

# NOTES

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## **Where There Is Smoke, There Is Fire: An Argument for Employees' Universal Right to Smoke-Free Workplaces Under International Human Rights Law**

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On April 22, 2011, the Centers for Disease Control and Prevention (CDC) announced that the United States is on track to achieve the CDC's goal calling for all fifty states and the District of Columbia to enact laws banning smoking in public places and worksites by the year 2020.<sup>1</sup> The CDC reported that from the year 2000 to 2010 alone, "[t]he number of states (including DC) with laws that prohibit smoking in indoor areas of worksites, restaurants, and bars increased from zero . . . to 26."<sup>2</sup> The United States is not alone in its efforts, as other countries also are following suit. In 2008 alone, almost 160 million people globally became newly protected by antismoking legislation.<sup>3</sup> As recently as in the past year, even more countries have decided to go "smoke-free." At the beginning of April 2011, the British media reported that "the Polish equivalent of environmental health officers" invited the United Kingdom's drug and alcohol team manager to help replicate the United Kingdom's widely successful antismoking legislation in Poland.<sup>4</sup> In January 2011, a new law went into effect in Spain outlawing smoking in all bars and restaurants.<sup>5</sup> Finally, in March 2011, the Chinese Ministry of Health announced an indoor smoking ban in all public areas starting May 1, 2011.<sup>6</sup> Despite these efforts, employers and states, for the most part, have failed to

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<sup>1</sup> M. Tynan et al., *State Smoke-Free Laws for Worksites, Restaurants, and Bars—United States, 2000–2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 472, 472 (2011) (stating that this goal "is achievable if current activity in smoke-free policy adoption is sustained nationally and intensified in certain regions, particularly the South"). The announcement was highly publicized. See, e.g., *CDC Predicts Smoking Bans in Every State by 2020*, CHARLESTON GAZETTE (W.Va.), Apr. 22, 2011, at 2C; *Indoor Ban on Smoking Gains Steam*, STAR-LEDGER (Newark, N.J.), Apr. 22, 2011, at 15; *Smoking Bans Proliferate, CDC Says*, BOS. GLOBE, Apr. 22, 2011, at 2.

<sup>2</sup> Tynan et al. *supra* note 1, at 472.

<sup>3</sup> Gillian Griffith et al., *Implementation of Smokefree Workplaces: Challenges in Latin America*, 52 SALUD PÚBLICA DE MÉX., at S347, S348 (2010).

<sup>4</sup> *County Boss to Help Poles Ban Smoking*, COVENTRY EVENING TELEGRAPH (Eng.), Apr. 11, 2011, at 11.

<sup>5</sup> See Ciaran Giles, *Spain Says 'Adios' to Smoking in Bars, Cafes*, ASSOCIATED PRESS FIN. WIRE, Oct. 20, 2010.

<sup>6</sup> Zhuang Pinghui, *Smoking Ban on Way for Indoor Public Places; New Regulations on Tobacco Use to Come into Effect from May 1*, S. CHINA MORNING POST, Mar. 24, 2011, at 4.

protect workers' fundamental human right to breathe clean air at work.

This Note explores governments' and employers' roles and responsibilities under the International Bill of Human Rights and other international human rights instruments to protect workers' right to breathe clean air at work. An underdeveloped area of scholarship is how international human rights law obligates both governments and employers around the world to provide smoke-free work environments *specifically* for their workers. While a handful of scholars have taken a human rights approach to tobacco control,<sup>7</sup> they either have lacked focus entirely by identifying no particular class of persons at risk, or have concentrated their efforts on other traditionally vulnerable groups, such as women and children, while disregarding workers.<sup>8</sup> Still others have advocated for the largely unrealistic prohibition of smoking in general rather than the elimination of involuntary secondhand smoke exposure.<sup>9</sup> This Note argues that human rights-based arguments targeting the interrelationship between environmental tobacco smoke (ETS) and the workplace are particularly powerful; not only are workers an especially vulnerable class to the harmful effects of ETS, but several human rights instruments guarantee workers additional protections under international law.

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<sup>7</sup> See generally Rangita de Silva de Alwis & Richard Daynard, *Reconceptualizing Human Rights to Challenge Tobacco*, 17 MICH. ST. J. INT'L L. 291 (2008–2009) (using a human rights framework to examine tobacco control); Carolyn Dresler & Stephen Marks, *The Emerging Human Right to Tobacco Control*, 28 HUM. RTS. Q. 599 (2006) (arguing for general tobacco control, including that involving consumption and marketing of tobacco); Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL'Y L. & ETHICS 137 (2005) (arguing that the World Health Organization's (WHO) Framework Convention on Tobacco Control is too weak to protect an individual's human right to health by failing to firmly commit states to address clinical smoking cessation); Chuanfeng Wu, *State Responsibility for Tobacco Control: The Right to Health Perspective*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 379 (2008) (arguing that states have a human rights obligation to provide smoking cessation services, combat tobacco smuggling, and guarantee individuals access to health-related tobacco information).

<sup>8</sup> *E.g.*, de Alwis & Daynard, *supra* note 7, at 293 (arguing that "a derivative human right to tobacco control emerges from the right to life and right to health guarantees, and is especially relevant to the rights of *women and children*") (emphasis added); Dresler & Marks, *supra* note 7, at 617–29 (discussing at length women's and children's rights to be free from exposure to tobacco).

<sup>9</sup> See generally de Alwis & Daynard, *supra* note 7, at 298–300 (analyzing how tobacco sale, consumption, and marketing practices infringe upon human rights guarantees).

In Part I, I examine secondhand tobacco smoke as one of the most common and dangerous indoor air pollutants.<sup>10</sup> While becoming increasingly aware of the health dangers of cigarette smoking, the international community still often ignores secondhand smoke's role as a deadly occupational hazard. Consequently, ETS exposure remains a significant cause of preventable death.<sup>11</sup> For example, in Canada, more than one thousand nonsmokers die each year due to ETS-induced heart disease and cancer,<sup>12</sup> while in China, the figure is closer to one hundred thousand.<sup>13</sup> Because workers spend such a large percentage of their lives at work, prolonged occupational ETS exposure can have particularly debilitating, or worse, fatal consequences. The World Health Organization (WHO) has estimated that approximately two hundred thousand workers around the globe die each year from exposure to secondhand smoke.<sup>14</sup>

In Part II, I argue that under international human rights law, governments around the globe have a legal obligation to provide smoke-free environments for their workers. The International Bill of Human Rights universally protects workers' rights to life and to safe and healthy working environments. Under this declaration, every U.N. member state is obligated to protect its workers from ETS exposure, a proven occupational hazard. Specifically, many countries have legally committed themselves to take additional protective action by ratifying other international treaties applicable to occupational secondhand smoke exposure. Despite this obligation, as of 2008, comprehensive smoke-free laws only covered less than six percent of the world's population.<sup>15</sup>

Governments, however, are not solely responsible for protecting the world's workers. In Part III, I argue that under the International Declaration of Human Rights and other international human rights laws, employers are independently accountable for taking action to

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<sup>10</sup> Mattias Öberg et al., *Worldwide Burden of Disease from Exposure to Second-Hand Smoke: A Retrospective Analysis of Data from 192 Countries*, 377 LANCET 139 (2011).

<sup>11</sup> HEALTH CAN., TOWARDS A HEALTHIER WORKPLACE: A GUIDEBOOK ON TOBACCO CONTROL POLICIES 6 (2007), available at [http://www.hc-sc.gc.ca/hc-ps/alt\\_formats/hecs-sesc/pdf/pubs/tobac-tabac/work-trav/travailler-eng.pdf](http://www.hc-sc.gc.ca/hc-ps/alt_formats/hecs-sesc/pdf/pubs/tobac-tabac/work-trav/travailler-eng.pdf).

<sup>12</sup> *Id.*

<sup>13</sup> Press Release, Bloomberg Philanthropies, Bloomberg Philanthropies Applauds China's Next Steps Against Tobacco (Apr. 6, 2011), available at [http://www.wpro.who.int/NR/rdonlyres/7331B75E-8066-48D9-99BC-406699688285/0/China\\_Ban\\_46112.pdf](http://www.wpro.who.int/NR/rdonlyres/7331B75E-8066-48D9-99BC-406699688285/0/China_Ban_46112.pdf).

<sup>14</sup> WHO Urges All Countries to Restrict Smoking; Agency Wants Tobacco Banned in Public Places, VANCOUVER SUN, May 31, 2007, at A13.

<sup>15</sup> *Smoking Bans Still Rare: WHO*, CBC NEWS, (Dec. 9, 2009), <http://www.cbc.ca/news/health/story/2009/12/09/smoking-bans-who-tobacco.html>.

protect their workers from ETS exposure regardless of their states' respective legal responsibilities. Despite this obligation, many employers have neglected to go smoke-free because of the myth that smoking bans negatively impact businesses, especially in the hospitality industry.

Finally, in Part IV, I confront the myth, fueled largely by the tobacco industry, that smoke-free policies negatively impact profit margins. I argue that not only are such policies economically benign, but they also can be quite, if not substantially, beneficial. By preventing employees from smoking in the workplace, employers can reduce costs, mitigate litigation exposure, and boost employee morale and productivity. As employers become increasingly educated as to these benefits, more employers are voluntarily choosing to go smoke-free independently of their obligations under international law.

