSR stressed that implementation of the MCIAA’s intent to provide a smoke-free environment for nonsmokers in all indoor public areas could be effected “without destroying the right of the smoker by providing him/her with a smoking area within each establishment, if the proprietor so designates” (a possibility, to be sure, that it promptly rendered less probable by providing that “[n]othing in these regulations shall be construed to require the proprietor of a public place to designate a smoking area”). Although ANSR specified that separate smoking lounges had to be “ventilated to remove the toxic air so that it cannot travel to the non-smoking sections,” it was nevertheless willing to permit smoking and nonsmoking sections within a single room so long as they were separated by a partition (of undefined height) or a four-foot-wide aisle. Brandt may have been inspired to sponsor the latter device by his familiarity with its having been proposed in the petition that Action on Smoking and Health had submitted to the U.S. Transportation Department and Federal Aviation Administration in 1969 for promulgation of a rule requiring the separation of smoking and nonsmoking passengers on all commercial domestic air carriers. In it the group’s founder, lawyer John Banzhaf, proposed seating nonsmokers on the left and smokers on the right side, so that “the center aisle would be an effective barrier between the two groups,” although the petition

504 Minnesota Department of Health Adult Health Section, Subject: Draft of Proposed “Rules and Regulations of the Minnesota State Board of Health for Regulating Smoking at Public Places and in Public Meetings” (July 7, 1975), in MSA, MHS, 112.H.18.3(B).

505 Rules and Regulations as submitted by the Association for Non-Smoker’s Rights n.p. [1-3, 6] (July 29, 1975), in MSA, MHS, 112.H.18.3(B). Many years later Edward Brandt assumed that he was at the very least involved in writing this submission. Telephone interview with Ed Brandt, St. Paul (Oct. 14, 2009).
pointed out that air circulation in an airplane was “typically poor.”

The tragically absurd public health consequences of the four-foot-wide-space proposal—which, as noted, was already embodied in the Health Department’s draft and remained enshrined in the final set of rules—by what was arguably the country’s leading and most successful statewide anti-smoking organization would be spectacularly on display in the testimony of an elementary school teacher at the Health Department’s public hearing on the rules toward the end of the year. A self-professed “sort of nervous” Gerald Ratliff—who had been “extremely involved” in ANSR, devoting countless hours to seeking to persuade businesses to comply with MCIAA—explained that whereas in other elementary schools in his suburban Twin Cities district teachers had negotiated for smoking lounges, his school had

a one-room lounge. We have a very small one. I would say it’s [a] ten by twenty or ten by fifteen room, [in] which are four very small tables like in bars. And what they have done is separate the two tables from the other two tables by four feet and let people smoke in there. And it’s the only place for teachers to smoke in the building. So it’s worse than a bar. And I just am wondering if it’s possible to add to...Section 442, or...Section (p) on minimum room size, where you can allow smoking, because it’s really almost absurd because the smoke is so thick, you know. If you have a room that has two chairs in it and you split one chair for smokers and one for non-smokers, it doesn’t seem to be reasonable. So I would suggest adding a minimum room size for the definition of “room”.

No ANSR member took up the cudgels for Ratliff or proposed a change to deal with the extreme exposure to which he had been exposed. Nor did the Department’s principal rule drafter, Kent Peterson, who did answer one of Ratliff’s other questions, respond or suggest that some other provision in the

506 Brandt attached a reprint of the petition to ANSR’s post-Board of Health public hearing statement. CR 115(213) (Dec. 20, 1969) (n.p.), appended to Edward Brandt to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Why, given the plentiful experience with the fecklessness of such a “barrier” after the rule had gone into effect on July 10, 1973, anti-smoking advocates were willing to extend the discredited model to other settings is unclear. For the rule, see 14 Code of Federal Regulations Part 252, in CR 38(90):12207-11 (May 10, 1973).

507 Board of Health Hearing Transcript at 171 (Dec. 2, 1975).


510 Asked about the complaint decades later, Peterson, while understandably not recalling it, commented that “I think (and you can see in the documents) that there probably was not statutory authority to make as intrusive a requirement as to impose a
rules that Ratliff had perhaps overlooked already made the school district’s arrangement unlawful.\textsuperscript{511} Ratliff’s experience was made all the more poignant by the overwhelmingly significant fact, which he did not reveal at the hearing, that only a very small minority of his fellow teachers smoked and yet intolerably polluted the air of the small lounge. Indeed, the very fact that at the time such monopolization of indoor air by smokers was considered the norm, which disqualified complainers as supersensitive deviants to whom business owners resented being required to cater, was precisely the social-psychological-cultural-legal foundation to whose dismantling compliance with the MCIAA would eventually contribute so powerfully. But that process was just being initiated, and for Ratliff and similarly situated exposees it would be many years before the law provided any protection.\textsuperscript{512} (Asked decades later what MCIAA had changed for such nonsmoking teachers, Peterson observed: “For what we now know about the health consequences of air in a confined space only separated by a minimal 4 foot space, nothing changed for their health. It did however send a message to all smokers that the social acceptability of smoking had changed. Smokers were restricted to a space—unfortunately the air was not. ... MCIAA was the initial statement of rights for non-smokers; it took a while to learn how much change was needed to preserve safety of health consequences.”)\textsuperscript{513}

minimum room size or even an air exchange requirement.” Email from Kent Peterson to Marc Linder (Oct. 29, 2009). In fact, an air exchange requirement was one of the alternative “acceptable smoke-free area” criteria.

\textsuperscript{511}Ironically, when the nervous non-tenured teacher asked whether he could be fired for asking his employer for clarification of the policy or an improvement of the situation, Assistant Attorney General Terry O’Brien was unwilling to give him an answer without having researched the question, though he “suspect[ed]” that Ratliff could not be fired. He nevertheless went on to suggest that Ratliff could not count on the Health Department for any assistance: “That is a question for the two parties in private actions to work out. [I]f you have a very bad employer or if you have an employer that is running around the room smoking or whatnot, that...will be something that those two will have to work out among [sic] themselves....” Board of Health Hearing Transcript at 173 (Dec. 2, 1975).

\textsuperscript{512}Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Ratliff confirmed that separation of smokers and nonsmokers by four-foot-wide spaces in restaurants helped somewhat in some restaurants and not at all in others.

\textsuperscript{513}Email from Kent Peterson to Marc Linder (Oct. 29, 2009). As for what was known about the health consequences of secondhand smoke exposure, it is noteworthy that when ANSR in a post-Board of Health proposed rules hearing submission presented documentation so that the Board would have access to the facts that had persuaded the legislature to enact the MCIAA, it focused on eye and nasal irritation, headaches, and coughs. Edward Brandt to Kent Peterson (Dec. 19, 1975), in Health Department, MSA,
How deeply compromised MCIAA was by this point was nicely encapsulated in the gloss that Kahn had put on the 1974 version of MCIAA at the House Health Subcommittee hearing on H.F. 2801. Citing the provision declaring that “[s]moking areas shall be separate, of adequate size and with adequate ventilation to fulfill the purpose of this act,” she observed that “I would imagine if you had a small room where it was impossible to provide a separate smoking and a non-smoking area, that would be interpreted to mean that you could not designate it a smoking area. It is only permissive to designate the area, it is not mandatory.”

In contrast to this lax regime in mixed-use rooms, ANSR would have banned smoking entirely in hallways, corridors, skyways, concourses, elevators, restrooms, lobbies, ticket and registration areas, public meetings, and the non-seating areas of shopping malls. Bolder still was the flat ban on smoking in retail stores, businesses, agencies, and public service establishments, except in private enclosed offices and even there only if they were ventilated so as to prevent the smoke from entering public and work areas. Also ahead of its time was the requirement that public places “which have intercom systems shall periodically announce over the system that smoking is not permitted except in designated areas” unless they had “other effective means of enforcing the no-smoking ban.”

Restaurants may have been anti-smokers’ bête noire, but ANSR apparently deemed it too discontinuous with addictive cultural practices even to propose an outright smoking ban; indeed, it also over-generously would have permitted owners to designate up to 50 percent of the total service area as the smoking section (although the smoking prevalence rate was far lower and ANSR’s other proposed proportions in other mixed-use public places such as waiting rooms in health clinics and medical treatment centers, government building smoking lounges, various lobbies, and seating sections of shopping malls would have been much lower).
were limited to one-third). Then, however, ANSR cast off this timidity by 
subjecting this provision to the de facto impossible-to-satisfy condition that the 
smoking section “be properly ventilated to prohibit [sic] the smoke from entering 
the other areas of the restaurant.” Almost as intrepid was ANSR’s definition of 
the statutorily exempt “bar”: to qualify, 90 percent of an establishment’s revenue 
was required to derive from the sale of liquor—a hurdle whose stringency would, 
in the event, far exceed the definitional criterion that the Health Department 
would eventually devise. ANSR’s proposal also raced beyond the Department’s 
ultimate rule in totally banning smoking in all classrooms in educational facilities, 
but, again, it acquiesced in the vested privileges of addicted professors and staff 
by permitting their private, enclosed offices to be designated smoking areas518 
(even though and while students might be required to meet with them there).

On August 4, Peterson sent Special Assistant Attorney General Terry O’Brien 
for comment a draft of the “format” he intended to use to draft the rules. By this 
point he had already finished preliminary drafts of Rules 1 and 3, which, together 
with drafts of Rules 2 and 4, were to be finished the next day, when he was going 
to be discussing them with “interested parties during the next two weeks.” He 
also informed O’Brien that a draft (of the complete rules) would be available for 
review by the Board of Health by August 29. Although neither the first two 
drafts, which Peterson attached, nor the second two are extant, a copy of the 
format, which was simply the table of contents of the rules, has survived.519 
Already this earliest skeletal structure of the rules closely resembled the final

518 Rules and Regulations as submitted by the Association for Non-Smoker’s Rights 

519 Kent Peterson to Terry O’Brien, Subject: Review of Matters of Format, Preliminary 
Drafts and Jurisdiction Issues (Aug. 4, 1975), in Health Department, Attorney General 
Papers, MSA, MHS, 103.I.15.1(B). Presumably the rulemaking schedule was delayed and 
the Aug. 29 deadline became Sept. 12 as noted below. Peterson posed several questions 
to his legal adviser the most interesting of which dealt with whether it was lawful to 
enforce MCIAA in patient areas of hospitals and nursing homes: “The reasoning against 
application to patient areas is that the area is ‘rented’ to a patient for his/her temporary use. 
However, I am in doubt regarding application to large wards of patients...or double 
occupancy rooms.” Id. The rules ultimately did apply to patient areas, but O’Brien’s 
response, which he may have given orally, is not preserved. Peterson also asked about 
MCIAA’s applicability to federal government buildings and interstate transportation. 
Finally, Peterson also mentioned that on Aug. 7 he and O’Brien were scheduled to meet 
with Judith Pinke (assistant to the Labor and Industry commissioner) and Ray Adell (an 
attorney in that department) to clarify the statutory exemption of factories and warehouses 
from Health Department jurisdiction and the meaning of an enclosed, indoor public place 
serving as a workplace. No record of that discussion appears to be extant.
work product except in one striking respect\(^{520}\), whereas the key provision of this draft was framed in terms of implementing the statutory requirement of “minimizing the toxic effects” of smoke in adjacent nonsmoking areas by means of existing physical barriers, ventilation systems, and seating arrangements,\(^{521}\) later Peterson re-assigned its role to the only partly statutory term “acceptable smoke-free area.” MCIAA used the term “smoke-free area” only in the ambiguous context of imposing on the proprietor responsibility for making “reasonable efforts to prevent smoking in the public place”—but solely with respect to one of four such alternative types of efforts, namely, “arranging seating to provide a smoke-free area.”\(^{522}\) This crucial phrase\(^{523}\) underwent several changes with regard to its placement and function in the rules; the exact chronology of its insertion into the draft rules is uncertain because the August draft(s) is/are not extant, but its later fate is instructive: after two decades of enforcement agents’ travails with anti-smokers who (cantankerously but understandably) took “acceptable smoke-free area” literally, the Health Department decommissioned the source of the truth-in-packaging dispute.\(^{524}\)

The next steps in the rule drafting process are difficult to reconstruct gaplessly because what was apparently the first complete draft, that of August 11, has not survived, although its contents are, to some extent, known\(^{525}\) from

\(^{520}\)This draft also lacked certain detailed definitions as well as Rule 5 on waivers, which Peterson was still drafting.

\(^{521}\) [Kent Peterson], Format of Clean Indoor Air Regulations at 2 (Draft, Aug. 4, 1975), in Health Department, MSA, MHS, H.112.18.3.(B).

\(^{522}\) 1975 Minn. Stat. ch. 211, § 6(b). See also above this ch.

\(^{523}\) For the Department’s justification for the term, see below this ch.

\(^{524}\) See below this ch.

\(^{525}\) One stray page of Peterson’s notes to the file dated Aug. 11 has survived. It sought to justify a “percentage requirement,” which presumably related, inter alia, to the rule prohibiting the size of a smoking-permitted area to be “more than proportionate to the preference of patrons of that establishment for such an area” (Rule 3.a) (Sept. 9, 1975)). Since MCIAA (§ 6(b)) required owners to make reasonable efforts to prevent smoking by one of four methods, including “arranging seating to provide a smoke-free area,” Peterson concluded that “the percentage of the room must not be so large that no ‘smoke-free area’ could be preserved. The percentage would vary in different categories of establishments depending upon density of type seating and other factors.” Note to Regulations File: Justification for Percentage Requirement (Aug. 11, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Assistant Attorney General O’Brien was apparently commenting on this issue when he advised Peterson that his use of the term “proportionate to the public’s preference” as a guideline for the size of a smoking-permitted area might cause problems because “public” was not defined and “many publics” existed: “ANSR may say
detailed comments that Assistant Attorney General O’Brien sent Peterson on September 4.526 Deeming the draft “an excellent starting point in getting these rules into effect,” O’Brien generally focused on pointing out to Peterson ambiguities (such as the qualifier “reasonable”) that vested too much discretion in state officials and that regulatees could manipulate into loopholes.527 Of particular interest is O’Brien’s discussion of the term “smoke-free,” which Peterson had apparently used in the sub-rule governing restaurants (and perhaps several other public places). O’Brien first dwelt on the term in a general section emphasizing that “[s]tandards or criteria for determining a result should be distinguished from statements of results.” He identified “smoke-free” as merely stating a conclusion rather than “the analysis by which that conclusion was reached.” However, in order to be enforcible, the rule had to “state the methods

526Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).

527O’Brien did not cover all points at this time, but only “some major areas of concerns,” deferring a more in-depth memo until Peterson submitted a final proposed draft. Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 1-2 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
with which to determine whether or not an area is ‘smoke-free.’” Under the specific discussion of its use in the restaurant sub-rule, O’Brien then posed three important questions: “Who decides what is ‘smoke-free?’ [sic]. Once decided, how is it proven? What demonstrable evidence could be introduced to indicate compliance or non-compliance in the event of dispute?” Presumably it was this methodological-interpretive admonition that prompted Peterson in the next iteration of the draft to adopt the heavily freighted phrase “acceptable smoke-free area” and to define it in terms of physical criteria—height of barriers, width of aisle spaces, air changes per hour of ventilation systems, and concentration of carbon monoxide—that an inspector could (theoretically) readily measure.

To be sure, this definition in terms of means rather than results left open the question as to whether barriers and spaces, which turned out to be the only means that owners ever used, could in fact produce smoke-freedom (acceptable to whom?) rather than meaningless circularity insensitive to the substantive public health objectives underlying the drive for state intervention. That ahistorical hindsight was not needed to question the robust protectiveness of barriers or spaces was demonstrated a little later by the complaint of no less an authority figure than the assistant personnel director for the Minnesota Department of Public Safety. Two weeks after the Board of Health had held a public hearing on its proposed rules (which included the option of separating smoking and nonsmoking areas by 56-inch-high barriers or four-foot-wide spaces), Jean Rozeske submitted a comment on official letterhead contesting the adequacy of the rules for an eight-hour-a-day working environment “based on experience in a work area which essentially complies with two of the criteria set forth by the Board of Health in reference to physical barriers and separating space. Although these conditions are met, I continue to suffer with daily headaches, congestion, sore throats, and difficulty with breathing.” In the event, such a statement was

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528Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 1 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
529Terry O’Brien to Kent Peterson, Proposed Rules Implementing the Clean Indoor Air Act at 4 (Sept. 4, 1975), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B).
530Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.i) (Draft Sept. 9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
531Only the CO concentration was a result, but, as noted below, inspectors never measured it. Moreover, in the event, particulate matter, which was far more lethal, was less amenable to measurement at the time.
532Jean Rozeske to Warren Lawson (Dec. 17, 1975), in Health Department, MSA,
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unable to dissuade the Board of Health from upholding the Health Department’s unsubstantiated assertion that 56-inch-high barriers were “sufficient to completely interrupt the direct flow of smoke from seated persons and to provide deterrence from indirect shifting of smoke.”

Publicly Available Drafts of the Board of Health’s Proposed Rules Prior to Its Public Hearing in December

On September 12, the Health Department sent to all Board of Health members a draft of proposed rules, requesting them to make suggestions for the proposal being prepared by the Department’s staff. Whether that draft is extant is uncertain because when, on October 1, Dr. Warren Lawson, the Department’s executive officer, attached “[t]he staff recommendation for proposed rules” to the materials he sent the Board members for their meeting on October 9, it was unclear whether that iteration incorporated the members’ suggestions that he had solicited on September 12. To be sure, on September 11 the press obtained a copy of the 19-page proposal (stamped “not official, draft only”), which the Department was sending to restaurant owners, hotels, office managers, citizens groups, and other interested parties. The copy of a draft preserved in the Minnesota State Archives bearing the date of September 9 and otherwise corresponding to the press account of it may be the draft that Lawson sent to Board members on September 12. The only reason for uncertainty as to whether the September 9 draft was identical to that of September 12 was that on September 10, Peterson held a meeting attended, at the very least, by Neil

MHS, 112.H.18.3(B).


536 Regulations for Implementation of Minnesota Clean Indoor Air Act (Draft 9/9/75) (every page is stamped “Not Official Draft Only”), in Health Department, MSA, MHS, 112.H.18.3(B).
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Solberg, chairman of the Downtown Committee of the Building Owners and Managers Association of Minneapolis, whose members owned or controlled 10 million square feet of office space, Raymond Jones, the director of administration of Pillsbury Company, and a representative of IDS Properties, Inc., a subsidiary of Investors Diversified Services, Inc., which owned several million square feet of downtown Minneapolis office space, but presumably also by other Twin Cities firms covered by MCIAA. That the written statement by Solberg (which appears to have been prepared for oral presentation)537 and a letter by Jones, both dated September 10,538 made it clear that they were responding to the (aforementioned no longer extant) draft of August 18 suggests that they were not yet privy to the September 9 draft.539

Solberg, on behalf of the Minneapolis building owners and managers, sought to identify a dichotomy in the proposed rules between “public facilities” or “public areas,” on the one hand, and the “office building industry” on the other. Whereas, in his group’s view, the rules were “heavily oriented” toward the former, they were “extremely ambiguous and inadequate” regarding the latter: “We are essentially dealing with two distinctly separate problems: controlled office space with existing highly scientific work flow procedures which govern the positioning and layout of employee work stations as opposed to public areas.”540 This alleged contradiction between profitably and scientifically operated offices and government-mandated public health intervention became the hallmark rhetorical ploy of Twin Cities big business’s opposition to the MCIAA rules.541 To one of the rules’ key operating provisions concerning the

537 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
538 Raymond Jones/Pillsbury Co. to Kent Peterson (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
539 Because it seems implausible that Peterson would have withheld the September 9 draft from precisely the businesses whose input he was seeking, it is possible that he at the very least revealed to them whatever changes he had made since the August 18 draft, that they commented on them, and that he then made some last-minutes changes in the draft that the press received on September and that Lawson distributed to the Board on September 12. If not, then the September 9 draft was the September 12 draft.
540 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 1 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
541 In 1975, two of the principal resisters, Pillsbury Co. and Honeywell Inc. had sales of $1.2 billion and revenues $2.8 billion, respectively. “Pillsbury Reports Record Sales and Earnings for Year,” NYT, June 27, 1975 (57); “Honeywell and Control Data Show
minimization of the toxic effects of smoke in adjacent nonsmoking areas the owners unconditionally objected on the grounds that it was “undefinable in terms of specifics and could lead to undue confusion as well as dogma [sic] of requirements based on non-engineering criteria” without offering a corrective. It is difficult to discern any rational kernel of BOMA’s objection (other than a possible failure to construe the inter-linked proposed rules properly), since, although at this stage the Health Department had operationalized its minimization sub-rule only in terms of unquantified “considerations,” which did apply to offices and office buildings, at the same time the “acceptable smoke-free area” standard, which also applied to these specific locations, was defined by


542 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 1 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

543 Rule 3.d) required owners who designated smoking-permitted areas to minimize the toxic effect of smoke in adjacent non smoking areas according to the following considerations:

1) In selection of the smoking permitted area, existing physical barriers including walls, pillars and partitions shall be utilized.
2) Designation of the smoking permitted area shall contemplate ventilation capacity and general air movement in the “public place or meeting room.” The general air movement shall not be from the smoking permitted area to the no smoking area.
3) Arrangement of seating shall provide a distance between the smoking permitted area and no-smoking area.

Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.d) at 8 (Draft 9/9/75) (every page is stamped “Not Official Draft Only”), in Health Department, MSA, MHS, 112.H.18.3(B). It is assumed here that the structure of the pertinent sections of the Aug. 18 draft to which the building owners were responding was sufficiently similar to that of Sept. 9 to support the analysis of the owners’ criticism. The discussion of O’Brien’s memo on Peterson’s Aug. 11 draft and of the latter’s “format” suggest that it was. If it was not, then Solberg’s comments could still not have persuaded Peterson to quantitate the minimization provision since Peterson would already done so in the Sept. 9 draft.

544 The sub-rule governing offices provided that in an open work area office that was not used by the public, but was a workplace “occupied by both smokers and non-smokers,” the owner would be considered in compliance with the MCIAA if he used any of these three mechanisms: (1) prohibition of smoking in the entire area; (2) prohibition of smoking in the entire work area and provision of a smoking lounge in a separate area; or (3) permission to smoke “in one or more sections of the open work area which are used exclusively by smokers and people who permit smoking, but prohib[j]on in all sections

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reference to precisely determined quantifications based, at least in part, on engineering criteria. That in fact office building owners and managers were
seeking a special exemption finally became obvious in their last specific comment keyed to the sub-rule governing offices: “Smoking in office areas is difficult to post and control because of the innumerable work stations involved, the movement of people from station to station, and the very fact that open area plans and work stations have passageways which can support smokers and non-smokers alike. It would appear that this section should be eliminated as well as any other pertinent part within this text in that the restrictions on smoking could relate to public areas in public buildings or perhaps other public areas in private buildings when so designated properly.”

This special pleading on behalf of office workplaces that the general public did not frequent made no impression on Peterson (who many years later explained): “Since the law includ[ed] places of employment of that type, we could not consider exempting them. We talked to them to try to find workable ways to make it possible for them to manage while still enforcing the law.”

The building owners then concluded by asserting that the August 18 draft rules “place an undue burden on the employer’s ability to administer effectively together with an unnecessary financial burden.” Solberg also accused the “text” of being “completely unaware of the engineering and architectural efforts that will be required to satisfy these general objectives.”

At the end of his prepared statement Solberg turned the discussion over to Jones “so that the employer’s position might be shared with you [i.e., Peterson].” The “brief comment” that Jones then made was presumably not so detailed or specific as his letter of September 10. The August 18 draft, which Raymond Jones, who would continue attacking the rules throughout the rulemaking

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546 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

547 Email from Kent Peterson to Marc Linder (Oct. 14, 2009).

548 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

549 Statement of the Minneapolis Association of Building Owners and Manager Association [sic] Relating to Proposed Clean Indoor Air Rules at 2 (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
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process, criticized appears, at least with respect to the provisions at issue (smoking/nonsmoking areas in single room public places and office space), to have been identical to that of September 9/12. Jones insisted that it was “imperative to clarify the wording because this is a critical operating issue. Office space is arranged to aid employees in the performance of their jobs.” After quoting an industrial psychologist who had argued that because “[f]unctional, behavioral and technical aspects determine the layout of individual work places, groups and departments,...the building is built around the organization, the organization is not squeezed into predetermined spaces,” Jones informed Peterson that Pillsbury had spent $1.49 per square foot for studying, planning, and the layout of two 28,147 square-foot “largely open-area floors to assure the effective operation of the units located there.” From there he jumped to unsubstantiated and fanciful anti-procrustean claims of pending commercial doom under MCIAA. According to the first opaque scenario, if the firm designated all non-private office space nonsmoking, the “loss of productivity” would amount to $462,000 annually—“[i]f an estimated 264 smoking employees in our Headquarters offices were absent from their work station one hour per day to visit Smoking Permitted areas...” Under the second scenario, which “would quite possibly” bring about an ever greater productivity loss, designating one side of a room smoking and the other nonsmoking would cause “many employees to travel to another part of the floor to contact those with whom they closely work”—a travelog that “contradicts” the aforementioned “scientific study.” Under a capitalist nightmare of a prestidigitated example, Jones claimed that “to separate the Commodity Analysts, Decision Makers and Internal and External Information Systems could easily cost us $10,000.00 in 10 minutes with a $.10 per bushel market on 100,000 bushels of wheat by delaying our reaction time.” Having limned these slippery slopes to bankruptcy, Jones requested that MDH reword the “single room” and office space provisions to authorize owners to “[d]esignate individual work station areas as No Smoking or Smoking Permitted areas in open office space” in order to “permit continued high productivity, scientifically planned.”

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50At the Board of Health public hearing Jones presented the same criticism of designating one side of a room smoking and the other nonsmoking on the grounds that it interfered with “scientific” work flow. Board of Health Hearing Transcript at 116 (Dec. 2, 1975).

51Jones’s next letter of Sept. 26, as noted below, indicated that some changes had been made between Aug. 18 and Sept. 12.

52Raymond Jones/Pillsbury Co. to Kent Peterson (Sept. 10, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The press picked up this tale of huge losses occasioned by interference with grain-buying teams’ need for instant reactions to rapid
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As asked decades later about the reality content of such complaints, Peterson observed that “I would not be surprised if the specific example cited from Pillsbury would have been viewed as reality in 1975 whereas it’s not now.”

Unfortunately, Jones did not engage in a dialog with an employee at the downtown St. Paul office of a large insurance firm who complained to the Health Department in 1975 about being subjected to the kind of individual work station regime for which Pillsbury was pleading, under which “there is really no smoke free area at all.” She added that if management did not like the efficiency consequences of separating smokers and nonsmokers, “then the answer of course is to prohibit smoking altogether. I am paid to work. I resent employees who are paid to smoke.”

(Nothing in MCIAA, as Brandt later observed of Jones’s complaint about alleged costs of compliance, “requires any employer to pay employees who are off smoking and not working.”)

The September 9/12 draft included several crucial provisions that had to carry the burden of both implementing the legislature’s unexpressed intent as to how capacious or narrow the outright prohibition of smoking was to be and, correlative, how numerous and extensive or few and confined the exceptional designated smoking areas and interpreting the expressed directive that “existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.”

The key operative term in this context was the “Acceptable Smoke-free Area,” which, oddly, was not keyed to MCIAA’s only use of the term “smoke-free area”—namely, owners’ § 6 duty to “make reasonable efforts to prevent smoking in the public place by (a) posting appropriate signs; (b) arranging seating to provide a smoke-free area; (c) asking

fluctuations in market prices. Austin Wehrwein, “Nonsmokers Rights Law Sparks Minnesota Dispute,” WP, Oct. 6, 1975, Bates No. TIMN0462140. At the Board of Health public hearing the Northwestern National Life Insurance Co.—40 percent of whose 650 employees at its headquarters in Minneapolis smoked—aligned itself with Pillsbury’s complaints and proposed solutions. Preposterously, the company also asked the Health Department to consider “treating us like an office supporting a factory....” Board of Health Hearing Transcript at 155-60 (quote at 160) (Dec. 2, 1975).

Email from Kent Peterson to Marc Linder (Oct. 14, 2009). With regard to the practical significance of such claims, Peterson added: “Those broad estimates of dollars lost in productivity don’t have much impact when writing the rule. I have always thought that good managers can adjust work circumstances to maintain productivity. However, the rule had to be justified as reasonableness and their input meant something there.” Id.

Nancy Cincoski to Secretary and Executive Officer of the Board (Dec. 17, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

Board of Health Hearing Transcript at 161 (Dec. 2, 1975).

1975 Minn. Laws ch. 211, § 5, at 633, 634.

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smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or (d) any other means which may be appropriate.” Indeed, this version of the draft rules dealt with this duty only indirectly (without even mentioning “smoke-free place”) by noting that: “Permissible alternatives to the mechanisms described in Section 6...may include any of the following: 1) If on entry into the location all persons are asked their preference for a smoking permitted or a no smoking area, then the proprietor...shall be deemed in compliance if at least one sign advising the public of this mechanism is conspicuously posted at all entrances normally used by the public. 2) (Other mechanisms are being prepared.)" This alternative presumably qualified as one of the statutory other appropriate means. Instead of regulatorily implementing the “smoke-free area” provision in its narrow statutory context, the Health Department applied it to various “Categories of Affected Places” covered by Rule 4. First, however, drafter Peterson defined an “Acceptable Smoke-free Area” as an area of the public place or public meeting where smoking is prohibited and at least one of the following conditions exist [sic]:

1) There is a continuous, physical barrier of at least five feet in height to separate the smoking permitted and no smoking areas.

2) There is an isle [sic] of space of at least four feet in width to separate the smoking permitted and no smoking areas.

3) The ventilation system in the room containing both a smoking permitted and no smoking area has total air circulation (recirculated plus air) not less than six air changes per hour including supply of tempered air not less than 7½ cubic feet per minute per person.

4) By using a combination of the ventilation system, isle [sic] space or physical barriers, the concentration of carbon monoxide in the no smoking area shall at no time exceed 10 milligrams per cubic meter (9 parts per million).

5) (Other acceptable standards being prepared)"  

557 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 9 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). Since the MDH abandoned this structure in later drafts, other mechanisms were not prepared. In the next iteration this provision dropped the express reference to § 6 of MCIAA and deemed the preference asking a “reasonable effort...to prevent smoking...” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 7 (Draft 10/9/1975), in Health Department, MSA, MHS, 112.H.18.3(B); Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.e) at 7 (n.d. [Oct. 1, 1975]) (copy furnished by MDH).

558 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.i) at 4 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

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The application to individual affected places was exemplified by restaurants, in which smoking was limited to designated smoking areas, the size and location of which smoking-permitted areas were required to be “limited to provide an acceptable smoke-free area in the remainder of the establishment.” The same requirement to provide/assure an “acceptable smoke-free area” was also applied to other locations, including retail establishments, office areas, public conveyances, passenger terminals, health care facilities (including patient dining rooms or activity rooms and lounges), public meeting rooms, and educational facilities.

Since the Health Department at this stage did not explain the meaning of the interpretive gloss “acceptable” or the reason for its insertion, let alone the scientific bases for the barrier heights or aisle space as guarantors of smoke-freedom, their analysis is postponed until the account here reaches the stage in the process when such justifications were forthcoming. Noteworthy is the great emphasis that this draft placed on implementing the mandate in § 5 of MCIAA that: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas.” An entire sub-section of Rule 3 was devoted to “Minimizing the Toxic Effects,” which was eliminated from the October iteration, which, in turn, inserted in its stead a subsection generally operationalizing “Acceptable Smoke-free Area” in lieu of splintering its application to the aforementioned selected locations. The September draft required owners, where they designated smoking-permitted areas, to carry out the minimization “according to the following considerations: 1) In selection of the smoking permitted areas, existing physical barriers including walls, pillars and partitions shall be used. 2) Designation of the smoking permitted areas shall contemplate ventilation capacity and general air movement in the ‘public place or meeting room.’ The general air movement shall not be from the smoking permitted area to the non smoking area. 3) Arrangement of seating shall provide a distance between the smoking permitted area and no smoking area.” These Health

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559 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 9 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The same mandate applied to the designated no-smoking side of a single-room restaurant. Id.

560 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.b), c), d) e), f), i), and k) at 10-17 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The mandate did not, however, apply to auditoriums, arenas, gymnasiums, theaters, hotels, motels, or places of work (unless the latter were located in any of the aforementioned public places).

561 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.d) at
Department proposed rules thus reproduced the fecklessness of the MCIAA while adding rules too vague or weak to be usefully enforceable (such as “contemplate”). Like the statute, the rules did nothing to protect nonsmokers from secondhand smoke in public places that lacked pre-existing barriers or ventilation systems. Why the seating arrangement provision did not require even the inadequate four-foot space called for by the “acceptable smoke-free area” the Department did not explain.

Having previously concluded that it lacked authority to prescribe any quantitative apportionment of the space, the Health Department was able to shed only weak light on the opaque determination in § 5 of the MCIAA—namely, that the owner of a single-room public place was compliant if he reserved and posted “one side of the room...as a no-smoking area” was to define “one side” as “a contiguous portion of the room, including any seating arrangements” and to require that the “size of the no smoking area shall be at least proportionate to the preference of patrons of that establishment for such an area.”

The proposed resolution of the contentious issue of regulating smoking in the open work area of an office (defined as a location in which “professional activities or clerical and administrative activities are the principal usage”) that was not used by the general public but was occupied by smoking and nonsmoking workers conferred discretion on owners to achieve compliance with their responsibility under § 6 of MCIAA to “make reasonable efforts to prevent smoking” by using any of three mechanisms: (1) banning smoking in the whole area; (2) banning smoking in the whole area and providing a smoking lounge in a separate room; and/or (3) permitting smoking in one or more sections “used...
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exclusively by smokers and people who permit smoking” but prohibiting it in all sections in which “people do not expressly permit smoking.”\footnote{Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 11 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). This special sub-rule was presumably meant to instantiate MCIAA § 6(d), which provided that owners could also use “any other means which may be appropriate” in complying with their duty to “make reasonable efforts to prevent smoking....”} Inherent in the third mechanism was the fatal defect of undermining protection for nonsmokers by subjecting them to the full brunt of precisely the kind of workplace pressure to go along to get along that would perpetuate their self-injurious acquiescence that MCIAA was meant to abolish in favor of compulsory norms.

In any public conveyances with a capacity of 10 or more passengers (including the driver) the Health Department authorized owners to designate smoking-permitted areas, thus implicitly prohibiting smoking altogether in public transport with eight or fewer passengers (plus the driver). How owners would go about “assur[ing] an acceptable smoke-free for non-smokers” or minimizing toxic effects in such close quarters as in a bus the rules failed to spell out. Such a seemingly hopeless task of compliance might suggest that the Department was seeking to effectuate a de facto ban on smoking there, but the later course of the drafting process would refute such a hypothesis.

The more than two pages that the Health Department devoted to health care facilities constituted the most extensive attention bestowed on any category of affected places. However, despite patients’ greater than average vulnerability to the health impacts of smoke exposure, the rules were hardly the most stringent. For patient bed areas the rules offered two alternative procedures. First, in a scenario not unbridgeably remote from the “More doctors smoke Camels than any other cigarette” ads that had been terminated more than two decades earlier,\footnote{Stuart Elliott, “When Doctors, and Even Santa, Endorsed Tobacco,”\textit{NYT}, Oct. 6, 2008, on http://www.nytimes.com/2008/10/07/business/media/07adco.html.} the administration could ask prospective patients whether they preferred a smoking-permitted or a no-smoking area, assigning rooms “according to this preference when space is available.” If no space was available in either the no-smoking or smoking areas, then “smoking shall be prohibited in all patient bed areas except areas which are used exclusively by smoker patients and patients who have expressed permission for smoking”—thus, once again, subjecting nonsmokers to social pressure to acquiesce in smoking at a time in their lives when they might have the least social-psychological wherewithal to mount resistance. On top of this lax governance, the Health Department also prioritized hospital administrators’ wishes over the availability of warnings to nonsmokers by
allowing health care facilities to satisfy the signage requirements merely by posting a single sign at the entrance to each wing or floor stating that smoking was prohibited except in designated areas. Alternatively, if management did not assign bed areas according to patient preference, smoking had to be prohibited in all patient bed areas except rooms “occupied exclusively by smoker patients or patients who have expressed permission for smoking”—setting up the same stress test for nonsmokers.\(^{567}\) Imposing the burden of enforcement on sick nonsmokers stood in sharp contrast to the endorsement in 1974 by the board of the Minnesota Hospital Association of a unanimous resolution of the Minnesota State Medical Association urging hospitals to allow patients to smoke in multi-bed rooms only with the approval of their own doctors and that of the non-smoking patients’ doctors.\(^{568}\)

Finally, in order to effectuate the provision in § 7 of MCIAA for waiving the act’s requirements if the Board of Health determined that there were “compelling reasons” and the waiver would not significantly affect nonsmokers’ health and comfort, the September draft rules required applicants to prove that the law’s implementation would both “[r]esult in the public place[’s] not being able to provide the service for which the place is intended, and...[e]ndanger the ability of the public place to meet its costs for operation”; the draft also required that, despite the waiver, the CO concentration “in all sections of the public place at no time will exceed” the regulatorily mandated 10 milligrams per cubic meter for an “acceptable smoke-free area.” In connection with making these eligibility determinations the Board of Health permitted itself “access to all records of the public place pertinent to such application”\(^{569}\)—an intrusion into the documentation of the factors underlying regulated businesses’ profitability that the Board/Department modified by the time it made its proposed rules available.

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\(^{567}\) Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)1) at 13-14 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

\(^{568}\) “Hospital Unit Seeks Tobacco-Sale Ban,” \textit{MT}, June 15, 1974 (10B:5-7). Though only a non-binding recommendation to hospitals, the vote was considered a “major victory” for ANSR, which had been trying to use hospitals to set an example. The recommendation also included a ban on hospital sales of tobacco.

\(^{569}\) Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 5 at 18-19 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). By October the Health Department dropped the requirement that the applicant prove that implementation would result in “not being to provide the service...” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 5.b) at 11 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH).
at the public hearing in December.⁵⁷⁰

While drafting the proposed regulations, staff of the Health Department—whose head, Dr. Warren Lawson, was a heavy smoker⁵⁷¹—met, after the State Board of Health had given notice of its intent to seek information from sources outside the agency; these “interested parties” included “legislators who authored the Act, voluntary health organizations which supported the Act and associations of establishments affected by the Act.”⁵⁷² Asked whether the Department had received any guidance from the legislature as to how to frame the regulations, Peterson, their chief drafter, noted that the only legislator with whom he had met was Kahn herself, but that her voice had been only one of many and her views had not been accorded any greater weight than anyone else’s. The principal constraint that Peterson faced in drafting the rules was the issue of how far they could extend without imposing an “undue burden” on businesses (including their profitability) so that they could be reasonably implemented by virtually all businesses. By the same token, the regulations had to accommodate the “feeling that there was a right to smoke.”⁵⁷³ Since MCIAA neither explicitly nor implicitly embodied either a right to smoke or any indication that the legislature intended the regulatory agency to subordinate its public policy of protecting the public health to business profits—except for the provision for a waiver, which owners had to request and which therefore operated apart from the general framework, but nevertheless could not be granted if it significantly affected nonsmokers’ health and comfort⁵⁷⁴—the drafter’s acquiescence in such

⁵⁷⁰“The Board has the right to request any other information reasonably necessary to determine the merits of the waiver application. Failure to submit such requested information may result in denial of the waiver application.” Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 445(a) at 15 (n.d. {Dec. 2, 1975}), in Health Department, MSA, MHS, 112.H.18.3(B). The provision was retained in the final rules.


⁵⁷²Consideration of Proposal to Authorize Public Hearing Relating to Regulation for the Minnesota Clean Indoor Air Act, in Warren Lawson to Members of the State Board of Health, Re: Agenda Material for October 9 Meeting (Oct. 1, 1975) (copy furnished by Minnesota Health Department).

⁵⁷³Telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).

⁵⁷⁴1975 Minn. Laws ch. 211, § 7, subd. 1, at 633, 635.
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an overarching constraint on the shielding of non-smokers from secondhand smoke exposure suggested that the regulations would not even reach the outer limits of a statute that was already deeply flawed by its permissive authorization of designated smoking areas. Peterson’s pragmatic defense of the regulation emphasized that: “At the time, many felt that the separate areas did protect us non-smokers better than without the law. ... I believe that an unacceptably strict law and rules would have been ignored or, worse yet, repealed before acceptance of non-smoking areas were [sic] shown. Investigation and enforcement of more stringent standards was not an option.”

The possibility of such a backlash was visibly on display in a letter to Peterson in mid-September from Representative Bruce Nelsen, a Republican who had voted against H.F. 79 on final passage in the House but then voted for it after the Senate had amended it. While purporting to view MCIAA as an “admirable attempt to resolve a problem of growing concern” that “eventually will help mold and alter public attitudes about the rights of non-smokers,” Nelsen reported that “organized groups supporting this legislation are now trying to do by rule and regulation what they did not obtain through legislation.” He acknowledged that “there would be many different ideas of the exact legislative intent of this bill,” but he was nevertheless “absolutely amazed” when he read about some proposals for which he insisted that, as he saw it, legislative intent did not call such as “[i]nstallation of ventilating fans; required four-foot isles [sic]; requiring large and expensive signs at all entries; hiring a person to make announcements over the PA system or maintaining a four-foot buffer zone between smoking and non-smoking areas.” What his animus boiled down to was that many such proposals were “really asking the private sector to pay for changing...public attitudes. Only when the state of Minnesota decides it will rent the areas involved in a four-foot wide buffer zone will the financial responsibility be replaced.”

In turn, ANSR met informally with the Board and covered businesses in order to “get input into the regulations from those concerned so that the regulations will effectively protect the non-smoker and also take into consideration the reasonable concerns of proprietors.” Business owners’ schmoozing with agency officials pursued a different end. For example, John Kahler, who in 1975-76 was both president of the Minnesota Hotel & Lodging Association and corporate general manager and executive vice president of Kahler Corporation, whose Kahler

575 Email from Kent Peterson to Marc Linder (Apr. 2, 2009).
576 Bruce Nelsen to Kent Peterson at 1-2 (Sept. 15, 1975), in Health Department, MSA, MHS, 112.H.18.3.(B).
Grand Hotel in Rochester serviced the Mayo Clinic,\footnote{http://www.hospitalitymn.org/displaycommon.cfm?an=1&subarticlenbr=168 (visited Apr. 1, 2009)} pressed on Robert Willmarth, the aforementioned cigar-smoking member of the state Board of Health, his opposition to any ventilation system air exchange requirements.\footnote{Telephone interview with Robert Willmarth, Rochester (Apr. 1, 2009).}

By October Bohr was apparently trying to make amends for his lack of diligence in legislative lobbying by spearheading the Minnesota Restaurant Association’s “rear-guard action”\footnote{“Minnesota: No Smoking,” \textit{Newsweek}, Dec. 8, 1975, at 35, Bates No. TIMN0461865.} to persuade the world that “any place serving beer, wine or liquor is a ‘bar.’” For the many restaurant owners “banking on the act’s ‘bar loophole’” to escape coverage this implausible contention was apparently the ultra-thin reed on which they were resting their case against ANSR in “battling to influence” the Health Department, which was under time pressure to meet its November deadline to issue regulations. Even some restaurants that purported to comply were in fact engaged in guerrilla warfare: for example, “a couple at a fancy restaurant who complained that a tiny third-floor, nonsmoking area reminded them of a toilet” found themselves “escorted out by the bouncer.” Nor were restaurants outliers: the Minnesota Association of Commerce and Industry also began resisting on the grounds that smoking restrictions in offices and factories “would be costly and disruptive—if not impossible to implement,” because, for example, fixed machinery and equipment could be incompatible with creating “smoke segregation areas.” Little wonder that ANSR accused some big firms and banks of “dragging their feet, fearful that smoking customers will complain.”\footnote{Austin Wehrwein, “Nonsmokers’ Rights Law Sparks Minnesota Dispute,” \textit{WP}, Oct. 7, 1975 (A7), Bates No. TIMN0461982.}

In distributing the September 12 draft rules, Peterson included a letter asking recipients for comments. Based on the responses preserved in the Department’s archived files, he did not receive many before the Board of Health met on October 9 to consider whether to authorize Lawson to hold a public hearing, but those that were submitted came largely from the same aforementioned Twin Cities building owners and managers, some of whom continued adamantly to oppose application of the law to their commercial space. Indeed, BOMA’s resistance had stiffened to the point that it lambasted coverage even of “public areas” (i.e., areas accessible to members of the general public who were not employed in the offices housed in buildings owned or managed by BOMA members) to which it had seemed reconciled just three weeks earlier. But on October 2, Arthur Olofson,
the association’s executive secretary, informed Peterson that the fact that by personal observation he knew that there was “certainly a lack of recognition for the ‘no smoking’ restriction in elevators”—which had already been off limits before the MCIAA—suggested that enforcement was “poor if not impossible. We recognize that public areas which include corridors, washrooms and skyways will have similar problems of enforcement. It would appear to be pure folly to attempt to legislate in these areas.” In other words, taken together with BOMA’s earlier claim that enforcement in tenant space was all too possible and destructive of productivity, this new negativity would have led to a total exemption for office buildings from a law that Olofson conceded had “merits,” which, however, he did not bother to spell out. Instead, he insisted that, given the differences in size and complexity of space usage as between small and large tenants, there was “no equitable way to treat individuals on a similar basis and therefore to define areas for smoking should be a decision of management.” Consequently, BOMA shifted to the position that even as to the private entrepreneur, office tenant, or office owner the proposed rules “will be difficult and burdensome to implement technically and will be difficult if not impossible to enforce from a practical viewpoint.”

Even more hostile was the Northern States Power Company, whose property and land manager had received inquiries from all manner of employees not a single one of whom had mentioned a word about an “undesirable condition caused by smoking.” Opposed to coverage of “so-called ‘public’ office buildings” whose use by the general public was “incidental,” he complained that MCIAA had “created an opportunity for a small vocal minority to stir up a lot of animosity within the building that has little or nothing to do with health hazards from inhaling smoke.”

Without explaining the change it sought, IDS Properties contended that among its tenants were many occupying as little as 200-300 square feet and no private offices; since each smoker would have to be surrounded by 200 square feet of space and the buildings’ bathrooms and corridors were public and therefore smoking-prohibited, if any employee was opposed to smoking, no employee in such small offices could lawfully smoke in the building and a great deal of time and effort would be lost as a result of the smokers’ leaving the building to smoke.

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582 Arthur Olofson (Building Owners and Managers Association of Minneapolis) to Kent Peterson (Oct. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
583 Donald Robbins (Northern States Power Co.) (Sept. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (no addressee).
584 Larry Strohkirch (IDS Properties, Inc.) to Kent Peterson (Sept. 30, 1975), in Health
The indefatigable Jones from Pillsbury weighed in again, taking a much different stance than the unrelenting opposition displayed by BOMA (which he stated he was sure would have “thoughts of their own”). Instead, in order to “ease compliance capability on the part of an office building occupant” he cooperatively proposed a number of specific modifications, at least one of which the Health Department immediately adopted before it even submitted the next iteration to the Board of Health. This proposal, which hardly lived up to his claim of merely “clarify[ing] the language,” reduced the minimum height of the physical barriers sub-branch of the “acceptable smoke-free area” from five feet to 56 inches; it also would have deleted the requirement that the physical barrier be “continuous.” Pillsbury sought to justify these two changes on the grounds that in a so-called open-plan or landscaped office—which purportedly accounted for 60 percent of all offices “now on the drawing boards”—“physical barriers are often not continuous but are sufficient to provide a degree of audio and visual privacy and interrupt horizontal air flow. Standard heights of free standing ‘landscaping’ screens of at least one major manufacturer are 56 inches and 72 inches—not five feet—whereas at least two major manufacturers of open-plan panelling use standard heights of 62 inches and 80 inches.” In addition to including the claim about “interrupt[ing] horizontal air flow,” later in his formal “Justification” for the rules, Peterson did in fact adopt the 56-inch standard, which appeared in the draft presented to the Board of Health on October 1/9, but did not jettison “continuous.” It is noteworthy that although the sole basis for the height change was the purported commercial availability of barriers, and although three of the four types exceeded five feet, Jones opted for (and the

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585Raymond Jones (Pillsbury) to Kent Peterson at 1-2 (Sept. 26, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (internal quote from magazine Architectural Management).

586See below this ch.

587See below this ch. Pillsbury also proposed that the four-foot-wide aisle space be modified to delete “wide” and “aisle” because aisles in office landscaping layouts were “ill-defined or non-existent.” Peterson deleted the former but not the latter. Finally, Pillsbury prevailed in its proposal to delete the requirement that where smoking was permitted in one or more sections of the open work area of an office, “[s]moking permitted areas shall be limited to assure that the remainder of the room is an acceptable smoke-free area....” Raymond Jones (Pillsbury) to Kent Peterson at 2-3 (Sept. 26, 1975), in Health Department, MSA, MHS, 112.H.18.3(B); Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.c)3) at 11 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B); Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a) at 8 (Oct. 1, 1975) (copy furnished by MDH).
Health Department acquiesced in) the only one that lowered the standard. As for dropping continuousness, whatever make-believe “degree...of privacy” non-continuous barriers (or, for that matter, even continuous 56-inch barriers) provided against noise and the distractions of seeing and being seen and whatever minimal efficacy they displayed in interrupting horizontal air flow, they would be wholly impotent against drifting smoke.

Finally, Peterson also received extensive comments on the September 9/12 draft rules from Radisson Hotels lawyer-lobbyists Brooks and Kuduk, who, in addition to misleadingly asserting that their client had “not opposed the concept of separating smoking and non-smoking areas”—after all, they had testified before the legislature that the whole bill was unnecessary—submitted a lengthy laundry list of objections, only one of which was adopted by the Health Department in its October 1/9 draft and all of which combined would have severely compromised not only the implementing rules, but the statute itself. Their complaints began with the claim that the definition of “place of work” (“any location at which two or more individuals perform any type of...service for consideration of payment under any type of employment relationship, including but not limited to employment by a[n]...individual”)

588 was so broad that it embraced a private residence when the owner hired two or more people to provide a service in his own house—a result that, without explanation, they claimed was not statutory intent. The definition of “bar” was “unacceptable” because Radisson saw no reason to use a quantitative capacity to serve (50) meals as an exclusionary classificatory criterion. The only criterion that did not “necessarily include false or arbitrary considerations” was “whether an establishment can sell alcoholic beverages....” These commercially self-serving assertions failed to explain why the legislature had bothered to exempt bars but not restaurants, why Representative Kahn had acquiesced in the restaurant industry’s pressure to exempt restaurants from H.F. 79, why great controversy had attended the Senate’s coverage of restaurants late in the process, or why Chum Bohr and the Restaurant Association had displayed intense animosity toward that amendment if, as Radisson claimed, any restaurant could nevertheless exempt itself by the simple expedient of securing a license to sell alcohol, which presumably Radisson and the vast majority of restaurants had. The lawyers’ only objection that was even plausibly anchored in the text of the law was to that part of the definition of “acceptable smoke-free area” framed in terms of five-foot-high physical barriers “and” ventilation systems with numerically specified air changes. Because MCIAA “specifically indicated that existing” barriers and ventilation systems

588 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 2.a) at 1 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
“were to be used to facilitate the separation of smoke-free areas,” Brooks and Kuduk argued that the sub-rule “clearly goes beyond the statutory intent.”

Their argument would have been robust if (1) they had not falsely charged that the Health Department required compliance with both the barriers and ventilation methods and (2) the proposed sub-rule had not given covered public places the option of using four-foot wide spaces, about which the act was silent and which, in fact, according to the Health Department’s original and long-time head of MCIAA enforcement, was the most commonly used means of compliance with the “acceptable smoke-free area” requirement.

The only one of Radisson’s numerous suggestions that was embodied in the next iteration of the rules was one small part of its proposed elimination of the prohibition of smoking-permitted areas in such common traffic areas as entry lobbies, registration areas, or hallways of hotels/motels on the grounds that the ban exceeded the bounds of MCIAA, which merely required that no-smoking areas be provided in those areas. The only concession that the Health Department made in this regard was to permit the designation of “a portion of the seating area of a lobby or lounge” as smoking permitted. It nevertheless retained its general ban on smoking-permitted areas in “common traffic areas...or other areas which would be required to be used by non-smokers.”

Brooks and Kuduk failed to mention that the provision to which they objected was not specific to hotels, but rather a “general provision[,]” which prohibited the location of smoking-permitted areas “in a complete area which non-smokers

589 William Brooks, Jr. and David Kuduk to Kent Peterson (Oct. 3, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The letter stated that the comments were based on a draft of the rules labeled “second draft”; the draft of Sept. 9 bore no such designation, but textually and in terms of section numbering it corresponded to Radisson’s references. The Health Department did insert a provision in the rules expressly excluding private residences, but not until the final version following its public hearing. See below this ch.

590 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). Schneider retired in 1994.

591 William Brooks, Jr. and David Kuduk to Kent Peterson (Oct. 3, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

592 Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)2) at 10-11 (Oct. 1/9, 1975) (copy furnished by MDH). This sub-rule of the later draft was arguably even broader than that criticized by Radisson inasmuch as the latter had limited such common traffic areas to those “used by non-smokers to accomplish the activities for which a hotel, motel or resort is intended.” Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.h) at 16 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
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would be required to use to accomplish the activities for which the public place is intended” and was exemplified by the prohibition of smoking-permitted areas “in a complete area of required public use such as an entry lobby, ticket areas, hallways, elevators or similar places which must be used by non-smokers.”

As with the applicability of the mandate to minimize toxic effects, the September 9/12 draft rules inserted this general provision in several categories of affected places, but with precise locational specifications. Perhaps the most prominent and consequential application was to areas in retail establishments that “must be used by the non-smoker to utilize the retail store, such as the complete entry or exit lobby or all counters at which payment is made for the goods and services.”

The other two locations were passenger terminals, in which “[s]moking shall not be permitted in a ticket area or public movement areas such as hallways, stairways and waiting lines to board the public conveyance” and health-care facilities, in which the Department prohibited smoking in “common traffic areas such as the entry area, corridors, elevators or other areas which must be used by non-smokers to get from one location to another in the health care facility.”

Ironically, whereas Radisson’s lobbying resulted in only a minor paring back in the October draft rules of the total ban on smoking in common traffic areas in hotels, the proposed ban was totally eliminated with regard to retail establishments and passenger terminals (as a consequence of those locations’

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593 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 3.a) at 5 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B). The Oct. 1/9 draft was almost identical except for the deletion of the imprecise “complete,” which was then reintroduced in the December 2 proposed rules. Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3.a)2) at 4 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH); Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(3) at 7 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

594 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.b) at 10 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

595 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.e) at 13 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

596 Regulations for Implementation of Minnesota Clean Indoor Air Act, Rule 4.f)2) at 14 (Draft 9/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).

597 Asked 34 years later about this about-face, Peterson observed: “I don’t remember any smoking/non-smoking check-out lanes. It seems incredible now to think of people walking around a retail store smoking and even considering a smoking checkout.” Email from Kent Peterson to Marc Linder (Nov. 22, 2009).
elimination from the rule governing “categories of affected places”) and, arguably, cut back sharply in health-care facilities,598 concerning none of which has any written record of lobbying been preserved. (The smoking ban in common traffic areas in health care facilities was absent from the December 2 version of the proposed rules as well as in the final rules.)599

The Health Department later sought to justify this ban on the grounds that “it is felt that these designated smoking permitted areas shall be arranged to provide smoke free access to the activities which are conducted in the public place.” And even if the Department’s “feel[ing]” that “it would be contrary to the basic intent of this legislation”600 to permit hybrid use of such areas was reasonable, it is difficult to discern any difference that would have justified such radically different treatment as between common traffic areas and, for example, a restaurant, so as to have justified complete smoke-freedom in the former and inundation with smoke from numerous smokers only four feet away in the latter. Indeed, the Board of Health later inadvertently conceded as much in upholding the Department’s position: “The Board...finds that this rule is necessary to conform with the intent of” §§ 6(b) and 2 of MCIAA “in that non-smokers should have access to the activities conducted within the public places without being subjected to the harmful effects of tobacco smoke.”601

That even the Health Department officials most intensively participating in drafting the rules insufficiently appreciated or understood the exposures from which they were purportedly protecting nonsmokers—even according to the laws of physics and the standards of human sensory perception of the time—was embarrassingly on display in December in the response to a complaint by Estelle Swanson, an ANSR activist602 and representative of an emphysema club,603 about

598 The October draft deleted from the September draft “to get from one location to another in the health care facility....” Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.e)2 at 10 (Oct. 1/9, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (and copy furnished by MDH).
599 See below this ch.
conditions in the common traffic areas in the very Health Department building in which the Board of Health public hearing on its proposed rules was taking place:

MS. SWANSON: [B]eing that the law specifically states that it was going to protect me from smoke-filled places, why isn’t there something in the law to eliminate smoking in entranceways. Now right here in this building, had I gone out and had to come back in during the recess, as an emphysema patient, I probably would have gone down. It was blue with smoke right in the entryway. There is no other way for me to get into this building. Why isn’t there something in the law to protect us from entrances.

MR. PETERSON: It is the purpose of one of the general provisions to speak to reasonable protection of entrances and exits of buildings. We have posted our lobby as a no smoking area, and have not posted the distance between the two doors. I understand your point, and I think we should consider as to whether there would be significant smoke buildup between the two doors so that we have to post that also. [O]ur initial thought was that with that door being opened frequently, that [sic] the air does change so frequently that there couldn’t be much smoke...

This farce reached its high point when MACI representative Oliver Perry intervened to inform the hearing examiner that “the policeman who is guarding the door out there is smoking in the non-smoking area in your building.”

Based in part on the comments that the Health Department had received, it effected a number of significant changes in the October 1 draft proposed rules that the staff recommended to the Board of Health for the latter’s consideration at its October 9 meeting. The definition of “acceptable smoke-free area” was marginally tightened by requiring that it constitute a “contiguous portion of the public place...including seating arrangements” and weakened by catering to
Pillsbury’s request and lowering the minimum required barrier height from five feet to 56 inches. In addition, the Department watered down the purportedly ultimate touchstone of acceptable smoke-freedom—carbon monoxide concentration—by setting it not at 10 milligrams per cubic meter (9 parts per million) in the area in question, as it had been in the previous draft, but at that level in excess of the “background concentration of carbon monoxide in air immediately outside the facility...”

Whereas the September draft rules lacked a unitary sub-rule for applying the definition of the key concept of the “acceptable smoke-free area,” October’s iteration restructured Rule 3 (“General Provisions”) by replacing the sub-rule on “Minimizing the Toxic Effects” with one on “Acceptable Smoke-Free Area,” which was now operationalized uniformly: “The size and location of all smoking permitted areas shall be determined such that toxic effects of smoking are limited in no smoking areas. The proprietor or other person in charge is responsible for making arrangements for an acceptable smoke-free area...” The Health Department’s prescription in this foundational provision merely to “limit” smoking’s toxic effects in nosmoking areas in the face of an express statutory mandate of “minimiz[ation]” boded ill for prospects that the regulations would interpret and implement the MCIAA to be more rather than less protective of nonsmokers. (To be sure, by the time of the December 2 version of the proposed rules, the Department had thought better of this misstep, inserting instead “minimized,” which then remained in the final rules.)

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607 Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2(j) at 3-4 (Draft 10/9/1975), in Health Department, MSA, MHS, 112.H.18.3(B); Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2(j) at 3-4 (n.d. [Oct. 1, 1975]) (copy furnished by MDH). The Health Department later justified the use of outside air background CO levels as the baseline on the grounds that “there may be greater levels of carbon monoxide produced on the outside by motor vehicles. Outside CO pollution will not be a consideration in determining the inside concentration which is ‘acceptable smoke-free.’” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 9-10, MDH Ex. 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112H.18.3(B). By the time of the public hearing the proposed rules defined the outside air as within 12 feet of the building.


609 Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for...
The October draft’s general provisions went on to mandate that if smoking was to be permitted—in conformity with the statute, which conferred discretion on, but did not require, owners to permit smoking at all\textsuperscript{610}—the smoking areas that owners were responsible for designating “shall not be located such that non-smokers would be required to use the areas in order to participate in the activities for which the public place is intended.” As examples of locations that would be off limits to smoking the draft mentioned those that had to be used by nonsmokers such as hallways, elevators, and entry, exit, and ticket areas. Moreover, the size of such designated smoking areas “shall not be more than proportionate to the preference of patrons of that establishment for a smoking permitted area, as can be demonstrated by the proprietor.”\textsuperscript{611} (The final regulations watered this provision down by specifying that it “shall not be construed to prevent designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.”)\textsuperscript{612}

In implementing the MCIAA’s imposition on owners of the responsibility for making “reasonable efforts to prevent smoking in the public place by...posting

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Implementation of Minnesota Clean Indoor Air Act, MHD 443(d) at 10 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B); Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act, Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(e) (Apr. 2, 1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{610}“Smoking areas may be designated by proprietors...” 1975 Minn. Laws ch. 211, § 5, at 633, 634. A decade later the Department pointed out that “when a proprietor...exercises the option to provide smoking permitted areas, this is done with the knowledge that there will be some costs involved. These are costs which they have opted to incur but which are not necessary in order to comply with the law.” Before the Minnesota Commissioner of Health: Statement of Need and Reasonableness at 3 (June 13, 1986), Bates No. TIMN0458156/8.

\textsuperscript{611}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3 a) 1)-3) at 4-5 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).

\textsuperscript{612}Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(b)(3) (Apr. 2, 1976), Bates No. TIMN0240635/39. While the MDH rules were being drafted Kahn opined to an alderman from St. Louis, whose proposed anti-smoking ordinance expressly prohibited designated smoking areas from encompassing more than 20 percent of the total seats or total area of the room, that his approach was “good because we did not do that in our bill, and the State Board of Health doesn’t seem to have enough nerve to do it in their rules and regulations. Phyllis Kahn to Bruce Sommer at 1 (Oct. 24, 1975), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). The provision was § 3(1) of the ordinance, which was attached to the correspondence.
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appropriate signs,” “arranging seating to provide a smoke-free area,” “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke,” “or...any other means which may be appropriate,” the October draft proposed rules specified one of these “other means” alternative to the first three by declaring that “[i]t shall be considered to be a reasonable effort by the proprietor...to prevent smoking in a public place if all persons are asked upon entry into the public place their preference for a smoking permitted or a no smoking area and all persons are then directed to the appropriate area. Furthermore, at least one sign advising the public of this mechanism shall be conspicuously posted at all entrances normally used by the public.” (The Health Department did not retain this sub-rule in the final rules: although the provision, beginning with “if” did reappear, it functioned only as a partial substitute for the duty to post signs.)

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613 1975 Minn. Laws ch. 211, § 6, at 633, 634.
614 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 3 e) at 7 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The Department characterized this method as “particularly satisfactory for restaurants which currently use a host or hostess to direct people to seating and no further cost in personnel or changes in the seating arrangements of the facility would be required.” Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17, MDH Ex. 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112H.18.3(B).
615 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(d)(8) (Apr. 2, 1976), Bates No. TIMN0240635/41. The Health Department deleted from the final rules the provision spelling out an alternative method for owners to carry out their responsibility to prevent smoking. Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of the Minnesota Clean Indoor Air Act at 12, attached to “Adoption of Rules Implementing the Minnesota Clean Indoor Air Act of 1975” (n.d. [after Dec. 2, 1975 and before Apr. 2, 1976]), in Health Department, MSA, MHS, 112.H.18.3(B). Oddly, this explanation by the Health Department staff to the Board of Health of the Department’s post-hearing proposed deletions and additions to the rules failed even to mention the dismantlement of this provision. The Board’s “Findings of Facts” offered an opaque and misleading explanation by claiming that “MHD 443(d)(8) relating to inquiries of all users as to their preferences for placement was initially proposed in another section. However, based upon testimony...at the Hearing..., the Board finds that its inclusion in MHD 443(d) relating to signs is appropriate inasmuch as this rule permits an alternative to posting several signs.” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 29 at 10 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).
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The October draft introduced a number of changes in Rule 4 creating special rules for individual “Categories of Affected Places.” First of all, half of these places (including retail establishments, passenger terminals, auditoriums-arenas-gymnasiums-theaters, and public meeting rooms) were eliminated. With regard to the specific places retained, the Department bestowed a great favor on restaurant owners at the expense of their nonsmoking customers by providing that “[d]uring hours of operation when a facility which may otherwise be considered a restaurant does not serve food but does serve alcoholic beverages, the facility shall be considered a ‘bar’”—meaning that it was lawful to permit smoking everywhere, including in areas that were otherwise strictly nonsmoking, but that now would be super-inundated with particulate matter on various surfaces and the stench that it would continue to offgas. In the sub-rule that now merged coverage of workplaces and offices “not customarily used by the general public”—owners of which were now freed from compliance with the general signage rules and were required merely to post one sign per floor stating that smoking was prohibited except in designated smoking areas—the Health Department further weakened protection for nonsmokers by applying to both the social pressure-ridden rule for offices that owners would be “considered to [be] making reasonable efforts to prevent smoking if smoking is permitted only in sections of the place of work or office which are used exclusively by smokers and people who permit smoking.” In some small workplaces/offices the indiscriminate designation of such smoking areas in the same room as no-smoking areas might have been constrained to some extent by a new sub-rule that required each no-smoking area to be at least 200 square feet. Exposure to smoke was also intensified for people in public conveyances with a capacity of fewer than 10: if everyone, including the driver, expressly consented, the conveyance in its

lobbyist Bohr stated his belief that “at the time we discussed” the provision (presumably at some non-public consultation with Peterson), “we were talking about the number of signs that would have to be used, and could we get away with signs by doing something else. I think this could be construed by people reading it that all of a sudden it becomes a qualification of what people must do. I think that the words ‘in lieu of signs’ is missing in this thing.” Without in any way mentioning the proposed rule’s entirely different function of offering owners an alternative method of discharging their responsibility to prevent smoking, Peterson agreed with Bohr, called the point “well taken,” and announced that the Department would consider the suggestion. Board of Health Hearing Transcript at 120-21 (Dec. 2, 1975).


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entirety could “considered a smoking area....”\textsuperscript{18} Finally, the rule regarding health care facilities was modified to prohibit visitors and staff from smoking in patient rooms “unless patients expressly permit”\textsuperscript{19}—a comically tragic form of a ban in light of patients’ obvious reluctance to jeopardize the company, care, and expertise of the very people whom they needed most in the world during those critical days by vetoing those persons’ ministering to their own addiction, which for decades until August 1, 1975, had been their unquestioned and uncontested vested privilege. The Department inserted the same mechanism into the sub-rule governing patient dining, activity, and day rooms and lounges, in which, under the September draft, smoking had been prohibited except in designated smoking areas; in contrast, the October draft extended smoking to theretofore nonsmoking areas if “expressly permitted by all patients and residents of the facility....”\textsuperscript{20}

Except for blue-collar workplaces (subject to DLI rules), MCIAA did not distinguish among various kinds of workplaces on the basis of whether the general public frequented them or not. On the contrary, the statute defined “public place” to include “any enclosed, indoor area used by the general public or serving as a place of work....”\textsuperscript{21} Thus MCIAA did not distinguish for coverage purposes between non-blue-collar workplaces that the general public used and those it did not use. Similarly, the definition of “office” in the Board of Health’s draft proposed rules meant “every building, structure or area which is used by the general public or serves as a place of work at which the principal activities consist of professional, clerical or administrative services.”\textsuperscript{22} The rules nevertheless impermissibly discriminated against nonsmoking white-collar workers whose workplaces and offices were “not customarily used by the general public”; the draft rule provision that the owner “shall be considered to [be] making reasonable efforts to prevent smoking in the public place if smoking is permitted only in

\textsuperscript{18}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. c)2) at 9 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). See also below this ch.

\textsuperscript{19}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. e)1)cc) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).

\textsuperscript{20}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4. e)3) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The sub-rule for patient dining and other rooms was absent from the proposed rules available at the public hearing and the final rules.

\textsuperscript{21}1975 Minn Laws ch. 211, § 3 subd. 2, at 633 (italics added).

\textsuperscript{22}Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2 c) at 2 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH).
sections of the place of work or office which are used exclusively by smokers and people who permit smoking,"623 by virtue of jettisoning objective criteria and introducing the subjective criterion of whether nonsmokers “permit[ted]” smoking, subjected nonsmokers to potential intimidation to acquiesce in their colleagues’ smoking.

The workplace/office rule went on to provide that where smoking-permitted and no-smoking areas existed in the same room, each no-smoking area was required to be at least 200 square feet and an “acceptable smoke-free area” (meaning that it was required, for example, to be separated from the nosmoking area(s) by 56-inch-high physical barriers or four-foot-wide spaces). Owners who availed themselves of this option were freed from the obligation to comply with the otherwise more specifically informative sign-posting requirements624 that, by pin-pointing where smoking was prohibited and permitted, promoted the compliance and enforcement processes. Instead, the only signage requirement to which those in charge of non-blue-collar workplaces and offices were subject was to “conspicuously post at least one sign on each floor which states, ‘Smoking is prohibited except in designated smoking areas.’”625

623 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 a) at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). This provision was dropped from the final rules. When asked many years later whether he agreed with the analysis in the text, then Assistant Attorney General Terry O’Brien replied: “I see the discrimination, but I don’t recall anyone raising the issue at the time of the rules process. Also, I don’t remember anyone suggesting a discriminatory intent, or for that matter, thinking about [it] in the context you raise. That, in retrospect, is the problem.” Email from Terry O’Brien to Marc Linder (Apr. 10, 2009).

624 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 a) at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The area-specific signage rule required that one of two posting methods be used. Under the first, “smoking permitted” and “no smoking” signs had to be placed at an easy-to-see height and location; in addition, “[t]he boundary between a no-smoking area and smoking permitted area shall be marked with signs so that persons may differentiate between the two areas.” Rule 3 c) 7) (aa) and (bb). In 1980 the Health Department created across-the-board equity by amending the definition of “acceptable smoke-free area” to require that all such areas be at least 200 square feet. This amendment was driven by inspectors’ observations that under the original rule owners “could designate an unreasonably small area as being smoke-free and still be in compliance. Non-smokers had little recourse in such instances.” The 200-square-foot rule was also designed to insure accommodation of up to 20 nonsmokers. [Minnesota Department of Health], Clean Indoor Air Rules: Statement of Need and Reasonableness at 1 (n.d. [1979]) (copy furnished by MDH).

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The press was more interested in a number of provisions in the draft rules dealing with bars and restaurants. A bar, which alone among public places was authorized by the statute to be “designated as a smoking area in its entirety,” was defined by the draft regulations as an “establishment where one can purchase and consume alcoholic beverages, but excluding any such establishment having table and seating facilities for serving of meals, in consideration of payment, to more than fifty people at one time.” Restaurants were defined as “every building, structure, or area used as, maintained as, or advertised as, or held out to the public to be an enclosure where meals are served for consideration of payment.” Regardless of the impact of lingering smoke, restaurants qualified as bars—and were thus entitled to be designated as smoking areas in their entirety—during those hours when they served no food, but did serve alcohol. Newspapers called special attention to the rule that required bars that served meals to more than 50 people at one time to set aside nonsmoking areas, prompting Glenna Johnson, the head of ANSR’s Awareness Committee, to oppose the 50-person threshold on the grounds that in small communities bars-restaurants serving under 50 might be the only place in town to eat. In contrast, ANSR’s director, Mary Jo Matczynski, who called the MCIAA a “revolutionary idea,” though “pleased” with the Health Department’s proposals—which did

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626 1974 Minn. Laws ch. 211, § 5, at 633, 634.
628 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 2 b) at 2 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The rule went on to exclude from the definition of “meals” “foods which are prepackaged when served to the public or foods which are served as snacks or appetizers.” This sub-definition was dropped from the final rule, which instead specified that the meals “are made available to be consumed on the premises.” Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 442(p) (Apr. 2, 1976), Bates No. TIMN0240635/39. See also MHD 442(c).
not set forth how much space in a restaurant, office, or other public place had to be reserved for nonsmokers—suggested a 50-50 division in restaurants as “fair.” Indeed, since 63 percent of adults, and presumably even more pre-adults, were nonsmokers, Matczynski may even have been short-changing her constituents, but Peterson, the drafter, appeared to dismiss her rigid numerical approach by insisting that “it would be impossible to have an absolute minimum that would apply to all restaurants because they are so different in nature.”