## I

### THE RIGHT TO BREATHE CLEAN AIR AT WORK

The human right to a work environment devoid of secondhand smoke exposure fundamentally derives from ETS's role as a deadly air pollutant. ETS exposure in any context is dangerous, however, occupational exposure can pose particularly grave risks. Section I.A. generally examines the health consequences that flow from occupational ETS exposure, while Section I.B. specifically focuses on research pertaining to the workplace.

#### A. *Danger from ETS*

ETS, also known as passive or secondhand smoke, consists of a combination of *sidestream smoke*, which is emitted from the burning tip of a cigarette, and *mainstream smoke*, which a smoker inhales, filters, and then exhales.<sup>16</sup> Sidestream smoke, which is both quantitatively and qualitatively different from mainstream smoke, constitutes the vast majority of ETS, contributing over half of the particulate matter and nearly all of the vapor phase.<sup>17</sup> Quantitatively, a passive smoker typically inhales less tobacco smoke than an active

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<sup>16</sup> Michael P. Eriksen, Charles A. LeMaistre & Guy R. Newell, *Health Hazards of Passive Smoking*, 9 ANN. REV. PUB. HEALTH 47, 48 (1988).

<sup>17</sup> Ross C. Brownson et. al., *Environmental Tobacco Smoke: Health Effects and Policies to Reduce Exposure*, 18 ANN. REV. PUB. HEALTH 163, 164–65 (1997); Eriksen et al., *supra* note 16; *see also* Taiwo A. Oriola, *Ethical and Legal Analyses of Policy Prohibiting Tobacco Smoking in Enclosed Public Spaces*, 37 J.L. MED. & ETHICS 828, 828 (2009) (“About 85 percent of environmental tobacco smoke is sidestream smoke, while the remainder is mainstream smoke.”).

smoker, as the room air dilutes ETS.<sup>18</sup> Quantitatively, however, sidestream smoke is significantly more harmful than mainstream smoke.<sup>19</sup> Specifically, because sidestream smoke neither undergoes as complete a combustion process nor similarly is diluted by the porous cigarette paper, sidestream smoke contains higher quantities of nicotine, ammonia, benzene, carbon monoxide, and other dangerous chemicals.<sup>20</sup> For example, the carcinogen aminobiphenyl is enhanced thirty-fold in sidestream over mainstream smoke.<sup>21</sup> In all, ETS is made up of 4000 chemicals, 50 of which are known carcinogens and 250 of which are definitively harmful to health.<sup>22</sup> Furthermore, many of these particles that cigarettes release into the environment are tiny and therefore are easily drawn deep into the lungs of nonsmokers.<sup>23</sup>

Any claim that ETS exposure does not qualify as an occupational hazard is unpersuasive; every credible medical and scientific organization worldwide acknowledges that ETS exposure causes serious illness and death in nonsmokers.<sup>24</sup> The causal link between secondhand smoke exposure and lung cancer is particularly strong. Among the leading U.S. scientific and health agencies that have confirmed this tie are the National Academy of Sciences of the National Research Council, the Environmental Protection Agency (EPA), the Public Health Service, the National Institute for Occupational Safety and Health, the American College of Occupational and Environmental Medicine, the California Environmental Protection Agency, and the National Toxicology Program.<sup>25</sup> The impact is quite substantial, with over forty-six studies finding that a nonsmoker increases his or her risk of lung cancer by twenty-four percent with exposure to secondhand smoke.<sup>26</sup> In the United States alone, lung cancer caused by secondhand smoke kills 3400 victims annually.<sup>27</sup> ETS exposure not only leads to lung cancer,

<sup>18</sup> Brownson et al., *supra* note 17, at 165.

<sup>19</sup> *See id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Oriola, *supra* note 17, at 828.

<sup>23</sup> Eriksen et al., *supra* note 16, at 48.

<sup>24</sup> PAN AM. HEALTH ORG., "GREATEST HITS" OF TOBACCO CONTROL OPPONENTS (2003), available at [http://www.paho.org/English/AD/SDE/RA/toh\\_greatest\\_hits.doc](http://www.paho.org/English/AD/SDE/RA/toh_greatest_hits.doc).

<sup>25</sup> RONALD COLMAN, NOVA SCOTIA DEPARTMENT OF HEALTH, THE ECONOMIC IMPACT OF SMOKE-FREE WORKPLACES: AN ASSESSMENT FOR NOVA SCOTIA 11 (2001), available at [http://www.tobaccoscam.ucsf.edu/pdf/9.5-GPI\\_Atlantic.pdf](http://www.tobaccoscam.ucsf.edu/pdf/9.5-GPI_Atlantic.pdf).

<sup>26</sup> J.A. Ford, Editorial, *Protecting Workers in Licensed Premises From the Effects of Secondhand Smoke*, 55 OCCUPATIONAL MED. 583, 583 (2005).

<sup>27</sup> Oriola, *supra* note 17, at 829.

but it also causes larynx, oral cavity, esophageal, and bladder cancers and is a probable cause of cervical, kidney, pancreas, breast, nasal sinus cavity, nasopharyngeal, and stomach cancers.<sup>28</sup>

Aside from cancer, ETS is associated with increased fluid in the middle ear, additional episodes of asthma, headaches, nausea, bronchitis, pneumonia, dizziness, decreased pulmonary function, and eye, lung, nose, and throat irritation.<sup>29</sup> ETS exposure during pregnancy increases the risks of miscarriage, low birth weight, and perinatal death.<sup>30</sup> One Bristol study consisting of 8500 couples determined that nonsmoking women subjected to ETS at work are fourteen percent less likely to be able to conceive a child within one year.<sup>31</sup>

Finally, ETS produces fatal and nonfatal heart disease. ETS exposure causes the blood pressure and heartbeat of nonsmokers to “rise measurably, [which] indicat[es] extra stress placed on the heart.”<sup>32</sup> Not only does this extra stress have short-term toxic effects on heart health, but it can also produce long-term permanent effects, contributing to the development of atherosclerosis.<sup>33</sup> Also, passive smoke diminishes the blood’s ability to deliver oxygen to the heart, as the twenty-three milligrams of carbon monoxide released by each cigarette into the air<sup>34</sup> competes with oxygen for binding sites on red blood cells.<sup>35</sup> Lastly, secondhand smoke boosts platelet activity, increasing the likelihood of blood clot formation, damage to the coronary arteries’ lining, and recurrent or more serious myocardial

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<sup>28</sup> See *Secondhand Smoke and Cancer*, NAT’L CANCER INST. (Jan. 12, 2011), <http://www.cancer.gov/cancertopics/factsheet/Tobacco/ETS>.

<sup>29</sup> OFFICE ON SMOKING & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., *MAKING YOUR WORKPLACE SMOKEFREE: A DECISION MAKER’S GUIDE 3* (1996); WHO, *PROTECTION FROM EXPOSURE TO SECOND-HAND TOBACCO SMOKE: POLICY RECOMMENDATIONS 5–6* (2007).

<sup>30</sup> See Giselle Salmasi et al., *Environmental Tobacco Smoke Exposure and Perinatal Outcomes: A Systematic Review and Meta-Analyses*, 89 *ACTA OBSTETRICIA ET GYNECOLOGICA* 423 (2010).

<sup>31</sup> James Chapman, *How Secondhand Smoke Can Damage a Woman’s Fertility*, *DAILY MAIL* (London), Sept. 30, 2000, at 39.

<sup>32</sup> RONALD COLMAN, *THE COST OF TOBACCO IN NOVA SCOTIA 74* (2000), available at <http://www.gpiatlantic.org/pdf/health/tobacco/costoftobacco-ns.pdf>.

<sup>33</sup> Stanton A. Glantz & William M. Parmley, *Passive Smoking and Heart Disease*, 273 *JAMA* 1047 (1995). In fact, research shows that “[p]eople who smoke cigarettes are chronically and continually adversely affecting their cardiovascular system, which adapts to compensate for all the deleterious effects of smoking. Nonsmokers, however, do not have the ‘benefit’ of this adaptation, so the effects of passive smoking on nonsmokers are much greater than on smokers.” *Id.* at 1051 (citation omitted).

<sup>34</sup> *Legislation for Clean Air: An Indoor Front*, 82 *YALE L.J.* 1040, 1043 (1973).

<sup>35</sup> COLMAN, *supra* note 25, at 25.

infarction.<sup>36</sup> The American Cancer Society calculates that ETS related heart disease kills over fifty-three thousand nonsmokers each year in the United States alone.<sup>37</sup> One does not have to undergo prolonged ETS exposure to jeopardize heart health. According to the CDC a mere five-minute exposure to ETS can “increase an individual’s risk [of] a heart attack or stroke,”<sup>38</sup> as “the body’s blood clotting system is very sensitive to small amounts of smoke.”<sup>39</sup> Given these statistics, it is unsurprising “that there is no safe level of tobacco smoke.”<sup>40</sup>

### *B. ETS and the Workplace*

Because adults spend so much of their time at work, consistent occupational ETS exposure is particularly worrisome. It is widely recognized that secondhand smoke exposure is a leading source of occupational disease in many industries. Generally, workers exposed to secondhand smoke face a twenty-five to thirty percent increased risk of cardiovascular disease and a twenty to thirty percent increased risk of lung cancer.<sup>41</sup> Workers in the hospitality industry, including those employed in bars and restaurants, are among the most vulnerable (and least protected). The Tobacco Advisory Group of the Royal College of Physicians has estimated that in 2003, 497 working-aged people in the United Kingdom died from workplace exposure to ETS,<sup>42</sup> while only 226 died from work-related accidents in the prior year.<sup>43</sup> In the United States, workers in bars, bowling alleys, billiard halls, betting establishments, and bingo parlours face ambient nicotine concentrations that are 2.4 to 18.5 times higher than those in office environments and 1.5 to 11.7 times higher than those in restaurants.<sup>44</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> Samuel J. Winokur, Note, *Seeing Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants*, 75 GEO. WASH. L. REV. 662, 665 (2007).