The October draft also created special rules for several other kinds of public places. The Health Department staff created a bifurcated rule for “public conveyances” (which included “every air, land or water vehicle” used to transport people “for compensation,” including airplanes, trains, buses, boats and taxis) based on passenger capacity: in any public conveyance with a capacity of 10 or more persons (including the driver) designated smoking-permitted sections were authorized; those with a capacity of fewer than 10 “may be considered to be a smoking area in its entirety if the driver and the passengers expressly consent.” Since the provisions for specific public places such as public conveyances prevailed over the general provisions if they “conflict with or are inconsistent with” the latter, presumably smoking sections could be lawfully designated in the larger-capacity conveyances even if they were inconsistent with the existence

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633 The only rule applied to educational facilities was that smoking-permitted areas were prohibited in areas “normally used” by under 18-year-olds. Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 d) at 9 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). It was retained in the final rules. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(f) (Apr. 2, 1976), Bates No. TIMN0240635/43.


637 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 at 8 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). Although this provision stated that “[a]bsent irreconcilable conflict” owners “shall be expected to comply” with both provisions, the word “irreconcilable” was not repeated in the sentence quoted in the text. The meaning of the curious directive “shall be expected” was opaque.
of “acceptable smoke-free areas.”

In its official “Justification,” the Health Department staff sought to explain its proposed special rule for small vehicles on the grounds that “[w]e feel that it is not likely that a smoke free area could be maintained” in a smaller than 60-square-foot public conveyance with a low ceiling” if any smoking were permitted. The staff nevertheless managed to transmogrify this commonsensical conclusion into a rule sanctioning smoking-permitted areas by means of the unsubstantiated and highly dubious claim that the “concept of permitting the driver and all passengers to express their consent for smoking permitted in the entire public conveyance is also analogous with [sic] the public policy created in” MCIAA “for private, enclosed offices occupied exclusively by smokers.”

This attempt at analytic reasoning broke down, inter alia, because whatever rationale the legislature may have imagined supported perpetuating white-collar employees’ smoking privileges “[e]ven though such offices may be visited by non-smokers” and even though employees might have to enter those offices as a condition of employment, the legislature nevertheless deemed them “private,” whereas it expressly regulated only what it called “public” conveyances. The only discernible carryover from the imagined rationale for occupants of private offices would have been protecting the (mobile) workplace-based privilege of the drivers of those public conveyances to continue smoking regardless of the health impact of the smoke exposure in such extraordinarily confined spaces on their countless thousands of passengers. Yet the result could just as well have been intimidation of nonsmoking drivers into exposing themselves to (tipping) passengers’ smoking. Apart from creating the potential for intimidating nonsmokers into acquiescing in making smaller-capacity conveyances into smoking areas in their entirety, the sub-rule left it unclear how it would be administered in the real
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world as passengers entered and left: would, for example, the appearance of a new passenger, who refused to consent to smoking, require everyone to stop smoking, which would then resume as soon as that passenger left, although the smoke might linger during the return to the nosmoking regime? Or, as in a much more piquant scenario imagined by a speaker at the public hearing on the Health Department rules: “[I]f you got into a limousine and three passengers wanted to smoke and one didn’t...they couldn’t kick the other guy out. And it seems to me there ought to be some provision for that. You can’t kick somebody out because he doesn’t want to smoke. Or...he wants to be in a smoke free area when the other want to smoke. I mean, they are common carriers, and they shouldn’t be allowed to throw out a person that doesn’t want to smoke because the other passengers want to smoke.”

Minnesota, in opposing the provision requiring owners to determine customers’ preferences in order to determine the relative size of a smoking-permitted area, suggested that if the rule remained, employers be given the opportunity to ascertain employees’ willingness to consent to an area that would be entirely smoking permitted. Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, at 140 (Dec. 2, 1975) (Bennett Davis), in Health Department, Attorney General Papers, MSA, MHS, 103.I.15.1(B). The question/comment elicited only a “Thank you” from the hearing examiner. Id. After Kent Peterson had answered in the affirmative a question by another member of the public as to whether the rule meant that it was possible that smoking areas could be allowed on Metropolitan Transit Commission buses, he added in response to a follow-up question as to whether a local ordinance would override the state law that a more stringent city ordinance would take precedence. Id. at 141-42 (Michael Hennen). These conundrums might therefore have been mooted by pre-existing local ordinances banning smoking in some kinds of public conveyances. At least Minneapolis appears not to have adopted any. Email from Mary Rumsey (reference librarian University of Minneapolis Law Library) to Marc Linder (Apr. 17, 2009) (based on the indexes and tables of contents of the non-circulating Minneapolis Ordinance Code, July 1, 1960, As Amended Through December 31, 1972). An ordinance may, at least substantively, have been superfluous because, according to the director of customer services at Metro Transit: “Although I don’t have first-hand knowledge, it is my understanding that smoking has never been permitted on the buses of Metro Transit and its forebears since the first days of public ownership under the Metropolitan Transit Commission, which was created by the state legislature in 1967 and operated its first publicly owned transit service in 1970. The major private predecessor was Twin City Lines. It’s [sic] Trainmen’s and Bus Drivers’ Guide dated July 1, 1950 says: ‘Passenger Smoking. Passengers shall be allowed to smoke on the rear platforms of the standard type car if city ordinances permit. On P.C.C. cars or on buses smoking is not allowed...’” Email from Robert Gibbons to Marc Linder (May 6, 2009).
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That the Health Department proposed a more rather than less smoking-permissive regime for health care facilities was (seemingly) as astonishing as the fact that, as one ANSR activist put it, “hospital administrators fought us tooth and nail,” matched only by bar owners. This stance was squarely placed in a

These proposed provisions were retained in the final rules. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(a) and (e)(1) and (2) (Apr. 2, 1976), Bates No. TIMN0240635/41/43. Asked decades later whether passengers were as little protected as the text seemed to suggest, Peterson replied: “Smoking in taxicabs or similar small spaces was a difficulty and we tried to work out a compromise with the consent provision. There may not have been either authority nor scientific evidence to order a public place to be totally non-smoking. Your observations about whether or not nonsmokers were protected uses the current knowledge of second-hand smoke. In 1975 we had very little of that evidence.” Email from Kent Peterson to Marc Linder (Apr. 10, 2009). In fact, however, as shown elsewhere in this chapter, contemporaries were acutely aware of the impact of secondhand smoke and the fecklessness of the law’s prophylaxis. For example, a week after Peterson had drafted the first set of proposed rules, he received comments pointing out, inter alia, that: “Many elderly people with heart and respiratory ailments must ride buses and would be subjected to an extremely unhealthy atmosphere if this section is allowed to remain.” Gerald Peterson to Kent Peterson (Sept. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3 (B). Another Minnesotan informed the Board of Health just three days before the public hearing on its proposed rules that when several rows of seats were set aside at the back of a Greyhound bus, “the air is filled with smoke all the way to the front of the bus and our lungs and clothing are saturated with the foul odor for smokers.” Lucile Ahrens to Dr. Warren Lawson (Nov. 29, 1975), Health Department, MSA, MHS, 112.H.18.3(B). Three years after MCIAA’s enactment several pro-smoking senators introduced an amendatory bill that, after authorizing owners to designate nonsmoking areas, prohibited the Metropolitan Transit Commission from designating any of its public conveyances a nonsmoking area in its entirety if the scheduled run from beginning to final stop on the route exceeded 30 minutes. S.F. 1995 (Feb. 9, 1978, by Olson, Vega, Stumpf, Ueland, Solon). The bill would also have imposed the same condition on all public places under the control of the state of Minnesota or any of its political subdivisions. Because an “overwhelming number of ANSR supporters” showed up to testify, the hearing on Mar. 2, 1978 was cancelled and the bill was pulled at the last minute and died. Gene Rosenblum et al., “ANSR Appeals for Help,” ANSR 6(2):n.p. [1] (May-June 1978) (quote); email from Jeanne Weigum to Marc Linder (Apr. 14, 2009).

Telephone interview with Gerald Ratliff, St. Paul (Oct. 31, 2009). Light on the scope of smoking in hospitals and administrators’ cavalier attitude toward smoking was shed by an anti-smoking activist-emphysema patient who had devoted many hours to securing passage of the MCIAA. In a letter to the state health commissioner she characterized practices at St. Joseph’s Hospital as “a good example of the downright
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defiance going on, even in hospitals where smoking should not be allowed at all.” Estelle Swanson to Warren Lawson (Nov. 24, 1975), in Health Department, 112.H.18.3(B), MSA, MHS. To her letter she attached a response to her complaints about the hospital’s lack of compliance from the administrator, who, after observing that the law was “a very controversial subject, with each side claiming rights and privileges,” defended the hospital’s compliance by reference to a large sign at the entrance stating that smoking was not allowed “except” in the automat, coffee, shop, cafeteria, conference rooms, locker rooms, lounge area, private offices, staff hall, and waiting rooms. With the exception of the coffee shop and cafeteria, in which there were “marked tables where smoking is not permitted,” apparently the hospital permitted smoking everywhere in the named areas. In addition, in the lobby “we feel there is ample space to allow for freedom for both smokers and non-smokers without interference to either group.” Sister Marie de Paul to Estelle Swanson (Aug. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

And while agreeing that hospital administrators had fought against MCIAA, Kent Peterson was “not sure they all had the same reasons but some fought it because they were fighting state standards of all types. The hospital industry has long prided itself on private accreditation as a substitute for state regulation. Basically that is ‘self-regulation’ and to avoid regulation by multiple jurisdictions and potentially the need to sort out multiple standards. It would be ok if there were the same or more stringent standards in accreditation and public accountability, but there was not. Several years later, medical leaders convinced hospitals executives to become leaders in the non-smoking movement. It became good PR. But they were anti-regulation like any other businessperson initially.”

Like the aforementioned special signage sub-rule for white-collar workplaces, that for patient rooms relieved owners of any duty to post signs in those rooms “if there is at least one sign at the entrance to each floor and wing which states:  

643 Email from Dr. A. Stuart Hanson to Marc Linder (Nov. 8, 2009).
644 Email from Kent Peterson to Marc Linder (Nov. 1, 2009).
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‘Smoking is prohibited except in designated smoking areas.’ As for the patient rooms themselves, owners or those in charge were free to choose between two options. First, they could “ask all prospective patients” whether they preferred a smoking-permitted or no-smoking area; when space was available, they were then required to “assign rooms according to this preference”; when no space was available in a no-smoking room and “a patient is admitted to a room originally designated for smoking, smoking shall be prohibited in that patient room unless expressly permitted by the non-smoker.” Or second, if the owners did not assign rooms in accordance with patients’ preferences, “smoking shall be prohibited in all patient rooms except patient rooms occupied exclusively by patients who smoke or patients who have expressed permission for smoking.” These procedures, which put nonsmokers whose health was compromised in the vulnerable position of going along to get along in order to avoid aggravating their anxieties by confronting their roommates, were retained in the final rules. Arguably even greater potential for intimidation was built into the provision, which the final rules also retained, that “[v]isitors and staff shall be prohibited from smoking patient rooms unless patients expressly permit.”

Ironically, the Health Department sought to justify these rules by reference


648 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(g)(2) (Apr. 2, 1976), Bates No. TIMN0240635/43.

649 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 e) 1) (cc) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH); Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(g)(3) (Apr. 2, 1976), Bates No. TIMN0240635/43. Amusingly, after the statute and rules went into effect, some hospitals permitted smoking only with a physician’s permission and only if a nurse was present. “Minnesota Clean Indoor Air Act (MCIAA) Regulations Explained,” ANSR 4(4):3 (Oct. 1976).
to “the unique characteristics” of patients, who were “more likely to be suffering from a health condition which is adversely affected by toxic byproducts of cigarette smoke.” Moreover, since patients’ rooms were so small that “any amount of smoking...could affect the health and comfort of non[-]smoking patients,” the Department perceived the need—and claimed that its rules provided—for “maximum efforts to totally separate smokers from non[-]smokers.” Significantly, the final rule dropped one of the few outright bans on smoking embodied in the draft rule—namely, in such “common traffic areas” as corridors, elevators, entry or exit areas, or other areas that non-smokers had to use. (In 1980, agreeing with complaints filed by non-smokers that smoking was inappropriate in hospitals and “most inappropriate” in corridors, emergency rooms, treatment rooms, admitting areas, and intensive care units, the Health Department promulgated a rule prohibiting those in charge from designating any such places smoking-permitted areas. Not until 1987 did the Minnesota

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651 Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4 e)2) at 10 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). Neither the chief drafter of the rules nor his legal adviser was able to recall why this provision had been deleted from the final rules. Email from Kent Peterson to Marc Linder (Apr. 10, 2009); email from Terry O’Brien to Marc Linder (Apr. 10, 2009).

652 Minnesota Department of Health, Clean Indoor Rules: Statement of Need and Reasonableness at 6 (n.d. [ca. 1979]) (copy furnished by MDH) (quote); State Register 3:2065 (May 21, 1979); Minn. Code of Agency Rules 7 § 1.444 F. 4 (Apr. 14, 1980). Nevertheless, 15 years later, when the Health Department proposed similar rules changes whose validity turned on the same statutory language, the administrative law judge found them to be defective. The first proposed change would have prohibited smoking in office buildings except in private enclosed offices and designated smoking areas of lunchrooms or lounges. Doug Kelm, lobbyist for the Tobacco Institute and R. J. Reynolds objected that MCIAA did not authorize such a rule and the ALJ agreed: although the change was supported by record “facts showing its reasonableness, it negates the authority of 'proprietors or others in charge' to designate smoking areas in office buildings. This authority is granted by statute and cannot be removed by rule.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 28.b, 28.d, and 29.a (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm. The ALJ went on to concede that although the proposed rule’s effect “is laudable, is supported by public opinion...and is based upon present day knowledge of second hand smoke,” it nevertheless went beyond the MCIAA of 1975, “which was presumably based
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legislature amend MCIAA by and large to ban smoking in health care facilities including doctors offices.)

The structure and evolution of the special rules for hotels, motels, and resorts resembled those for hospitals. The draft rules excluded sleeping rooms rented to guests from the smoking ban except in the designated smoking areas regime (thus subjecting all nonsmokers to smoke residues in rooms previously occupied by smokers), but at the same time they prohibited the establishment of

upon the state of knowledge at that time.” The second proposed change would have prohibited smoking in all customer areas of retail stores, but the ALJ held that, although the proposed rule was “supported by the evidence and by most retailers, it exceeds the statutory authority granted to the Department” because “it flatly bans smoking while the statute permits a smoking area selected by the store management.” Kelm had objected to prohibiting customers from smoking in smoking-permitted areas. State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 35.d (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm. The rule advisory group, in which the Minnesota Retail Merchants Association was represented, raised no concerns about the proposal. State of Minnesota, Minnesota Department of Health, In the Matter of Proposed Rules of the Minnesota Department of Health Relating to the Clean Indoor Air Act, Minnesota Rules, parts 4620.0050 to 4620.1500 (Mar. 24, 1994), at 24 (copy furnished by MDH). George A. Beck, the ALJ in the 1994 matter, later stated that the 1979 and 1994 outcomes were “inconsistent” with each other. Telephone interview with George A. Beck, St. Louis Park, MN (Apr. 15, 2009). The 1979 ruling may have passed muster because possibly the affected hospital industry did not object. Email from Kent Peterson to Marc Linder (Apr. 15, 2009). As early as 1971 Minneapolis had adopted an ordinance (as a precaution against fire) prohibiting tobacco smoking in any retail store designed and arranged to accommodate more than 100 people or employing more than 10 subject to the proviso permitting smoking in designated smoking and rest rooms, restaurants, executives offices, beauty parlors, and barber shops in such retail stores. § 643.160.2(f) (Ordinance 96-306 passed June 25, 1971), in Minneapolis Ordinance Code: July 1, 1960, as Amended Through December 31, 1972.

6531987 Minn. Laws ch. 399, § 2, at 3158. The provision in this amendment that allowed patients to smoke if their attending physician authorized smoking in writing was repealed by 1992 Minn. Laws ch. 576, § 2.


655This same disregard of residues attended the decision to permit smoking in restaurants during those hours when they sold no food but did sell alcohol. The Health Department staff argued that this sub-rule provided both “flexibility” for owners and “adequate protection of the public’s health.” Before the Minnesota State Board of Health,
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smoking-permitted areas in “common traffic areas such as registration areas, hallways, elevators or other areas which would be required to be used by non-smokers.” From this prohibition, however, the rules excepted “a portion of the seating area of a lobby or lounge...” As was the case with hospitals, the final rule deleted the partial ban on designated smoking areas in common areas.

The agency’s proposed eligibility criteria for implementing the statutory provision conferring discretion on the state Board of Health to waive the law, on request, for “compelling reasons” if the waiver did “not significantly affect” nonsmokers’ “health and comfort” were, correspondingly, twofold. The applicant bore the burden of demonstrating the existence of both those “[c]ompelling reasons to necessitate a waiver,” which might “consist of evidence that implementation of the Act would endanger the ability of the public place to meet its costs of operation,” and “clear and convincing evidence to prove that even” if the act and rules were waived, “the concentration of carbon monoxide in all sections of the public place shall at no time exceed the background concentration of carbon monoxide in air the building by more than 10 milligrams per cubic meter (9 parts per million).” In other words, as long as the owner


Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(h)(2) at 14 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

1975 Minn. Laws ch. 211, § 7 subd. 1, at 633, 635.

Minnesota Department of Health, Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 5 b) 1) and 2) at 11 (n.d. [Oct. 1/9, 1975]) (copy furnished by MDH). The final rules modified both criteria somewhat: for “meet its costs of operation” was substituted “produce sufficient income to meet its operating expenses”; and the outdoor air carbon monoxide background reference was limited to that within 12 feet of the building. Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act: Minnesota Department of Health Rules Chapter Twenty-Six, MHD 445(b)(1) and (2) (Apr. 2, 1976), Bates No. TIMN0240635/44. At the Board of Health public hearing on the proposed rules their principal drafter, Peterson, stated that “the amount of unusable space [caused by the four-foot-wide space rule] and projections as to how much...income would be derived if you could use that space” might be evidence that implementing the law could cause an owner to be unable to meet his costs of operation. Board of Health
demonstrated that the entire public place was the equivalent of an “acceptable smoke-free area” in terms of this carbon monoxide level test (despite the fact that smoking were permitted in the place), the law might be waived on grounds of profitlessness. (The legislature did not repeal the waiver regime until 1995.)660 Remarkably, the Health Department sought to justify this rule on the grounds that “the statute was not intended to cause adverse economic effects or to cause termination of employment” and claimed that this “concept is found” in the MCIAA provision stating that “no additional physical barriers or ventilation systems would be required to be installed.”661

That restaurants were looming as the law’s Achilles heel and that the Minnesota Board of Health was not inclined to prioritize protecting nonsmokers from exposure to smoke over owners’ self-perceived financial interest in prioritizing smokers became clear at the October 9 Board of Health meeting in response to a proposal by Board member Michael Keable, to require restaurants (and other covered public places) to reserve at least 25 percent of their total floor space for nonsmokers. Underlying his initiative was personal experience; when he and his wife had asked for seats in a nosmoking area in one of the “better restaurants” of his hometown (St. Cloud), they “were led to a card table set up in the basement.” Having been “made to feel like a second-class citizen,” Keable offered the amendment to close a “loophole” in the staff’s proposed regulations because “[t]echnically, the card table in the basement may have complied with the law....” In principle Keable’s proposal appealed to Assistant Health Commissioner Dr. Ellen Fifer, who, however, found the need for inspectors to measure the floor space to check compliance—no one appears to have cut this Gordian knot by suggesting seating as the alternative criterion in restaurants, as in fact occurred when the rules were amended in 1980—an

Hearing Transcript at 149 (Dec. 2, 1975). The final rule (445(b)(1)) then required that “[a]cceptable evidence...consist of financial records and/or projections, based upon demonstrable proof, reasonably showing changes of income and/or expenses which are directly attributable to the Act or these Rules.”

662 Gordon Slovut, “State Health Board Gives No Quarter to Smoking Foe,” Minneapolis Star, Oct. [10], 1975 (1A, 4A), Bates No. TIMN0462141/2.
663“...A restaurant shall be deemed to be in compliance with these rules if 30% of the seats in the eating area are designated as ‘Smoking Prohibited.’” Minn. Code of Agency Rules 7 § 1.444(D) (Apr. 14, 1980). Interestingly, initially the Health Department’s
additional enforcement burden. Another board member, retired policeman Patrick Daugherty, based on his guess that in northeast Minneapolis the majority of restaurant goers were smokers, (illogically) challenged the fairness of the figure of 25 percent, prompting Keable to point out that, with the cigarette industry claiming at most 63 million smokers out of a total population of 220 million, 25 percent would be “conservative.” His arguments, however, were of no avail, and the Board defeated his proposal by a vote of 10 to 2. Chief rule drafter Peterson, adducing no statutory warrant for such a policy, insisted that the draft regulations represented “a ‘middle ground’” reached after discussions with the restaurant industry and other businesses as well as with those seeking to protect nonsmokers from tobacco smoke’s “potentially harmful health effects.” The key to attaining this golden mean was the aforementioned rule that prevented large bar-restaurants from lawfully declaring themselves exempt bars if they could seat more than 50 for food at one time. In reality, such a rule not only did nothing to protect consumers in smaller restaurant-bars, but authorized owners to declare their restaurants “‘part-time’” bars and thus exempt them from coverage during the hours when they did not serve food.664

proposed rule had encompassed all public places and prohibited owners from designating “smoke-free areas” that measured “less than 200 square feet, or 30 percent of the total public area, whichever is greater.” State Register 3:2063 (May 21, 1979) (MCAR 7 § 1.443 C. 4. C.). For ANSR’s reaction that “restaurants, places of work, meetings and all other legally defined public places must provide nearly one-third no-smoking arrangements, see “MCIAA to Be Amended in 1980,” ANSR 7(3):n.p. [1] (Nov. 1979). The Department proposed this sub-rule in order to “help assure that every public place designates a no-smoking area.” Under the rule promulgated in 1976, owners “could argue that none of his patrons asked for a no-smoking area.” Under the rule promulgated in 1976, owners “could argue that none of his patrons asked for a no-smoking area. Non-smokers were then forced to occupy smokey areas....” Since the owner’s determination was exclusively within his control, “it was difficult for health inspectors to evaluate whether or not the facility was in compliance.” Under the proposed rule owners were not permitted to designate no-smoking areas covering less than 30 percent of the total area “regardless of whether or not a smaller proportion of his patrons have requested a no-smoking area.” [Minnesota Department of Health], Clean Indoor Air Rules: Statement of Need and Reasonableness at 3 (n.d. [ca. 1979]) (copy furnished by MDH). The Department deleted the general 30 percent rule both because it intended that rule to apply only to restaurants and because with a generally applicable minimum area requirement already in place, there was no need for an alternative minimum. State of Minnesota, Before the Minnesota Commissioner of Health, In the Matter of Proposed Amendments to Rules Relating to Clean Indoor Air, Findings and Conclusions at 2 (Dec. 10, 1979) (copy furnished by MDH).

664Gordon Slovut, “State Health Board Gives No Quarter to Smoking Foe,” Minneapolis Star, Oct. [10], 1975 (1A, 4A), Bates No. TIMN0462141/2. Nevertheless, years later Keable observed that the Board’s discussion of the MCIAA had not been
As far as Keable’s own restaurant encounters were concerned, years would pass before they improved. In the meantime he was persuaded that “some restaurateurs were ‘going out of their way to harass nonsmokers.’” Moreover, as wholly inadequate as restaurant compliance may have been, “‘unfortunately,’” in Keable’s view, “‘business and management aren’t going out of their way to provide the same level of rights [for employees] as they would for customers in public areas.’”

Keable was merely a highly visible and vocal target of such guerrilla warfare tactics engaged in by restaurant owners to subvert the law. Restaurants, as many people informed the Health Department in public comments submitted during the run-up to the public hearing, “often designate just two or three tables for nonsmokers and make sure that those tables are in the worst locations—no view, near noisy busing stations, near smelly rest rooms and drafty doors. And worst of all, a haze of smoke from the adjacent tables hangs over the nonsmokers.” To be sure, even such debilitating and demeaning conditions would have passed muster under the proposed regulations so long as the tables were four feet away from a smoking area.

The Health Department may have received only 23 complaints from nonsmokers by the beginning of October, but even Kahn was under no illusions about the state health state inspectors’ ability to “‘police this law effectively, even if they add a smoking check on their yearly visit.’” Although she knew that violations had taken place, she was “‘by and large...satisfied with the present

“acrimonious.” He felt at the time that anti-smoking regulation had to be developed gradually—if nonsmokers pushed for precipitous change that dropped the axe on everyone, “we’d get slapped down.” Telephone interview with Michael Keable, St. Joseph, MN (Mar. 20, 2009). The Board of Health, which was the Health Department’s administrative body, was composed of 16 members, nine of whom broadly represented licensed health professionals and six of whom were public members. The Minnesota Legislative Manual: 1975-1976, at 361-62 (listing only six members with health-related degrees).


Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009) (original chief of enforcement of MCIAA).

Gordon Slovut, “State Health Board Gives No Quarter to Smoking Foe,” Minneapolis Star, Oct. [10], 1975 (1A, 4A), Bates No. TIMN0462141/2.
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situation,’” which was just a “‘first step.’” Bohr, the executive vice president of the Minnesota Restaurant Association, must have been more than satisfied when, at the end of November, he received a letter from the St. Paul police chief after the later had reviewed the proposed MCIAA rules:

Violation of the law, as far as we can determine, is a misdemeanor of the lowest order and as such will receive absolutely no attention from our Department except as it might be necessary to respond to specific complaints occurring within our jurisdictions. To date we have received no complaints and have taken no action, and we are not anticipating any great change in that area of police activity.

In fact, in so far as I can determine, the whole thrust of the regulation is directed toward some sort of health and welfare inspection program. If anyone is really serious about enforcing the Statute and the regulations to the letter of the law, it seems to me it speaks toward hiring some sort of an army, armed with citation booklets and loosed upon the unsuspecting public for some yet undetermined purpose.

Sure looks like a money-maker, if nothing else.

Bohr recycled this written expression of manifest revulsion against his police force’s involvement in enforcing such a law by a Twin Cities police chief bubbling over with such undisguised bias against the mere thought of protecting nonsmokers.

Nor was the police department the only St. Paul government agency aiding and abetting the pro-smoking forces. Far more astonishing was the set of comments on the state Health Department’s proposed MCIAA rules submitted to Peterson by the Deputy Health Officer of the Division of Public Health of St. Paul’s Department of Community Services. Based on his staff’s review of the draft rules, Edward Eberhardt underscored “a very severe bias toward the rights of non-smokers as opposed to those of smokers.” Without revealing what those latter rights were and what qualifying expertise he, qua public health official, possessed to evaluate them in relation to the former, he believed that both had to be considered, though he also found “the entire concept to be distasteful.” While acknowledging that that bias was “perhaps, the intent of the law,” he nevertheless

670Harry Wilensky, “Effort to Ban Smoking Results in Murky Law,” St. Louis Post-Dispatch, Nov. 16, 1975 (1), Bates No. TIMN0240663.
671Richard Rowan to W. J. Bohr (Nov. 25, 1975), Bates No. TIMN0462137.
672Bohr later quoted it. “Statement of Chum Bohr” (Sept. 15, 1978), Bates No. 500024298/301-2. He also attached a copy of the letter to his post-Board of Health hearing statement, claiming that it “establishes [t]he inability of the State and local Health Department to enforce the law against the smoking violator....” W. J. “Chum” Bohr to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
found it worthy of criticism that “many of the areas affected are, by their characteristics, of such a nature that they could designated only as a non-smoking area.” He implicitly contested the entire tenability of the MCIAA by characterizing its core feature, the “acceptable smoke-free area,” as “an impractical requirement relative to existing practice.” In particular, he called attention to his inability to grasp the process of reevaluation that tobacco use was undergoing by admitting that “I find it completely out of the realm of my imagination to envision compliance by a bowling alley if they must designate smoking areas.” Beyond his failure to perceive any overriding public health interest as between smokers and those exposed to their smoke, Eberhardt shared one concern with the police chief—shielding his “already overburdened staff” from “a considerable influx of complaints.”

The December 2, 1975 Public Hearing on the Rules to Implement the MCIAA

At the time of the hearings, the local newspapers as well as TV stations carried the story. I was particularly concerned because one of the local TV stations, WCCO, captured some film of some health department officials, including bigwigs, sneaking cigarettes, during the break. At the time, the Commissioner, Assist. Commissioners, and others were smokers, and the [sic] smoking was permitted in offices at the Department. I implored one of the reporters not to broadcast health dept. officials puffing on their heaters during breaks from the hearing. He didn’t.

On October 23, the Board of Health ordered that a public hearing on the proposed rules be held on December 2. During the combined nine-hour public

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673 Edward Eberhardt to Kent Peterson (October 31, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).

674 Email from Terry O’Brien to Marc Linder (Apr. 8, 2009). In 1975 O’Brien was an assistant attorney general who both assisted Kent Peterson in drafting the Board of Health rules and acted as its lawyer at the public hearing.

675 Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Order for Hearing (Oct. 23, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The hearing was to be held directly preceding one conducted by DLI. Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Notice of Hearing (Oct. 27, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Earlier the hearings themselves had been tentatively scheduled for October 23. Schedule for Regulations Regarding Minnesota Clean Indoor Air Act (n.d.),
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hearings agency officials “trotted out” the proposed MCIAA regulations. The more than seven of those hours that were held under the auspices of the State Board of Health witnessed wide-ranging attacks on the law and agency rules by building and business owners, although the approximately 150 people in the audience were “clearly on the side of nonsmokers, applauding when persons testified how they had been bothered by smoking in restaurants, offices, while waiting in line at banks and bus stations, and even in restrooms.” (Ironically, the entire back page of the following day’s issue of the St. Paul Pioneer Press that reported on the hearing was devoted to an ad for Marlboro.) In contrast, the audience at the Labor and Industry Department hearing, which did not begin until after 5 p.m., was, according to ANSR, “very small” and engaged in limited discussion. In addition to the presentation of ANSR’s policy statement, the vice president of the Minnesota AFL-CIO, Leonard LaShomb, merely explained that he “had not heard much” from union members about the smoking regulations for factories and warehouses.

The proposed rules on which witnesses commented differed from the draft that had been submitted by the staff to the Board of Health most saliently with regard to a new limitation and two gaping exceptions to it. Under the general provision governing smoking-permitted areas: “One and only one smoking permitted area shall be designated per room. However, rooms containing at least 20,000 square feet...in total floor space may designate more than one smoking permitted area...” Then under the special sub-rule governing workplaces as
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one of the “categories of affected places,” the Health Department added yet another huge exception to the just created “one and only one smoking permitted area per room” rule: in workplaces “not customarily frequented by the general public” the same room “may contain several, separate no smoking and smoking permitted areas provided” that the former were at least 200 square feet in area.\(^{682}\)

New, too, was the related provision that: “In a public place which contains two or more rooms which are used for the activity, the responsible person may designate one entire room as smoking permitted as long as at least one other comparable room has been designated as a no-smoking area.”\(^{683}\) All of these changes sparked controversy analyzed below.

Hearing Examiner David Giese explained at the outset of the Board of Health hearing that the proposed rules had been divided into 14 sections on which testimony would be received seriatim from witnesses,\(^ {684}\) who, by the end of the marathon session, numbered 36.\(^ {685}\) On the first section, which dealt with the authority, scope, and purpose of the rules, only the bill’s principal author, Phyllis Kahn, offered testimony. In addressing what she “perceive[d] as the legislative intent in the passage of this law,” Kahn observed that “[t]he basic problem has

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\(^{682}\)Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 444(b) at 11 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The provision remained in the final rules subject to the clarification that each no-smoking area had to encompass at least 200 square feet. See below this ch.

\(^{683}\)Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(2) at 7 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The provision, with an important weakening modification, was retained in the final rules.

\(^{684}\)Board of Health Hearing Transcript at 9 (Dec. 2, 1975). Under the Board of Health’s procedural rules for the hearing, a witness “may be sworn upon his request but it is not required. If he elects not to be sworn, that may be considered in determining the weight to be given to his testimony. By giving testimony, a witness...subjects himself to questioning by the panel. However, he is subject to cross-examination by non-members of the panel only if he affirmatively consents to being so examined. A refusal to be cross-examined may be considered in determining the weight to be given to his testimony.” Minnesota State Board of Health, “Procedural Rules for Hearing” (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

been that for much too long, smokers have claimed all air as their inalienable territorial right, thus, it requires a special effort to assert that the right to be free from tobacco smoke transcends any right to smoke tobacco and must in the interests of public health prevail when the two are in conflict.\footnote{Statement by Rep. Phyllis Kahn for the Hearing on Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act (Dec. 2, 1975), in Legislative, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). This part of Kahn’s statement is quoted from this source because the transcript’s version is incorrect and incomprehensible.} After wandering off point to join ANSR in urging rejection of the DLI rules as “totally inadequate,” she also emphasized that although nothing in the law implied a balance between smokers’ and nonsmokers’ rights (or even required designation of smoking areas), neither the law nor “hopefully the regulations to be adopted” sought to “eliminate smoking”; rather, they “seek to establish the right to breathe clean air as a fundamental public right.”\footnote{Email from Ed Brandt to Marc Linder (May 2, 2007).}

Comment then proceeded to the crucial and contentious issue of the regulatory definition of an “Acceptable Smoke-Free Area,” which accordingly attracted extensive testimony, none of which, however, challenged the agency’s insertion of the non-statutory modifier “acceptable.” Such an objection might have been expected from ANSR, but its representative, Edward Brandt, the organization’s legislative committee chair—who later recalled that business representatives’ testimony had “made it clear that many employers considered any requirement to do anything to protect the health and comfort of non-smokers to be unreasonable interference”\footnote{Board of Health Hearing Transcript at 12-13 (Dec. 2, 1975). The “/sic/” was inserted by the court reporter. See also “Proposed No-Smoking Rules Called Too Strict.”}—concisely signaled that awareness of the intense counter-pressures that political-economically powerful owners of covered public places were bringing to bear on the Health Department was prompting ANSR to make do with much less than fulfillment of its maximum agenda:

Ideally, the Association for Non-Smokers Rights would like to see a stronger definition of a smoke-free area than is contained in here, because we do not believe that it is going to completely resolve the problem of insuring that smokers /sic/ have a right to breathe fresh air. Nevertheless, in keeping with the extensive consultations which the staff members of the Board of Health have participated in in trying to get the comments of various parties who are interested in and affected by these regulations, we feel that what is contained in here...is a reasonable compromise, even though it falls short of our ideal. We believe that it does take into consideration the legitimate concerns of people with varying interests.\footnote{Board of Health Hearing Transcript at 10-12 (Dec. 2, 1975).}
In order to understand what ANSR (and owners\textsuperscript{690} of covered public places) were reacting to, it is necessary to discuss the Health Department’s explanation of “acceptable smoke-free area” in its “Justification,” which was included as one of the hearing exhibits. The Department was careful to point out that this definition ostensibly implemented MCIAA’s (only) provision to use the term “smoke-free area”\textsuperscript{691}—namely, § 6, which made it owners’ responsibility to “make reasonable efforts to prevent smoking in the public place by...arranging seating to provide a smoke-free area...” (That is, “arranging seating to provide a smoke-free area” was one of four alternative means of making “reasonable efforts to prevent smoking.”)

Although the Department did not mention this issue in explaining its definition of the phrase, later in the “Justification,” when dealing with the operative rule that required owners to “make arrangements for” the “acceptable smoke-free area”\textsuperscript{692} defined earlier, it characterized the statutory phrase


\textsuperscript{690}The December 2 proposed rules included for the first time definitions of the terms “proprietor or other person(s) in charge of a public place(s)” used in §§ 5-6 of the MCIAA. “‘Proprietor,’” which applied to a corporation and an individual, meant “the party, regardless of whether he is owner or lessee of the public place, who ultimately controls, governs or directs the activities within the public place” and did “not mean the owner of the property unless he ultimately controls, governs or directs the activities within the public place.” Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 442(l) at 5 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). “‘Other person in charge’” was awkwardly defined as “the agent of the proprietor authorized to perform [sic; should be “give”?] administrative direction to and [perform] general supervision of the activities within the public place at any given time.” Id. MHD 442(i) at 4. Finally, the regulatory term “responsible person” meant the “proprietor or other person in charge.” Id: MHD 442(n) at 6.

\textsuperscript{691}Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{692}MDH 443(d) (Oct. 1, 1975). Glossing MCIAA § 5, this sub-rule (which was retained in the final rules as MDH 443(e)) also provided that the “size and location of any smoking permitted area shall be determined such that toxic effects of smoking are minimized in the adjacent no smoking area.” In turn, the Health Department glossed its own rule by arguing that § 5 of the statute gave the Department “authority to require that the size and location of any smoking permitted area shall be determined such that the toxic effects of smoke are minimized in the adjacent no smoking area. While the proprietor still has general flexibility to designate a smoking permitted area as the business operation dictates, there must be a certain over-riding concern for the toxic effects of smoking which
“arranging seating to provide a smoke[-]free area” as “ambiguous.” Exactly what that ambiguity was the staff failed to mention. Nor, at first glance, does “smoke-free” appear to be, even in the slightest way, capable of two or more interpretations; on the contrary, the term appears to be especially unequivocal and translucent. After all, the legislature could have required the area to be merely nonsmoking or smoking free; that it did not so choose might have had been linked to the fact that the MCIAA’s hallmark was its ban on smoking everywhere except in smoking-permitted areas (rather than requiring certain areas to be nonsmoking). However, since the statute did use the term “non-smoking areas” and “no-smoking area” in § 5, it certainly could have used the term in § 6. That it instead used “smoke-free” could therefore prompt the conclusion that the legislature envisioned three kinds of areas: smoking permitted, nonsmoking, and smoke-free, in the last of which both smoking and smoke from smoking-permitted areas would be prohibited. Indeed, it is only by interjecting § 5 that the “Justification” was able to create the appearance/semblance of an ambiguity where otherwise none would have been in sight. That section provided that: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoking in adjacent non-smoking areas.” In contrast, § 6 did not deal with minimizing the drift of smoke from smoking-permitted areas into smoke-free areas, but with the “prevent[ion of] smoking in the public place” altogether by means of signs, “arranging seating to provide a smoke-free area,” and “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke.” In other words, whereas § 5 contemplated that smoking would continue to take place and

693 Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 21 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Since the statutory provision applied only to “existing” barriers and ventilation systems and since most covered public places in fact wound up using four-foot-wide spaces to create compliant “acceptable smoke-free areas,” the Department appears not to have reflected on its lack of the aforementioned statutory authority where owners used those spaces instead.

694 As the head of ANSR’s public awareness committee looked back at her efforts to explain to owners their obligations under MCIAA: “What I...remember is how difficult it was for people to see that what we were telling them was that they had to find a place for the smokers, not the non-smokers.” Email from Glenna Mills to Marc Linder (Nov. 1, 2009).
that owners would be required to take at least one physical measure to reduce the smoke’s drift into nonsmoking areas, § 6 contemplated that no smoking would take place and that therefore the nonsmokers would be seated in a (completely) smoke-free area.

The major interpretive obstacle that this reading must confront (other than that apparently no one at the time championed it) is how to identify these two different areas; the only assistance that the statutory text offered was that § 5 specified that a public place consisting of a single room may contain a merely “no-smoking area” on “one side of the room,” which would be subject to the owner’s duty to “minimize the toxic effects of smoke” emanating from the adjacent other side of the room. It also turned out that § 6 did contain an ambiguity after all, albeit not one to which the Department called attention: since the “smoke-free area” resulted from arranging seating, smoke-freedom would not have been mandatory in areas that lacked seating—a conclusion that suggested that the legislature was concerned with situations/places in which nonsmokers were spending more extended periods of time (and therefore were sitting) as opposed to ones in which they were transiently moving through an area or standing for shorter periods.

Neglecting these subtleties, the treatment of the definition by the “Justification,” favoring the agentless passive and running together §§ 5 and 6, declared: “It is felt that the term ‘acceptable smoke-free area’ is more appropriate to use in regulations because only ‘reasonable’ efforts are necessary and designation of a smoking permitted area is allowable. Therefore, the law does not necessarily expect 100% ‘smoke-free’ conditions and ‘acceptability’ of the no-

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695 The Health Department turned this logical structure on its head when it not only defined, in the sub-rule, “acceptable smoke-free area” to mean a “contiguous portion of the public place...including seating arrangement,” but also glossed the sub-rule as necessarily including seating arrangements “so that a proprietor does not designate non-seating portions of the public places as the only no-smoking area.” MHD 442(a)(1) (Oct. 1, 1975); Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

696 The Board of Health went even further in this direction by finding that since § 6 required a smoke-free area and § 5 required use of existing barriers/ventilation to minimize toxic smoke effects, MHD 442(a) “merely clarifies the optional conditions available to proprietors to maintain a ‘smoke-free area.’” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 4 at 2 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).
smoking area is the real question.”697 Because the “reasonable efforts” of § 6 refer to prevention of smoking rather than to achievement of smoke-freedom, the Department failed to demonstrate that it had persuasively identified the legislature’s intent to mean “non-smoking” both when it used “non-smoking” and “smoke-free area.” The Health Department belittled and debased the legislature’s choice of a smoke-free standard even further when it characterized the carbon monoxide threshold level as the measurement “for determination of relative smoke-free conditions....”698

Acquiescence by the state’s premier anti-smoking organization in an administrative standard of smoke-freedom that was at best a misnomer ensured that no individual criticisms of 56-inch barriers and four-foot spaces would prompt the agency to strengthen the criteria.699 In contrast, businesses were not satisfied with the concessions that the Health Department had made to smoking. Indeed, a broad front of businesses and business organizations, led by Pillsbury Company’s representative, Raymond B. Jones, flayed the Department’s effort to regulate smoking among white-collar employees in offices. After digressing to attack the “double standard” that was “unfair to all employees” resulting from the fact that 13 of Pillsbury’s installations were subject to the Board of Health’s jurisdiction and 9 to the Labor Department’s and recommending that both agencies adopt the latter’s (extraordinarily relaxed rules), Jones urged striking

697 Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

698 Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 7 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (italics added). The Health Department’s underappreciation of the stringency of the legislative mandate of “smoke-free” areas was underscored by its including “where smoking is prohibited” in the definition of an “acceptable smoke-free area” and then glossing this phrase as “necessary to eliminate any chance for uncertainty about smoking in an area that is considered as an ‘acceptable smoke-free area.’” MHD 442(a)(1) (Oct. 1, 1975); Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). No uncertainty could possibly arise in the context of a 100-percent smoke-free area; in contrast, in an area that the Department certified as smoke-free, even though it was visibly polluted with clouds of tobacco smoke that had drifted from four feet away, uncertainty as to the permissibility of smoking might be imaginable.

699 In fact, no witness challenged this provision during this part of the testimony. Faye Topliffe, an ANSR activist from Duluth, proposed that the barrier and four-foot space be combined since the latter by itself could not protect nonsmokers. Board of Health Hearing Transcript at 23-24 (Dec. 2, 1975).
“continuous” as modifying “barriers” on the grounds that it was “vague.”\textsuperscript{700} In the event, he attempted to explain neither what could possibly be vague about “continuous” nor how any protection whatsoever could be provided nonsmokers if smoking and nonsmoking sections were, at intervals, separated by nothing.

President Oliver Perry of the 1,700-member Minnesota Association of Commerce and Industry\textsuperscript{701} briefly complained about the “unduly restrictive” conditions imposed by barriers and spaces, which might undermine efficiency and morale in offices.\textsuperscript{702} Expanding on these points in a written statement that he did not read,\textsuperscript{703} Perry—whose remarks were surely most congenial to the R. J. Reynolds top executives and TI President Kornegay who were on the list to which the newspaper clipping reporting Perry’s them was circulated\textsuperscript{704}—claimed that employers embedded their drive for “maximum efficiency in an environment responsive to employee needs,” whereas erecting barriers and rearranging space “to comply with regulations for which there is no demonstrated need or demand would be counter [sic] productive.” Conjuring up another specter, the state’s principal employers organization implausibly imputed reason to a demand by its class antagonist: Perry warned that it was “entirely reasonable that organized labor would request special concessions for smokers if these proposed rules are implemented.” Constructing nonsmokers and unions as mutually exclusive, he predicted that “[i]f such a request became a part of the collective bargaining agreement, then non-smokers could demand the same”\textsuperscript{705}—presumably for paid breaks.

Associated Industries of Minneapolis pushed MACI’s arguments beyond the breaking point. When Donald Lenarz, presumably without a shred of irony, insisted that “[c]ertainly a barrier of at least 56 inches in height, even with the three or four foot interval, could as effectively separate smoking permitted and no smoking areas as could the four foot space,” the grain of truth that underlay his claim was the latter’s fecklessness.\textsuperscript{706} Based on what he had heard at the

\textsuperscript{700}Board of Health Hearing Transcript at 16 (Dec. 2, 1975).
\textsuperscript{701}Statement of Oliver S. Perry Before State Board of Health at 1 (Ex. 22, Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
\textsuperscript{702}Board of Health Hearing Transcript at 18 (Dec. 2, 1975).
\textsuperscript{703}Board of Health Hearing Transcript at 154 (Dec. 2, 1975).
\textsuperscript{705}Statement of Oliver S. Perry Before State Board of Health at 5 (Ex. 22, Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
\textsuperscript{706}Board of Health Hearing Transcript at 20 (Dec. 2, 1975). AIM also urged both the acceptability of lower (51-inch) barriers and the total elimination of smoking/no-smoking
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hearing, Lenarz worried in a post-hearing written statement about the numerous non-smoker witnesses “radically affected by smoke (severe allergic reactions, asthma, emphysema, etc.)” who had proposed even more stringent rules than the Department’s. AIM foresaw the likelihood that “the only condition which would protect” such people, who were also probably only a “relatively small” proportion of the entire nonsmoking population, “would be the complete prohibition of smoking.” Rather than burden the final rules with “costly restrictive conditions” that affected so few people, Lenarz urged the Department to give “the employer and employee” an opportunity to “work out a satisfactory solution....”

The Minnesota Hotel, Resort and Restaurant Association was still represented by its registered lobbyist, Chum Bohr, who had failed its members so abjectly before the legislature that he apparently found it useful to falsify history in order to maintain a paying client base. In a post-hearing written statement he mendaciously and illiterately claimed that “[o]ur objections at the public hearing were the problems that we never afforded during the legislative session. Because our industry was never granted an opportunity, we feel that the law will be very expensive to us....” Lashing out to cover up his own incompetence as a lobbyist, Bohr issued this threat: “To qualify my statement of potential embarrassment to the Health Department and State Board of Health, every citation by the department to the establishment involved will be countered as to enforcement against the smoking violator. The more complicated the regulations, the more the department will be challenged by A.N.S.R. to enforce the law. Either way, many legal proceedings could be filed against the Department and the State Board of Health at a horrible waste of taxpayers [sic] monies.” At the hearing, Bohr enlarged the scope of the opposition to the “acceptable smoke-free area” criteria

sections if the public place satisfied the ventilation standard. Id. at 20-21.

707 Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

708 Bohr’s level of competence was painfully on display during the discussion of the definition of “bar,” when he got down to metaphysical brass tacks: “Dining in a supper club is not just dining, it’s an emotional experience.” Board of Health Hearing Transcript at 36 (Dec. 2, 1975). See also Gordon Slovut, “Rival Views Cloud Hearing on Smoking Law,” Minneapolis Star, Dec. 2, 1975, Bates No. TIMN0461869. Debating the law that allegedly interfered with that experience at a public hearing in the Minnesota Health Department Building at which smoking was prohibited apparently did not produce the same level of frustration. Lewis Cope, “The Air Doesn’t Clear After Debate on New Nonsmokers’ Rights Law,” MT, Dec. 3, 1975, Bates No. TIMN0461866.

709 W. J. “Chum” Bohr to Kent Peterson (Dec. 19, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).
by declaring that the provision under discussion was “clearly an over-extension of the law” and “prohibitive,” not only because many businesses were unable to afford “sophisticated ventilation systems,” but also “because of limited space, can neither meet the four foot separation or [sic] provide physical barriers. There are hundreds and hundreds of little ten-stool truck stops in this particular category.”

Bohr’s arguments prompted the first of several remarkable interventions by drafter Peterson regarding “our justification for these rules.” Assuring regulatees that Bohr’s point that the law did not require any additional barriers or ventilation system was “well taken,” he explained that “[t]hat is why there is the (dd) section requiring an objective standard of carbon monoxide concentration.” Consequently, small businesses would be free, instead, to “combine those mechanisms or use some other system to provide an area that has less than nine parts per million of carbon monoxide at all times.” The Health Department, in other words, had adroitly avoided giving grounds for judicial invalidation of the rule by pointing out that it in no way had fallen into the trap of imposing a requirement that the legislature had expressly declined. Effectively, however, it imposed a requirement that the legislature had not mentioned at all—the four-foot-wide space between smoking-permitted and nosmoking sections.

And when the Minnesota Retail Federation repeated businesses’ (physically wholly implausible) claims that existing barriers that were neither 56 inches high nor continuous “will adequately prevent smoke infiltration,” Peterson again felt called upon to comment. This time, however, his response rejected opponents’ mystifying position, but also made the agency’s standard vulnerable to contestation, and potentially, invalidation:

Our scientific reasoning is that—or it’s not too scientific—but our reasoning is that there is [sic] commercially available physical barriers in heights of 56 inches, 62 inches, 72 inches and 80 inches. Therefore this would be convenient to comply with. And also many filing cabinets, office furnishings, would also comply with that. It’s true that there are some that are lower. And in that case, it probably also would not retard smoke from going from a smoking area to a no smoking area.

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710 Board of Health Hearing Transcript at 24-25 (Dec. 2, 1975).
711 Board of Health Hearing Transcript at 26 (Dec. 2, 1975). Sub-section 4 of the draft rules of September 9/12 had expressly included, as noted above, the (ungrammatical) directive that “[b]y using a combination of the ventilation system, isle [sic] space or physical barriers, the concentration of carbon monoxide in the no smoking area shall at no time exceed 10 milligrams per cubic meter,” but this “combination” clause was eliminated from later drafts.
713 Board of Health Hearing Transcript at 27 (Dec. 2, 1975).
While few observers (who did not imagine that smoking restrictions would undermine their livelihoods) with their senses of smell and sight intact might have disagreed with Peterson’s skepticism regarding the smoke-shielding capacity of lower barriers, he himself had now cast doubt on the science base of the Department’s own claim that 56-inch barriers (or four-foot-wide spaces) would create “acceptable smoke-free areas.” Later, when the subject reemerged, one hearing participant who characterized the height as having been “arrived at arbitrarily,” suggested that “scientific data” should be gathered or tests conducted to determine whether such a barrier was in fact ineffective in separating smoking and nonsmoking areas. Peterson injected himself to remark that he was “certain” that in the course of implementation the Department would make such a determination, but then, prejudging any such undertaking (which never took place), he asserted, without citing any evidence, that “56 inches is adequate for seated individuals. And it does significantly deter the drifting of smoke for people who are standing.” Still later in the hearing Peterson appeared stymied when pressed to explain the basis for the Health Department’s “intent” that a 56-inch barrier, four-foot-wide space, ventilation system with six air changes and a supply of at least 7.5 cubic feet of tempered outside air per minute per person, and carbon monoxide concentration no more than nine parts per million in excess of that in the outside air within 12 feet of the building would “accomplish generally the same results.” Asked by his interlocutor whether, in developing the rules, he had research results showing such equivalence, Peterson stumbled: “Well, this is the intent, that physical barriers do that.” Told directly that to state such an equivalence “without any research support” was not adequate, the chief drafter failed even to venture a justification: “I see your point. Thank you.”

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714 Board of Health Hearing Transcript at 67-68 (Dec. 2, 1975) (Steve Olson).

715 Board of Health Hearing Transcript at 151-52 (Dec. 2, 1975) (Bennett Davis). This discussion took place in the context of the prerequisite of achieving the aforementioned carbon monoxide concentration for receiving a waiver: if this criterion was the fundamental one, it created an opaque enforcement situation for the public, who would be unable to smell, let alone, measure the CO, 10 milligrams per cubic meter of which were deemed to be “the chemical definition of ‘acceptable smoke-free air’” because exposure to that concentration for eight hours could produce carboxyhemoglobin blood levels in excess of two percent, against which the preponderance of research literature indicated that humans needed to be protected. Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 9 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Although the Department of Health was well aware that tobacco smoke consisted of hundreds of gases and particles (including carcinogenic benzo(a)pyrene), it selected CO “as the chemical to be measured for determination of relative smoke-free conditions because equipment is readily available to
Indeed, even the Department’s formal “Justification,” which became publicly available at the time of the hearing, offered absolutely no scientific (or any other type of) evidence to support the assertion that a 56-inch-high barrier could “demonstrate that an area is ‘acceptably smoke-free,’” let alone that such a barrier did or could stand in any empirical relationship to the maximum measure the level in air and carbon monoxide is one of the most dangerous absorbed gases in tobacco smoke.” Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 7 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Whatever the availability of such equipment, in fact Health Department inspectors never measured CO. See above this ch.

716 The explanatory “Justification” of the proposed rules, which set forth the reasoning to support, inter alia, the barrier height and space width requirements, was lacking in the file on the MCIAA regulations maintained at the Health Department. Telephone interview with John Olson ( Enforcement Coordinator, Indoor Air Unit, Minnesota Health Department), St. Paul (Mar. 31, 2009). Fortunately, however, a copy was located at the Minnesota State Archives/Historical Society. Many years later Kent Peterson spoke of having prepared the Statement of Need and Reasonableness. Email from Kent Peterson to Marc Linder (Apr. 2, 2009). However, this precise terminology appears not to have been used in the Minnesota Statutes until 1982. Minnesota Statutes § 14.23 (1982). To be sure, the legislature amended the Administrative Procedure Act in 1975 so that “[a]t the public hearing the agency shall make an affirmative presentation of facts establishing the need for and reasonableness of the rule proposed for adoption,” but this requirement did not go into effect until July 1, 1976. 1975 Minn. Laws ch. 380, § 2, at 1285, 1287. The APA in effect at the time the Health Department was proposing the MCIAA rules did require administrative rules before being adopted to be based on a “showing of need for the rule,” which, together with the reasons for it, had to be submitted to the attorney general. 1974 Minn. Laws ch. 344, § 2(4), at 577. See generally, George Beck et al., Minnesota Administrative Procedure 8-14 (1987). Beck, who was an administrative law judge within the Office of Administrative Hearings from its inception in 1976 until 2005 and had been a hearing officer in the Commerce Department from 1973 to 1975, stated that prior to 1976 the statements that agencies had provided to the Attorney General had been very brief (one page) and had not adequately explained the basis for proposed regulations. Telephone interview with George Beck, St. Louis Park, MN (Apr. 15, 2009). A lawyer at the Minnesota Office of Administrative Hearings, which after 1975 was given centralized authority over agency rules hearings, stated that administrative proceedings before that time were “pretty wild west.” Telephone interview with Michael Lewis, St. Paul (Apr. 9, 2009). Dr. Lawson, the Board of Health secretary and executive officer, did sign a Statement of Need, but it was merely a brief recitation of the legislature’s mandate to the Board to adopt rules. Before the Minnesota Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, Statement of Need (n.d.), Exhibit 9 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
acceptable CO level (10 mg/m³). The crucial question as to how a barrier over which tobacco smoke drifted could possibly fulfill its assigned function of reducing the CO level to acceptable from above acceptable—after all, since the CO level was the ultimate touchstone, if the acceptable level had already existed, there would have been no need for a barrier—the Health Department never posed, let alone answered. Although the Department neither presented nor needed scientific evidence to bolster its commonsensical rejection of non-continuous barriers “because a sufficient degree of interrupted horizontal air flow could not be assured,” when it came to the criterion of height, the “Justification” merely claimed that the 56-inch standard “was selected because 56 inches or more is sufficient to completely interrupt the direct flow of smoke from seated persons and to provide partial deterrence of the smoke from indirect drifting of smoke.”717

The Health Department staff never even tried to explain what “interrupt” meant or where and into whose air space the smoke drifted after the interruption was over.718

For the four-foot-wide space separating smoking-permitted and no-smoking areas, which turned out to be public places’ principal means of satisfying the “acceptable smoke-free area” standard, the Health Department never even purported to offer any public health-based justification. The only pseudo-explanation it was able to devise was that four feet was “a standard, accepted distance of comfortable aisle space which is used in commercial establishments.” That some relevant and plausible relationship existed between a distance that owners used to avoid customers’ chairs’ being backed into one another or other undesirable entanglements such as drowning out conversations and one that would protect nonsmokers from drifting smoke the Department was prudent


718 Although the Department’s ventilation system requirements may have been better grounded (in the building code and recommendations of the American Society of Heating, Refrigerating and Air-Conditioning Engineers), the staff incautiously admitted that satisfying that standard might not suffice and that reinforcement by yet another standard might be necessary despite the rule’s requiring owners to meet only one: “With an adequate ventilation system in use the level of toxic products from smoking would not exceed low concentrations and it is reasonable that no health danger would result. While there may be minor discomfort among the people most allergic to smoke, this discomfort would be minimal if the non-smokers are separated from smokers in some manner.” Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 4-5 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
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enough to refrain from making itself ridiculous by trying to demonstrate. Instead, the only justification it set forth pertained to the question as to why it did not impose a wider “neutral zone”; and here the reason had absolute nothing to do with public health: “Widths greater than four feet were considered but these were rejected because of a possible adverse economic effect on commercial establishments which would keep an unusually wide ‘aisle space’ to be [sic] in compliance with the Act and these rules.”

Despite the Department’s failure to address the issue, let alone to provide any reason whatsoever for this wildly implausible claim, the Board of Health crowned this charade by finding that four feet was “of sufficient distance to minimize toxic effects of smoke.”

Most striking about the origins of these crucial methods for implementing the compromise that the legislature struck between protecting nonsmokers from secondhand smoke and permitting the owners of public places to continue to permit people to smoke by minimizing the toxic impact of drifting tobacco smoke is that they were adopted from general considerations guiding seating capacity and spacing in public buildings totally unrelated to the (hopeless) task of blocking the movement of tobacco smoke. Why the Health Department concluded that such dimensions adopted from irrelevant functions would have served at all, let alone maximally, to preclude the spread of toxic smoke is unclear.


721 The Health Department official who drafted the proposed regulations, asked 34 years later for the sources of these two requirements, observed: “I do recall real difficulty finding existing standards from anywhere to use for [sic] basis for specific distances or heights. We got suggestions from interested parties in Minnesota but there were no other states with standards at the time. I was not aware of anyone in the surgeon general’s office or at HEW to ask for standards. I am not aware that they were working on the smoking/non-smoking area concept. I recall researching the height of barriers and distances used to create separation when people are seated in public buildings. I got information about the commercially available barriers and typical building practices. I recall that barrier height was easier than distance...for height we could use the height to create visible separate [sic; should be separation] when seated...that’s the justification for 56 inches. I do not recall the basis for 4 feet...but there must have been something similar; it was a practical rule of thumb or really just a compromise.” Email from Kent Peterson to Marc Linder (Apr. 4, 2009). The assistant attorney general who helped Peterson draft
Before testimony was taken on other definitions, Hearing Examiner Giese interrupted the announced schedule to permit the MCIAA’s chief Senate sponsor, David Schaaf, who had a conflict with a legislative committee meeting, to comment on whichever rules he wished. In the event, he chose, before entertaining questions about legislative intent, to dwell on only one aspect. His concern about endangering the health of nonsmokers in single-room eating places, even where they were apportioned half the room, and especially the specter he raised of going further “if the legislation isn’t proper,” may have been designed to dampen the opposition of restaurant owners.  

When testimony moved on to other proposed definitions, Oliver Perry of MACI picked up where Radisson had left off in its aforementioned letter to Peterson several months earlier protesting a definition of “place of work” broad enough to encompass private homes in which two or more people such as an “upstairs and downstairs maid” or two “catereses” [sic] were employed—an outcome that Perry believed would surprise and dismay legislators and the general public. The comment prompted Peterson to justify the threshold of two employees, but he failed to engage the debate about private residences despite Perry’s repetition of his challenge. (The Health Department nevertheless yielded: the final rules provided that they “shall not apply to a private residence when the residence is not customarily used as a ‘place of work.’” Its Findings of Fact expressly declared that this “specific exclusion is found to be necessary based on” Perry’s hearing testimony.)

the rules and represented the health commissioner at the public hearing on the proposed rules recounted that: “I know we had some written record to support what I refer to as the ‘engineering’ stuff. Even in those days, the Commissioner couldn’t just pull out a number without offering a reasonable basis. It may have been brief; it may have lacked many citations, but it would have been in writing and a part of the record. The APA was going through huge changes at that time, but by then it was clear that a bureaucrat couldn’t just pull some standard out of his rear, establish it, enforce it and fine for its violation. There had to be some justification.” Email from Terry O’Brien to Marc Linder (Apr. 8, 2009).

723 Board of Health Hearing Transcript at 53-54 (Dec. 2, 1975).
724 Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act, Minnesota Department of Health Rules Chapter Twenty-Six, MHD 444(b)(2) (Apr. 2, 1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B).

725 Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 31 at 11 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B). The Board of Health suggested that it made the change because the broad sweep had not been intentional: “clarifying language” was called for because “the inclusion
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Deviating from the procedure until that point, a member of the public directly asked Peterson what the (very contentious) term “one side of the room” meant. In lieu of answering, the chief drafter merely stated that since it had been “felt” that the statutory phrase was not clear, a definitional rule was needed to “clarify that ambiguity.” Unenlightened, the participant asked more specifically: “Does that mean half the room or just if there are 18 rows, with one side of the room with one row?” This time Peterson obliged that it did “not necessarily mean one-half of the room. ... So any group section of the room would be adequate.”

Despite the obvious debilitating impact that such lopsidedness could exert on public health, neither ANSR nor anyone else pursued the issue.

Having gone through the regulatory definitions, the hearing then proceeded to the general provisions, the first of which dealt with another contentious subject—smoking-permitted areas, testimony on which was extensive. The Health Department had inserted the two aforementioned significant changes into this section following presentation of a draft on October 1 for the Board of Health meeting on October 9. First, it limited the number of smoking-permitted areas per room, but then did an about-face and created an exception: “One and only one smoking permitted area shall be designated per room. However, rooms containing at least 20,000 square feet (6,096 1820 square meters) in total floor space may designate more than one smoking permitted area and shall otherwise comply with these rules.” And second, the Health Department staff added a
new subsection providing that: “In a public place which contains two or more
rooms which are used for the activity, the responsible person may designate one
entire room as smoking permitted as long as at least one other comparable room
has been designated as a no-smoking area.” 228 The Health Department staff sought
to justify the exception for rooms with at least 20,000 square feet of floor space
“in recognition that it would be reasonable for the smokers to walk a distance of
no more than approximately 5,000 feet to find a smoking permitted area.
Assuming approximately square dimensions of a room, the room containing at
least 20,000 square feet in total floor space is the type of room which would apply
to this concept. [F]or airport terminals and other extremely large rooms, it is
reasonable for this section to be included.” 229

Before touching on the staff’s difficult relationship with the Pythagorean Theorem, it is crucial to observe the complete disconnect between the MCIAA’s
purpose and any justifiable basis for this exception. The Health Department
declared that “[t]o remain consistent with the intent of the legislation and to help
assure an acceptable smoke free [sic] area in the public place, this rule requires
that there be one and only one smoking permitted area per room.” 223 It then
argued that the exception for large rooms was “permitted in recognition” of what
would be a reasonable distance for smokers to walk to reach an area in which it
would not be unlawful to smoke. Such a standard, however, was totally irrelevant
to what was in fact the sole relevant criterion in this context—namely, whether

228 Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 443(a)(2) (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).


230 Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). This sentence contains the same aforementioned error in the rule itself. What the staff meant was that the rule prohibited the designation of more than one smoking-permitted area per room.
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permitting multiple smoking-permitted areas in such rooms would “assure an acceptable smoke-free area” in that room. By failing either to scrutinize this criterion or to cap the number of smoking-permitted areas in such large rooms the Health Department facilitated the constriction of smoke-free areas. As for the 5,000-foot rule, perhaps it was whimsically chosen for its propinquity to the iconic mile that smokers were alleged to be willing to walk for at least one brand of cigarette. In any event, it could not possibly have been the straight-line distance that anyone would have had to walk in a 20,000-square-foot, approximately square-dimensioned room, in which 200 feet would be the greatest such distance. If the Health Department really meant 5,000 feet, the room in question would have had to have been 25 million square feet (with sides ca. 3,535.5 feet long), the non-existence of which in Minnesota would have redounded to nonsmokers’ benefit.

No Radisson representative spoke up at the Health Board public hearing in December, but the post-hearing written comments submitted by Brooks may have reinforced the Health Department staff’s desire to avoid judicial challenges to the rules by striking offending provisions. Brooks insisted that section 5 of the MCIAA, which specifically provided that “[s]moking areas may be designated by proprietors...except in places in which smoking is prohibited by the fire marshall, or by other law, ordinance or regulation” was “in direct opposition” to the proposed ban on smoking-permitted areas in common traffic areas: “The Department of Health is without authority to adopt such a restriction....”

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731 The sub-rule (MHD 444(b)(1)) requiring that no-smoking areas be at least 200 square feet might have acted as a de facto cap, but it applied only to workplaces not customarily frequented by the general public. This sub-rule was in its own right dysfunctional since, as shown below, it made “checkerboarding” possible. In response to the complaint by Jones of Pillsbury Company about the alleged arbitrariness of the 20,000 square foot standard Peterson pointed to the sub-rule as permitting more than one smoking-permitted area in rooms under that size. Board of Health Hearing Transcript at 92-93 (Dec. 2, 1975).

732 Roberta Rand, an ANSR member and employee in the Minneapolis Police Department dispatch office, was able to use this joke, to applause, at the end of the hearing when, in response to a complaint about the hardship for smokers who had leave their workplaces to take a walk to smoke: “the tobacco industry has made a big play for, ‘I’d walk a mile for a camel [sic].’ So why don’t they?” Board of Health Hearing Transcript at 179 (Dec. 2, 1975).

733 The Health Department presumably added this condition because, at the extreme, a room (say) 10 feet wide and 2,000 feet long (which still would not have required a 5,000-foot walk) would have been so narrow as to preclude acceptable smoke-free areas.

734 Letter from William Brooks, Jr. to Warren Lawson at 1 (Dec. 22, 1975), in Health
Astonishingly, the Health Department’s formulation of this sub-rule in the final rule turned the earlier version on its head by merely prohibiting the designation of common traffic areas in their entirety as smoking-permitted areas if non-smokers were required to use them and even authorizing “designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.”

Asked what might have prompted this reversal of policy, the chief drafter observed decades later: “It seems like a blatant gift to ‘smoking supporter’ but it is quite likely where we ended up. Such is the long process to avoid a contested rule. ... My charge was to write rules that accurately enforced the law and could be supported if there were a contested rule. I do not remember exactly which group would have appealed the rules but it was a constant issue. This was a milestone law and we wanted the rules to promote, not delay enforcement of the new law. As you know, that’s why compromises are made.”

Incredibly, the Health Department staff in its post-Dec. 2, 1975 public hearing recommendation to the Board of Health that it adopt the final rules claimed that the “new language,” which had been “rewritten at the suggestion of several persons who felt that it was not understandable,” “has the same operative effect but is intended to be easier to understand.”

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736 Email from Kent Peterson to Marc Linder (Oct. 19, 2009).

737 “Adoption of Rules Implementing the Provisions of the Minnesota Clean Indoor Air Act, MSA, MHS, 112.H.18.3(B). In contrast, Radisson secured no changes with its unspecified complaint that the legislature’s deletion of the provision in the original H.F. 79 making owners who wilfully failed to enforce MCIAA guilty of a misdemeanor barred the Board of Health from reimposing it. Id. at 2-3. Not only did Brooks fail to identify the rules that “attempt to make the proprietor...a policeman,” but he also ignored the fact that section 7(3) of MCIAA did empower the state board of health to seek injunctions of repeated violations of proprietors’ section 6 responsibilities, which included the duty to “make reasonable efforts to prevent smoking in the public place by” posting signs, “arranging seating to provide a smoke-free area,” “asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke,” “or by any other means which may be appropriate.” Brooks undermined his own critique of the proposed rules both by conceding that MCIAA “is designed and intended to provide a smoke-free area in public places for persons who desire such a facility “ and asserting that “Radisson hotels and restaurants have not opposed the concept of designating smoking and non-smoking areas” without reflecting on the fact that “smoke-free” was so much more comprehensive than “non-smoking” that achieving it might necessitate considerably greater restrictions on smoking than might otherwise have been anticipated. Id. at 3-4.
In point of fact, the process regarding this sub-rule was much more complex and many-layered than Peterson was able to reconstruct from memory. And although this radical change emerged, ironically, from an agreement that apparently formed spontaneously at the public hearing on December 2, the final outcome may not have represented a consensus. The General Metropolitan Area Hospitality Association, represented by attorney Gerald Singer, insisted that the common traffic area sub-rule “cause[d] more concern than any other single provision” because, for example, in order to seat someone in a single-room restaurant’s nosmoking area that was not located immediately at the entrance it was necessary to cross the smoking area—which, in many if not most restaurants, was the bar. The same problem occurred with respect to reaching the bathrooms, which were generally located in the bar area. Singer “recognize[d] the evil to which the proposed rule is sought to drive at, but nevertheless, compliance with this would require designation of basically the entire premises as a nosmoking area, or would entail the major revision and reconstruction work, which I don’t think was contemplated in the original act when they talked about existing barriers.” After Singer had complained about such renovation and the “great cost” that would be associated with it,\footnote{Board of Health Hearing Transcript at 48, 2 (Dec. 2, 1975).} Harry Erickson, a militant ANSR member from Minneapolis who spoke up more discrete times than anyone else at the hearing,\footnote{Board of Health Hearing Transcript at 69-71 (Dec. 2, 1975).} cut Singer and the restaurant owners no slack in offering a guided tour of named “establishment after establishment” in which nonsmokers were exposed to smoking.\footnote{Board of Health Hearing Transcript at 71-73 (Dec. 2, 1975).} Astonishingly, however, a little later Brandt himself took the floor to declare that Singer’s comment had been one of the few criticizing the proposed rules that “had some relevant factual basis and was not simply opposition to the intent of the law.” Marching much further toward compromise, he even “appreciate[d] the fact that strictly interpreted, that Subsection could create a problem for some kind of establishments. And I would not object to having some modification there to make clear that if the restaurant, for example, honestly tries to designate smoking and non-smoking areas, the fact that the smoking area would be next to an entrance or next to a washroom, that persons who would briefly have to go through such an area to get to the non-smoking area, this would be permissible.” In the event, the one caveat that he did attach to his quasi-official ANSR acquiescence was, as already shown, ignored by the Health Department: “I would urge you...to be very careful in any revision...to make sure that such a qualification would not be broader than would be necessary.
to accomplish the purpose in mind.”

The Department diluted protection for nonsmokers as well in another location already shown to be inextricably interwoven with common traffic areas. Earlier in the hearing Singer had raised the issue of the definition of “bar,” which he insisted was “intended” to encompass the cocktail lounge area of a restaurant despite the fact that customers sometimes received food service there. Crucially, he admitted that such cocktail lounges were “always near the beginning [i.e., entrance] of the place. So that you can’t get anywhere without walking through it.” Singer did not mention the potential problem, let alone call for its elimination—presumably because restaurant owners were already treating cocktail lounges as smoking areas—but the proposed rules being discussed at the hearing defined a “bar” as “any establishment where one can purchase and consume alcoholic beverages.” Since a cocktail lounge was not an “establishment” in its own right, but merely part of a larger restaurant establishment whose owner, despite selling alcohol in the non-cocktail lounge eating areas, was barred by MCIAA from declaring the entire establishment smoking permitted, an interpretive obstacle to declaring the entire lounge smoking permitted existed. Instead of engaging and arguing against this lesser issue (which none of the participants appeared to grasp), two anti-smokers vociferously attacked the statutory exemption for bars as a “gigantic loophole within the law.”

But even after Peterson had intervened to point out that “we have to somehow balance the inclusion of restaurants and the exclusion of bars,” ANSR’s chief

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741 Board of Health Hearing Transcript at 83-84 (Dec. 2, 1975). In its Findings of Fact the Board of Health ratified this agreement between restaurant owners and ANSR, expressly basing the “qualification” permitting smoking-permitted areas to be “designated in a location which non-smokers may briefly cross to reach an intended activity” on Singer’s and Brandt’s testimony; it excused this additional smoke exposure on the grounds that the modified “rule will conform with [sic] the intent of the law without placing an undue burden on proprietors.” Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 24 at 9 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

742 Board of Health Hearing Transcript at 34 (Dec. 2, 1975).

743 During the common traffic area discussion, Singer had used the example of a restaurant where “[y]ou have to walk by the bar where you are allowed to smoke.” Board of Health Hearing Transcript at 70 (Dec. 2, 1975).