<sup>38</sup> Marot Williamson, Comment, *When One Person’s Habit Becomes Everyone’s Problem: The Battle over Smoking Bans in Bars and Restaurants*, 14 VILL. SPORTS & ENT. L.J. 161, 166–67 (2007) (citation omitted) (internal quotation marks omitted).

<sup>39</sup> Jeremy Laurance, *Smoker’s Families 25% More Likely to Get Cancer*, INDEPENDENT (London) (Oct. 17, 1997), <http://www.independent.co.uk/news/smokers-families-25-more-likely-to-get-cancer-1236242.html>.

<sup>40</sup> Jonathan P. Winickoff et al., *Beliefs About the Health Effects of “Thirdhand” Smoke and Homesmoking Bans*, 123 PEDIATRICS, at e74, e78 (2009).

<sup>41</sup> Leslie Zellers, Meliah A. Thomas & Marice Ashe, *Legal Risks to Employers Who Allow Smoking in the Workplace*, 97 AM. J. PUB. HEALTH 1376, 1376 (2007).

<sup>42</sup> Ford, *supra* note 26, at 584.

<sup>43</sup> *Id.*

<sup>44</sup> M. Siegel & M. Skeer, *Exposure to Secondhand Smoke and Excess Lung Cancer Mortality Risk Among Workers in the “5 B’s”: Bars, Bowling Alleys, Billiard Halls,*



As a result, anywhere from one to fourteen of every one thousand workers in these establishments “who works for 40 years will die of lung cancer attributable to their workplace secondhand smoke exposure.”<sup>45</sup>

Although workers in the hospitality industry are among the most vulnerable, other workers are not exempt from risk. For example, in the United Kingdom, prior to recent legislation banning smoking in indoor places, passive smoking in the workplace killed three people each day, resulting in a total of 900 office workers’ deaths and 145 factory workers’ deaths annually.<sup>46</sup> These dire findings extend beyond Europe. In Asia, a group of Hong Kong scientists, who studied ten thousand police officers, concluded that nonsmoking men exposed to passive smoke for one year took twice as much time off from work than colleagues working in a smoke-free environment.<sup>47</sup> Additionally, the exposed police officers were thirty percent more likely to have sought treatment for respiratory symptoms in the fourteen days preceding their absences.<sup>48</sup> These statistics make sense given that nonsmokers who are heavily exposed to ETS in the workplace “smoke” the equivalent of sixty-one cigarettes per year.<sup>49</sup>

Occupational smoke exposure also endangers workers’ safety in other ways. First, cigarettes greatly increase the risk of industrial fire and explosion. Smoking can be blamed for approximately thirty percent of U.S. fire deaths and ten percent of worldwide fire deaths.<sup>50</sup> The WHO estimated that in 2002, fires caused by smoking killed three hundred thousand persons.<sup>51</sup> The 1947 Texas City ammonium nitrate explosion, which the Federal Bureau of Investigation blamed

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*Betting Establishments, and Bingo Parlours*, 12 TOBACCO CONTROL 333, 336 (2003) (reporting results of a study that analyzed existing data on exposure to secondhand smoke).

<sup>45</sup> *Id.*

<sup>46</sup> *Second-Hand Smoking “Kills Hundreds at Work,”* BRISTOL EVENING POST (U.K.), Apr. 16, 2003, at 64.

<sup>47</sup> JOHN GRIFFITHS & KATE GRIEVES, WHO, WHY SMOKING IN THE WORKPLACE MATTERS: AN EMPLOYER’S GUIDE 3 (2002).

<sup>48</sup> *Id.*

<sup>49</sup> KNUT-OLAF HAUSTEIN & DAVID GRONEBERG, TOBACCO OR HEALTH?: PHYSIOLOGICAL AND SOCIAL DAMAGES CAUSED BY TOBACCO SMOKING 250 (2d ed. 2010).

<sup>50</sup> Press Release, Carole Gan, UC Davis Health Sys., Study Shows Smoking Is a Leading Cause of Fire Disaster and Death Worldwide, Costing over \$27 Billion Yearly (Aug. 4, 2000), available at <http://www.ucdmc.ucdavis.edu/newsroom/newsdetail.html?key=2763&svr=http://www.ucdmc.ucdavis.edu&table=archived>.

<sup>51</sup> CARIN HÅKANSTA, INT’L LABOR ORG., WORKPLACE SMOKING: A REVIEW OF NATIONAL AND LOCAL PRACTICAL AND REGULATORY MEASURES 6 (2004).

on a lit cigarette, is a particularly striking example.<sup>52</sup> The explosion resulted in the worst industrial disaster death toll in U.S. history, claiming 4100 casualties.<sup>53</sup> Finally, ETS can place workers in “double jeopardy,” by increasing the hazardousness of other chemicals in the workplace.<sup>54</sup> For example, exposure to tobacco smoke multiplies the danger of asbestos.<sup>55</sup> Therefore, that ETS exposure poses significant health risks, particularly in the occupational context, is widely recognized by the scientific community.

## II GOVERNMENTAL RESPONSIBILITY UNDER INTERNATIONAL CONVENTIONS

The right to safe and healthy working conditions, which encompasses the right to an ETS-free working environment, is a fundamental human right. Sections II.A, II.B, and II.C examine, respectively, governmental responsibility under (1) the International Bill of Human Rights, (2) various International Labour Organization (ILO) conventions, and (3) other international human rights instruments. Section II.D acknowledges that while governments have made substantial progress in guaranteeing this right for their respective workers, much work is yet to be done. Finally Section II.E addresses the difficulty inherent in an outright state-initiated smoking ban.

### *A. Obligation Under the International Bill of Human Rights*

The International Bill of Human Rights is made up of: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Economic, Social and Cultural Rights; and (3) the International Covenant on Civil and Political Rights.

First, the Universal Declaration of Human Rights, which the U.N. General Assembly based on the “inherent dignity” of all people and ratified on December 10, 1948, is the “basic international pronouncement of the inalienable and inviolable rights of all members of the human family,”<sup>56</sup> and forms the foundation of international human rights law. Articles 3, 23, and 22 are the most relevant to

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<sup>52</sup> Press Release, Gan, *supra* note 50.

<sup>53</sup> *Id.*

<sup>54</sup> HEALTH CAN., *supra* note 11, at 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Questions and Answers About the Universal Declaration of Human Rights*, U.N. ASS’N IN CANADA, <http://www.unac.org/rights/question.html> (last visited Oct. 1, 2011).

occupational safety and health. Article 3 of the Declaration protects the human “right to life, liberty and security of person,” while Article 23 more specifically delineates that “everyone has the right . . . to just and favourable conditions of work.”<sup>57</sup> Lastly, Article 22 recognizes that the right to just and favourable conditions of work is “indispensable [to human] dignity.”<sup>58</sup>

The International Covenant on Economic, Social, and Cultural Rights, ratified by the General Assembly on December 16, 1966, further protects the human right to safe and healthy working conditions. Article 7 of the Covenant “recognize[s] the right of everyone to the enjoyment of just and favourable conditions of work,” while Article 12 specifically “recognize[s] the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and urges “[t]he improvement of all aspects of environmental and industrial hygiene.”<sup>59</sup> The Committee on Economic, Social, and Cultural Rights, which monitors implementation of the Convention, has interpreted Article 12 to include “preventive measures in respect of occupational accidents and diseases . . . [and] prevention and reduction of the population’s exposure to harmful substances such as . . . harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.”<sup>60</sup> The Committee has further stated that Article 12.2 “embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances” and that the term “industrial hygiene [as used in Article 12] refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.”<sup>61</sup>

Governments that legally allow employers within national territories to permit smoking at work violate their citizens’ right to life as well as to safe and healthy working conditions protected under these instruments. Under the International Bill of Human Rights, governments have an affirmative responsibility to provide workers

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<sup>57</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>58</sup> *Id.*

<sup>59</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>60</sup> *The Right to the Highest Attainable Standard of Health*, Gen. Comment No. 14, U.N. ESCOR, Comm. On Econ., Soc. & Cultural Rights, 22d Sess., ¶ 15, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>61</sup> *Id.*

with safe and healthy work environments by passing legislation requiring employers to keep their workplaces smoke-free. While every member state of the U.N. has specifically “pledged . . . to achieve . . . the promotion of universal respect for and observance of [the] human rights [enumerated by the Universal Declaration],” the document is “a common standard of achievement for . . . all nations”; therefore, it is essential that *all* members of the international community protect its enumerated human rights by the rule of law.<sup>62</sup>

### ***B. Obligation Under ILO Conventions***

In addition to the obligations imposed under the International Bill of Rights, some nations have gone farther by ratifying conventions of the ILO, the international organization under the U.N. responsible for enacting and overseeing international labor standards. Any U.N. member state may join the ILO, which currently encompasses 183 member states.<sup>63</sup> As a tripartite agency, the ILO convenes governments, employers, and workers, to promulgate labor policies and standards through recommendations and conventions.<sup>64</sup> After the International Labour Conference adopts a convention, the convention becomes considered an “international labor standard,” and member states may commence the ratification process.<sup>65</sup> After ratification, a given convention becomes a treaty in international law.<sup>66</sup> While recommendations and un-ratified conventions do not have the force of law, they are nonetheless considered standards within the body of human rights.