744 MHD 442(c) (Dec. 2, 1975).

745 Board of Health Hearing Transcript at 36 (Dec. 2, 1975) (Rohalio Lasso). Maria Mueller also wondered why the law was written to exclude bars. Id. at 39.
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representative, Brandt, failed to suggest that the proposed sub-rule be clarified to preclude within-restaurant cocktail lounges from attaining the status of totally exempt bars. Rather, his undifferentiated support for the regulatory status quo missed the issue altogether: “We strongly support the inclusion of the definition of a bar under (c), or something reasonably close to this definition as essential to carrying out the full intent of the law.”

In the event, the Health Department/Board of Health was attentive to what it characterized as the indication of “some confusion” in the hearing testimony (irrelevantly citing Singer’s aforementioned statement that cocktails lounges were intended to be included within the definition of “bar”) “as to the status of a bar within an establishment and its relationship to the rest of the establishment.”

Following the hearing, the Department, whose “Justification” had not discussed this sub-issue of the definition of “bar,” recommended to the Board that the additional phrase “or portion of an establishment” be adopted to “permit a ‘cocktail lounge’ which exists as a part of an establishment which is otherwise a restaurant to be considered a ‘bar’ for the cocktail lounge portion only, and the restaurant portion to be regulated under this Act.”

Without revealing the substance of its own regulatory intent, let alone that of the overriding legislative intent, the Board then rubber-stamped the change on the grounds that “MHD 442(c) which defines ‘bar’ was never intended to exclude a separately designated room of an establishment in which alcohol is served but in which meals are not served. Thus, a portion of an establishment which functions solely as a bar within these rules may be considered a bar for only that portion regardless of activities conducted in the remainder of the establishment.”

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746 Board of Health Hearing Transcript at 38 (Dec. 2, 1975). Brandt’s inattentiveness to this issue may have been a function of his personal indifference, stated many times even more than three decades later, to the health impact of smoking on bar customers. Telephone interviews with Ed Brandt, St. Paul (2007-2009).


749 “Adoption of Rules Implementing the Provisions of the Minnesota Clean Indoor Air Act of 1975 (n.p. [at 2]) (n.d.), in Health Department, MSA, MHS, 112.H.18.3(B).

750 Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of
The aforementioned lack of consensus on the common traffic areas sub-rule hinged on differences between the restaurant industry, to which ANSR was prepared to make concessions, and general business offices, whose managers' sad stories of disruption not only failed to prompt ANSR to subvert its own goals, but drove Peterson both to lose his patience with owner efforts to maintain smoking and to make an uncharacteristically unbureaucratic intervention.

The source of this resistance to the new anti-smoking regime was Donald Lenarz, representing Associated Industries of Minneapolis, an organization of 725 employers and building owners/managers, which had been formed in 1937 as a capitalist class struggle organization to deal with a growing number of powerful unions in a more “subtle” manner than the disbanded Citizens Alliance: in lieu of the latter’s head-on collisions, strikebreakers, brute force, and gunmen, Associated Industries fielded “a small army of trained employer representatives, labor conciliators and employee relations directors.” Instead of illustrating the disruptive impact on smoking in office areas of the proposed common traffic sub-rule by reference to any of AIM’s many members, Lenarz chose AIM’s own 3,600 square-foot headquarters staffed by 14 employees. Abstracting from the exempt “private offices,” he focused on the 124-sq.-ft. library, 124-sq.-ft. supply room, 350-sq.-ft. conference room, 127-sq.-ft. reception area, and 382-sq.-ft. general office area, several of which were in practice diminished by the presence of cabinets and other objects. For example, it was “impractical” to divide the library—which association members also used—being effectively less than a hundred square feet, into smoking and nosmoking sections, to put up partitions in it, or to get a four-foot space between sections. The conference room would be subject to the common traffic sub-rule because nonsmoking members of union committees would be required to use that room for the purpose for which it was intended (i.e., collective bargaining). If AIM made the room nonsmoking, since the hallways and restrooms would be posted nonsmoking, periodically unionists and others (totaling 15 or 20 people) would have to leave the building to smoke, thus interrupting the function; if, on the other hand, AIM divided the room and

1975, “Findings of Fact,” ¶ 13 at 6 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B). Against the background of this expressed regulatory intent regarding Final Rule 442(c), it would not have been lawful for owners to serve meals to cocktail lounge customers in the lounge, as Singer indicated had been the practice.

751 Donald Lenarz to Hearing Examiner (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

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table 50-50 (without being able to comply with the four-foot-wide-space requirement), the resulting physical seating configuration would, since smoking and nonsmoking were cross-class phenomena, interestingly have ousted the traditional labor versus management constellation in favor of smokers versus nonsmokers—an outcome that left Lenarz sputtering: “So I don’t know where we are.” And, finally, the general office area for five clerical workers, four of whom smoked, could not be partitioned by barriers and was not large enough to allow for a four-foot-wide space; and “since our ventilation system probably doesn’t meet the requirements in the rules and we can’t measure the carbon monoxide concentration,” it too might have to be posted nonsmoking, thus causing those smokers to leave the building to smoke, “however many times that may be during the day.”

Having listened to a very lengthy account that did not even come close to tugging a single one of his heartstrings, Peterson mild-mannered but definitely drew the inexorable conclusion for AIM and many Minnesota smoking aiders and abettors:

MR. PETERSON: I would like to point out that the law does put the burden on the smoker and not the non-smoker.

(Applause)

MR. PETERSON: And that these rules are consistent therefore with the law. And therefore, if the proprietor attempting to comply with an acceptable smoke-free area can find no other alternative, you would have to post no smoking in its entirety. That’s the intent, I believe, of the law.

With regard to the sub-rule pertaining to public places with two or more rooms used for the same activity, which conditioned the designation of an entire room as smoking-permitted on the owner’s designating “at least one other

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753 Board of Health Hearing Transcript at 94-97 (Dec. 2, 1975).
754 Board of Health Hearing Transcript at 97-98 (Dec. 2, 1975). Peterson’s curiosity was stimulated when told that he had made some interesting responses to comments: “I was an ambitious young guy only one year out of the School of Public Health. I think the attorneys always told me to listen, ask questions but never state an opinion during the hearing. What did you find interesting? It should have been pretty bland.” Informed of his response to Lenarz, he was gratified to learn that “I had enough confidence to respond to the business representative. Crazy to hear about it now.” Email from Kent Peterson to Marc Linder (May 3, 2009).
comparable room...as a no-smoking area,” the Health Department’s “Justification” self-contradictorily both accurately repeated this sub-rule and misstated it, to nonsmokers’ detriment, by asserting that, “if one room is entirely designated as smoking permitted then there is responsibility to have at least one other comparable room with a no smoking area” (rather than to designate it nonsmoking in its entirety).

This issue arose at the hearing when a representative of the Bloomington Hospitality Association—who, under oath, stated (and submitted as an exhibit “statistics which are not b.s. or hearsay” purporting to show) that over a 10-week period of 9,786 persons served lunch in two rooms at one restaurant absolutely none made advance reservations for a seat in a nosmoking area and only 14 so requested after entering—charged that there was a contradiction between this provision and MHD 444(b)(4), which provided that the “size of the designated smoking permitted area shall not be more than proportionate to the preference of patrons of that location for a smoking permitted area....” Despite the unambiguous language and meaning of section (b)(2), Peterson initially and erroneously responded that it “does state that at least a portion of a comparable room shall be a no smoking area.” Then finally understanding that a problem existed, he sought shelter from the criticism in the shaky conjecture that “I don’t believe that we have authority to require that the entire comparable room smoking be no smoking”—without, apparently, seeing any need to offer a statutory warrant for authorizing an owner to declare every square inch of a room smoking-permitted. Unwilling to face the reality of the rule’s text that he himself had drafted and/or too flustered to reproduce his own work product accurately, Peterson instead erroneously claimed that “it does state that where there are two rooms, one is entirely smoking, there shall be a comparable room that indicates a no smoking area.” Perhaps perceiving at last the discrepancy between his statement of the rule and the rule, he conceded that: “We may have to clarify that. Apparently you don’t understand that was the intent.” An incredulous Chum Bohr had to ask him to repeat his statement, prompting Peterson to misstate yet again that “a portion of the comparable room must contain a no smoking area.”

At least Brandt of ANSR was not hoodwinked: calling Peterson’s interpretation a “proposal to change that language,” he bluntly objected because

757Board of Health Hearing Transcript at 73-76 (Dec. 2, 1975).
it “would utterly defeat the purpose of trying to provide maximum protection for
the non-smoker. The wording should be the other way round. [A]t least one
whole room should be a non-smoking facility with possible mixture in other
rooms.” ANSR’s counterattack was unavailing. Peterson, backed by the
Board of Health, possessed the authority not only to vindicate his mistake and
bring reality into sync with it, but to impose it on the rest of the world: the final
rule read just as he had erroneously claimed (“as long as at least a portion of one
other comparable room has been designated as a no-smoking area”).

In contrast to ANSR’s aforementioned concession on common traffic areas,
Brandt proposed supplemental language for what he deemed “the heart” and “the
most important part of the entire regulation,” the adoption of which he strongly
urged regardless of whatever changes might be made in other sections. That
subsection (MHD 443(a)(4)) mandated that the “size of the designated smoking
area shall not be more than proportionate to the preference of patrons of that
location for a smoking permitted area, as can be demonstrated by the responsible
person.” ANSR viewed adoption of this sub-rule as “absolutely essential”
because it was “vital in dealing with the problem of token compliance,” which,
as already noted, was especially rampant in restaurants.

According to the Health Department’s “Justification,” this sentence
“describes the general method in which the proprietor should decide the size for
designation of a smoking permitted area...if such an area is provided.” The staff
deemed it “the most practicable method for such determination” after having
considered and rejected “an absolute minimum percentage or a minimum square

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758 Board of Health Hearing Transcript at 84 (Dec. 2, 1975).
759 Later Brandt admitted that “we have not pushed for a regulation that would require
multiple room public facilities to establish entire rooms that are smoke-free....” Board of
Health Hearing Transcript at 112 (Dec. 2, 1975).
760 Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act,
Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(b)(2) (Apr. 2,
1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B). The
Board of Health degraded the integrity of the process even further by asserting that this
final rule was “meant to give force and effect to both” § 5 of MCIAA, “which gives the
proprietor the right to designate smoking areas,” and § 6(b) “requiring the proprietor to
attempt to arrange seating so as to provide a smoke-free area.” Before the Minnesota State
Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the
Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 22
at 8 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).
761 Board of Health Hearing Transcript at 85 (Dec. 2, 1975).
762 ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air
Act at 1 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
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footage” because of the difficulty that the Department would have enforcing such standards and “because of the lack of ability to find a percentage or square footage which would be reasonable and proper for all public places....” While allowing owners to use “any reasonable method” (“as long as” it was consistent with MCIAA and the rules), the staff pointed out that “[m]ethods for size determination could be a combination of either surveys of customers and/or recording of the number of people who ask for smoking permitted areas in some period of time.” The Department offered two specific examples that it would find “acceptable”: (1) owners could start by designating the public place 50-50 as between smoking and nonsmoking and then “observe whether or not the size of those areas are [sic] adequate or excessive for customer demands, and then make changes in response to them; and (2) owners could, for a limited time period, ask all customers their preference for smoking or nonsmoking areas, record the numbers, and then designate seating accordingly. As long as the method was “reasonable” and “there are not a significant number of citizen complaints that the size has not been adequate,” Department inspectors would deem owners’ designations acceptable.763

Against this background, Brandt explained (to applause) that the figures cited by restaurateurs earlier in the hearing purporting to show that virtually no nonsmokers ever requested seating in a nonsmoking area were totally useless and totally beside the point, because they are based upon the assumption that the non-smoker must request the use of a non-smoking facility, which is clearly not the intent of the law. The law does not say that public places shall provide a non-smoking section for non-smokers who request it. It says smoking prohibited, period, excepting in designated smoking areas. ... If anyone is to request a specific facility, it is the smoker.... And no statistics from any restaurant have any validity whatsoever unless the proprietor has asked each and every patron what his preference is.764

763Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 17-18 (MDH Ex. 11, Dec. 2, 1975), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B). The Board of Health agreed that absolute minimum percentages or minimum square footage might not be reasonable for all public places because of “the variables of activity, use, need and population in each public place at any given time”; consequently, “fluctuating boundaries based upon demonstrable preference” were consistent with the need to protect nonsmokers’ health and comfort. Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 25 at 9 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

764Board of Health Hearing Transcript at 85 (Dec. 2, 1975). According to Glenna
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Because many nonsmokers who preferred nonsmoking sections would not initiate the request because they either were unaware of their legal rights or, “more probably,” did “not want to engage in what they think is going to be a hassle,” ANSR, comparing the experience in airplanes,\textsuperscript{765} proposed adding regulatory language to authorize owners to determine the percentage of patrons preferring a smoking area according to one of the following criteria: (1) the percentage of patrons expressing a preference for a smoking area “if all patrons are asked for their preference”; (2) the percentage of patrons expressing a preference for a smoking area in a survey, “provided that the survey include all patrons during a period of at least two weeks and provided that a new survey is conducted once each year”; (3) the percentage of patrons specifically requesting use of a smoking area if the owner does not ask all patrons for their preference; and (4) the percentage of smokers in the general population defined as 37 percent for establishments catering chiefly to adults and 25 percent for those catering to children and adults.\textsuperscript{766}

ANSR’s initiative was very rudely received by the general counsel for the Hospitality Industry of Minnesota, Robert Johnson,\textsuperscript{767} who earlier in the hearing, sounding as though he were mouthing Tobacco Institute propaganda, had (incorrectly) instructed those present that MCIAA was about health and “not a law to recognize certain individuals who may be irritated by smoke.”\textsuperscript{768}

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\textsuperscript{765}Board of Health Hearing Transcript at 103-104 (Dec. 2, 1975).

\textsuperscript{766}Board of Health Hearing Transcript at 86, 87 (Dec. 2, 1975). See also “ANSR Policy Statements: State Board of Health,” ANSR 4[should be 3](4):1, back page (Dec. 1975).

\textsuperscript{767}Of Johnson, whose tenure as a member of the Minnesota House of Representatives overlapped with his, Brandt said: “At least he was honest enough to state on the floor that he represented the restaurant association when pertinent bills came up in the House.” Email from Edward Brandt to Marc Linder (Oct. 28, 2009).

\textsuperscript{768}Board of Health Hearing Transcript at 30, 28 (Dec. 2, 1975). Kahn had little difficulty refuting this charge by pointing out that the MCIAA’s public policy section expressly declared the law’s purpose as protecting “the public health, comfort and environment.” \textit{Id.} at 31. See also Gordon Slovot, “Rival Views Cloud Hearing on Smoking Law,” \textit{Minneapolis Star}, Dec. 2, 1975, Bates No. TIMN0461869. Nevertheless, Oliver Perry of MACI raised the same point later in the hearing, complaining about “the extension of all these regulations into the work place without a showing that I am satisfied as sufficient showing, that...there is a substantial health hazard to employees.” Board of
Vociferously but incoherently Johnson accused Brandt of having presented a proposal “certainly contrary to the agreement that I thought we had with you and your organization....” The precise nature of that agreement and of ANSR’s breach was obscured by Johnson’s assertion that the “theory” that he thought that Brandt had “accepted” was that the “key” was “the preference of people we are serving,” and if Brandt was “not going to accept it, I think you really have gotten into an entirely different battle, because this then becomes an economic battle...rather than our desire to serve the public....” The only semi-intelligible sense that could be extracted from Johnson’s oration was that “there is just a heck of a lot of us that don’t smoke. We really don’t care where we sit. And if somebody else wants to smoke,...I think these people have rights....” The core of his objection appeared to be the claim that ANSR had acquiesced in the restaurant owners’ view that “preference was true preference, and indifference also was a preference on the part of the public.” Johnson wanted to “go back to that idea, that people are going to have to ask where they want to be.... But let’s not forget that there is a large segment who is indifferent, and I think that they also have to be recognized.” In other words, what Johnson in fact strenuously objected to was Brandt’s effort to use MCIAA to raise nonsmokers’ consciousness about their new right to smoke-free space in covered public places. The most that Johnson would put up with was ANSR’s “educat[ing] those people to go in and tell” the restaurants “that you want to be in a non-smoking area, then I think we have the preference of the customers coming forward.” But if Brandt’s plan was “to turn this thing around and start making policemen out of anybody in any industry”—especially if, as Johnson did not mention, nonsmoking was the default position and the burden was shifted to smokers to express their preferences—“I think we are going to have some difficulty, because I don’t think that is the way we thought in the law,”

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769Board of Health Hearing Transcript at 88, 90 (Dec. 2, 1975). See also Bob Goligoski, “Non-Smoking Rules Ignite Differences,” SPPP, Dec. 3, 1975 (12:5-6). Bohr also submitted as a hearing exhibit the results of a National Restaurant Association attitude survey that asked 3,192 consumers to rank order the importance of 22 features in choosing a restaurant. Depending on the type of restaurant, the presence of a nosmoking section
This position was pushed even further by John Kahler, a smoker who was president of the Minnesota Hotel & Lodging Association and vice president for operations of the Kahler Hotel in Rochester. He claimed that his hotel’s compliance with MCIAA (which consisted of having posted signs and “added the non-smoking area” by August 1) had, as far as he knew, elicited “not one single positive response from a guest,” although more than half a million people were in the building annually. Another seeming Tobacco Institute trainee, Kahler urged replacing “coercion and vindictiveness with some common sense and courtesy....” Relatively sedate at the hearing, in his post-hearing written statement Kahler shed his restraint to attack anti-smokers as just another “special interest” group that, “embark[ed] on a course of action for the oppressed,...lose sight of their real intent as they pursue their special interest.” In this case of providing “relief for a small minority of people who, unfortunately, suffer from lung or congestive problems,” anti-smokers “confused the issue” not only by including all non-smokers, but even more by failing to admit that “they recognize that the vast majority who enjoy going out for entertainment and the like don’t really give a hoot whether others smoke or not.” Indeed, most of Kahler’s smoking and nonsmoking customers felt that it was “ridiculous” to make an issue out of seating locations. He therefore proposed the market-knows-best solution (“a democratic way”) of letting hospitality operators “do their own thing” including “cater[ing] to non-smokers” and “[i]f the non-smokers are right, it won’t be long before we have a factual answer.” Such an approach would prevent non-smokers from “over-playing their hand and trying to transmit some of their responsibility to us.” In the context of the collective problem of public health, however, Kahler failed to explain how the dictum that “each of us...must assume responsibility for any personal problems we may have” could possibly be implemented when only state intervention could limit or eliminate the source of

ranked between 13th and 17th, garnering between 119 and 11 votes. The numbers enabled the NRA to remark that although proposed measures in 17 or 18 states to require designating a portion of restaurants no-smoking were “no doubt noble, it would also seem that consumers are not quite as concerned about this issue as some would have us believe....” “How Non-Smoking Section Rates with Consumers,” NRA News 14(10):6 (Apr. 1975), MDH Ex. 18 (Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B) (attached to letter from William Fisher, NRA exec. v.p., to Chum Bohr (Sept. 23, 1975).

770Board of Health Hearing Transcript at 82 (Dec. 2, 1975).
771Board of Health Hearing Transcript at 83 (Dec. 2, 1975).
772John Kahler to Kent Peterson (Dec. 19, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
secondhand tobacco smoke exposure.

Later, Peterson himself took up this issue again when he relayed to Bohr a comment from “our health education department” concerning the conclusion that “we” had reached “about the fact that the public is not educated about the fact that this law exists, and that it is apparent that there are not many people who request a no-smoking area.” Since the legislature had failed to appropriate any funds for public education about MCIAA, the Health Department, which was “willing to work with the hospitality industry however possible to improve this public education,” inquired, without the slightest hint of irony, whether “you have some budget that could be obtained from private sources, like your own....” Instead of rising to the bait, Bohr denied Peterson’s premiss: “I’m just plain telling you that the public has been aware of it.”

In the event, the Board of Health, based on Brandt’s testimony, adopted the first and third of ANSR’s four proposed methods for determining the “proportional preference of users of a smoking-permitted area” (and rejected, without explanation, one that tracked one approved by the aforementioned “Justification”).

When the hearing proceeded to focus on “Categories of Affected Places”—the rules for which, under MHD 444(a), prevailed over the general provisions of MHD 443 if the two were in conflict—Oliver Perry of MACI attacked the definition of “office,” designed to determine whether it would be

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773Board of Health Hearing Transcript at 99-100 (Dec. 2, 1975).
775Rules As Adopted for the Implementation of the Minnesota Clean Indoor Air Act, Minnesota Department of Health Rules Chapter Twenty-Six, MHD 443(b)(4)(aa) and (bb) (Apr. 2, 1976) (copy furnished by MHD), in Health Department, MSA, MHS, 112.H.18.3(B). The final rule also gave owners the discretion to use “an alternate method which reasonably indicates the user’s preference.” MHD 443(b)(4)(cc). The final preference-determination rule read as follows: “(aa) the percentage of users of the location who express a preference for a smoking-permitted area when the responsible person asks all users for their preference, or (bb) the percentage of users of the location who request or select a smoking-permitted area when the responsible person does not ask all users for their preference, or (cc) the percentage of users who are determined by the proprietor to prefer a smoking-permitted area by an alternate method which reasonably indicates the user’s preference.”
776“When a public place contains an office which supports activities which are principally to manufacture or assemble goods, products or merchandise for sale, or to store
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subject to the Health Department or the Labor & Industry Department rules, as creating a “double standard.” He reasoned that an “intolerable situation” and a “nightmare” for compliance and enforcement would result from the fact that the corporate headquarters of (say) General Mills or 3M or that of any manufacturing firm located in a downtown Twin Cities office building would be “exempt” (that is, not covered by the former set of rules), while the “office next door” of lawyers, architects, or accountants or the headquarters of a retailer such as Dayton’s would be covered.777 Brandt counterattacked by pointing to the irony that the language to which Perry was objecting was adopted by the legislature in direct response to Perry’s objections to the possibility of dual regulations.778

(Although no representative of Honeywell, Inc.779 spoke at the public hearing, the firm, which employed more than 15,000 employees in more than 20 buildings in the Twin Cities area, submitted a post-hearing written statement suggesting that the rule be amended to provide that “all facilities of a private employer engaged primarily in the manufacture of goods, which are not usually frequented by the general public, be under the regulation of one agency.” In light of the laxness of the Labor Department rules it was self-explanatory that “[p]referably this agency should be the Department of Labor and Industry.”


778 Board of Health Hearing Transcript at 127-28 (Dec. 2, 1975). For Perry’s confused and unconvincing attempt at rebuttal, see id. at 132.

779 Honeywell’s position on MCIAA was ambivalent inasmuch as the law increased demand for the air filtration equipment that the firm produced. After Honeywell management had finally recognized that these devices were unable to remove particulates, it decided to ban smoking in its buildings—a decision reinforced by the human resources department’s conclusion that a nosmoking regime decreased health costs. Telephone interview with Patsy Randell, Minneapolis (May 4, 2009) (long-time company official who in 1975 lobbied for it on MCIAA).

780 Statement of Honeywell, Inc. at 3 (n.d.), attached to F. A. Boyle [personnel director, Honeywell] to Dr. Warren Lawson (Dec. 19, 1975), in Health Department, MSA, MHS,
In the event, based on a letter from DLI to the Health Department written two weeks after the public hearing,\textsuperscript{781} the provision was “rephrased to conform with” the former’s rules.\textsuperscript{782}

Brandt then segued into an extended policy discussion of the comparative merits of the two departmental sets of rules. ANSR “appreciate[d]” that the Health Department rules were a “sincere effort to determine specific and workable standards concerning the work places,” but the fact that during the “extensive consultation” held prior to issuance of the proposed rules the relatively little attention that had been directed to workplaces meant that “perhaps none of us have had a chance to think through this aspect of the regulations quite as thoroughly as we might have wished to.” Brandt then (with considerable exaggeration) praised the Board of Health for “essentially...proposing...to provide the same level of protection for the non-smoker in the work place as in the place visited by the general public.”\textsuperscript{783} However—and this circumstance assumed even

\textsuperscript{781}Judith Pinke (Assistant to the Commissioner) to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{782}Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 32 at 11 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B) (erroneously dating the letter as Dec. 8). Revised and final rule MHD 444(c) read: “When a public place which is a factory, warehouse or similar place of work contains an office which is incidental but related to the primary operation, such office shall for the purposes of this Act, be regulated under Rules of the Department of Labor and Industry.”


\textsuperscript{112.H.18.3(B).} Although the company stated to the Board of Health that “we have a significant interest in providing a clean and healthy environment for our employees” (id. at 1), a clerical employee (who was a single parent of three) informed Lawson that she had been “terminated on the spot” when she refused to work in an area with heavy smokers and stale air. Donna Pritchard to Dr. Warren Lawson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

\textsuperscript{781}Board of Health Hearing Transcript at 128 (Dec. 2, 1975). For the second use of “sincere” in the transcript, which was presumably a result of Brandt’s misspeaking or the court reporter’s error, “specific” has been substituted, which appeared in ANSR’s written statement. ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 3 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Despite the fact that ANSR and the Health Department had “worked quite well together on the of the original rules,” their relations were, until about 1977, “less than cordial....” This tension was apparently in part linked to the Department’s having initially regarded MCIAA “with dismay” because of the view that it was unenforceable. Jeanne Weigum, “The Self-Enforcing Law: The Way to a Cleaner Indoor Environment,” in Proceedings of the Fifth World Conference on Smoking and Health 2:333-36 at 333
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greater significance since so many manual workers were not even covered by the Health Department rules—ANSR’s “feeling” was that the standards of protection for the non-smoking employee need to be stronger than those for places that are used by the general public, for several reasons: One is that the employee normally spends approximately 40 hours a week at his work place, whereas most patrons will probably spend an hour or two at a given kind of public establishment, or a little bit more. So the amount of exposure is much greater at the work place.

Furthermore, the employee doesn’t have any option but to go to work at the one place where he has a job. Whereas the patron of a public service will sometimes have some choice of facilities which he wishes to patronize. Furthermore, since the criterion in each case is an acceptable smoke-free area, which can be met by having a...distance of four feet between the smoking area and the non-smoking area, this is probably reasonably satisfactory in a public facility like a restaurant, because if I’m given a table that’s only four feet from the non-smoking [sic; must be smoking] section, I can respectfully decline and say, I would wish to wait until a table is available to me a little farther away from the smoking section. That same four feet distance however is less adequate as a protection for the asthmatic employee whose station happens to be four feet from the chain smoker.

Brandt may have offered the airline system as one way “the state could use [sic] to force restaurants” to implement the law’s clear intent of making “‘smoke-free places the norm, not the exception,’” but indirectly his statement underscored the obvious—namely, that airplane-style segregation in restaurants offered nonsmokers virtually no protection from secondhand smoke. ANSR took this position despite the fact that, as Brandt observed many years later, “even no-smoking areas had no real protection from smoke in most restaurants. If you asked for one, they would give you one, but it might be next to a smoking area,

(William Forbes et al. eds 1983).

784Board of Health Hearing Transcript at 128-29 (Dec. 2, 1975).


786In a notice of proposed rulemaking in 1979 the Civil Aeronautics Board—which had still “not finally decided whether the rules as now amended will be sufficient to protect non-smokers from unreasonable exposure to tobacco smoke”—in response to a comment by ASH that smoking should be prohibited in forward first class not only because its small size precluded “effective separation,” but also “because smoke drifts back into the tourist no-smoking area even when a curtain is drawn,” stated that there was no convincing demonstration...that grouping all smokers together would solve the problems associated with smoking on aircraft.” Civil Aeronautics Board, Part 252 - Provisions of Designated ‘No-Smoking’ Areas Aboard Aircraft Operated by Certificated Air Carriers: Proposed Restrictions on Smoking at 2, 4 (May 16, 1979), Bates No. 03743088/9/91.

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which was useless.”787 Such candor stood in sharp contrast to Brandt’s understandably propagandistic but nevertheless hopelessly hyperbolic claim, written in the fall of 1975 and published in early 1976, that: “When you deplane in Minneapolis or St. Paul, you’re in clean indoor air country.”788

Brandt was willing to accept the four-foot-wide space as the Health Department rule for non-workplaces (even though it did not produce a smoke-free area acceptable to him)—the definition of an “acceptable smoke-free area” was “not as strict...as we would ideally like,” but overall ANSR regarded the rules as a “good compromise” that would “have a substantial positive effect on alleviating the problems stemming from indiscriminate smoking in public places”789—but on behalf of ANSR he suggested one of two courses for workplace-related rules: the proposed workplace rules should either be adopted on an interim basis with the commitment to develop stronger rules as soon as experience with the interim ones made improvement possible or, “in view of our total disenchantment” with the DLI rules, deleted for the time being and both departments should immediately undertake a serious effort to draft stronger rules.790

Following Brandt’s detour a crucial discussion took place about the alternative to the aforementioned MHD 443(a)(1), which prohibited the designation of more than one smoking-permitted area per room (except in rooms containing at least 20,000 square feet). Under the alternative, “a place of work which is not customarily frequented by the general public may contain several, separate no smoking and smoking permitted areas within the same room provided the no smoking areas are at least 200 square feet...in area. Such no smoking areas must comply with the requirements for an acceptable smoke-free area....”791 The draft of September 9/12 had lacked such a provision, a version of which appeared in the draft of October 1/9 and stated that in a workplace or office not customarily used by the general public the owner would be deemed to be making reasonable efforts to prevent smoking if it was permitted in sections used exclusively by smokers and “people who permit smoking. Where such smoking permitted areas and no smoking areas exist in the same room..., each no smoking area shall be at

787 Email from Ed Brandt to Marc Linder (Mar. 19, 2009).
789 ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 1 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
790 Board of Health Hearing Transcript at 129-30 (Dec. 2, 1975).
791 Minnesota Department of Health Rules Chapter Twenty-Six: Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, MHD 444(b) (n.d. [Dec. 2, 1975]), in Health Department, MSA, MHS, 112.H.18.3(B).
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least 200 square feet...and an acceptable smoke-free area....”792 The Health Department staff’s “Justification” made no effort at all to conceal the extent to which the Department had acquiesced in the aforementioned importuning by Twin Cities firms and building owners that the rules respect corporate office managers’ conception of the role played by smokers and their smoking in their “scientific” (i.e., profit-maximizing) operations. Not to be underestimated here was the fact that, as Patsy Randell, who as Honeywell, Inc.’s lobbyist in 1975 attended the legislative hearings and debates (rising to director of state government affairs and vice president of corporate diversity and multicultural business affairs), later explained, all Twin Cities corporate executives at the time smoked (drank and were white).793

Ironically, then, although ANSR failed to persuade the Board of Health to bring the level of protection for office workers up to that for the general public regarding this rule, the final rule depressed the level of protection conferred on the general public down toward that granted office workers by permitting more than one smoking-permitted area in rooms containing at least 20,000 square feet.794 The Health Department staff argued that the new rule was “necessary to provide additional flexibility to places of work” because there was need for permitting more than one smoking permitted area per room in a place of work due to the separation of employees according to activities within many work locations, the long period of time which both smoking and non smoking employees spend at the place of work, and the adverse economic effect which could be created by excess time off for smoking breaks or by separation of people doing related activities.795

The basis of the 200-square-foot rule was the 150-square-foot “standard, accepted” per person area in commercial business offices obtained from the very entities on whose behalf the pro-smoking revision was undertaken—“Minneapolis and St. Paul owners and managers.” On what scientific basis the staff decided to tack on 50 extra square feet it kept to itself, offering only this robustly opaque

792Proposed Rules for Implementation of Minnesota Clean Indoor Air Act, Rule 4.a). (Draft 10/9/75), in Health Department, MSA, MHS, 112.H.18.3(B).
793Telephone interview with Patsy Randell, Minneapolis (May 4, 2009).
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justification: “it was decided to require all no smoking areas to be a minimum area greater than 150 square feet. Hence, 200 square feet was selected as proper to maintain minimum space for a ‘smoke-free’ environment.” How these 10 x 20-foot island oases, separated by a four-foot moat from the breezy oceans of drifting smoke, could possibly merit the tag, “acceptable smoke-free area,” the “Justification” did not even seek to explain.796

By the same token, however, the staff was not even audibly embarrassed to assert that this exclusively employer-demanded arrangement would redound to nonsmoking workers’ health. Indeed, in this very context the Department did not even shy away from deploying a term that virtually per se suggested air quality degradation:

“Checkerboarding” of no smoking and smoking permitted areas is herein allowed for places of work not customarily frequented by the general public because such places generally have working areas assigned by functional activities within the place of work. Alternation of such working locations, beyond a small distance to conform to 200 square feet no-smoking areas, would not be economically feasible for employers. Employers are still required to provide an “acceptable smoke-free area”.... With the 200 square foot minimum and “acceptable smoke-free” standard, it is felt that the health and comfort of non-smoking employees will be improved.797

By whom this vision of improved health and comfort was “felt” and whether the improvement was being measured vis-a-vis the previous iteration of the rules, which lacked this beneficent public health provision, staff said not. Moreover, this cave-in stood in screaming contradiction to another explanation in the self-same Health Department “Justification” of its proposed rules, which emphasized that “acceptable smoke-free area” was necessarily defined as a “contiguous portion of the public place” to indicate that “the area must be ‘connecting or compacted’ and not broken down into ‘checkerboard’ type sections.”798 But while

798 Before the Minnesota State Board of Health, In the Matter of Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Justification” at 3 (MDH Ex. 11, Dec. 2, 1975), in Health Department, MSA, MHS,
the Department was at it, the staff yielded to yet another corporate demand—freedom from aesthetic pollution
Since this rule applies only when the place of work is not customarily frequented by the general public and the people who are there would be expected to understand that smoking restrictions exist within the place of work, it would not be necessary to have all the sign provisions which are required by the general sign rule. Instead, one sign (prohibiting smoking except in designated areas) per floor would suffice to pull off this behavioral-cultural revolution the vanguard of which Minnesota was universally “felt” to be.

Impressively, both the Department’s justification and the impact of the new rule constituted an unambiguous rebuff to Brandt/ANSR’s proposal that workers needed more rather than less protection than the general public, who, by and large, not only spent much less time exposed to smoke than employees—who many or most of them were in other capacities—but were also much freer to choose less smoky (or more smoke-free) public places to frequent.

The Health Department’s gift to employers at the expense of nonsmokers’ health failed to placate one of its most insistent demanders, Pillsbury Company, which the press, with some accuracy, credited with this victory of employers over public health: “The original idea was to require that the smokers be huddled together somewhere out of the way of the nonsmokers. That was altered after a representative of the Pillsbury Co. said separation that way would interfere with office productivity. The result was the 200-square-foot rule.”

Ungrateful, the firm’s ubiquitous agent, who now for the first time introduced himself as “Ray Jones, a non-smoker,” opined that “200 square feet...could become an awkward number” and urged a rollback: since the 150 square feet per work station rule of

112.H.18.3(B).

799 Raymond Jones of Pillsbury Company had complained that required 1.5-inch high lettering on signs was “aesthetically repugnant of tasteful office environment.” Board of Health Hearing Transcript at 116 (Dec. 2, 1975). ANSR militant Harry Erickson responded that “I really don’t feel that...most of the health problems are aesthetically beautiful either. And I would just as soon have some unattractive signs helping a person with asthma...as opposed to not having the signs and having them suffer....” Id. at 118-19.


801 Gordon Slovut, “Nonsmokers’ Rights Soon to Be Spelled Out,” Minnesota Star, Feb. 16, 1976, Bates No. TIMN0462127. This account is confused since the draft rule had already included the 200 square-foot-rule.
thumb “in actuality is in excess of what most businesses experience,” he requested that the Health Department consider lowering “that number to 150 in identification of work stations.”**802** (In its post-hearing “brief,” which purported to identify items of “utmost significance in operating a business,” Pillsbury revealed its desire to subvert MCIAA by recommending both that the limit on the number of smoking-permitted areas be dropped regardless of room size and of whether the general public frequented the place and that smoking be permitted in any nosmoking area “with the permission of the non-smoker(s) present.”)**803** The Northwestern National Life Insurance Company went Pillsbury one better by suggesting that the Department permit employers to “designate work station by work station non-smoking and smoking,...provided it complied with the four foot requirement.”**804** Instead of engaging Pillsbury in a race to the bottom, Lenarz of Associated Industries of Minneapolis asked Peterson whether the proposed requirement that nosmoking areas be at least 200 square feet meant individually or in the aggregate.**805**

In explaining that the rule meant that each of the multiple nonsmoking areas had to reach the 200-square-foot threshold, Peterson placed himself in breathtakingly sharp self-contradiction to his own “Justification” because now he claimed that the “intent of that 200 square foot requirement is to maintain some separation, some reasonable separation, so there could not be checkerboarding of no smoking areas and smoking permitted areas.” Embellishing the aforementioned derivation in the “Justification” of the 200-square-foot standard, Peterson asserted that “we wanted to have more than enough for one person so that that person wasn’t just isolated in an island by himself.”**806** This justification was unmoored from any relevant considerations: MCIAA was designed to protect nonsmokers from exposure to tobacco smoke, not to insure that two long-suffering nonsmokers might keep each other company in a 10 x 20-foot box as smoke drifted through their air space—especially not when 200 square feet represented “standard, acceptable” floor space for only one and one-third persons.

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**802**Board of Health Hearing Transcript at 133 (Dec. 2, 1975).
**803**Raymond Jones to Hearing Examiner at 2, 3 (Dec. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
**804**Board of Health Hearing Transcript at 160 (Dec. 2, 1975) (John Murphy). In a post-hearing written statement the company expressly suggested dropping the 200-square-foot requirement altogether in exchange for meeting two of the “acceptable smoke-free area” standards such as the four-foot-wide space and ventilation. John Murphy to Kent Peterson (Dec. 22, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
**805**Board of Health Hearing Transcript at 134 (Dec. 2, 1975).
**806**Board of Health Hearing Transcript at 135 (Dec. 2, 1975).
Alone this rule made a mockery of the outlandish claim by John Banzhaf, one of the country’s leading anti-smoking campaigners, that the MCIAA as “the strongest” public smoking law “makes a very simple proposition: there shall be no smoking except in certain small designated smoking areas.” 807

Peterson, who had drafted the regulations, observed decades later that under them smoke would be “everywhere” after an hour: its visibility and odor might have been diminished, but in terms of the air’s chemical composition, probably no change had occurred. 808 He then added: “We simply did not know that the hazardous effects of smoking would be carried in the air away from the visible smoke and worst smell. Obviously, we now have evidence to support that even invisible effects of tobacco smoke is [sic] hazardous.” 809 That some nonsmokers in the mid-1970s, without the benefit of hindsight, had also been well aware of the pitifully marginal reduction of exposure to secondhand smoke that segregation effected did not mean that they realized that the new situation was no more tenable or stable than the old smoke-wherever-you-feel-like-it situation: the mere fact that society had finally recognized that smoking caused harm to others and made some (partly symbolic) gestures to rectify the problem was and was hailed as a great victory; few people (other than cigarette company executives) understood that more was not only possible but inevitable. Similarly, the objections that many building and business owners and employers raised regarding the burdensomeness of complying with and enforcing smoker segregation would foreseeably have motivated them to reach the same conclusion that airlines eventually did—namely, that the game was not worth the candle and that therefore a flat ban would be more cost effective. It was precisely this nightmarish convergence of attitudes on the part of anti-smokers and owners of covered public places that constituted the tobacco industry’s premonition of the endgame.

The Department of Labor and Industry Draft Rules

[T]he regulations proposed by the Department of Labor and Industry for places of work under its jurisdiction are woefully inadequate.... 810

808 Telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).
809 Email from Kent Peterson to Marc Linder (Apr. 2, 2009).
810 ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 3 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
MCIAA assigned primary jurisdiction over “factories, warehouses and similar places of work not usually frequented by the general public” to the Labor and Industry Department, while the state Board of Health retained rulemaking control over all other workplaces. MCIAA’s smoking ban except in designated smoking areas did not apply to the former workplaces; where workers’ close proximity or inadequate ventilation caused “smoke pollution detrimental to the health and comfort of nonsmoking workers” the Labor and Industry Department, in consultation with the Health Board, was required to “establish rules to restrict or prohibit smoking....” The DLI had already produced a set of draft rules by August 12, which were, however, very brief. In addition to defining the statutory scope of coverage as including “any indoor location of an employer’s enterprise used principally to manufacture or assemble goods, products or merchandise for sale, or to store goods, products or merchandise not for the purpose of retail sale,” the rules merely required employers to satisfy their duty to prohibit or restrict smoking by choosing one of three options: prohibiting smoking in the entire work area; applying for and receiving a waiver (authorized by § 7 of MCIAA if the Board of Health found that there were compelling reasons and that a waiver would “not significantly affect” nonsmokers’ health and comfort); or, “to the extent possible without unreasonable interruption of the business operation, designat[ing] a smoking area and a no smoking area, each in size approximately proportionate to numbers of smokers and nonsmokers employed in the vicinity.”

However inadequate ANSR may have deemed the Health Department’s

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811 1975 Minn. Laws ch. 211, § 4, at 633, 634.
812 Proposed Rules and Regulations of the Department of Labor and Industry Pursuant to M.S. 144.414, § I (draft Aug. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). This definition was narrower—that is, less inimical to the interests of nonsmoking white-collar employees in factories and warehouses—than the next iteration and the final rules, which also mandated coverage of “those areas incidental but related to the primary operation covered by these regulations.” See below this ch. No evidence was found suggesting that the Labor and Industry Department shared this draft with the general public or regulatees; the Health Department, with which DLI was required to consult, file stamped it received on Aug. 14.

813 Proposed Rules and Regulations of the Department of Labor and Industry Pursuant to M.S. 144.414, § II (draft Aug. 12, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). Under the third option, if an employer received a complaint from a nonsmoking employee about discomfort, the employer was required to “make every reasonable effort” to “arrange suitable ventilation,” eliminate the source of the smoke, “transfer the nonsmoker,” or “make other arrangement agreeable to the nonsmoker.” Id. § II.C.2.
The Minnesota Clean Indoor Air Act of 1975

proposed regulations, Brandt, in an ANSR policy statement released a week before the joint Health and Labor and Industry hearings, excoriated those of the Labor and Industry Department as “totally unacceptable” and urged their rejection. (In contrast, ANSR supported the Health Department regulations “with a few qualifications.”) Unsurprisingly, President Oliver Perry of the Minnesota Association of Commerce and Industry said that he did not have “any quarrel” with the Labor and Industry proposal. In response to Brandt’s criticism that the rules’ vagueness invited “employer interpretation or abuse,” Deputy Commissioner Raymond Adel, while acknowledging that the rules were “not very specific,” excused them on the grounds that “there are too many situations that would have to be individually covered...we can’t make individual rules to apply to each situation.” For example, Adel insisted that “sometimes a certain employee needs to work at a certain plant location, such as being assigned to operate fixed equipment, and for that reason it is not reasonable to expect an employer to rearrange his workers.” Brandt dismissed this argument by reference to the statute’s “clear intent...that if you can’t rearrange people then the law clearly authorizes the department to prohibit smoking in an area.”

814 The hearings were presumably held jointly because the MCIAA required the DLI, “in consultation with the state board of health,” to “establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” 1975 Minn. Laws ch. 211, § 4. On October 22, the labor commissioner gave notice of the hearing, to begin on December 2 after the adjournment of the Health Department hearing. The purpose of the proposed rules he described as “establish[ing] reasonable means and methods which employers may utilize to safeguard the health and comfort of non-smoking employees from smoke pollution caused by smoking employees.” Before E. I. Malone, Commissioner Department of Labor and Industry, In the Matter of the Proposed Adoption of Rules of the Department of Labor and Industry Governing Smoking in Factories, Warehouses and Similar Places of Work, Notice of Hearing at 2 (Oct. 22, 1975).

815 ANSR Policy Statements: Department of Labor and Industry,” ANSR 4 [should be 3](4):1 (Dec. 1975). An editorial preface noted that the statements were synopses of lengthier statements presented at the December 2 hearing, but the press quoted from them on November 26.

rights law,” under the Labor and Industry rules. To be sure, in answer to his own question as to why a DFL state administration, with the DFL controlling both houses of legislature, would have adopted “such extreme pro-employer regulations,” Brandt later adduced his “belief that smoking was more prevalent among factory workers than in the general population” and “a few negative responses by lobbyists for some individual unions to the law.” In that precise context it remained unclear whether the regulations accommodated employers more than smoking blue-collar workers and their unions, but in retrospect Brandt expressed the judgment “that Malone did what the majority (although maybe a slim one) of [smoking] blue-collar workers wanted,” and in that sense “was catering to union workers, not to employers.” In the same vein, the


818 Email from Ed Brandt to Marc Linder (May 2, 2007). A nationwide survey in 1976 revealed that, with regard to occupational groups, nonfarm blue-collar workers had the highest cigarette-smoking prevalence rate among men 20 and over—50.4 percent compared to 36.6 percent among white-collar workers; every male blue-collar subgroup had a higher prevalence rate than every white-collar subgroup. Gordon Bonham, Use Habits Among Adults of Cigarettes, Coffee, Aspirin, and Sleeping Pills: United States 1976, App. tab. 3 at 21 (U.S. Department of Health, Education, and Welfare Pub. No. (PHS) 80-1559, Oct. 1979). The only other explanation that Brandt gave in support of his position was the conjecture that Republican Senator Robert Brown had offered the amendment to transfer rule-writing jurisdiction over factories and warehouses to the Labor and Industry Department “on behalf of business interests,” since Brandt considered “specious” Brown’s claim that he had done so to avoid interfering with OSHA regulations. Email from Ed Brandt to Marc Linder (May 2, 2007). More than three decades later Brown had no recall of his amendment. Telephone interview with Robert Brown, St. Paul (Mar. 11, 2009).

819 The Labor and Industry Commissioner in 1975-76 was E. I. (Bud) Malone, a former journeyman electrician and officer in the International Brotherhood of Electrical Workers, who had been appointed by a Republican governor in 1968 and twice reappointed by a DFL governor. The Minnesota Legislative Manual: 1975-1976, at 419. When Brandt complained to Malone about the regulations, he reminded Brandt that his union had endorsed him when he ran for his House seat (although Brandt was a Republican in a heavily DFL district).

820 Email from Ed Brandt to Marc Linder (Mar. 18 and 19, 2009). The then assistant to the commissioner of Labor and Industry concurred in Brandt’s view. Telephone interview with Judith Pinke, Minneapolis (Mar. 26, 2009). Significantly, in 1994 when the Health Department proposed a rule to tighten regulation of smoking in factories, warehouses, and similar workplaces by restricting smoking to private enclosed offices and designated smoking sections of lunchrooms and lounges unless employees were stationed
longtime head of enforcement at the Health Department observed that blue-collar unions, which had been “very guarding” of their smoking members’ continuing to be entitled to smoke at work, never filed any complaints on behalf of nonsmokers.821

With regard to the Department of Labor and Industry draft rules822 a role reversal took place at the hearing: whereas employers were by and large not only supportive, but urged that the Board of Health adopt the (feckless) DLI rules, on ANSR’s behalf Brandt launched a slashing critique that urged their virtually wholesale rejection, leaving only the provision dealing with employee lunchrooms, cafeteria, lounges, and rest areas unscathed.

Overall, ANSR denounced the proposed DLI regulations “as worse than no regulations at all” and called for their rejection and development of new ones that “would be meaningful, specific and consistent with the intent of the law.”823 The lunchroom provision required employers to “reserve one side or area of the room for the sole use of non-smokers, and...make a reasonable effort to minimize the toxic effects of smoke pollution in that area.”824 The provision governing general

821Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).
822In 1984 the legislature transferred jurisdiction over these workplaces from DLI to the Health Department and repealed the former’s special rules. 1984 Minn. Laws ch. 654, § 113, at 1903, 1981. At the initiative of Phyllis Kahn, who had met with the Health Department regarding “enforcement of standards to restrict smoking in workplaces” under DLI, MDH, acting at Kahn’s suggestion and determining that DLI agreed, drafted bill language for the transfer. Sister Mary Madonna Ashton, Commissioner of Health, to Phyllis Kahn (Mar. 22, 1984), Minnesota Department of Health, Phyllis Kahn file (copy furnished by MDH).
823“ANSR Policy Statements: Department of Labor and Industry,” ANSR 4 [should be 3](4):1, back page (Dec. 1975). Alternatively, ANSR recommended adoption of Labor and Industry’s rules “with the recognition they will serve only as interim standards and with the commitment [sic] to revising the regulations as soon as some experience with implementing them has been gained.” “ANSR Policy Statements: State Board of Health,” ANSR 4 [should be 3](4):1, back page (Dec. 1975).
824Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses
The Minnesota Clean Indoor Air Act of 1975

work areas ANSR regarded as “an open invitation to employers to evade their responsibility and to violate the intent of the law to protect the health and comfort of non-smoking employees.”

That provision read as follows: “Upon complaint of an employee that the close proximity of workers or inadequate ventilation is causing smoke pollution detrimental to his or other non-smoking employees’ health and comfort, the employer...shall make a reasonable effort to determine the causative factors of the smoke pollution.” ANSR criticized this last clause on the grounds that the rule, by authorizing the employer to do so, “when such cause is obviously smoking by employees...encourages an employer to refuse to recognize the validity of a complaint that an employee is bothered by smoke.” The Labor Department draft then went on to provide that: “If the employer...finds that the smoke pollution is due to the close proximity of workers or the inadequacy of ventilation, he shall make a reasonable effort to minimize the toxic effects of the smoke pollution on non-smokers.” Brandt dismissed this framework for regulating employers’ “responsibility to deal with smoke pollution [a]s so general as to be not only totally unenforceable from a legal point of view,
but also totally useless as a standard form an educational point of view."829

The final provision of the DLI draft rules, which dealt with efforts to minimize tobacco smoke’s toxic effects, sounded to Brandt/ANSR “like an effort at deliberate sabotage of the purposes” of MCIAA830 because employers were required to act only “‘to the extent possible without unreasonable interference with the business operation.’”831 Moreover, the fact that under the rule employers’ efforts to minimize toxic effects had to include the arrangement of seating or work patterns as a means of separating smokers and nonsmokers only “‘provided that such an arrangement is not detrimental to the employment status of either the non-smoking or smoking employees’”832 prompted Brandt to conclude that permitting employers to refuse to separate smokers and nonsmokers on these grounds was “an outright perversion of the law.” ANSR’s critique was based on the proposition that, although the legislature did not intend for the factory and warehouse regulations to be “any weaker” than those governing places under the Board of Health’s jurisdiction, the DLI proposals “fail to incorporate even the very weak standard” embodied in the Board of Health regulations. This conclusion, in turn, derived from the argument that MCIAA was “based on scientific evidence that smoking is detrimental to the non-smoking employee if


831Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses and Similar Places of Work LICA 5 a) (n.d. [file stamped received Oct. 24, 1975, MDH]), in Health Department, Minn. State Archives, MHS, 112.H.18.3(B).

832Labor and Industry Proposed Rules Governing Smoking in Factories, Warehouses and Similar Places of Work LICA 5 a) 3) (n.d. [file stamped received Oct. 24, 1975, MDH]), in Health Department, MSA, MHS, 112.H.18.3(B). This language was also quoted by Gordon Slovut, “Proposal on Blue-Collar Smoking Turns Air Blue,” Minneapolis Star, Nov. 28, 1975 (9A), Bates No. TIMN0461951, whereas Brandt’s quotation was too abridged to be comprehensible. The final rule lacked the proviso quoted in the text. State of Minnesota, Department of Labor and Industry, Labor and Industry Rules Governing Smoking in Factories, Warehouses and Similar Places of Work, LICA 5(c) (Apr. 2, 1976), Bates No. 85646238/9. LICA 5 a) 1) and 2) also required of employers “utilization of existing physical barriers” and “consideration of the flow of air movement, so that insofar as possible, smoke shall move away from non-smokers” among their efforts to minimize toxic effects of smoke pollution.
he is forced to absorb it.”

To defend this position Brand would have had to explain why the legislature’s apparent privileging of the protection of the non-employment-related “general public” over that of factory, warehouse, and other workers whose workplaces the “general public” did “not usually” frequent did not entail a differential regulatory structure that conferred a lower level of secondhand smoke protection on such employees whose work lives did not typically intersect with customers/consumers’. After all, MCIAA expressly stated that section 4’s ban on smoking in public places “except in designated smoking areas...shall not apply to factories, warehouses and similar places of work not usually frequented by the general public, except that the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.”

(When the then assistant to the commissioner of Labor and Industry was read this provision 34 years later, she laughed heartily in recollection of her and her colleagues’ amused and bemused reaction to the question of how they would ever be able to know whether smoke had been detrimental to blue-collar workers’ health.) Since this weakening exception—which Kahn herself, as explained above, was constrained to offer in order to secure passage of her bill in committee after employers, supported by pro-employer committee members, had requested an even more radical watering down of the bill—authorized a continuation of laissez-faire smoking (or whatever regime employers had in place) in such workplaces in which worker proximity or ventilation did not detrimentally affect nonsmoking employees’ comfort and health, it clearly imposed preconditions for obligatory intervention by employers that did not exist in other settings.

Brandt’s post-hearing argument to the contrary to the Labor and Industry Department was based on a retelling of the legislative history that ignored and misrepresented its basic facts:

The amendment to the bill concerning factories, warehouses and similar places of

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8341975 Minn. Laws ch. 211, § 4, at 633, 634.
835Telephone interview with Judith Pinke, Minneapolis (Mar. 26, 2009).
836Jeanne Weigum, the current head of ANSR who has been an official of it for more than three decades, stated that “the amendment weakened the bill.” Email from Jeanne Weigum to Marc Linder (Mar. 21, 2009).
work was not meant to provide for any different degree of protection for non-smokers in
these places than in any other places. It was simply designed to meet the objections of
Oliver Perry that such establishments would otherwise be subject to dual regulation, and
potentially incompatible regulations, by the Department of Industry under the
Occupational Safety and Health Act and by the State Board of Health under the Clean
Indoor Air Act.\footnote{Ed Brandt to Judy Pinke (Dec. 19, 1975) (copy furnished by ANSR).}

Although MCIAA just as clearly did not confer unlimited discretion on DLI in
formulating rules to restrict or ban smoking, the law more than plausibly
contemplated a lower level of protection for factory and similar workers.
Whether the ulterior motive was to accommodate employers or more heavily-
smoking blue-collar workers and their unions, nonsmoking workers would be
disadvantaged vis-a-vis employees and the general public in other covered public
places.

Although Brandt’s claim of parity may have been exaggerated, his view,
expressed in amplified post-hearing comments to the Labor and Industry
Department, that “nothing in these proposals...would in any way whatsoever
restrict smoking”\footnote{Ed Brandt to Judy Pinke (Dec. 19, 1975) (copy furnished by ANSR).}
was nevertheless valid—especially in light of DLI’s later record of virtual non-enforcement.\footnote{According to ANSR’s longtime head: “I do not believe labor and industry ever
enforced any part of MCIAA, not once.” Email from Jeanne Weigum to Marc Linder
Cleaner Indoor Environment,” in Proceedings of the Fifth World Conference on Smoking
and Health 2:333-36 at 335 (William Forbes et al. eds 1983). The head of enforcement
at the Minnesota Health Department stated that his agency never did any enforcement in
factories. Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). By
mid-1976, despite Brandt’s desire to have the law enforced like jaywalking ordinances
(“police would crack down on violators occasionally to remind everyone about the law”),
MDH had not issued a single ticket. M. Gelfand, “Smoking Law Shows Signs of
Compliance,” \textit{MT}, June 21, 1976 (1A), Bates No. TIMN0462116/7.} In his follow-up comments Brandt attacked
the aforementioned “without unreasonable interference” language as feckless
because the standard was left undefined and “business representatives at the
public hearing...made it perfectly obvious that many employers consider any
requirement to do anything to protect the health and comfort of non-smokers to be ‘unreasonable interference.’”\footnote{Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).} He also pointed out that the “detrimental to the
employment status” of any employee language “would undoubtedly be interpreted
by employers unsympathetic to” MCIAA “to mean the smoking of any employee
could not, or at least need not, be restricted if the employee objects”—an outcome
that “would make a mockery of” the law.\textsuperscript{540} Little wonder that by mid-1976 Brandt complained that: “The biggest problem we’ve had is in the workplace.... We have not seen much evidence of cooperation by employers. And it’s a problem because the employee is likely to be very hesitant to approach the employer.” And Kahn agreed that a high priority for amending MCIAA was “some protection for an employee who complains about not being given a smoke-free area.”\textsuperscript{841}

Post-Hearing Efforts by Regulatees and ANSR/Kahn to Modify the Health Department Rules

The law does not say that proprietors must set aside a non-smoking section for those who ask; it says smoking in public places is prohibited, except that designated places may be set aside for smokers. The intent is clearly to make smoke-free places the norm, not the exception.\textsuperscript{842}

With the record left open for 20 days for receipt of written statements pertaining to the Board of Health’s proposed rules,\textsuperscript{843} numerous entities, but especially a number of the same firms that had forged a high advocacy profile during the previous months and ANSR, submitted detailed proposals for further changes. The Board of Health did adopt the few changes recommended by the Health Department staff, but the latter characterized them all as “no substantial changes from the public hearing draft such that a new hearing would be required before promulgation....”\textsuperscript{844} Several of the changes that were based on statements made at the hearing were already discussed above. Perhaps the most notable addition prompted by post-hearing comment stemmed from Representative

\textsuperscript{540}Ed Brandt to Judy Pinke (Dec. 19, 1975) (copy furnished by ANSR).
\textsuperscript{842}ANSR Policy Statement, Board of Health Regulations, Minnesota Clean Indoor Air Act at 2 (MHD Ex. 21, Dec. 2, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).
\textsuperscript{843}Board of Health Hearing Transcript at 181-82 (Dec. 2, 1975).
Kahn, who suggested this change to the four-foot-wide space provision. "This may be empty space or could be a section of seats or area acting as a buffer zone in which smoking is not permitted, but which itself is not considered to be part of an ‘acceptable smoke-free area.’" She offered owners this accommodation in the form of "more flexibility in the type of boundaries they would like to create. I think it would be particularly useful in a restaurant where one was considering the division of a line of booths and could avoid the necessary erection of a partition." The "buffer zone" was a kind of nobody’s zone in the sense that smokers sitting there were not permitted to smoke, yet nonsmokers sitting there were not in an “acceptable smoke-free area.” Why members of either group would nevertheless have sat there is unclear, but if they did, they would to some extent have alleviated owners’ alleged concerns about reduced seating capacity. The change could be viewed as a continuation of the Realpolitik that had led Kahn to exempt restaurants from H.F. 79 in the first place, but it may also have been a clever means of precluding owners from taking advantage of the possibility that Peterson had pointed out to them at the hearing of including the income loss associated with the unusable space caused by compliance with the MCIAA in applying for waivers.

The Final Board of Health Rules

Minnesota is the model, and the proposed regulations will go far toward clearing the air

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845 For confirmation that the change was based on Kahn’s letter, see Before the Minnesota State Board of Health, In the Matter of the Proposed (Rules) (Amendments) Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975, “Findings of Fact,” ¶ 8 at 3-4 (Apr. 1, 1976), in Health Department, MSA, MHS, 112.H.18.3(B).

846 Manifestly, Stuart Olshansky, “Is Smoker/Nonsmoker Segregation Effective in Reducing Passive Inhalation Among Nonsmokers?” *AJPH* 72(7):737-39 at 737 (July 1982), was mistaken in asserting that “segregation laws simply do not specify how far nonsmokers should be situated away from smokers in an enclosed area....”

847 Phyllis Kahn to Kent Peterson (Dec. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). The wording of the final rule, MHD 442(a)(2)(bb), differed largely by substituting “unoccupied” for “empty.”

848 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).

849 Board of Health Hearing Transcript at 149 (Dec. 2, 1975). A former Health Department inspector noted that the use of four-foot-wide spaces in smaller restaurants such as diners might have effected an overall reduction in the number of seats, but did not generally produce that impact. Telephone interview with Jim Witkowski, St. Paul (Mar. 26, 2009).
across the country.\footnote{Gerald Riso (Managing Director, American Lung Assoc.) to Dr. Warren Lawson (Nov. 21, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).}

Unlike the anti-public smoking law in Iowa, whose 1978 statute would not provide for administrative regulations,\footnote{See below ch. 25.} the Minnesota legislative scheme was to some extent both weakened and arguably strengthened by the regulations promulgated by the state Department of Health\footnote{Kahn (and the public information director of the American Lung Association in Minneapolis, Maggie Vertin) "conceded that there was some compromise in writing the regulations that implemented the law. 'The regulations are much looser than the law itself' Ms. Vertin said. 'We lost a little in the writing.'" William Endicott, "No-Smoking Law Is Only Puffing Along," C-J, Oct. 12, 1978, Bates No. TIMN0461854} on April 2, 1976,\footnote{The Minnesota State Board of Health adopted the rules by resolution on Feb. 19, 1976, and Dr. Warren Lawson, the commissioner of health and secretary and executive director of the Board adopted them on Mar. 5, 1976; they were filed with the secretary of state on April 2, 1976. State Board of Health, In the Matter relating to the Proposed Rules Relating to the Implementation of the Minnesota Clean Indoor Air Act of 1975: Order Adopting Rules (copy furnished by the Office of the Revisor of Statutes); telephone interview with Kent Peterson, Minneapolis (Apr. 1, 2009).} which the \textit{L.A. Times-Washington Post Service} hyperbolically characterized as having “caused more controversy than anything in the state since the Sioux Indian uprising of 1862.”\footnote{“Attack on Smoking Takes New Course,” \textit{Courier-Journal and Times} (Louisville), June 13, 1976 (B2), Bates No. TIMN0462094.} Subversive of whatever rigor MCIAA possessed was a series of changes that the final rules enshrined regarding smoking-permitted areas. To recapitulate: first, after limiting to only one the number of smoking-permitted areas that owners were authorized to designate per room, the Department reversed course by exempting rooms with at least 20,000 square feet of floor space, which were subject to no limit on the number of smoking permitted areas;\footnote{Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(b)(1) (Apr. 2, 1976), Bates No. TIMN0240635/39.} second, a sub-rule conferred on owners of public places with two or more rooms used for the same activity the discretion to designate one entire room as smoking permitted “as long as at least a portion of one other comparable room” was designated no-smoking;\footnote{Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(b)(2) (Apr. 2, 1976), Bates No. TIMN0240635/39.} and third, a sub-rule modified the ban on smoking in common traffic areas that nonsmokers had to use by declaring that that provision “shall not be
construed to prevent designation of a smoking-permitted area in a portion of the establishment which non-smokers must briefly cross to reach the intended activity.”*857

Even more central to, but also more ambiguous regarding, the protection that the law conferred on non-smokers was the requirement that the person in charge of a covered public place “make arrangements for an acceptable smoke-free area....”*858 Under this sub-rule 859 an owner was in compliance with MCIAA so long as he separated the smoking and nosmoking sections by a four-foot space or with 56-inch high barriers—regardless of how much smoke drifted from the former to the latter. Although the rules purportedly set forth a performance standard (with regard to the ultimate statutory purpose of protecting non-smokers from secondhand smoke) in terms of CO concentrations, because inspectors never took such measurements, in reality owners were free to satisfy a mechanical, fixed quantitative standard without any reference to whether compliance with it achieved that purpose (since the Health Department presumed that the presence of either of those physical standards would per se secure the desired outcome).

Long before it promulgated the final rules in 1976, the Department had received ample public comment complaining about how useless the 56-inch barriers and 4-foot spaces had already proved to be in practice. One commenter explained to Kent Peterson that a “five foot barrier is the same as no barrier since smoke rises and spreads. An aisle space of four feet is ridiculous because the smoker can exhale (blow) the smoke farther than that.”*860 Another told Peterson’s boss that “[o]ne can hardly notice the difference since the law was passed. ... What good does it do to have smokers and non-smokers in the same room a few feet apart?”*861 A high school teacher expressed her “strong feelings” about designated smoking areas, which she illustrated by reference to the faculty room’s four tables, two of which were labeled smoking and two nonsmoking: “But, the entire room is in a constant haze of smoke! It is ridiculous to label or designate areas in close proximity of one another because smoke travels.”*862

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858 Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 443(e) (Apr. 2, 1976), Bates No. TIMN0240635/41.

859 MHD 442(a)(1)-(2), Bates No. TIMN0240636-7.

860 Gerald Peterson to Kent Peterson (Sept. 18, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

861 Ruby Olson to Warren Lawson (Nov. 17, 1975), in Health Department, MSA, MHS, 112.H.18.3(B).

862 Jean Anderson to Warren Lawson (Nov. 20, 1975), in Health Department, MSA,
Regardless of the fecklessness of these options, inclusion of barriers and ventilation raised the question of whether the agency had overstepped its legislatively conferred powers in potentially mandating expenditures by owners, from which making the statute expressly protected them by limiting their duties to the use of “existing” ones. After all, “old ventilation systems,” as Kent Peterson (self-contradictorily) pointed out, were “grandfathered” into the regulations. Moreover, the legislative history made unequivocally clear that the bill’s chief author, Kahn, acquiesced in that limitation precisely because of the objection that the agency might impose such expenditures. Perhaps Bohr was referring to this fact when he complained that some of the Board of Health’s proposals “were an ‘overextension of the law,’ particularly as they apply to restaurants.” Notwithstanding such complaints, the Health Department managed, as explained earlier, to avoid acting beyond its powers by giving owners the choice of using the four-foot-wide space and thus making barriers/ventilation elective rather than mandatory.

Even if owners had universally complied with this elaborate scheme, it could not even remotely have protected nonsmokers from ambient secondhand smoke exposure. The absurd character of even this more sensitive regime was visibly on display in a newspaper photograph from mid-1976 showing a smiling restaurant owner leaning on a (noncompliant) 42-inch-high “barrier” dividing the restaurant into two equal smoking and nonsmoking sections and gazing at a customer whose dense cigarette smoke floats far above the barrier just inches
from his face.\textsuperscript{866} In 1978 Lung Association anti-smoking activist Robin Derrickson reported of her own experiences in restaurants: “The inadequacy of our law sticks out when I look to my left and just past that 4’ buffer space is a cigarette pouring out smoke. Smoke hasn’t been told about staying out of the no smoking section. ... I contend that the no smoking section is a start and that it is unfortunate that the law has been turned around—the whole place should be no smoking with the smoking section set aside.” Just how limited horizons were even at the cutting edge of the anti-smoking movement was exquisitely on display in her utopian lament that: “I calm myself thinking we’ve changed attitudes for the better, but we are not yet to the point of being able to seal smoking sections off from the remainder of the restaurant. That’s the ideal and maybe we’ll be to that point someday.”\textsuperscript{867}

The 56-inch-high physical barriers also performed another regulatory (if not real-world) function: the final rules added a definition of “room” as “any indoor area which is bordered on all sides by a wall or partition of at least 56 inches (1.42 meters). Such sides shall be continuous and solid except for door portals for entry and exit.”\textsuperscript{868} Adoption of this definition exacerbated MCIAA’s central weakness, as ANSR president Jeanne Weigum was still pointing out in 1983:

\begin{quotation}
[T]he regulations allow smoking in private offices if they are not shared with non-smokers and the department has defined short walled cubicles as offices. This in effect means that work sites might have several dozen little smoking areas in a larger working area. Obviously the smoke does not remain in the cubicle and many of the complaints we receive are from people adjacent to a cubicle where someone smokes. It is our hope that the department will change their interpretation of this. At the present time this interpretation is making it more difficult to provide genuine protection for non-smokers.\textsuperscript{869}
\end{quotation}

In the event, it took the Health Department more than another decade to amend the rule to define a “room” as having floor-to-ceiling walls,\textsuperscript{870} but the


\textsuperscript{867}Robin Derrickson, Untitled Typescript at 8 (Sept. 1978) (talk given at Western Lung Conference) (copy from Ed Brandt’s papers furnished by ANSR).

\textsuperscript{868}Rules as Adopted for the Implementation of the Minnesota Clean Indoor Air Act MHD 442(q) (Apr. 2, 1976), Bates No. TIMN0240635/39.


\textsuperscript{870}Minnesota Rules § 4620.0100 subp. 17 (1995). At the same time the Health Department amended the rules to define a “private enclosed office” as a room occupied
relevant question in this context was why ANSR—which in the interim had removed the word “Rights” from its name (but nevertheless retained the ANSR acronym)—“because we thought it made us sound too militant.... It conjured up the image of the kind of people who went around with squirt guns and we really don’t advocate such tactics”—did not mount a similar campaign against other 56-inch-high barriers (or four-foot-wide spaces) on the grounds that they, too, failed to provide “genuine protection for non-smokers” in restaurants and other public places. After all, as late as 1980, a questionnaire concerning restaurants’ compliance with that year’s new MCIAA regulations revealed that 68 percent of ANSR’s own members replied that only “rarely” was a 56-inch high (or 4-foot wide) physical barrier even present.


Lauren Wilkinson, “Anti-Smoking Laws,” Associated Press Executive News Service, May 23, 1987, Bates No. TIMN0457515 (quoting Sandra Sandell). At the time of the change in 1984, ANSR opaquely claimed that “Association for Nonsmokers—Minnesota” would “attract the support of a wider audience” and “appeal to a broad base of the community....” “Jottings,” ANSR, No. 1, Winter 1984, at 2; “Name Changes—Goals the Same,” ANSR, No. 2, Spring 1984, at 1. However, as ANSR’s long-time president said much later: “We wanted to be less confrontational and more appealing to work places. We wanted to go in proposing solutions rather than seeming demanding about ‘rights.’” Email from Jeanne Weigum to Marc Linder (Apr. 13, 2009).

In its response following the administrative law hearing on the 1994 proposed rule changes to objections by the tobacco industry lobbyist Doug Kelm to the proposed floor-to-ceiling walls for private enclosed offices the Health Department noted that it had received complaints about tobacco smoke arising from office cubicles, and then proceeded to assert without explanation that the barriers functioned in the general setting: “While a barrier of fifty-six inches in height is appropriate for separating smoking and nonsmoking areas, the minimum size of the nonsmoking area is 200 square feet. ... Treating cubicles as private, enclosed offices could place smokers adjacent to every employee in the office seeking accommodation. In such a case there would be no contiguous space available to segregate ETS from nonsmoking employees.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 19b (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678.rr1.htm.

ANSR Opinions on MCIAA Restaurant Compliance,” ANSR Flyer 2(2):1-2 (Dec. 1980). Revealingly, although the questionnaire asked whether the non-smoking area was free of ashtrays, it failed to ask whether it was free of tobacco smoke.
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The Final Labor and Industry Department Rules

When the law was passed, we were quite naive. Most of us had a belief that when the law passed the job was finished. Others would see to it that it was enforced. ... Many members became discouraged and dropped out of the organization. It appears that the people who are likely to be involved in the “grind it out” part of enforcing the law, are different from those who are likely to be involved in the passage of the law. Those who envision quick and easy results are likely to be discouraged and disappear, often in bitterness. Without people to carry on the much less glamorous enforcement and educational part of the process, legislation is much less likely to succeed. 874

Issued on the same day as the Health Department rules, the Department of Labor and Industry “Rules Governing Smoking in Factories, Warehouses and Similar Places of Work” failed to attain even the aspirational rigor of the Health Department’s rules. The relaxed regulatory framework was set by the declaration that MCIAA “excludes from its provisions” factories, warehouses, and similar workplaces and merely “directs” the department to establish rules where workers’ close proximity or inadequate ventilation caused smoke pollution detrimental to nonsmoking employees’ health and comfort. Then going far beyond mechanical paraphrase of the statute, the Department articulated the purpose of its rules as “safeguard[ing] the non-smoking employee’s health and comfort within reasonable regulation of his working environment without serious disruption of the work activities at his place of work.” 875 After declaring employers that

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875Labor and Industry Rules Governing Smoking in Factories, Warehouses and Similar Places of Work, LICA 1(e) (Apr. 2, 1976), Bates No. 85646238. The Department defined the scope of factories and similar workplaces to mean “the indoor area of any facility of an enterprise used principally to manufacture or assemble goods, products or merchandise for sale, or to store goods, products or merchandise not for the purpose of direct retail sale, and shall include those areas incidental but related to the primary operation covered by these regulations.” Id. LICA 2. In other words, office workers in such plants were assimilated to factory workers and not to white-collar workers in covered workplaces. The final Health Department rules expressly mandated this classification. MHD 444(c), Bates No. TIMN0240635/42. Nevertheless, in 1977, three days after receiving a complaint about an MCIAA violation at the Sperry Univac plant in Roseville, Charles Schneider, the section chief of Environmental Field Services at MDH, informed the employer that a memo that the company had prepared in August 1975 stating that its legal department had taken the position that the law’s blanket restrictions did not apply to the company’s plants because they were not usually frequented by the general public was “in error”: because
prohibited smoking in areas used by nonsmokers to be compliant,\textsuperscript{876} it offered the former an alternative that was much less protective for the latter: in lunchrooms, cafeterias, lounges, and rest areas provided to employees and not open to the public, employers were required to reserve one side or area of the room for the exclusive use of nonsmokers and to “minimize the toxic effects of smoke pollution in that area.” The size of such areas had to be “proportional to employee preference,” about which employers were required to maintain documentary records.\textsuperscript{877} In contrast, in general work areas:

Upon complaint of an employee that the close proximity of workers or inadequate ventilation is causing smoke pollution detrimental to his or other non-smoking employees’ health and comfort, the employer...shall determine the causative factors of the smoke pollution.