Three of the most relevant conventions to the problem of occupational ETS exposure are the Occupational Cancer Convention, the Chemicals Convention, and the Working Environment (Air Pollution, Noise and Vibration) Convention. The Occupational Cancer Convention of 1974 (C139) legally binds ratifying member states to protect workers from carcinogens in the workplace by taking specific measures, including: (1) reducing the number of workers exposed to carcinogens; (2) educating workers on the health risks of such exposure; and (3) “ensur[ing] that workers are provided with . . .

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<sup>62</sup> G.A. Res. 217 (III) A, *supra* note 57.

<sup>63</sup> Gillian MacNaughton & Diane F. Frey, *Decent Work, Human Rights, and the Millennium Development Goals*, 7 HASTINGS RACE & POVERTY L.J. 303, 311 (2010).

<sup>64</sup> *Id.* at 311–12.

<sup>65</sup> *Id.* at 312.

<sup>66</sup> Edward E. Potter, *The Growing Significance of International Labor Standards on the Global Economy*, 28 SUFFOLK TRANSNAT’L L. REV. 243, 244–45 (2005).

medical examinations . . . during the period of employment.”<sup>67</sup> Scientists have identified sixty-nine substances in ETS that definitively cause cancer, including tar, arsenic, benzene (an industrial solvent, refined from crude oil), cadmium (used in the manufacture of batteries), formaldehyde, chromium (used in the manufacture of dyes, paints, and alloys), butadiene (used in rubber manufacturing), polycyclic aromatic hydrocarbons, and acrolein (a former chemical weapon).<sup>68</sup> Therefore, because secondhand smoke is a proven occupational carcinogen, states that have ratified C139 must ensure that its employers adequately protect workers against the harms of ETS.

The Chemicals Convention of 1990 (C170) mandates that member states ensure that employers institute safeguards so that workers are not exposed to dangerous chemicals above set exposure limits and receive information about occupational hazards.<sup>69</sup> Scientists have identified over four thousand chemicals in ETS<sup>70</sup> to which there is no safe level of exposure.<sup>71</sup> The only way to effectively protect people from ETS’s harms is to completely prohibit all smoking in indoor environments, as even low exposure levels have adverse consequences.<sup>72</sup> Therefore, under C170, ratifying member states must require employers to comprehensively ban all indoor smoking. Because the Convention also gives workers the “right to remove themselves from danger resulting from the use of chemicals,”<sup>73</sup> it is unlawful for countries that have ratified the Convention to retaliate against employees who will not tolerate occupational smoke exposure.

Finally, the Working Environment (Air Pollution, Noise and Vibration) Convention of 1977 (C148) mandates signatories to promulgate “[n]ational laws or regulations [that] shall prescribe that measures be taken for the prevention and control of, and protection

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<sup>67</sup> Int’l Labour Org. (ILO), Occupational Cancer Convention, June 24, 1964, C139.

<sup>68</sup> *Smoking and Cancer: What’s in a Cigarette?*, CANCER RESEARCH UK, <http://info.cancerresearchuk.org/healthyliving/smokingandtobacco/whatsinacigarette/> (last updated Sept. 25, 2009).

<sup>69</sup> ILO, Chemicals Convention, June 25, 1990, C170.

<sup>70</sup> Maria Cheraghi & Sundeep Salvi, *Environmental Tobacco Smoke (ETS) and Respiratory Health in Children*, 168 EUR. J. PEDIATRICS 897, 901 (2009).

<sup>71</sup> See M. Nebot et al., *Environmental Tobacco Smoke Exposure in Public Places of European Cities*, 14 TOBACCO CONTROL 60, 62 (2005).

<sup>72</sup> See *Secondhand Smoke and Cancer*, *supra* note 28.

<sup>73</sup> Chemicals Convention, *supra* note 69, at art. 18.

against, occupational hazards in the working environment due to air pollution, noise and vibration.”<sup>74</sup> Under Article 11:

Where continued assignment to work involving exposure to air pollution, noise or vibration is found to be medically inadvisable, every effort shall be made, consistent with national practice and conditions, to provide the worker concerned with suitable alternative employment or to maintain his income through social security measures or otherwise.<sup>75</sup>

Clearly, as shown at length above, ETS is *not* medically advisable and should be covered within the broad definition of “air pollution,” which Article 3 defines as “cover[ing] all air contaminated by substances, whatever their physical state, which are harmful to health or otherwise dangerous.”<sup>76</sup>

While ILO Recommendations are non-compulsory, conventions are in fact legally binding.<sup>77</sup> Accordingly, “when a member nation ratifies a convention, the nation is required to implement national policies so that the country will be in compliance with that convention.”<sup>78</sup> To ensure compliance, the Conference Committee on the Application of Standards and the Committee of Experts on the Application of Conventions and Recommendations are charged with examining alleged breaches of international labor standards pursuant

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<sup>74</sup> ILO, Working Environment (Air Pollution, Noise and Vibration) Convention art. 4, June 20, 1977, C148.

<sup>75</sup> *Id.* at art. 11.

<sup>76</sup> *Id.* at art. 3.

<sup>77</sup> See HÉCTOR BARTOLOMEI DE LA CRUZ ET AL., THE INTERNATIONAL LABOR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 21–24 (1996). It is important to note that there is a debate as to the effectiveness of ILO conventions, even when ratified by member states and thus binding. While many argue that the ILO lacks enforcement mechanisms, others claim that through its reporting and supervisory systems, “the ILO has been successful in ensuring member states’ adherence to formal obligations.” Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT’L L. 361, 382 (1995); see also Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking A New Balance for U.S. Enforcement of Internationally-Recognized Workers’ Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 706–07 (1998) (“The ILO should remain the primary vehicle for enforcement of international labor rights standards. Although it lacks sanctions to enforce member state obligations under the Conventions, the mere existence of this international human rights regime is nonetheless powerful, as it provides a forum for workers and their representatives to raise transgressions of international labor rights standards and forces employers and governments to review their conduct and provide justifications for the alleged violations.”). A full discussion of this debate, however, is beyond the scope of this Note.

<sup>78</sup> Baltazar, *supra* note 77, at 700.

to a 1926 resolution.<sup>79</sup> In addition to elaborate reporting mechanisms, “the ILO has complaint procedures, which enable governments, trade unions, and employer organizations, as well as the ILO’s Governing Body, to initiate complaints for violations of the Conventions.”<sup>80</sup>

As with all others, Conventions 139,<sup>81</sup> 148,<sup>82</sup> and 170<sup>83</sup> only legally bind those member states that have voluntarily undergone the ratification process. Even if not ratified, however, these conventions do not lose their importance in validating and calling international attention to workers’ rights. Conventions are useful tools for international and nongovernmental organizations to apply pressure on countries that have yet to ratify them. As international labor standards expert Lance Compa has noted, “[a]dherence to these core ILO conventions is considered a function of membership in the Organization regardless of whether a state has ratified them.”<sup>84</sup> Finally, those member states that do not ratify a given convention are “nonetheless obligated to submit an annual report to the ILO which discusses the extent to which its national policy is consistent with that

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<sup>79</sup> ILO, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, REPORT III (1A), at 2 (2011), available at [http://www.ilo.org/ilc/ILCSessions/99thSession/reports/lang--en/WCMS\\_151556/index.htm](http://www.ilo.org/ilc/ILCSessions/99thSession/reports/lang--en/WCMS_151556/index.htm).

<sup>80</sup> MacNaughton & Frey, *supra* note 63, at 313.

<sup>81</sup> The following member states have ratified Convention 139: Afghanistan, Argentina, Belgium, Bosnia and Herzegovina, Brazil, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Guinea, Guyana, Hungary, Iceland, Iraq, Ireland, Italy, Japan, Lebanon, Luxembourg, the former Yugoslav Republic of Macedonia, Montenegro, Nicaragua, Norway, Peru, Portugal, Serbia, Slovakia, Slovenia, Sweden, Switzerland, the Syrian Arab Republic, Ukraine, Uruguay, and the Bolivarian Republic of Venezuela. *Convention No. C139*, INT’L LAB. ORG., <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C139> (last updated to include new signatories Feb. 10, 2011).

<sup>82</sup> The following member states have ratified Convention 148: Azerbaijan, Belgium, Bosnia and Herzegovina, Brazil, Costa Rica, Croatia, Cuba, the Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Ghana, Guatemala, Guinea, Hungary, Iraq, Italy, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Montenegro, Niger, Norway, Poland, Portugal, the Russian Federation, San Marino, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Tajikistan, the United Republic of Tanzania, the the United Kingdom, and Zambia. *Convention No. C148*, INT’L LAB. ORG., <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C148> (last updated to include new signatories Feb. 10, 2011).