If the employer...finds that the smoke pollution is due to the close proximity of workers or the inadequacy of ventilation, he shall minimize the toxic effects of the smoke pollution on non-smokers. The employer...shall maintain records which document the actions taken on complaints received.\textsuperscript{878}

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However, employers’ duty to minimize those toxic effects was severely diluted by limiting it to “the extent possible without unreasonable interference with the business operation.” Within those confines employers were required to: use existing physical barriers; use “flow of air movement, so that insofar as possible, smoke shall move away from non-smokers”; and arrange seating or work patterns to separate smokers and nonsmokers. 879

Contemporaneous and Later Views of the MCIAA’s Effectiveness

Once upon a time ANSR and other advocates, wallowing in spasms of naive optimism through 1975 and 1976, thought the law would mean an end to public smoking. 880

Other Minnesotans were apparently also dissatisfied with the efficacy of such mechanisms: in 1987—by which time the Health Department believed that during the dozen years MCIAA had been in force no one had yet been fined for violating it—Charles Schneider, the section chief of Hotels, Resorts, and Restaurants of the Environmental Health Division of the Health Department, told the press that the enforcement staff had “encountered situations where a place was in compliance with the law but still had some unhappy people.” Such people presumably included “people who authored the original bill,” who “would have liked to [have] made the entire world smoke free.” In fact, by this time even the higher bureaucracy at the Health Department conceded that “[w]ith the term “acceptable smoke-free area,” people think it means literally smoke free....” 881

Whether the Health Department’s false advertising—a much later comparative study of particulate matter and nicotine levels in smoking and designated no-smoking areas characterized identification of the latter as a “‘smoke-free area’” as “inappropriate, perhaps to the point of such usage now being misleading and deceptive” 882—was even partly responsible for nonsmokers’ literalist turn did not appear to occur to Mary Thompson, the Department “official in charge of keeping smokers in their place,” who maintained that: “It’s


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conceivable that you could have smoking and non-smoking areas within the same room. The smoke drifts. It’s a non-smoking-area; it’s not necessarily smoke free.” By 1994, in connection with an administrative law hearing on the Health Department’s proposed regulation to tighten the regulation of smoking in factories, warehouses, and similar workplaces—an initiative that prompted one of the cigarette companies’ lobbyists to complain that the MDH “promotes a philosophy of deep government intrusion or micromanagement”—the executive director of the Association for Nonsmokers-Minnesota (ANSR) forthrightly declared that after MCIAA’s enactment “many tried to meet the letter of the law by separating smokers from nonsmokers. That many governmental agencies, restaurant owners, and employers now provide smoke-free environments...testifies to their experience that separation does not work. It appears that once they were forced to do something about second-hand smoke, they eventually chose to go smoke-free.”

Looking back, Dr. Ellen Fifer Green, who as assistant health commissioner had represented the Health Department in supporting MCIAA before the legislature, characterized it as a “very weak law” that did not help very much in terms of improving indoor air content, but whose very existence “made people feel better.” David Giese, a nonsmoker who worked for 36 years at the Health Department and was the hearing officer at the public hearing on December 2, 1975, looked back at the law, especially as it affected restaurants, as “pretty ineffective if you were at all close to the smoking area.”

Charles Schneider, who from the outset was responsible for MCIAA’s enforcement, laconically judged his own agency’s regulations as having been “pointless” in seeking to neutralize the toxic effect of designated smoking areas: anyone who gave any thought to the matter or observed even compliant public

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884Doug Kelm (North State Advisers), Statement of Need and Reasonableness (SNR) at 5 (June 13, 1994) (Public Exhibit No. 5, prepared testimony at hearing on MDH proposed rules (4620)) (copy furnished by MDH).
886Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).
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places would have had to conclude that once smoking was permitted it was impossible to protect nonsmokers.\textsuperscript{888} To be sure, Schneider’s low regard for the rules’ theoretical effectiveness as well as his dismissal at the outset of the substance of the new law as not worth the paper it was written on was, according to Jeanne Weigum, ANSR’s long-term president, largely driven by not wanting to be saddled with an enforcement burden unaided by any additional staff or funding.\textsuperscript{889} Schneider, who had quit smoking in 1968,\textsuperscript{890} saw no accident in his agency’s not having any full-time inspector: “The feeling we got was that if there had been money attached to the bill, it would have been voted down.” Despite the fact that Schneider knew that “the health risk from ‘second-hand smoke’ is much higher in an office situation where a person may be exposed to fumes eight hours a day,” and that the “most ‘violent’” complaints that his office had received involved office smoking policies, Schneider nevertheless felt no embarrassment in conveying his “personal opinion” to the press that there was a “‘good chance’ for some modification of the law” in a direction that could not have redounded to the benefit of office workers’ health: “‘There have been some cases that to absolutely comply would cost [sic] a great deal of money—primarily in office situations.... Seating arrangements are based on work flow patterns, not on smoking patterns. Sometimes it is just not possible to carry on business with nonsmoking seating patterns.’” Resisting employers were fortunate in finding likemindedness in the very agency empowered to enforce MCIAA—not to mention their good fortune that the legislature had appropriated “‘not one penny for enforcement.’”\textsuperscript{891}

A former state Health Department inspector distinctly remembered more than

\textsuperscript{888}Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). Unclear is how Schneider reconciled this retrospective judgment with his claim 30 years earlier that “‘[t]hings are a lot better for the non-smoker in Minnesota than they were before this ordinance [sic].’” Bill Douthat, “Despite Bans, Smokers Elsewhere Puff Away,” Miami News, Apr. 9, 1979, Bates No. TIFL0059493. This claim was juxtaposed to the admission by an official of General Mills, which employed 3,000 people in Minnesota, that not only did it not comply with the 200-square-foot no-smoking zone rule, but that neither employees nor Schneider’s agency had complained.

\textsuperscript{889}Telephone interview with Jeanne Weigum, Minneapolis (Apr. 7, 2009). Weigum, who became involved with ANSR shortly after MCIAA’s passage and while the regulations were being drafted, distinctly recollected Schneider’s statements at meetings during this early period; she added that his attitude eventually changed.


three decades later that smoke drift over regulation-compliant barriers rendered MCIAA only “marginally effective” —especially in conjunction with the fact (confirmed by Schneider) that the agency never performed carbon monoxide readings, never checked to ascertain whether ventilation systems produced the required number of air changes, and never revoked any restaurant’s license for failure to comply with MCIAA. James Brinda, the director of environmental health for the Minneapolis Health Department, who was in charge of enforcing the law in the state’s largest city, had so internalized the gap between real protection of nonsmokers and MCIAA’s permissive designated smoking areas that, in referring to the 265 and 184 complaints received by his department in 1976 and 1977, respectively, he had no compunction about publicly airing his own bias: “[A] lot of these beefs came from the kind of people who want to abolish smoking from the face of the earth.” He impatiently ridiculed such otherworldly complainers:

“I get complaints from people who say they aren’t getting a smoke-free area in a restaurant, but what may be acceptable to one person may not be to another”.... He said many people expect restaurant air that is totally free of smoke. “The woman who constantly complains about smoke, won’t be satisfied until the entire world quits smoking....”

892 Telephone interview with Jim Witkowski, St. Paul (Mar. 26, 2009) (still employed at the Environmental Health Division of the Minnesota Health Department).

893 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009). In 1980 the Health Department deleted the provision dealing with carbon monoxide concentration because “inspectors found that it was nearly impossible to make reliable measurements...within the time available for carrying out an inspection. This criterion was also found to be unsatisfactory since it allowed for acceptable levels of carbon monoxide to vary in relation to changing levels in air,” which were “clearly affected by auto emissions and by a facility’s proximity to roads, etc.” Moreover, “only one or two facilities ever relied on carbon monoxide concentrations for compliance....” [Minnesota Department of Health], Clean Indoor Air Rules: Statement of Need and Reasonableness at 2 (n.d. [1979]) (copy furnished by MDH).


895 Elena De La Rosa, “Compliance with No-Smoking Areas Varies,” MT, Apr. 11, 1977 (1A), Bates No. TIMN0462112. In fact, Brinda took the position that, given the intense opposition of restaurant and bar owners, just getting the law passed had been an accomplishment, but that the law’s chief purpose had been educational, although no one in 1975 had contemplated that some day all public places would be no smoking. Telephone interview with James Brinda, Minneapolis (Mar. 29, 2009).
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But even nonsmokers who merely wanted to keep the smoke out of their nonsmoking areas would have to remain unsatisfied since the Health Department’s regulations used a rigidly numerical, objective (albeit irrational) definition of “acceptable smoke-free area” as one in which smoking itself was prohibited and (and for example) from which the smoking-permitted area was separated by a four-foot space, although Brinda himself admitted that “of course” smoke did drift across the “imaginary line” separating them.896

Perhaps the most reflective, self-reflective, and playful insights into the mindset of those who played prominent roles in advocating for the initiation of statewide government controls on smoking in public were articulated by former Assistant Attorney General Terry O’Brien, who both counseled Peterson in drafting the Board of Health’s proposed regulations and represented the health commissioner at the public hearing on December 2, 1975. Asked more than three decades later whether back in 1975 he had regarded the designated smoking area system as largely subverting the intended protection of nonsmokers, inasmuch as smoke drifted over 56-inch-high barriers and across 4-foot-wide spaces, and whether he had thought that this regime was just a foot in the door or might be as good as it was ever going to get, he observed:

When the statute was passed, mainly due to Phyllis Kahn’s energy, everything was an open slate. The legislature gave little guidance except do something, and there were few existing guidelines. The entire concept was thought revolutionary by those who pushed it, and those who feared it. I don’t think any of us thought our efforts were the end game. We knew that secondary smoke traveled more than four feet and could leap tall buildings if necessary. But little was said by us since the opponents correctly guessed that this was the foot in the door. We never purported that the rules were all that would be done, but didn’t deny it either.

Looking back, the rules seem almost silly. They were, however, the foot in the door which established the concept of clean indoor air, empowered non smokers to object and report, gave the color of governmental sanction, and, to some extent, pushed smokers to acknowledge, however reluctantly, that their exhalations resulted in invasions of other people’s personal tissues. So, yes, without thinking too far ahead, none of us were crusaders, it was a job to be done and none to[o] exciting as [sic] that, we thought we would be back at it once the public accepted the idea. And the public did.

I suspect that Hawkeyes, as well as Gophers, are shocked to be asked if they want smoking rooms when traveling to other states. We giggle now to see old black and white movies where the doc asks the patient in the hospital bed if he wants a smoke or old Movietone News showing Congressmen smoking during their hearings—as was everyone else. These rules were among the first steps of what has turned out to be a long and largely

896 Telephone interview with James Brinda, Minneapolis (Mar. 29, 2009).
Finally Articulating the Need to Dismantle the Scientifically Obsolete Regime of Designated Smoking-Permitted Areas

The well-mixed concentration of smoke in a space is directly proportional to the smoker density and inversely proportional to the air exchange rate. Erecting a barrier a few feet high or placing the smokers and nonsmokers in different parts of the space changes neither. Increasing the distance from the source to the target will reduce peak exposure, because of the proximity effect, which acts while the source is on, i.e., when the cigarette is lit, but does not eliminate exposure. It’s sort of like being shot with a ‘32 round instead of a ‘45.”

It took an anti-smoking activist in 1977 in Massachusetts (which in 1975 outright banned smoking in supermarkets and Massachusetts Bay Transportation Authority means of transit, except in personal offices, but failed to provide for enforcement) to point out that the strictest public smoking law was not wearing any clothes—that is, that MCIAA did not really protect nonsmokers from secondhand smoke. In his testimony in 1977 to the National Commission on Smoking and Public Policy, Roni Rechnitz, the executive director of Citizens for Clean Air in Publicly Used Buildings, noted that although it was “on paper at least...the most comprehensive legislation to date,” MCIAA was “not good law. And it is not effective law. But it is significant law having been the first and thus opening the door for better, well thought out, and more enforceable legislation.” As an advocate of a statewide referendum, Rechnitz opined that “[t]he primary problem” with the Minnesota law was that “it had to be passed by a legislature entailing all the customary ‘political considerations’ deemed necessary for passage.” With regard to the substantive protections that MCIAA provided, he correctly identified designated smoking areas as “the key here. By trying to overly accomodate [sic] smokers it introduced a number of complicating factors which greatly reduced the potential effectiveness of the bill.” This

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897 Email from Terry O’Brien to Marc Linder (Apr. 9, 2009).
898 Email from James Repace to Marc Linder (Apr. 6, 2009).
900 The National Commission on Smoking and Public Policy was created by the American Cancer Society in October 1976, inter alia, to examine the effectiveness of anti-smoking policies. Report of the National Commission on Smoking and Public Policy: A National Dilemma: Cigarette Smoking Or the Health of Americans (Jan. 31, 1978), Bates No. TIMN0431947.
understatement reflected the fact—which appears never to have been highlighted during the legislative debate in Minnesota—that “a gas by the definition of its physical properties expands to the limit of its confinement. Smoke will not stay on one side of a room because it is a designated smoking area.” For this reason Rechnitz called the provision permitting designated smoking areas on all public conveyances with a capacity of ten or more persons “the worst section of that law,” though the same inundation of nosmoking areas with smoke from adjoining designated smoking areas occurred across the gamut of covered public places.901

Such accounts demonstrated that some health advocates were well aware of the virtual uselessness of what by then had become the legislative standard permitting proprietors to designate smoking areas virtually wherever they pleased. It was this aspect of MCIAA that prompted Judy Pinke, the assistant to the commissioner of the Labor and Industry Department, many years later to refer to it as an “awfully baroque piece of legislation.”902

By the 1980s, as scientists began to devise appropriate measuring devices and develop a much deeper understanding of the consequences of secondhand smoke exposure, they criticized the kind of physical separation measures that the Health Department required for compliance with the MCIAA as virtually useless. Thus, for example, as early as 1985, two of the leading exposure scientists, James Repace and Alfred Lowrey, noted that “[p]hysical separation of nonsmokers and smokers into sections within a given space reduces peak concentrations, but not average concentrations to which nonsmokers are exposed, and therefore does not affect average lifetime risk.”903 (A decade later, Repace became more specific,
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declaring that although environmental tobacco smoke levels were higher in
smoking than in nonsmoking sections, restricting smoking to one side of a room
did “not reduce the ETS loading of the space. Thus, tobacco smoke will rapidly
diffuse throughout the space and the laws of physics also rule out this putative
control measure.”)904

By 1986 even the Minnesota Health Department publicly admitted what the
basic human sense of smell and sight should have demonstrated as soon as the
law had gone into effect in 1975. In the Statement of Need and Reasonableness
that it issued in June 1986, the Department proposed some clarifying amendments
to the MCIAA rules, including the blanket replacement of the term “smoke-free”
with “nonsmoking,” especially in the crucial operating concept of “Acceptable
smoke-free area.” The reason for the change was straightforward:

People have often interpreted the term “smoke-free to mean a totally smokeless area.
Under the rules, it is not always possible to achieve a smoke-free environment when a
room contains both nonsmoking and smoking-permitted areas. Although the rules are
intended to prevent a nonsmoker from having direct contact with smoke, smoke may
occasionally be detectable in the nonsmoking portion in a room. Therefore, it is preferable
to use a term which reflects actual conditions.905

Despite the ludicrous understatement suggesting that smoke in smoking-
prohibited areas that were designed to shield nonsmokers from exposure was an
exceptional and marginal phenomenon rather than the massive and necessary

904James Repace, “Risk Management of Passive Smoking at Work and at Home,”
PM3006519230/44-45.

905Before the Minnesota Commissioner of Health: Statement of Need and
Reasonableness at 6 (June 13, 1986), Bates No. TIMN0458156/61.
result of the inherently flawed system of designated smoking areas, the Health Department’s decision to eliminate what was in effect false advertising constituted an important, albeit halfhearted, acknowledgment that the decade-old regulations were unable to live up to their capacious interpretation of MCIAA, which—with the one aforementioned ambiguous provision requiring owners to arrange seating to “provide smoke-free areas”—did not in fact promise such smoke-freedom.

ANSR not only did not criticize the administrative rules’ conflation of word and reality, but at times reinforced it. Thus in 1983 the organization declared that: “The most visible means for the public to recognize what has been accomplished is through smoking and nonsmoking sections in restaurants. This identification is due largely to the dedication of ANSR members during the first few years after the inauguration [sic] of the law. The Restaurant Committee...was diligent in its efforts to contact restaurant owners regarding the need for provide smoke-free areas for nonsmoking patrons.”

The surgeon general’s 1986 report on the health impact of involuntary smoking finally prompted ANSR to break with its acquiescence in separation between smokers and nonsmokers. By 1989 it conceded that, however important the MCIAA had been in eliminating tobacco smoke pollution, it was “inconsistent with our current knowledge about secondhand tobacco smoke.” In particular, the law’s “minimal requirements” permitting “separation of smokers and nonsmokers within the same air space” made it “possible for an employer to abide by the letter of the law while his or her employees suffer from the tobacco smoke in the workplace.” (Why ANSR refrained from directing the same critique at restaurants is unclear.) In 1989 it worked with Kahn and other sympathetic legislators to file companion House and Senate bills to amend MCIAA, inter alia, to offer nonsmokers greater protection from secondhand smoke exposure resulting from “drift from one cubicle or section of a room to another. The most significant parts of the bills addressed such problems by requiring that the odor of smoke be eliminated in nonsmoking areas.”
Not that Kahn, whom the Tobacco Institute regarded as the industry’s “long-time nemesis,” had waited until 1989 to launch her initiative to dismantle the scientifically obsolete regime of designated smoking areas: during the 1987-88 legislature sessions she had filed “a new scheme to place mammoth restrictions on this industry.” 910 Instead of abolishing designated smoking areas outright, Kahn’s H.F. 607 and H.F. 1920, as TI noted, eliminated them “upon request of offended non-smokers.” 911 Like MCIAA, her bills did not even mandate the use of physical barriers or ventilation systems in public places in which they were not already “existing,” yet the bills still required them to be used to “eliminate the presence of smoke in physically related nonsmoking areas.” Nevertheless, even though this provision appeared not to impose any duty on owners of public places without such barriers or systems, Kahn’s 1987 and 1988 bills took the radical step of requiring all owners of public places with a designated smoking area to “eliminate the designated smoking area and post appropriate signs advising the public that smoking is prohibited” if compliance with their already existing responsibilities under § 144.416 (to “make reasonable efforts to prevent smoking”) did “not prevent further complaints.” 912

In part because Kahn’s bills were only a part of an “extremely heavy and dangerous legislative agenda facing the industry” 913 (including bills to ban vending machine sales, ban smoking in all public buildings, restrict smoking in schools, require self-extinguishing cigarettes, increase the cigarette tax, and limit the tax exemption for publications advertising tobacco products), 914 the Tobacco Institute’s Midwest regional officers considered Minnesota “the most anti-tobacco state in the nation.” 915 To deal with this broad-based onslaught, TI mobilized its own counter-offensive, which in scope and intensity overshadowed by far any aggregation of resources that it would ever bring to bear in Iowa and included appearances at hearings by the cigarette oligopoly’s star Covington &

\[\text{References:}\]

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Burling lawyers David Remes and John Rupp. One of TI’s leading flaks, Brennan Moran (later Dawson), assistant to the president, also inundated the Minnesota House Human Services Subcommittee with the cigarette firms’ standard dose of obfuscatory mendacity beginning with the claim that the bill “would be better titled the ‘Minnesota Smoker Harassment Act of 1988,’” especially since its “vendetta-like harassment” was directed at what was merely an “occasional annoyance” and “completely ignore[d] the real culprits of indoor air pollution...faulty ventilation systems....” Whereas the cigarette manufacturers otherwise propagated entrusting decisions about smoking to owners, when it came to this “anti-smoker ‘revenge’ bill,” suddenly Moran lambasted “granting employers dictatorial power” lest they pander to employees “claiming hypersensitivity to tobacco smoke...” Instead, she urged on the legislators the oligopolists’ favorite hoax—committing such decisions to the “common courtesy of smoking and nonsmoking employees and customers.” Whether Moran’s arrant nonsense detracted from or reinforced the overall effort, the tobacco industry’s richly endowed concerted lobbying may well have contributed to H.F. 1920’s defeat in the House Human Services Subcommittee by a vote of 5 to 3 and its death three weeks later by a vote of 8 to 7 in full committee.

The cigarette companies may have succeeded in frustrating enactment of this particular anti-smoking initiative, but the Tobacco Institute was nevertheless constrained to admit that “Minnesota’s 1987 legislative session was one of the most punishing in our industry’s history” inasmuch as it “adopted the largest single cigarette excise tax increase in the history of the tobacco industry” in addition to “the first statewide law restricting the promotional distribution of tobacco products.” TI was also keenly aware that political momentum had shifted in Minnesota: whereas “most anti-tobacco measures” from 1975 and 1984 had

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918Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report at 7 (Feb. 18, 1988), Bates No. TIMN0457532/8/43.

been “dealt with in committee or...thwarted by direct lobbying,” “punitive legislation” was coming forth in ever greater and threatening volume since the advent of the state Health Commissioner’s Technical Advisory Committee on Nonsmoking and Health, which TI recognized as “an explosive coalition against the tobacco industry” that included “broad business representation....”

In 1989, Kahn’s H.F. 452 would have imposed more stringent requirements on those in charge of covered public places. Textually, Kahn sought to achieve this objective by amending the existing provision in the following ways: “Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize prevent the toxic effect presence of smoke in adjacent nonsmoking areas.”

In other words, whereas until then MCIAA did not require owners to have ventilation systems at all and the administrative regulations in effect gave owners a choice of using physical barriers or four-foot-wide spaces, but in either case failed to enforce a performance standard of minimizing smoke drift to neighboring nosmoking areas, ANSR and Kahn not only literally (though perhaps inadvertently) mandated the use of barriers and ventilation, but also imposed a zero-tolerance standard for smoke in adjacent nonsmoking areas. However, since no commercially practicable ventilation system could achieve such an outcome, presumably the bill’s authors intended that owners of public places would on their own eliminate designated smoking areas rather than face MCIAA’s (weak and ineffectual) sanctions. Ironically, then, this unwieldy mechanism constituted a step backward from H.F. 607/1920.

In the event, in 1989 neither the House nor Senate bill, which the Tobacco Institute again mobilized the cigarette companies’ resources to target for defeat,
made any progress: H.F. 452 failed even to get a committee hearing, while S.F. 713 was tabled after having been “drastically amended by the Health Committee, whose members refused to regard it as a health issue.”

Even the Health Department’s aforementioned truth-in-nonsmoking-areas initiative took almost another decade to secure: not until 1995 was the amendment incorporated in the Minnesota Rules. The Statement of Need and Reasonableness that the Department submitted in 1994 as part of the administrative rulemaking process still seemed to reflect wonderment that “the public often interprets the term ‘smoke-free’ to mean ‘absolutely free of smoke’” or that it was “sometimes difficult for people to understand that compliance with the MCIAA and these rules does not actually result in areas which are free of environmental tobacco smoke.” Going beyond the Department’s more modest admission in 1986, it now conceded that in mixed smoking/nonsmoking rooms or buildings “the environment will not actually be ‘smoke-free.”

Compliance and Enforcement, Such As They Were

Early press accounts suggested how feebly the new regime—which at the time the tobacco industry ranked as the country’s “Most Severe” set of restrictions—protected nonsmokers. The “Minnesota Indoor Clean Air Act Survey” of food service operators, conducted by the National Restaurant Association in January 1976, found that by far the single most widespread method of creating a nosmoking section was to “designate several tables as a no-smoking

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area.” In contrast to the 56 percent of respondents who used that method, 20 percent made one side of the room nosmoking, 16 percent created nosmoking sections by means of partitions, eight percent used a separate dining room, while designating the entire restaurant nosmoking was “basically not being used as an alternative.”\footnote{National Restaurant Association, Minnesota Indoor Clean Air Act Survey at 4 (n.d. Jan. 7, 1976), Bates No. TIMN0240683/6. 195 (or 38 percent) of 518 operators to whom surveys were sent returned them. Id. at 1. To be sure, the most prevalent method would not have been compliant unless the section was also separated by at least four feet from the smoking section.} Even more revealingly, fully 74 percent of respondents replied No to the question: “If there was no Clean Air Act, would you provide a no-smoking section?,” while only 20 percent answered Yes.\footnote{National Restaurant Association, Minnesota Indoor Clean Air Act Survey at 3 (n.d. Jan. 7, 1976), Bates No. TIMN0240683/5. Correspondingly, 67 percent believed that a majority of their customers did not favor MCIAA, whereas only 19 percent believed that a majority of their customers did support it. Id.}

At the state Health Department itself, which issued the regulations, “desks have been rearranged so the 500 employees sit in clusters of smokers and nonsmokers, generally separated by file-cabinet barricades.” The legislature’s attitude toward its own creation was captured by its having waived the law “on at least one occasion so the smoking representatives would stay in their seats for a crucial late-night debate, rather than scurrying off the floor for a smoke. And Martin Sabo”—MCIAA co-sponsor and “the two-pack-a-day speaker of the House was—was one of the first to comply with the law: he pasted a ‘smoking allowed’ sign over two of his four chairs in the waiting area his office. ‘Thank goodness my boss is a smoker,’ said Sabo’s secretary..., who had a similar sign near her typewriter.’”\footnote{“Attack on Smoking Takes New Course,” Courier Journal and Times (Louisville), June 13, 1976 (B2), Bates No. TIMN0462094.}

In April 1976 the head of ANSR’s Public Awareness Committee reported that in addition to health care institutions, in which it was “inexcuseable [sic]...to allow smoking throughout their facilities,” state offices and buildings were “[a]nother problem area.... Enforcement is non-existent at the capital.” Glenna Johnson urged ANSR members to “[w]rite your legislator and demand an explanation for the blatant disregard of the MCIAA.”\footnote{Glenna Johnson, “Public Awareness Committee Report,” ANSR 4(1):3 (April 1976).} Several months after promulgation of the regulations a reporter saw with his own eyes a sign in the largest restaurant in Minneapolis unlawfully declaring the entire premises a smoking area. Such brazen violations prompted Brandt to
remark that “[f]or those who felt the law would be an immediate solution to the problem, it has to be a disappointment,’” but, with equanimity, he added that he had known that “‘it would be an educational campaign and I perceive the law as one tool to give nonsmokers the force of law.’” In 1977, when a journalist observed several people smoking directly in front of a no smoking sign at the Minneapolis Amtrak station and called the attention of the stationmaster to the violations, the latter replied: “‘All we can do is put up the signs.... We can’t do anything if people disobey them.’” The Amtrak official was wrong: MCIAA required those in charge of public places not only to post signs, but to “make reasonable efforts to prevent smoking in the public place by...asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke.”

To be sure, this mandate was risibly weak in that it literally not only did not obligate the owner on his own initiative to ask smokers not to violate the law, but even when he did intervene on a discomforted customer’s or employee’s behalf, he had no duty to inform the police of the violation if the smoker continued to smoke. Kahn herself, the journalist later discovered, had had the same experience in the same public place with the same outcome. She nevertheless maintained that the law was “adequate” as it was and did not need to be changed to make it enforceable. The problem was that “[s]hort-staffed and overworked police departments can’t be expected to devote their time to rounding up smokers”; consequently, the burden of enforcement fell on those in charge of public places who “usually don’t ask people to obey” the no smoking signs. As a possible solution Kahn suggested actions to enjoin those in charge of public places who had repeatedly violated the law to enforce it. Since the injunction actions that


935 1975 Minn. Laws ch. 211, § 6(c), at 633, 634.

936 George McCormick, “Enforcing Clean-Air Act,” MT, Feb. 3, 1977, Bates No. TIMN0240675. It is unclear whether Kahn’s position would have been encompassed by what The New York Times characterized as “agreement among...antismoking groups that enforcing the statutes is almost impossible; that compliance...is mostly a matter of public cooperation....” Shawn Kennedy, “Smoking Restrictions Are Proving Popular But Hard to Enforce,” NYT, Nov. 17, 1977 (A1), Bates No. TIMN0462090.
MCIAA authorized the board of health and affected parties to institute merely enjoined “repeated violations” of proprietors’ aforementioned duty, which did not, in this context, go beyond asking (on behalf of customers/employees) smokers not to smoke, it is difficult to discern what systemic objectives such actions could have achieved—unless litigants could have persuaded judges that the provision in section 6 requiring proprietors to “make reasonable efforts to prevent smoking in the public place by...any other means which may be appropriate” encompassed much broader duties such as calling the police. The only plausible reason for Kahn’s preference for such an unwieldy and probably ineffective tool in lieu of amending the law (to impose specific duties on owners) was her knowledge that she no more had the requisite legislative majority for it in 1977 than in 1975, when she had been constrained to acquiesce in deleting the provision making owners’ violations misdemeanors. Such resignation in the face of limited legislative enthusiasm for a smoking ban was reflected in ANSR’s admission in 1978 that: “‘We haven’t reached the point where smoking is socially unacceptable, and the non-smokers still have to put up with it.’”

Assistant Health Commissioner Dr. Fifer, who was the agency’s self-described “front man” at the legislature, revealed that the department had had a “general understanding” with the legislature (though not with Kahn) that the Health Department would not crack down, for example, on noncompliant

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937 1975 Minn. Laws ch. 211, § 7(3), at 633, 635.
938 1975 Minn. Laws ch. 211, § 6(c), at 633, 634.
939 In fact, the Minnesota Statutes Annotated discloses no reported court decision relating to MCIAA at all. To be sure, the chief enforcer, Charles Schneider, stated in 1981 that “‘[t]he ultimate enforcement given us by the law is that we can seek an injunction keeping a business from operating.’” During the six years since the law had been in force the Health Department had “threatened such action ‘maybe 75 to 100 times’ statewide. It has never had to carry through.” Sandy Battin, “Smoking Rights Not Cloudy in Minnesota,” News-Tribune (Duluth), Nov. 1, 1981, Bates No. TIMN0462001. Schneider, who was in charge of restaurant and hotel inspections, later stated that the Minnesota Attorney General’s office had advised the Health Department that MCIAA had conferred on the latter the power to seek injunctions to keep businesses from operating; since the Department never sought any such injunction, it was unclear whether judges would have upheld the Attorney General’s interpretation. Schneider added that “theoretically,” affected private parties presumably had had the same right. Telephone interview with Charles Schneider, Minneapolis (Apr. 2, 2009).
restaurants by revoking their licenses. By 1979, the department knew of no case in which it had been necessary for an owner to change the ventilation. Moreover, even when the Health Department did engage in enforcement in response to complaints, it consisted merely in Schneider’s writing a letter to the owner or manager; if the agency received no further complaints, it took no further action.

In 1979 Brandt also confirmed the existence of an “implied understanding” to go slow with respect to enforcement between ANSR itself and owners. In testimony before a Wisconsin legislative committee considering a public smoking bill he stated that “the Minnesota experience reflects a tacit appreciation of the value of accommodation. ... I think it is probable that business interests would have commenced a lawsuit if the non-smokers’ rights movement had insisted upon so stringent an application of the letter of the law as to create a serious difficulty (or at least the perception of a serious difficulty) for proprietors.”

Even for Brandt, who had initiated the drive for legislation, this gradualism was appropriate: the disappointment of those who criticized MCIAA because it had “not been enforced strictly enough” stemmed from their “unrealistic expectations of a solution achieved by a single shot, so to speak—that passage of a good law would, of itself, take care of the problem....” In contrast, “[t]he larger number...realized that enactment of the law, although of great importance, was nevertheless only one step in a lengthy, difficult, mostly education process....”

Brandt’s analysis, however, missed the important point that the disappointment of at least some of the critics was apparently not rooted in an unrealistic expectation of frictionless and instantaneous enforcement of a “good

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941 Telephone interview with Ellen Fifer Green, Minneapolis (Mar. 28, 2009).
943 Telephone interview with Charles Schneider, Minneapolis (Mar. 27, 2009).
944 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] at 6, Bates No. TI03870504/09).
945 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] (n.p. [at 9]), Bates No. TI03870504/12.

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law.” Rather, some may have concluded that MCIAA itself was deeply flawed by virtue of its central feature of designated-smoking-areas, which, even if 100 percent of owners had complied with their obligations all the time, insured that nonsmokers would continue to be exposed to secondhand smoke in restaurants and other covered public places almost as intensely as before, just as they continued to be in airplanes with nonsmoking sections. This skepticism was presumably at least in part reflected in a June 1978 Minnesota Poll revealing that 33 percent of nonsmokers did not think that restaurant operators generally provided “adequate no-smoking areas.”

(Moreover, the fact that, according to the same poll, even 71 percent of smokers, in addition to 75 percent of nonsmokers, thought that the “no-smoking law should be strictly enforced” made a mockery of the Tobacco Institute’s wishful thinking propaganda that “[t]here aren’t enough people who vitally care about the issue to make the law

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946“Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978 (1A, 6A), Bates No. TIMN0462261. To be sure, the ambiguity of the question made it impossible to determine whether respondents thought that they were being asked whether they believed that nosmoking sections were smokefree or numerous or large enough: “State law requires that restaurants provide nonsmoking areas for customers who want them. Do you think restaurant operators generally do or do not provide adequate no-smoking areas?” Of nonsmokers 33 percent said No and 66 percent Yes. The responses prompted Richard Wade, director of the Division of Environmental Health of MDH, to express surprise that “so many people are satisfied with restaurants’ compliance” since the Department received 1,200 to 1,400 complaints annually. “Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B). Even less on point was a question posed two and a half years earlier as to how effective the law had been in cutting down on smoking in public places: 12 percent responded “very effective,” 38 percent “somewhat effective,” 28 percent “not very effective,” and 15 percent “not at all effective.” Of nonsmokers who were sometimes bothered by smokers 56 percent responded either “very effective” or “somewhat effective.” “Minnesota Poll: Most Nonsmokers Think Rights Law Has Been Helpful,” *MT*, Jan. 18, 1976, clipping in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118.F.8.3(B).

947“Minnesota Poll: 7 of 10 Residents Think No-Smoking Sections Adequate,” *MT*, June 25, 1978 (1A, 6A), Bates No. TIMN0462261. Two years later, even 87 percent of two-pack-a-day smokers (in addition to 92 percent of nonsmokers) favored the law requiring restaurants and other businesses to “set aside some space for people who do not smoke.” “Minnesota Poll: Cigarette Smoking Interest Fading: 67% Wish They Could Give Up Habit,” *MT*, May 11, 1980 (1F at 10F), Bates No. TIMN0462021/2. To be sure, this very high proportion might have been reduced if the poll had correctly stated the law as prohibiting smoking except in designated smoking areas.
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[MCIAA] work.”)948 Two years later, 64 percent of nonsmokers polled by a newspaper in the St. Paul area responded that they were “bothered” when someone smoked near them in a restaurant, many explaining that “they felt the laws should be even stronger, with separate rooms or partitioning of rooms in restaurants for smokers and nonsmokers.”949

For those who regarded the law’s failure to eliminate the source of tobacco smoke in public places as the problem, it was unclear, as Brandt argued in 1979, that the anti-smoking movement had in fact “made a lot of progress, relatively rapidly.”950 After all, if, as Kahn stressed, “[p]erhaps the most important reason for passage of the law is its reasonableness. It doesn’t prevent anyone from smoking,”951 the gap between the avant-garde but timid MCIAA and a law that

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950 Comments by Edward R. Brandt (Co-Founder and Former President of the Association for Non-Smokers Rights) on the Effectiveness and Effects of the Minnesota Clean Indoor Air Act and Related Issues (elaborating upon testimony before the Wisconsin Assembly Committee on State Affairs, March 20, 1979, on Assembly Bill 80 [to be entered as testimony for American Lung Association of Mid-Maryland] (n.p. [at 9]), Bates No. TI03870504/12.