<sup>83</sup> The following member states have ratified Convention 170: Brazil, Burkina Faso, China, Colombia, the Dominican Republic, Germany, Italy, the Republic of Korea, Lebanon, Luxembourg, Mexico, Norway, Poland, Sweden, the Syrian Arab Republic, the United Republic of Tanzania, and Zimbabwe. *Convention No. C170*, INT’L LAB. ORG., <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C170> (last updated to include new signatories Feb. 10, 2011).

<sup>84</sup> Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT’L L. 151, 155 (1992).

of the particular convention.”<sup>85</sup> Therefore, whether or not formally binding, these ILO conventions obligate states to include the entitlement to a smoke-free work environment among the broader body of recognized workers’ rights.

### *C. Obligation Under Other Human Rights Instruments*

In addition to the International Bill of Human Rights and the ILO Conventions delineated above (among others), several other human rights instruments recognize the human right to a clean and safe working environment. For example, the American Declaration of the Duties and Rights of Man, adopted in 1948, recognizes both every person’s “right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources” and every person’s “right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.”<sup>86</sup> Similarly, the African Charter on Human and People’s Rights recognizes that “[e]very individual shall have the right to work under equitable and satisfactory conditions . . . [and] to enjoy the best attainable state of physical and mental health.”<sup>87</sup>

Supplementing these instruments is the WHO Framework on the Convention on Tobacco Control (FCTC),<sup>88</sup> which the World Health

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<sup>85</sup> Baltazar, *supra* note 77, at 700; *see also* Compa, *supra* note 84, at 154; Stephen I. Schlossberg, *United States’ Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 51 (1989).

<sup>86</sup> American Convention on Human Rights, American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

<sup>87</sup> African [Banjul] Charter on Human and Peoples’ Rights art. 15, 16, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58, (entered into force Oct. 21, 1986).

<sup>88</sup> The parties to the convention are: Afghanistan, Albania, Algeria, Angola, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, the Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, the Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, the Cook Islands, Costa Rica, Côte d’Ivoire, Croatia, Cuba, Cyprus, the Czech Republic, the Democratic People’s Republic of Congo, Denmark, Djibouti, Dominica, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, the European Community, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, India, the Islamic Republic of Iran, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Kyrgyzstan, the Lao People’s Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, the Libyan Arab Jamahiriya, Lithuania, Luxembourg, Madagascar, Malaysia, Maldives, Mali, Malta, the



Assembly adopted unanimously on November 30, 2004. The FCTC calls for signatories to “design and implement effective programmes aimed at promoting the cessation of tobacco use, in such locations as educational institutions, health care facilities, workplaces and sporting environments”<sup>89</sup> and “provid[e] for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.”<sup>90</sup> Therefore, these more specialized and, in some cases, region-specific documents, supplement the broader body of international laws in bolstering workers’ rights.

#### ***D. Current Progress***

Countries are beginning to take seriously their responsibility under international law to protect workers against occupational ETS exposure. In March 2004, Ireland became the first country in the world to make indoor workplaces (including restaurants, bars, and pubs) and public places smoke-free.<sup>91</sup> Since then, numerous others have jumped on the clean air bandwagon and have banned or limited smoking in public places. These countries include, but are not limited to, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Hungary, Iceland, Israel, Lithuania, Poland, the Russian Federation, Slovakia, Sweden, the former Yugoslav Republic of Macedonia, and

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Marshall Islands, Mauritania, Mauritius, Mexico, the Federated States of Micronesia, Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Niue, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Peru, the Philippines, Poland, Portugal, Qatar, the Republic of Korea, the Republic of Moldova, Romania, the Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, the Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, the Solomon Islands, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, the Syrian Arab Republic, Thailand, the Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Tuvalu, Uganda, Ukraine, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland, the United Republic of Tanzania, the United States of America, Uruguay, Vanuatu, the Bolivarian Republic of Venezuela, Viet Nam, Yemen, and Zambia. *Parties to the WHO Framework Convention on Tobacco Control*, WHO, [http://www.who.int/fctc/signatories\\_parties/en/index.html](http://www.who.int/fctc/signatories_parties/en/index.html) (last updated to include new signatories Aug. 10, 2011).

<sup>89</sup> WHO Framework Convention on Tobacco Control, World Health Assembly, 56th Ass., 4th plen. Mtg, Agenda Item 13, art. 14, Annex, WHO Doc. A56.VR/4 (May 21, 2003), available at <http://whqlibdoc.who.int/publications/2003/9241591013.pdf>.

<sup>90</sup> *Id.* at art. 8.

<sup>91</sup> See TOBACCO ADVISORY GRP., ROYAL COLL. OF PHYSICIANS OF LONDON, GOING SMOKE-FREE: THE MEDICAL CASE FOR CLEAN AIR IN THE HOME, AT WORK AND IN PUBLIC PLACES (2005).

Turkmenistan.<sup>92</sup> Already by 2001, nearly four-fifths of European countries had banned or restricted smoking in public buildings and public transport.<sup>93</sup>

Despite the international progress that has been made, “the overwhelming majority of countries [still] have no smoke-free laws, very limited laws, or ineffective enforcement.”<sup>94</sup> Only 7.4% of the world’s population is currently covered by comprehensive smoke-free public health laws.<sup>95</sup> As a result, in many countries, the vast majority of workers remain involuntarily exposed to ETS.<sup>96</sup> Progress is needed even in the richest and most developed countries, including the United States, which continues to restrict occupational smoke exposure at the state rather than federal level, resulting in unacceptably large segments of unprotected workers. In 2010, fifty-

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<sup>92</sup> HÅKANSTA, *supra* note 51, at 35.

<sup>93</sup> *Id.* at 15–16.

<sup>94</sup> WHO, WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC: IMPLEMENTING SMOKE-FREE ENVIRONMENTS 26 (2009), available at [http://www.who.int/tobacco/mpower/2009/gtcr\\_download/en/index.html](http://www.who.int/tobacco/mpower/2009/gtcr_download/en/index.html).

<sup>95</sup> Öberg et al., *supra* note 10, at 145.

<sup>96</sup> See, e.g., WHO, *supra* note 29 at 6 (“Two recent studies of a variety of settings in 39 developed and developing countries found SHS in the great majority of locations surveyed. In seven Latin American countries SHS (measured by ambient nicotine levels) was detected in 94% of the locations surveyed, including hospitals, schools and government buildings. A study comparing levels of fine particulate matter in indoor environments, where smoking was or was not observed, concluded that among the 32 countries studied, only the two countries with national comprehensive smoke-free air policies—Ireland and New Zealand—had acceptable levels of indoor air quality.”); Joaquin Barnoya et al., *Secondhand Smoke Exposure in Bars and Restaurants in Guatemala City: Before and After Smoking Ban Evaluation*, 22 CANCER CAUSES CONTROL 151 (2011) (finding that, six months after a comprehensive smoking ban was implemented in Guatemala City, nicotine was detectable in seventy-three percent of bars in the research); Marcia Erazo et al., *Secondhand Tobacco Smoke in Bars and Restaurants in Santiago, Chile: Evaluation of Partial Smoking Ban Legislation in Public Places*, 19 TOBACCO CONTROL 469 (2010) (concluding that despite partial smoking ban legislation in 2007, exposure to secondhand smoke remains high in restaurants and bars in Santiago, Chile); Maria J. Lopez et al., *Secondhand Smoke Exposure in Hospitality Venues in Europe*, 116 ENVTL. HEALTH PERSP. 1469 (2008) (detecting airborne nicotine in 97.4% of all samples collected from 167 hospitality establishments in eight different European countries); Denis Vinnikov et al., *Excessive Exposure to Secondhand Tobacco Smoke Among Hospitality Workers in Kyrgyzstan*, 7 INT’L J. ENVTL. RES. & PUB. HEALTH 966 (finding that, in a sample of bar and restaurant employees in Kyrgyzstan, eighty-two percent of employees stated that they would prefer to work in a smoke-free environment, yet, on average, were exposed to secondhand smoke for 13.5 hours per day and 5.8 days per week); Pinpin Zheng et al., *Workplace Exposure to Secondhand Smoke and Its Association with Respiratory Symptoms—A Cross-Sectional Study Among Workers in Shanghai*, 20 TOBACCO CONTROL 58 (2010) (finding that, in Shanghai, China, only 13.3% of a sample of 3530 workers were covered by total smoking bans).

three percent of all U.S. workers remained beyond the reach of comprehensive smoke-free workplace legislation.<sup>97</sup>

The struggle to implement comprehensive secondhand smoke restrictions remains hardest in developing countries, particularly those in Africa, which are among the least regulated.<sup>98</sup> Because many African countries lack resources and must cope with debilitating poverty, there is “keen [competition] between tobacco-related diseases and other very serious health issues, such as malaria or HIV/AIDS.”<sup>99</sup> This difficulty is compounded by many African governments’ strong involvement in tobacco production and increasing ineffectiveness in ensuring safer and healthier workplaces.<sup>100</sup> African countries, however, are not the only ones in the developing world who struggle to implement clean air legislation. According to the WHO’s survey data, “the proportion of high income countries with smoke free restaurants . . . is more than three times higher than the proportion of low- and middle-income countries . . . with similar measures.”<sup>101</sup> Shockingly, large segments of the population in developing countries remain ignorant, despite overall global progress, of the deleterious health effects of both active and passive smoking.<sup>102</sup> Accordingly, despite this significant progress, substantial work is left to be done.

### *E. Should Governments Ban Cigarettes Altogether?*

While it is important that governments regulate secondhand smoke exposure within the workplace, it is critical that, *at least as of now*, they do not completely ban the sale and/or use of cigarettes, especially within the home. To universally ban smoking would be unduly difficult for current smokers, who have chosen to engage in—and who are consequently addicted to—a once legal activity. Cigarettes are highly addictive, equally addictive as either heroin or

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<sup>97</sup> See Ellen J. Hahn, *Smokefree Legislation: A Review of Health and Economic Outcomes Research*, 39 AM. J. OF PREVENTIVE MED. S66, S67 (2010).

<sup>98</sup> See HÅKANSTA, *supra* note 51, at 15; see also Wilfred Agbenyikey et al., *Secondhand Tobacco Smoke Exposure in Selected Public Places (PM2.5 and Air Nicotine) and Non-Smoking Employees (Hair Nicotine) in Ghana*, 20 TOBACCO CONTROL 107 (2010) (stating that “only a few [African countries] (Djibouti, Kenya, Mauritius, Niger and South Africa) have passed legislation addressing tobacco control in public places”).

<sup>99</sup> HÅKANSTA, *supra* note 51, at 15.

<sup>100</sup> See *id.*

<sup>101</sup> WHO, WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC: THE MPOWER PACKAGE 46 (2008), available at <http://www.who.int/tobacco/mpower/2008/en/>.

<sup>102</sup> HÅKANSTA, *supra* note 51, at 15.

cocaine.<sup>103</sup> Those who make concerted efforts to quit smoking are usually unsuccessful. On average, an ex-smoker attempts to quit smoking two to three times before reaching ultimate success, and only 2.5% of smokers successfully quit each year.<sup>104</sup> Even those smokers who successfully quit face a high risk of relapse; most resume smoking within two to three months.<sup>105</sup> A complete smoking ban would be simply unfeasible. If a state completely banned smoking, it would alienate a large percentage of its population, while unfairly putting citizens in jeopardy of breaking the law. In contrast, occupational bans still allow smokers the ability to take cigarette breaks to satisfy their addictions outside the vicinity of their coworkers.

Moreover, whether or not one agrees with it, a strong argument is to be made that the complete prohibition of cigarette use within the home outright would trample upon smokers' right to privacy. This right is protected by Article 12 of the Universal Declaration of Human Rights, mandating that "no one shall be subjected to arbitrary interference with his privacy . . . [and] home"<sup>106</sup> and Article 17 of the International Covenant on Civil and Political Rights, protecting against "arbitrary or unlawful interference with [one's] privacy . . . [and] home."<sup>107</sup> The constitutions of nearly every country around the world and numerous international documents supplement the privacy provisions of the International Bill of Rights.<sup>108</sup> For example, Article 8 of the European Convention of Human Rights states that "everyone has the right to respect for his private and family life [and] his home" and that "there shall be no interference by a public authority with the exercise of this right."<sup>109</sup>

Given the strong privacy protections inherent in these instruments and the still prevalent use of tobacco worldwide, any attempt to

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<sup>103</sup> *What is a Smoking Addiction?*, EHEALTHMD, [http://www.ehealthmd.com/library/smoking/SMO\\_what.html](http://www.ehealthmd.com/library/smoking/SMO_what.html) (last updated June 28, 2011).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> G.A. Res. 217 (III) A, *supra* note 57.

<sup>107</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>108</sup> David Banisar & Simon Davies, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, GLOBAL INTERNET LIBERTY CAMPAIGN, <http://www.gilc.org/privacy/survey/intro.html> (last visited Oct. 1, 2011).

<sup>109</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force Sept. 3, 1953).

completely ban cigarettes within the home would likely face a strong backlash. Opponents of such a ban would forcefully argue that governmental law enforcement authorities who enter an individual's home to enforce a smoking ban not only "arbitrar[ily] interfere" with the homeowner's right to physical privacy but also his or her right to make private, autonomous choices. Another argument can be made that individuals have the right to make the choice to smoke (whether or not it is self-destructive) in the privacy of their own homes, given that their actions do not infringe on the fundamental rights of others, including rights to life, safety, and health.<sup>110</sup> Lastly, while cigarette use burdens states with additional health care costs, it is unclear that at this point that burden is sufficient to outweigh humans' heavy privacy rights. Accordingly, while some scholars have advocated for human rights-based justifications of a more comprehensive global smoking ban, as of now, a more feasible and realistic path is to advocate for the right to ban occupational exposure.

### III EMPLOYER RESPONSIBILITIES

In countries with smoke-free legislation, national law holds employers responsible for banning smoking within their respective workplaces. However, employers even in those countries that have failed to enact legislation are obligated under international human rights conventions to protect their employees' human rights by making their workplaces smoke-free.

Because international bodies initially conceived of human rights instruments primarily to protect individuals from excessive state power, international human rights law traditionally has been seen as legally binding only states rather than private actors.<sup>111</sup> Increasingly, however, scholars, courts,<sup>112</sup> and framers have recognized that human

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<sup>110</sup> It is important to recognize that advocates of a universal smoking ban focus the implications of ETS-exposure for women and children, even within the home. *See supra* note 8. While valid, a full discussion of this argument is beyond the scope of this Note. That said, it is important to recognize that, given the resulting implication of other rights, such a ban would likely face harsher criticism than one focused on the workplace. Accordingly, individual legislatures may be the best equipped on a case-by-case basis to weigh these competing rights in conceiving of nuanced legislation.

<sup>111</sup> David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 935-37 (2004).

<sup>112</sup> Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803-10 (2002) (showing that United States, Japanese, German,

rights instruments also implicate private actors, including individuals, domestic businesses, and transnational corporations.<sup>113</sup>

The Universal Declaration of Human Rights recognizes private actors' responsibilities both implicitly and explicitly. Scholars, including Professor Paust of the University of Houston Law Center, have noted that because the Declaration "speak[s] generally of the particular rights and freedoms of each person or of everyone without any mention of which person or entity might owe a corresponding duty," one can infer that "most of the human rights listed in the Declaration can be claimed not merely against the state but also against groups or individuals."<sup>114</sup> However, one does not need to depend solely on structural arguments to recognize that the Declaration implicates private actors. In the Preamble, the General Assembly explicitly pronounces the Declaration "as a common standard of achievement for all peoples and all nations . . . [that] every individual and every organ of society . . . shall strive by."<sup>115</sup> Furthermore, throughout the Declaration, the Framers use broad, sweeping language, such as in Article 29, which proclaims that "[e]veryone has duties to the community," and in Article 30, which states that nothing in the Declaration "may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."<sup>116</sup>

In addition to the Universal Declaration of Human Rights, employers are universally required to respect the International Covenant on Economic, Social and Cultural Rights, which, as previously mentioned, secures workers' rights to physical and mental health and to safe and healthy working conditions. As employers are individual actors within a larger community, their responsibilities are delineated in the Preamble of the Covenant, stating that "the individual, having duties to other individuals and to the community to

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British, Canadian, and Israeli courts have recognized that human rights law reaches private corporations).

<sup>113</sup> For excellent analyses of private actors' obligations under international human rights instruments, see generally Kinley & Tadaki, *supra* note 111; Paust, *supra* note 112; and Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) [hereinafter *The Other Side of Right*].

<sup>114</sup> *The Other Side of Right*, *supra* note 113, at 53.

<sup>115</sup> G.A. Res. 217 (III) A, *supra* note 57, at pmb1.

<sup>116</sup> *Id.* at art. 29, 30.

which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the . . . Covenant.”<sup>117</sup>

The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms emphasizes and expands upon the duty of employers to protect their employees. While this Declaration acknowledges that the state has the “prime responsibility” to protect human rights, the Preamble and Articles 10, 16, and 18 of the document recognize that individuals, groups, associations, and institutions, among others, play an important role in promoting fundamental freedoms.<sup>118</sup> Article 11 specifically applies to employers. It states that “everyone who, as a result of his or her profession, can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant . . . international standards of occupational and professional conduct or ethics.”<sup>119</sup> Employers, by virtue of their societal roles, have unique power over their employees, namely to set the terms and working conditions of employment. Article 11 burdens employers with the additional responsibility, on top of their roles as ordinary community members, to comply with international human rights standards.

Finally, the Sub-Commission on the Promotion and Protection of Human Rights, a think tank associated with the U.N. Commission on Human Rights, adopted on August 13, 2003, the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights,” stating that:

Transnational corporations and other business enterprises shall carry out their activities in accordance with the national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and

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<sup>117</sup> G.A. Res. 2200A (XXI), *supra* note 59, at pmbl.

<sup>118</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, G.A. Res. 53/144, U.N. GAOR, 53d Sess., U.N. Doc A/RES/53/144 art. 10, 16, 18. (Dec. 9, 1998),

<sup>119</sup> *Id.* at art. 11.

shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.<sup>120</sup>

Other human rights instruments also encompass private actors within their ambit. For example, the Preamble of the American Declaration of Rights and Duties of Man states that: “[t]he fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.”<sup>121</sup> Echoing this sentiment, the American Convention of Human Rights states that it should not be interpreted as “permitting any State Party, group, or person to suppress [or restrict] the enjoyment or exercise of the rights and freedoms recognized.”<sup>122</sup> The African Charter on Human and People’s Rights repeatedly contains language calling on the duties of individuals as well as of states.<sup>123</sup>

Scholars have noted that these instruments, which explicitly call upon individuals and other organs of society to respect human rights, can be contrasted with other documents that explicitly limit their corresponding duties to the state.<sup>124</sup> For example:

Article 1, paragraph 1, of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment restricts the Convention’s application to acts of torture committed “by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an *official capacity*.”<sup>125</sup>

Similarly, Article 2 of the Convention Relating to the Status of Refugees “recognizes that refugees have duties to the state in which they find themselves but does not deal with the human rights

<sup>120</sup> *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. ESCOR, Comm’n on Human Rights, 55th Sess., Agenda Item 4, ¶ 14, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>121</sup> American Declaration of the Rights and Duties of Man, *supra* note 86, at pmb1.