951 Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 309 (William Forbes et al. eds. 1983) (though dated 1983, the article refers to events that took place in 1985). Kahn’s use of “reasonableness” was Pickwickian: it meant “pragmatic” in the sense of disarming legislative opponents; with regard to the purpose of protecting nonsmokers’ health the law was unreasonable. With a change in punctuation, Kahn repeated the same statement in Phyllis Kahn, “The Minnesota Clean Indoor Air Act: A Model for New York and Other States,” New York State Journal of Medicine, Dec. 1983, at 1300-1301 at 1300. To be sure, Kahn went on to assert that: “If such measures [as dividing restaurants into smoking and nosmoking sections] do not result in a smoke-free atmosphere for the non-smoker, then the entire area must be made non-smoking.” Id. Kahn had also made these same claims (virtually verbatim) in 1976: Representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 5 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). On what statutory or regulatory provision she was basing this radical interpretation is unclear; like the Health Department rules’ misleadingly loose language, Kahn appears to have used “smoke-free” and “non-smoking” synonymously: “[M]ost
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would in fact have suppressed the source of smoke in public places and consequently provoked robust opposition by business owners and smokers would have been very great indeed. In any event, Kahn’s claim a little more than a year after it had gone into effect that MCIAA “sets out strict requirements for the designation of such smoking areas so that they are limited and will not affect the health or comfort of the non-smoker who chooses to pass through public life in a smoke-free atmosphere” was a preposterously exaggerated distortion of the law’s stringency. And although she may have been right in arguing that compliance with MCIAA’s comprehensiveness “requires a massive change in our culture and in our attitudes,” few would have foreseen that another 32 years would pass before the Minnesota legislature enacted such a statewide (indoor) ban.


representative Phyllis Kahn, Speech Before Public Health Association, St. Cloud at 6 (Oct. 8, 1976), in Legislature, House, Kahn (Rep. Phyllis), Files, MSA, MHS, 118F.8.3.(B). The word “requires” was handwritten replacing the struck out “incurred.”

To be sure, 30 years after MCIAA’s passage and shortly before passage of the statewide Freedom to Breathe Act in 2007, several local governments in the Twin Cities area began adopting ordinances banning smoking outright in restaurants and bars. For example, the Minneapolis smoking ban ordinance went into effect on Mar. 31, 2005. Minneapolis Code of Ordinances, ch. 234. http://www.ci.minneapolis.mn.us/council/
The fate of the bill that Duluth DFLer Arlene Lehto, an environmentalist and director of the Save Lake Superior Association, introduced in the House in 1979 (where the DFL had lost its majority, it and the Republicans both controlling 67 seats) strikingly confirmed just how limited the legislature’s commitment to strengthening the law was. H.F. 184 was designed to deal with the problem of rampant violations of MCIAA by restaurants by conditioning restaurant licensure on compliance with the law—or, as she colorfully (albeit unscientifically) phrased it in a press release, “to ensure citizens a right to a tasty meal in a public restaurant without involuntary consumption of anothers [sic] nicotine emissions.” By circumventing the “lengthy and costly process requiring the county to develop evidence in cases of non-compliance,” the use of licensure sanctions offered prompt hearings before an enforcing board that was “closer to the community.” ANSR enthusiastically supported the bill because it promised to overcome MCIAA’s Achilles heel of “voluntary compliance,” which had resulted from the legislature’s failure to appropriate any funding for enforcement. ANSR welcomed the measure, whose wording it had been “waiting to hear for three years,” because it empowered the state health commissioner, the state hotel inspector, or any other authority charged with enforcement of safety or health regulations in restaurants to determine whether they were compliant: “What this all adds up to is that the one big item that prohibited enforcement (expensive litigation) will be replaced by MDH inspector action,” which ANSR viewed as “demand[ing] immediate respect by restaurateurs.”

Dr. Harold Leppink, the St. Louis County (Duluth) public health officer who...
had suggested the initiative to Lehto, regarded MCIAA as an important educational tool because it forced everyone to confront the problem of smoking every time he or she entered a restaurant by virtue of having to choose a smoking or nosmoking section. And although he believed that segregation made conditions “a little better,” the fact that the smoke nevertheless continued to overwhelm nonsmokers in restaurants, even when owners were formally in compliance with the law, motivated the former, in his view, to push even more adamantly for prohibition of smoking in public places. The bill, to which Schaaf introduced the companion in the Senate, suffered a sharp rebuff in committee when, according to Lehto’s account three decades later, her fellow DFL legislator from Duluth, Thomas Berkelman, lit up a cigar and passed out cigars to the male members of the committee. (Tobacco smoke was typically so thick in House committee rooms that often Lehto had to leave.) This fraternity-house-like prank in response to a relatively modest effort to facilitate compliance (rather than to narrow the scope of permissive smoking) puts in its proper context the contemporaneous acknowledgment in The New York Times that “Comprehensive Minnesota Law of 1975 Stands Alone.” It also explains why the Times added that the “world of the American smoker is shrinking, but not nearly as fast as most antismoking crusaders would like it to.”

To be sure, Lehto’s bill was not killed outright on the spot: in an effort to get the bill out of committee Lehto amended it to cover only her own St. Louis and

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959 Harold Leppink, “Proposed Legislation on Minnesota Clean Indoor Air Act” (Feb. 12, 1979) (original furnished by Arlene Lehto); telephone interview with Arlene Lehto, Oro Valley, AZ (Mar. 30, 2009).

960 Telephone interview with Harold Leppink, Boca Raton, FL (Apr. 12, 2009).


962 Telephone interview with Arlene Lehto, Oro Valley, AZ (Mar. 30, 2009). To be sure, Berkelman denied her account (“I never did that”), charging that Lehto “kind of went off the deep end,” marginalizing her own effectiveness. Telephone interview with Thomas Berkelman, Minneapolis (May 9, 2009).


964 Email from Arlene Lehto to Marc Linder (Apr. 2, 2009) (surmising that “I might have been trying to get it past a committee however I could—and perhaps limiting it to the
neighbor Town County, in which she had support, in this radically shrunken version the committee recommended its adoption. Lehto was constrained to acquiesce in this miniaturized measure despite the warning by Dr. Lessink that: “Making compliance with MCIAA a condition for licensure would help St. Louis County solve some of the enforcement problems we have; however, MCIAA is of little value unless it can provide the same benefits to restaurant patrons throughout the state.” The bill was held over until 1980, when the House, sitting as the committee of the whole, voted 69 to 55 to adopt an amendment offered by Joseph Begich—a DFL mine manager from the Iron Range whose influence in St. Louis County antedated Lehto, of whom he was suspicious because of her attack on one of the mining companies for its environmental practices—to confine the coverage even further to first class cities in the two counties. A dozen days later Kahn tried to outmaneuver Begich, who had consistently voted against H.F. 79 and the rule change banning smoking on the House floor, by offering an amendment to extend coverage to all first-class cities statewide, but it failed by a vote of 41 to 76. Underscoring the voting heft of the anti-regulatory forces, another DFL representative, David Battaglia of Lake County, moved an amendment to strike his county altogether, leaving coverage only of St. Louis County’s sole first-class city (Duluth). After its adoption, the House passed the bill by a vote of 106 to 12, Lehto and Kahn voting with the majority presumably to secure an opening wedge for Senate or future legislative action, though in fact the bill died in the Senate Health, Welfare, and Corrections Committee.

Formal enforcement of the law, inadequate as it was to protect nonsmokers from exposure to secondhand smoke, remained problematic for years. More than three years after the law had gone into effect, with about 1,200 complaints being

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967 Harold Leppink, “Proposed Legislation on Minnesota Clean Indoor Air Act” (Feb. 12, 1979) (original furnished by Arlene Lehto).
968 Email from Arlene Lehto to Marc Linder (Apr. 4, 2009).
filed annually, half of them relating to offices and other workplaces, Schneider believed that “the majority of businesses” did not comply with it. In 1979, the commissioner of health, while contending that MCIAA “made things much more tolerable for the non-smoker,” noted that it had “not been a complete success....” Instead of attributing the act’s failure to achieve more than mere greater tolerableness to the deeply flawed institution of designated smoking areas—which were arguably nowhere more grotesquely inappropriate than in college classrooms, in which instructors at one state university were advised to designate a smoking and a nonsmoking section—Dr. George Pettersen focused on the inadequate enforcement, although in fact even stationing an inspector full-time in every restaurant would not have protected nonsmokers from tobacco smoke drifting over 56-inch-high barriers. (Perhaps this fact accounted for the blanket prohibition of smoking—except in two “private” offices—in the Health Department’s Division of Environmental Health.) In response to questions posed by a legislative aid in Oregon about the operation of MCIAA the physician commented: “The most serious problem with the law is the lack of any funds being appropriated from the State Legislature to defray any of the costs of developing the rules or carrying on an informational program or an enforcement program.”

973 George Pettersen to James Northrop (Feb. 14, 1979), Bates No. TIMN0240633/4.
974 In advising Metropolitan State University that it had to comply with MCIAA, the state attorney general’s office stated: “If a student continues to complain under such a designated space arrangement, instructors are permitted to ask all students to refrain from smoking because some individuals are disturbed.” Untitled (June 1978), Bates No. TIMN0462086. In 1975, in anticipation of the public hearing on the Health Department’s proposed rules, one commenter had written that “restaurants and U of M classrooms are the worst for finding a spot of sweet, fresh air.” Marcie Hildebrandt to Dr. Lawson (Oct. 28, 1975), in Health Department, MSA, MHS, 112.H.18.3(B). In late 1974, a suggestion made at an ANSR workshop that dealt, inter alia, with smoking in high schools, reflected smoking’s still hegemonic status: “Bring the matter of smoking in class to a student vote. Request that smoking be prohibited during class sessions. At the very least, request a non-smoking session in the classroom.” “Members Fire Up at Workshop.” ANSR 2(5):n.p. [1, at 2] (Dec. 1974).
975 George Pettersen to James Northrop (Feb. 14, 1979), Bates No. TIMN0240633/4.
The Tobacco Industry’s Efforts to Weaken the MCIAA and Stanch Its Emulation in Other States

As you know, attempts were made previously to organize the smokers in several states to provide them with an effective vehicle for expressing themselves to their elected officials. For reasons that a psychologist could better explain than I, there is little chance that we could stimulate a smokers’ revolt as long as the majority of those that use tobacco suffer from a “guilt complex.” The industry has remained silent so long on the alleged health hazards of smoking that despite their best efforts, The Tobacco Institute is not likely to change public opinion for many years to come. Until this can be done, the spread of no-smoking laws across the country should be factored into any sales forecast.  

After having failed to thwart enactment of the Minnesota law, the cigarette companies followed developments there very closely. Their ire was especially sparked by the perception that major corporations were adapting to the new rules rather than combating them. Ironically, the chief culprit appeared to be The Pillsbury Company, one of the state’s most prominent employers, which, as explained above, had, during the debate over the regulations, been one of the sharpest critics. (When Pillsbury complained about enforcement, Schneider, the Health Department’s head of enforcement, asked the company’s managers where Pillsbury had been while the bill was going through the legislature, prompting the response that they had never thought that it would pass.) But a newspaper article in February 1976 on the proliferation of anti-public smoking laws came to the attention of several R. J. Reynolds vice presidents, setting off a flurry of interoffice exchanges. In discussing the Minnesota law, the article noted that initially Pillsbury, which employed 900 people at its national headquarters in Minneapolis, had estimated that it could cost the firm $500,000 to comply with the law’s mandated segregation of smoking areas in offices and factories (if the smokers “had to leave their posts to smoke”). However: “After a trial period...,
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a Pillsbury spokesman said ‘the law is working out fairly well. It’s helped nonsmokers greatly and although it may cost us some money, the problem is more health than money.’” Nevertheless, Pillsbury’s “acceptance” appeared to be exceptional, since the state Association for Commerce and Industry still regarded the rules as “unduly restrictive.”

After an exchange of notes scribbled on a copy of the article and the preparation of a draft in March, on April 9, James R. Peterson, a Reynolds vice president, sent a slightly toned-down letter to William Spoor, the chairman of the board of Pillsbury. Explaining to “Bill” that the statement by the Pillsbury spokesman in the attached article suggested that the company was supporting the law “on the basis of health reasons,” Peterson asserted Reynolds’ position that the law lacked a “factual basis...in the health area.” He appended a Tobacco Institute propaganda brochure, which culminated in the assertion that “[t]he answer” to the “controversy” between 60 million smokers and “some” nonsmokers who were annoyed by tobacco smoke lay in “courtesy, not law. The alternative is to pave the way for government control of all sorts of everyday irritations. No one would advocate that.”

“Other businessmen argued that that it would be discriminatory to permit smoke breaks without providing similar time off for nonsmokers.”


982J. R. Peterson, Draft (Mar. 17, 1976), Bates No. 500050657. The “JSD/bt” abbreviation at the bottom of the draft suggests that it was written by or in the office of Dowdell, whose signed initials also appeared on the copy of the original article.

983For example, the draft’s characterization of the Pillsbury spokesman’s conclusion as “completely fallacious” was deleted. J. R. Peterson, Draft (Mar. 17, 1976), Bates No. 500050657.


985Peterson also appended an unidentified medical journal article.

986Tobacco Institute, “True? False? Tobacco Facts” (n.d. [1973]), Bates No. 500050658/62. About this time, even the Burnett ad agency criticized the Tobacco Institute’s “courtesy’ campaign” advertising, which was supposed to “help reduce excessive and unreasonable anti-smoking activism by non-smokers,” as itself

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Peterson believed that armed with “the facts,” Spoor “would not want Pillsbury to lend further credence to the current mythology that smoking under normal conditions constitutes a health hazard to nonsmokers.” Seeking to sway Spoor by alluding to “the many unfounded attacks...upon the food industry in recent years,” Peterson complained about the “growing number of unwarranted state and local regulations restricting, if not prohibiting, the use of tobacco in an ever-increasing number of public and private places.” Government interference was bad enough, but “[o]f equal concern [w]as the number of large and prestigious companies, like Pillsbury, that apparently have been pressured into acquiescing to yet another unwarranted governmental intrusion into the private sector.” In a very early sign of cigarette manufacturers’ realistic resignation, Peterson then regretted that it was “[p]erhaps...too late to completely reverse the anti-smoking trend,” but hoped that private companies would join with the tobacco industry to “prevent, at least, such extreme measures” as the Minnesota law from spreading, and that the Minnesota Association of Commerce and Industry could “prevail upon the Legislature to amend the onerous law...and

“unreasonable and risky” and “ludicrous.” While questioning the advisability of any paid consumer ads “to combat the present situation” and suggesting that Burnett’s own proposed ads might not accomplish the TI’s objective either because “[t]here may be no way to head off the activists,” Burnett did not appear to be embarrassed by the absurdity of its proposal, whose “message to non-smokers (including the activists) is that we’re all big boys and can get along together without any further formal restrictions.” Tobacco Institute “Courtesy” Campaign: Burnett Agency Position (1975), Bates No. 1005110514/5. Astonishingly, as late as 1980 ANSR published a board member’s explanation of MCIAA that asserted that “like every law, it cannot be effective unless it is understood and respected. The real solution is the exercise of consideration and common courtesy.” Nathan Portnoi, [untitled], ANSR 8(2):n.p. [2] (Nov. 1980). ANSR’s vacillating attitude was on display a few months later when a panel of its member-judges selected as the best answer to a Tobacco Institute ad on nonsmokers’ rights a response that attacked the “concept of common courtesy as a means to provide fair treatment for nonsmokers” as a “ploy by the tobacco institute [sic] to discourage nonsmokers from asserting their rights to breathe clean air.” Clara Riveland, [Untitled], ANSR 9(1):n.p. [3] (Mar. 1981). It is unclear whether Kahn was twitting or taking seriously the cigarette industry’s obfuscatory “courtesy” propaganda when she wrote some years after MCIAA’s passage: “Persons irritated by smoke expect to find a no-smoking section and have become more assertive in establishing their rights to such a space. Others look for smoking sections before lighting up and mistakes are generally taken care of by simple reminders. The law works effectively to simplify and reinforce rules of common courtesy.” Phyllis Kahn, “The Minnesota Clean Indoor Air Act: Legislation Enacted with Volunteer Group Support,” in Proceedings of the Fifth World Conference on Smoking and Health 2:309-11 at 310 (William Forbes et al. eds 1983).
correct some of the abuses that have been perpetrated under the guise of ‘protecting the public health.’” Suspecting that Spoor or “some of [his] people may have personal feelings on this subject”—that is, might themselves object to being forced to breathe tobacco smoke—Peterson nevertheless hoped that he could rely on the solidarity of beleaguered regulated capital to trump individual managerial character masks’ self-protective health instincts so that Pillsbury would not be willing to lend its “Corporate name to the endorsement of these restrictive Bills before a knowledgeable decision can be made on factual information.”

As incompetently as the cigarette companies may have opposed MCIAA as it was making its way through the Minnesota legislature, their vigilance became more focused soon after it went into effect. However, this new lobbying regime ran into several weighty stumbling blocks. An internal Tobacco Institute memo from March 1976, written by its Midwest regional manager, Larry Horist, to Roger Mozingo, vice president for government affairs, related that there are some who feel that the unequal enforcement provision (vis a’ vis, [sic] the division of responsibility between the state health authority over offices and commercial business and the labor department jurisdiction over factories, etc.) opens the possibility of having the law thrown out by the courts. Chum Bohr, of the hospitality industry, is one of the leading proponents of this view. He already has one of his members pledged to donate $10,000 to the legal battle.

On the other hand, Oliver Perry, of commerce and industry, speaks in favor of a legislative initiative. He feels that the above mentioned “flaw” in the original legislation could lead to reopening the matter in the legislature. Perry does admit, however, that there may be some difficulty in finding a sponsor. (Our one staunch supporter was recently defeated in the primary.)

Though Perry is partisan to our viewpoint, he feels somewhat constrained by the fact that many of his members favor the existing law.

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987 Letter from James R. Peterson to William H. Spoor (Apr. 9, 1976), Bates No. 500050653/4/5. Spoor had a senior vice president respond, who attached a copy of a publication that purportedly expressed the company’s position more accurately than the newspaper article, but unfortunately the attachment does not appear to be included in the online tobacco documents. The writer added conciliatorily that “[t]he scientific literature appears to reflect an unfortunate lack of scientific clarity as to the health hazards, if any, to non-smokers exposed to tobacco in public places.” Letter from W. J. Powell to James R. Peterson (Apr. 23, 1976), Bates No. 500050651.

988 Larry Horist to Roger Mozingo, Re Minnesota (Mar. 3, 1976), Bates No. 50005665/6. (Because of an apparently defective Bates No., accessing this document might be easier at http://legacy.library.ucsf.edu/tid/uxc99d00.) The memo was not dated, but a cover sheet from Mozingo to Dowdell at R. J. Reynolds was dated March 3. Horist
Although the memo failed to reveal the legal basis for challenging the differential regulation of factories on the one hand and offices and businesses (frequented by the general public) on the other, the outcome that Bohr and restaurant and hotel owners hoped to secure was presumably not MCIAA’s reenactment with factories subject to the same coverage as businesses open to the public under the original law. On the contrary, they must have speculated that if the legislature had to start all over again, it would reduce coverage of the latter to the very limited coverage of the former—an extreme implausibility given the large majority of Minnesotans who appeared to support the law as well as the brute fact that Perry had been unable even to scare up a sponsor for whatever bill owners wanted. Horist was unable to glean any advantage for the cigarette manufacturers in either strategy: “Since we are not interested in involving the industry in the court action—except by way of moral support—and since [Joe] Robbie sees little hope in the legislative route, I see little optimism in the short run.” The longer-term perspective, in contrast, would “depend on the effectiveness of TI activity in cooperation with Robbie in his dual role of association executive and lobbyist or a re-evaluation of this relationship.” This mention of Robbie and his state tobacco wholesalers organization raised yet another sore point since Horist had “not been satisfied with the support we are receiving from several of our association people—and this is a case in point. Robbie is personally a delightful and highly competent individual. He is well liked in the Minnesota community and respected by the association members. With regard to TI programs, however, I sense a lack of commitment and enthusiasm. Without the active attention of his office, TI necessarily has to take a much responsibility for local activities—to the detriment of other duties.” That Horist would “have to travel to Minneapolis to do things which they could be doing on our behalf” was “doubly wasteful” especially “in consideration of our financial contribution to the effort.”

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989 Larry Horist to Roger Mozingo, Re Minnesota (Mar. 3, 1976), Bates No. 50005665/6. An example of Robbie’s services about this time to the cigarette manufacturers was his report to the Tobacco Institute on a television program in Minneapolis on MCIAA, which featured Kahn and Bohr and “resulted as favorably as it could for the cigarette industry in our opinion.” Joseph Robbie to J. C. B. Ehringhaus (Feb. 17, 1976), Bates No. TIMN0462126
In the event, a few weeks later Representative Heinitz, who had almost succeeded in 1975 in removing coverage of workplaces from MCIAA, introduced a bill in the House that would have achieved much of what Bohr and Perry wanted (and had already urged in 1975). To be sure, the lack of cosponsors suggested that prospects of passage were slim. H.F. 2691 would have taken a long stride toward that goal by amending the definition of “public place” by narrowing the scope of covered workplaces to include only those “frequented by the general public.” Second, it redefined the critical term, “acceptable smoke-free area,” which had been introduced by the Board of Health regulations, to narrow the criteria, one of which owners were required to satisfy: deleting ventilation systems and carbon monoxide levels, Heinitz’s bill reduced the options to physical barriers at least 56-inches high or four-foot spaces between smoking-permitted and nosmoking areas. In other words, the more expensive technology and the performance standard measuring the efficacy of the dysfunctional barriers/spaces were eliminated. (To be sure, since the spaces and barriers, in that order, were, as noted earlier, virtually the only methods that owners were using anyway, the bill’s impact on the real world of compliance may not have been significant.) Third, the bill permitted smoking in nosmoking areas “with the express permission of every nonsmoker present. And fourth, H.F. 2691 lowered from 200 to 150 square feet the minimum size of nosmoking areas in rooms in which both smoking and nosmoking areas were permitted in workplaces not customarily frequented by the general public.\textsuperscript{990} The prosmoking forces’ initiative to roll back coverage of offices and business promptly revealed itself to be a pipe dream: after having been referred to the Health and Welfare Committee, the bill made no progress whatsoever.

Robbie appeared to have remained skeptical of his role in a legislative or judicial fix for the tobacco industry’s objections to MCIAA. In November 1976 he wrote to his nephew Stephen Bergerson—who as an official of Robbie’s Minnesota Candy and Tobacco Distributors Association believed that it was “inevitable” that the law “will force down tobacco sales”\textsuperscript{991}—that in the wake of Bergerson’s conversations with Horist, Bohr, and Perry, “nothing should be done to challenge this law by litigation” until after the 1977 legislative session. But in the meantime, even if Perry and MACI “want to try to and amend the law to restrict its application, I think we should leave it to them. We can help from


\textsuperscript{991}“Stringent No-Smoking Law Failing,” \textit{TO} 1(2):1 at 9 (Nov. 1976), Bates No. 01418984/92.
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behind the scenes but we must keep the public posture of being opposed to the law."

R.J. Reynolds appeared somewhat less pessimistic about the near-term chances of repealing what it called “the most stringent state anti-smoking law.” By January 1977 it had not yet been in effect long enough to reveal conclusively its impact on consumption, but the company’s vice president for planning could not help but believe that “in the longer run it will be damaging.” James Hind therefore recommended exploring with TI its “concept of getting signatures of smokers and applying it to the many public bans sought against smoking.” The petition sign-up that his interlocutor, F. Hudnall Christopher, Jr., had “so successfully carried out” in the case of the CAB (relating to airplanes) seemed to Hind “truly an expression of an individual’s freedom which everyone—government, media, and public[—]will respect. Minnesota might be the first place to go.”

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992 Joseph Robbie to Stephen Bergerson (Nov. 16, 1976), Bates No. 500050670. Bergerson, who 30 years later purported not to be able to remember the events surrounding the letter, stated that the industry had not lobbied against MCIAA in 1975 because no one had thought it would pass because it was too radical. Telephone interview with Stephen Bergerson, Minneapolis (Apr. 27, 2007).

993 J. F. Hind to F. Hudnall Christopher, Jr. (Jan. 27, 1977), Bates No. 500050668. In February and December 1979, at the request of higher-ups at Philip Morris, the director of marketing research “examined the effects of the Minnesota Clean Indoor Air Act...on that state’s cigarette sales,” and reported that tax-paid cigarette pack sales per capita in Minnesota as a proportion of those in the U.S. as a whole rose from 82.7 percent for the fiscal year ending June 30, 1975 (before MCIAA went into effect) to 85.2 percent for the year ending June 30, 1979—a movement that he characterized as a “slight improvement in Minnesota versus U.S. per capita sales since the passage of the Act.” J. N. Zoler to J. J. Morgan, Subject: Minnesota Cigarette Sales (Feb. 21, 1979), Bates No. 2045259239 (quote); J. N. Zoler to J. J. Morgan, Subject: Minnesota Cigarette Sales (Dec. 11, 1979), Bates No. 2024372752/3. Amusingly, when Stanton Glantz and his co-authors of a study of Minnesota tobacco politics referred to this inquiry—“It was not until the later 1970s that Philip Morris began to realize the economic impact of the Clean Indoor Air Act on sales in Minnesota”—they misleadingly implied that the effect was negative. Theodore Tsoukalas, Jennifer Ibrahim, and Stanton Glantz, Shifting Tides: Minnesota Tobacco Politics 13 (2003), on http://repositories.cdlib.org/ctcre/tcpmus/MN2003. The number of cigarette packages taxed in October 1975 in Minnesota exceeded that of a year earlier by 12.7 percent compared to an increase of only 1.2 percent nationally. “Tobacco Tax Council, Monthly State Cigarette Tax Report: Report for October 1975” (Dec. 11, 1975), Bates No. LG432661/2. In March 1976 the figures were 12.9 percent and 13.5 percent, respectively. “Tobacco Tax Council, Monthly State Cigarette Tax Report: Report for March 1976” (May 11, 1976), Bates No. TIMS0010245/6. For August 1976, the figures were 0.6
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In lieu of amending MCIAA, of which the tobacco industry was currently incapable, TI chose to pursue yet another one of its well-funded pipe dreams. In September 1976, the recently hired former editor of the city desk at the *Newport News Times-Herald*, Paul Knopick, who was now “editor of the largest circulating tobacco periodical in the world,” i.e., TI’s mendacous quarterly propaganda sheet, *Tobacco Observer*, heard from Horist that an article about MCIAA would be a good idea because it was still a “symbol—the classic case” of anti-smoking laws, which was “still mentioned by anti-smokers ‘at numerous hearings...both at state and local levels.’” Conveying Horist’s plans for run-of-the-mill TI deception, Knopick told vice president William Kloepfer of Horist’s belief that “an Observer article could be ‘reprinted’ and then ‘passed to legislators’ considering similar legislation. He especially thinks it would be effective if we could get someone else to byline it—a sheriff up there, or a top distributor.”

Two weeks later, Horist supplied Knopick with the names of several candidates for phony byliners, including lobbyists Bohr and Perry, Minnesota Candy & Tobacco Distributors Association heads Robbie and Bergerson, as well as St. Paul Police Chief Rowan (who in 1975 had sent Bohr a letter belittling MCIAA) and state Senator Baldy Hansen. This short list suggested that the cigarette companies already had a confidential relationship with Bohr and Perry, thus reinforcing the argument that they had been the tobacco industry’s covert lobbyists in 1975. In contrast, the relationship between Horist

percent and 4.3 percent, respectively. “Tobacco Tax Council, Monthly State Cigaret Tax Report: Report for August 1976” (Oct. 12, 1976), Bates No. TIMS0010044/5. A cumulative account revealed that whereas the number of cigarette packages taxed in Minnesota rose 5.1 percent for January to July 1976 (which fell completely within the period after MCIAA went into effect) over the same period of 1975 (before MCIAA’s effective date), the national increase was only 1.6 percent. “Tobacco Tax Council, Monthly State Cigaret Tax Report: Report for July 1976” (Sept. 10, 1976), Bates No. TIMS0010047/9. Apparently the cigarette oligopoly remained puzzled. In 1980 the manager of state public affairs at R. J. Reynolds made this opaque remark to the Tobacco Institute: “If we ever wondered why the Minnesota Clean Indoor Air Act failed to effect [sic] sales, I feel that the attached new regulations may provide us with some answers.”

Larry Bewley to Mike Kerrigan (Apr. 28, 1980), Bates No. 500024341.


P. Knopick to W. Kloepfer, Jr. (Sept. 8, 1976), Bates No. TI47350807.

Larry Horist to Paul Knopick, Re: Minnesota Article (Sept. 20, 1976), Bates No. TI47350800.
and Knopick appeared to fall considerably short of the bonhomie that typified intra-Tobacco Institute correspondence: indicating that Knopick was in the grips of a delusion that he was a real reporter—Kloepfer would flatter him by asserting that at his earlier job his “journalistic star was rising brightly...and it still is”—he had suggested to Horist that “as a journalist [he] should make the trip alone” to Minnesota, thus disappointing Horist’s plan to accompany him: “Someday, I hope to understand just what the hell that means. ... But alas, a [sic] accede to your inscrutable wisdom.” Despite the rebuff, Horist insisted on contacting “each of the gentlemen [on the list] to alert them to your visit and its purpose.”

Unsurprisingly, the (unbylined) article, which dutifully quoted most of Horist’s “leads,” turned out to meet the norm for TI distortion. For example, it quoted Bohr’s nonsensical allegation that the “group which fought for the act’ [presumably ANSR]...tied itself motherhood and apple pie”—without explaining why the public would automatically have associated suppression of indiscriminate public smoking with such virtues—and then highlighted the (false) claim by CBS News commentator Charles Kuralt that under MCIAA it was “against the law to smoke in any public place...even if it is your own office, [and] a policeman can walk into that office and arrest you.”

In 1983 MCIAA remained a major national problem for the cigarette industry’s efforts to ward off enactment of similar laws in other states. For example, in April Rick Seely, TI’s Michigan State (and later Midwest) Director complained to TI vice president Robert Hanrahan that: “Proponents of Clean Indoor Air Acts invariably point to Minnesota as, not only a model for such legislation, but a shining example of how such laws can work.” Seely’s tale of woe stretched back to December 1982, when he began trying to find both information on MCIAA’s “negative effects” and a representative of the MACI to testify against a bill in Michigan, but what prompted him to write was the conclusion of his “wild goose chase” that very day in the form of official word

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998 Remarks of William Kloepfer, Jr., Sen. VP-Public Relations, The Tobacco Institute Tobacco College of Knowledge at 12 (Nov. 17, 1981), Bates No. TI17930049/81. Remarkably, after all the revelations about the cigarette manufacturers, in 2009 Knopick manifestly believed that potential customers would be attracted to his PR business by reading on his company’s website that he had “created the first national publication for the tobacco industry, a keystone of a visible, effective public relations campaign.” http://www.eandecommunications.com/management.htm (visited Nov. 13, 2009).

999 Larry Horist to Paul Knopick, Re: Minnesota Article (Sept. 20, 1976), Bates No. TI47350800/1.

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from MACI’s vice president that “there is no such law in Minnesota as a Clean Indoor Air Act.” Frustrated by the fact that “we are without resources” to “counter[ ] the powerful and effective statements of our opponents and the witnesses they import from Minnesota,” Seely proposed that TI view “this situation as a priority item and hire a professional research group to survey the business community the right way. If we can get some negative, documented information and perhaps a few business people who are willing to expound on the negative aspects of the law, we could use these things in every state where a clean indoor air act is proposed.” If TI failed to dig up this kind of dirt, “our opponents will continue to rub Minnesota in our faces time after time after time.” In Michigan and Wisconsin alone, the pro-smoking forces would be faced with such legislation “either until the sponsors retire, hell freezes over or we silence the proponents once and for all, by proving that the MCIAA is either bad law or the most useless piece of legislation ever enacted by man.”1001

Exactly one month later Seely sent off yet another jeremiad to Hanrahan. This time he stressed that during the previous four years a clean indoor air bill had been introduced a total of six times in the Michigan legislature and that especially since 1981 Minnesota had been “consistently pointed to by proponents of this legislation as the paradise for non-smokers where all citizens gleefully comply with the law.”*1002 Seely then made a breathtaking admission for strictly internal consumption, which, if publicly disseminated, would have both suggested that the cigarette oligopoly feared that the endgame was approaching and revealed that the cigarette industry realized that the increasingly compelling and popular health regime embedded in Minnesota’s exemplary law was making a mockery of executives’ and underlings’ benighted but well-bankrolled plans to roll back anti-smoking regulation:

As our health arguments have grown ineffective and now fall on deaf ears, we need a strong defensive point to hang our hat on. That defense would be evidence of strong negative effects of Minnesota’s bill or spokespersons from Minnesota to address the issue of the failing of their legislation. ...

The Minnesota Clean Indoor Air Act holds an almost religious-like symbolism for anti-smokers and the purpose of our research study should be to destroy that image or at least render it ineffective as a model for enacting further legislation anywhere.1003

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1001 Rick Seely to Bob Hanrahan (vice president TI), Re: Minnesota Clean Indoor Air Act Study (Apr. 13, 1983), Bates No. TI03870700/1.
1002 Rick Seely to Bob Hanrahan, Re: Minnesota Indoor Air Act Study (May 13, 1983), Bates No. TI03870702.
1003 Rick Seely to Bob Hanrahan, Re: Minnesota Indoor Air Act Study (May 13, 1983), Bates No. TI03870702.
TI headquarters soon began taking the proposal to denigrate MCIAA seriously. In July 1983, shortly after Hanrahan had informed TI’s chief lobbyist in Minnesota that the proposed study was “very important,” John D. Kelly, senior vice president for state activities, wrote TI President Samuel Chilcote that the statute had been “cited repeatedly by advocates of such restrictive legislation as an example of how laws can successfully curb smoking.” Its citation as a model in other states such as Oregon and Michigan prompted Kelly to recommend authorization of field research into the Minnesota law’s effects whose only purpose was to “point out the negative impacts of the law—for example the costs to business owners, the state, and consumers—in an effort to determine whether the law is effective as a model for other states’ legislation.” (This pitch to TI’s president was toned down from a draft that had characterized the purpose more aggressively as “render[ing] the law ineffective as a model for other states’ legislation.”) The chief impediment to such a refunctionalization of the landmark measure lay in the popularity that it had attained in Minnesota. TI referred to an Associated Press article citing polls that “indicate 90 percent of state residents approve of the law.” Even worse from the cigarette manufacturers’ perspective was that the Minnesota Restaurant & Food Service Association, “whose members might have been expected to be troubled by this issue, is quoted as having discovered that a majority of restaurants surveyed found compliance with the law ‘easier than expected.’" The problem, as Kelly

1004Bob Hanrahan to Tom Kelm, Re Proposed Minnesota Study (June 21, 1983), Bates No. TI03870695.

1005John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [1-2] (July 25, 1983), Bates No. TI03870692/3. For a more polished version, see Paula Johnson Duhaime (Tobacco Institute) to David Krogseng (North State Advisers, Inc.) (Nov. 10, 1983), Bates No. TI03870689. Krogseng, former chairman of the Minnesota Republican party, was a TI lobbyist.

1006Untitled undated draft at 1-2 [latter half of 1983], Bates No. TI03870525/6 (date reconstructed from reference to Oregon Indoor Clean Air Act as having gone into effect July 1 “of this year”).


1008John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [1] (July 25, 1983), Bates No. TI03870692. According to a lengthy extract from the MRFSA news release, 54 percent of respondents
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formulated it, was that “as long as these statements remain unchallenged, advocates of smoking restrictions can point to the Minnesota law as the prototype for smoking bans, not only in the workplace, but in all indoor areas.” Since field staff reports and legislative activity in Iowa and other states indicated that “we must move expeditiously,” Kelly argued that MCIAA’s impacts had to be scrutinized quickly to determine the efficacy of neutralizing the effect this law is having and may continue to have on the smoking restriction debate in other states.

reported that compliance was “easier than expected,” 40 percent stated that the rules were “difficult” to enforce, and 6 percent found them “impossible to follow.” “Restaurants Find New Regulations Are ‘Easier Than Expected,’” ANSR 2 [sic; should be 8](1 [sic; should be 2]:1 (Aug. 1980).


1010 John D. Kelly to Samuel D. Chilcote, Jr., Re: Need to Challenge Anti-Smokers’ Claims on Minnesota Clean Indoor Air Act at [3] (July 25, 1983), Bates No. TI03870692/4. By November TI approved the plan and authorized its lobbyist in Minnesota to secure a cost estimate for the focus group study. Paula Duhaime to David Krogseng (Nov. 10, 1983), Bates No. TIMN0458181. A company did propose to do such a study of restaurant owners, smokers, and a cross section of adults for $14,500 and to file its final report by January or February 1984, but the online industry documents appear to include no further reference to such a study. James Lukaszewski (Brum & Anderson Executive Communications, Inc.) to David Krogseng (North State Advisors, Inc.) (Nov. 28, 1983), Bates No. TI03870735/6.

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