<sup>122</sup> American Convention on Human Rights art. 29, Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 673 (entered into force July 18, 1978).

<sup>123</sup> For example, Article 27 states that: “Every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community,” and Article 28 states that: “[e]very individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.” African Charter on Human and Peoples’ Rights, *supra* note 87, art. 27, 28.

<sup>124</sup> *The Other Side of Right*, *supra* note 113, at 58–62 (providing numerous examples of international instruments with limiting language).

<sup>125</sup> *Id.* at 60–61 (emphasis added) (quoting Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (Dec. 10, 1984)).



obligations of private individuals or groups.”<sup>126</sup> Because numerous human rights instruments and treaties, such as these two, *do* set limits on their application, it can be inferred that those that not only do not, but also contain broad, inclusive language, can be applied to private actors.

#### IV

#### ADDRESSING THE ALLEGED BUSINESS ARGUMENT AGAINST BANNING SMOKING

Despite their obligations under international human rights law, many states and employers have neglected to go smoke-free because of the myth that smoking bans negatively impact businesses, especially in the hospitality industry. A wide body of research proves, however, that in reality smoking bans enhance, rather than detract from, business profits. Not only are clean air policies instrumental in keeping employees safe, but researchers also have proven that they are effective means of increasing profits and revenues. Regardless of their human rights obligations, it makes plain business sense for employers to implement comprehensive tobacco control policies. Many of the world’s leading companies have recognized the strategic economic value of tobacco policies and therefore have taken steps to “go smoke-free.”

There are several financial benefits of smoke-free policies. First, smoke-free workplaces substantially reduce a business’s cleaning and maintenance costs, as cleaning “staff no longer ha[ve] to clean ashtrays, dust desks, and clean carpets or furniture as often.”<sup>127</sup> Although scholars disagree over exactly how much, on average, a company profits from a clean air policy, it is clear that cost reductions can be quite substantial. The U.S. EPA estimates that smoke-free restaurants save approximately \$190 per thousand square feet each year in lower maintenance cleaning costs.<sup>128</sup> A Canadian study puts the reduction of annual cleaning costs for smoke-free offices at approximately twenty dollars per smoking employee annually.<sup>129</sup> Not only are reductions substantial, but they also are widespread. A

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<sup>126</sup> *Id.* at 61.

<sup>127</sup> OFFICE ON SMOKING & HEALTH, U.S. DEP’T OF HEALTH & HUMAN SERVS., *Save Lives, Save Money: Make Your Business Smoke-Free 4* (2006).

<sup>128</sup> Hana K. Swayer, *Going Smoke-Free Pays*, TIMES-MAIL (Bedford, Ind.), July 5, 2007, at A6.

<sup>129</sup> SMOKE FREE EUR. P’SHP, SMOKE FREE EUROPE MAKES ECONOMIC SENSE 13 (2005).

survey of two thousand companies with smoke-free policies reported that approximately sixty percent of those companies benefited from reduced cleaning expenditures as a result.<sup>130</sup>

Additionally, smoke-free workplaces improve nonsmoking employees' morale and productivity. A study conducted by the Canadian Centre for Occupational Health and Safety found that in workplaces without smoking restrictions, twenty-five percent of nonsmokers express frustration and hostility towards their smoking colleagues.<sup>131</sup> The U.S. EPA confirmed this finding, concluding that smoke-free legislation reduces conflicts between smokers and nonsmokers and thereby increases organizational efficiency.<sup>132</sup> Another study, which investigated this phenomenon, noted that "[n]onsmokers hold negative stereotypes of smokers, suffer from depressed mood states when near a smoker, perform worse around smokers, are more aggressive toward smokers, help smokers less than nonsmokers, and require more interpersonal distance when interacting with smokers."<sup>133</sup> Smoking bans also improve relations between nonsmokers and management. According to Smokefree Action, a U.K.-based antismoking advocacy group, employees "typically appreciate not being exposed to smoke in the workplace . . . [and] [s]uch goodwill may translate into lower turnover of staff and greater productivity."<sup>134</sup> Finally, nonsmoking workers are likely to be more productive due to the health benefits associated with smoking bans. One study of workers in Hong Kong found that "nonsmokers exposed to secondhand smoke in the workplace are 37% more likely . . . to visit a doctor for a cold, flu, or fever than those not exposed."<sup>135</sup>

Opponents might argue that the improved morale of nonsmoking employees resulting from clean air policies is offset by a drop in morale of smoking employees. Research, however, proves otherwise. While clean air policies inevitably will frustrate some smokers,

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<sup>130</sup> Arnold B. Ritterband & Jeffrey Barg, *Public Ban Will Benefit Smokers and Nonsmokers Alike*, DAILY GAZETTE (Schenectady, N.Y.), July 16, 2000, at F-01.

<sup>131</sup> COLMAN, *supra* note 25, at 38.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 39.

<sup>134</sup> *Why Go Smokefree Early?*, SMOKEFREE ACTION, <http://www.smokefreeaction.org.uk/archive/gsfintroduction.html> (last visited Oct. 1, 2011).

<sup>135</sup> S.M. McGhee, A.J. Hedley & L.M. Ho, *Passive Smoking and Its Impact on Employers and Employees in Hong Kong*, 59 OCCUPATIONAL & ENVTL. MED. 842, 843 (2002).

reactions among the entire working population are largely positive.<sup>136</sup> In a 1996–1997 Canadian National Population Health Survey, eighty-eight percent of smokers supported nonsmokers' right to a nonsmoking work environment.<sup>137</sup> Furthermore attitudes in favor of smoking bans often improve even after a ban is implemented.<sup>138</sup> For example, a study examining Italian attitudes found that while in 2001, prior to a ban of smoking in public places, 83.3% of Italians supported the legislation; after the ban, this figure rose to over ninety percent.<sup>139</sup> Similar attitude changes have been reported in Ireland, the United States, and New Zealand.<sup>140</sup> In Lexington, Kentucky, after the imposition of a smoke-free law, residents “were more likely to perceive a higher risk of heart attack and a greater risk of developing cancer as a result of [secondhand smoke] exposure.”<sup>141</sup> When framed correctly, smoking employees are able to view clean air policies not as a criticism of their decision to smoke but rather as a message that the organization values the health and rights of its employees. Even smokers have been found to “welcome workplace restrictions.”<sup>142</sup>

In addition to these benefits, employers who fail to address the risks of ETS face the potential of litigation brought by their nonsmoking employees. Nonsmoking workers around the world exposed to ETS have prevailed in lawsuits brought against their employers. In the landmark case *Shimp v. New Jersey Bell Telephone Co.*, the New Jersey Supreme Court held that by permitting employees to smoke in the vicinity of a secretary allergic to cigarette smoke, a telephone company breached its common law duty to provide a safe working environment.<sup>143</sup> Similarly, in Australia in

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<sup>136</sup> James F. Thrasher et al., *Policy Support, Norms, and Secondhand Smoke Exposure Before and After Implementation of a Comprehensive Smoke-Free Law in Mexico City*, 100 AM. J. PUB. HEALTH 1789, 1789, 1796 (2010).

<sup>137</sup> HEALTH CAN., *supra* note 11, at 9.

<sup>138</sup> Thrasher et al., *supra* note 136, at 1789, 1796.

<sup>139</sup> S. Gallus et al., *Effects of New Smoking Regulations in Italy*, 17 ANNALS OF ONCOLOGY 346, 347 (2006).

<sup>140</sup> Mary Kay Rayens et al., *Public Opinion and Smoke-Free Laws*, 8 POL'Y POL. & NURSING PRAC. 262, 268 (2007).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*; see also Michael Erikson & Frank Chaloupka, *The Economic Impact of Clean Indoor Air Laws*, 57 CA: CANCER J. CLINICIANS 367, 371 (2007); Susan C. Hu et al., *Workplace Smoking Policies in Taiwan and Their Association with Employees' Smoking Behaviours*, 15 EUR. J. PUB. HEALTH 270 (2005) (finding in a study of Taiwanese workers that “most smokers support[ed] a smoking ban at their workplace”).

<sup>143</sup> *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516 (Ch. Div. 1976). For excellent discussions of how employers in the United States who allow smoking in their workplaces expose themselves to legal liability, see Franis J. Nolan, Commentary, *Passive*

1992, a jury awarded eighty-five thousand pounds to an Australian woman who sued her employer on the ground that thirteen years of occupational ETS exposure aggravated her asthma.<sup>144</sup> With the emergence of employer liability for occupational ETS exposure, legal liability became a primary motivation behind employers' decisions to implement such bans. Australian surveys show that this legal fear has overtaken concern for workers' health as the primary reason that employers implement smoking bans.<sup>145</sup>

While the above savings are substantial, perhaps the biggest payouts from nonsmoking policies come from those employees who cease smoking directly as a result of antitobacco workplace policies. Extensive international research proves that workplace smoking bans directly result in: (1) a reduction in the number of cigarettes consumed by smoking employees; and (2) an increase in the number of employees who are successful in their attempts to quit smoking.<sup>146</sup> In the United States, following the implementation of smoking bans, employees' cigarette consumption has decreased in the range of five to twenty-five percent, and the percentage of smoking employees has fallen between zero and twenty percent.<sup>147</sup> After the passage of Finnish legislation banning smoking in public places, both smoking prevalence and cigarette consumption declined by sixteen to seventeen percent in firms previously without bans.<sup>148</sup> Similarly, a

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*Smoking Litigation in Australia and America: How an Employee's Health Hazard May Become an Employer's Wealth Hazard*, 9 J. CONTEMP. HEALTH L. & POL'Y 563 (1993); Melissa A. Vallone, *Employer Liability for Workplace Environmental Tobacco Smoke: Get Out of the Fog*, 30 VAL. U. L. REV. 811 (1996); and Zellers et al., *supra* note 41, at 1376.

<sup>144</sup> Editorial, *Smoking Hazard to More than Health*, AGE (Melbourne, Austl.), May 29, 1992, at 13.

<sup>145</sup> COLMAN, *supra* note 25, at 44.

<sup>146</sup> Eriksen & Chaloupka, *supra* note 142, at 371; *see also* William N. Evans, Matthew C. Farrelly & Edward Montgomery, *Do Workplace Smoking Bans Reduce Smoking?*, 89 AM. ECON. REV. 728, 736, 742 (1999) (finding that in the United States "smoking participation" in smoke-free workplaces are four to six percentage points lower than in those that allow smoking); S. Gallus et al., *supra* note 139, at 347 (finding a 8.9% drop in cigarette sales in Italy following new smoking regulations); Michael K. Ong & Stanton A. Glantz, *Cardiovascular Health and Economic Effects of Smoke-Free Workplaces*, 117 AM. J. MED. 32, 35-36 (2004) (finding that national smoke-free legislation in the United States would "cause quitters to forgo 564 million packs and remaining smokers to forgo 401 million packs").

<sup>147</sup> David T. Levy, Frank Chaloupka & Joseph Gitchell, *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Control Scorecard*, 10 J. PUB. HEALTH MGMT. PRACT. 338, 340 (2004).

<sup>148</sup> Antero Heloma et al., *The Short-Term Impact of National Smoke-Free Workplace Legislation on Passive Smoking and Tobacco Use*, 91 AM. J. PUB. HEALTH 1416 (2001).

1991 study among Telecom Australia employees, conducted eighteen months after the implementation of a total workplace smoking ban, found that smoking employees consumed, on average, three to four cigarettes less per workday than before the ban and that the company population boasted a smoking quit rate double that of the community average.<sup>149</sup>

Virtually all research recognizes that, on average, smoking employees cost their employers more than their nonsmoking counterparts. This cost difference results from smokers' increased absenteeism, reduced productivity (due to cigarette breaks), increased health insurance premiums, and increased risk of fire damage to the workplace.<sup>150</sup> These costs can be quite substantial. In 2000, the annual cost of smoking in Scottish workplaces was estimated to amount to 450 pounds in lost productivity, 40 million pounds in increased absenteeism, and 4 million pounds in fire damage.<sup>151</sup> Moreover, according to the American Lung Association, smokers miss, on average, forty to fifty percent more days of work than their nonsmoking counterparts.<sup>152</sup> Because smokers suffer from severe smoking-related—and sometimes fatal—health effects, they additionally raise employers' health insurance premiums. Legislation specifically authorizes health plans offering individual and small group coverage to charge tobacco users premiums of up to 1.5 times as much as nontobacco users.<sup>153</sup> Consequently, smokers in the United States have an average health care payment of \$1145, while nonsmoking employees' payment only amounts to \$762.<sup>154</sup>

Despite the wide body of research showing that clean air policies positively influence profits, employers in the hospitality industry continue to be wary of smoking bans. Opponents believe that by instituting clean air policies they will lose their smoking clientele

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<sup>149</sup> COLMAN, *supra* note 25, at 37.

<sup>150</sup> See Steve Parrott, Christine Godfrey & Martin Raw, *Costs of Employee Smoking in the Workplace in Scotland*, 9 TOBACCO CONTROL 187, 187 (2000); see also Michael T. Halpern & Humphrey Taylor, *Beliefs Regarding Smoking in the Workplace: Results from the Global Workplace Smoking Survey*, 54 INT'L J. PUB. HEALTH 391, 391 (2009) (reporting that smoking decreases worker productivity, increases absenteeism, leads to earlier retirement, and imposes higher insurance costs).

<sup>151</sup> Parrot et al., *supra* note 150, at 192.

<sup>152</sup> Jim Collison, *Workplace Smoking Policies: 16 Questions and Answers*, PERSONNEL J., Apr. 1988, at 80.

<sup>153</sup> Leslie Algren, *Delaware Casinos Doing Fine Under Smoke-Free Law*, LANSING STATE J., Oct. 7, 2008, at 5A; Jim Rutherford, *Time for State to Go Smoke-Free*, BATTLE CREEK ENQUIRER (Battle Creek, Mich.), Dec. 5, 2008, at 8A.

<sup>154</sup> Rutherford, *supra* note 153, at 8A.

while failing to attract additional customers.<sup>155</sup> Research, however, shows that these fears are overblown, as clean air policies are overwhelmingly popular and have not resulted in economic decline.<sup>156</sup> In the United States, studies examining data collected from California, Colorado, New York, Texas, Kentucky, and elsewhere have all found that despite opposition, smoke-free legislation has not economically harmed restaurants and bars, and to the contrary, may have resulted in economic benefits.<sup>157</sup> According to the WHO, “a thorough review of the literature on the economic effects of smoke-free environments around the world concluded that, among the few studies presenting scientifically valid data, none had a negative economic impact, resulting instead in a neutral or positive impact on business.”<sup>158</sup> Much of this unfounded skepticism originates from tobacco industry campaigns designed to thwart the institution of clean air policies by claiming that bans economically harm businesses, particularly in the hospitality industry.<sup>159</sup> Internal documents confirm the economic motives behind these campaigns. For example, in a 1993 memo eventually discovered during civil litigation, a Philip Morris analysis emphasized the financial impact of smoking bans on the tobacco companies and warned that “three to five fewer cigarettes per day will reduce the annual manufacturer profits a billion dollars per year.”<sup>160</sup> Moreover, almost without exception, studies showing negative effects of smoke-free ordinances are connected to the tobacco industry and rely on manipulated data, biased scientific methods, and subjective information, including anecdotes and perceptions.<sup>161</sup> As employers become more educated about the advantages and disadvantages of smoke-free legislation, support for such bans logically should increase.

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<sup>155</sup> Rayens et al., *supra* note 140, at 263.

<sup>156</sup> WHO, *supra* note 101, at 26; Rayens, *supra* note 140, at 263.

<sup>157</sup> See Rayens, *supra* note 140, at 263; see also Erikson & Chaloupka, *supra* note 142, at 373–76 (discussing studies analyzing data from California, Colorado, New York, and Kentucky that found no negative economic impact on revenue or employment as a result of smoke-free ordinances).

<sup>158</sup> WHO, *supra* note 101, at 26.

<sup>159</sup> Erikson & Chaloupka, *supra* note 142, at 373.

<sup>160</sup> Editorial, *Playing Tricks With Smoke*, LEDGER (Lakeland, Fla.), June 2, 2002, at A16.

<sup>161</sup> Richard Feldman, *Smoking Ban: Pro and Con*, STAR PRESS (Muncie, Ind.), May 15, 2005, at 3B.

## V

## SUMMARY AND CONCLUSIONS

The dangers of ETS have been clearly documented. Because a large percentage of the world's population spends so much of their daily lives at the workplace, the danger of ETS is not only a general health problem but also an occupational safety issue. Involuntary exposure to secondhand smoke results in hundreds of thousands of deaths annually.

Progress has been made in protecting workers' rights. The International Bill of Human Rights protects workers' rights to life and a safe and healthy work environment. Because the International Bill of Human Rights is universal in both content and application, it obligates every government and individual employer around the globe to take action to protect workers against ETS exposure. Moreover, U.N. member states that have ratified relevant conventions are legally bound to take additional protective action.

More work, however, is needed. While governments and employers in all parts of the world have banned or limited smoking in indoor workplaces, further action is required to universally secure workers' fundamental human rights. The struggle to keep workplaces smoke-free remains hardest for governments in developing nations plagued by poverty and ignorance of ETS's debilitating health effects. Additionally, employers are often hesitant to go smoke-free because of unfounded fears that they will lose their smoking customer bases. The tobacco industry often fuels these fears, which run contrary to reliable evidence, showing that bans often enhance rather than hurt profit margins.

We have a long way to go before all workers around the world are safely protected from deadly exposure to ETS. In this struggle, however, it is important not to lose sight of the fact that "we are dealing with one of the most serious occupational safety and health hazards of our time."<sup>162</sup> Fortunately, unlike many other public health hazards, secondhand smoke exposure can be easily avoided with relatively simple steps by governments and employers. Because this problem's remedy is so simple, it is a travesty for us to sit back and to let even one worker die from involuntary exposure to this deadly air pollutant.

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<sup>162</sup> HÅKANSTA, *supra* note 51, at 66.

