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A Poor Player: Exempting Theatrical Productions from Smoke-Free Laws

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A POOR PLAYER* : EXEMPTING THEATRICAL PRODUCTIONS FROM SMOKE-FREE LAWS

Michael Freiberg **

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*Your honour's players, hearing your amendment,
Are come to play a pleasant comedy;
For so your doctors hold it very meet,
Seeing too much sadness hath congeal'd your blood,
And melancholy is the nurse of frenzy.
Therefore they thought it good you hear a play
And frame your mind to mirth and merriment,
Which bars a thousand harms and lengthens life.¹*

I. INTRODUCTION

Although every state has on its books a law regulating secondhand smoke in indoor areas, these laws vary widely in their scope and applicability. Some states prohibit smoking only in government

* WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5.

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1. YALE SHAKESPEARE, *THE TAMING OF THE SHREW* act 1, sc. 2, lines 136-44.

buildings,² while others prohibit smoking in all workplaces and public places, including bars and restaurants, with only minor exceptions.³ The anti-tobacco organization Americans for Nonsmokers' Rights (ANR) concluded that as of July 5, 2010, twenty-two out of fifty states had a "100% smoke-free workplace, restaurant, and bar law."⁴

Even in these twenty-two states, each state law contains exemptions that allow smoking in locations where the law would otherwise prohibit smoking. Some of these exemptions, such as exemptions for hotel and motel sleeping rooms, are commonplace.⁵ Other exemptions are less common. Minnesota, for example, allows smoking in locked psychiatric units⁶ and in a disabled veterans' rest camp.⁷ Ohio allows smoking in workplaces where "all employees are related to the owner."⁸

One potential exemption that has generated controversy in at least two states is an exemption allowing actors and actresses to smoke as part of a theatrical production. Eleven states and the District of Columbia have such exemptions.⁹ These exemptions are of varying significance, because some are in states with comparatively weak smoke-free laws.¹⁰ Others are located in states with laws that ANR considers to be comprehensive, where smoking would otherwise be prohibited in theaters.¹¹

At a time when more and more states are strengthening existing smoke-free laws, it is important to assess the constitutional, practical, and political necessity of allowing actors and actresses to smoke as part of theatrical productions. Should any of these needs be present, it is important that a smoking exemption be carefully drafted so that only bona fide theatrical productions are exempted. Otherwise, the

2. See, e.g., Wyo. Exec. Order No. 1990-1 (1990), available at <http://www-wsl.state.wy.us/sis/wydocs/exeorders.html>.

3. See, e.g., WASH. REV. CODE §§ 70.160.011-.100 (2010).

4. AMERICAN NONSMOKERS' RIGHTS FOUNDATION, Overview List – How Many Smokefree Laws?, <http://www.no-smoke.org/pdf/mediaordlist.pdf> (last visited Oct. 27, 2010).

5. See, e.g., MINN. STAT. § 144.4167, subd. 3(2) (2010); N.Y. PUB. HEALTH LAW §§ 1399-q(2) McKinney (2010).

6. MINN. STAT. § 144.414, subd. 3(b) (2010).

7. MINN. STAT. § 144.4167, subd. 8 (2010).

8. OHIO REV. CODE ANN. § 3794.03(C) (West 2010).

9. ALASKA STAT. § 18.35.310(b) (2010); ARIZ. REV. STAT. ANN. § 36-601.01(B)(7) (2010); CAL. LAB. CODE § 6404.5(d)(9) (West 2010); D.C. CODE § 7-1708(3) (2010); IDAHO CODE ANN. § 39-5503(1)(e) (West 2010); ME. REV. STAT. ANN. tit. 22, § 1542(2)(b) (2010); MASS. GEN. LAWS ch. 270, § 22(c)(6) (West 2010); MINN. STAT. § 144.4167(9) (2010); N.M. STAT. ANN. § 24-16-4(n) (West 2010); R.I. GEN. LAWS § 23-20.10-6(b) (2010); S.C. CODE ANN. § 44-95-20 (2010); TEX. PENAL CODE ANN. § 48.01 (Vernon 2010).

10. See, e.g., IDAHO CODE ANN. §§ 39-5503 (2010) (allowing smoking in: bars; retail tobacco stores; buildings owned and operated by social, fraternal, or religious organizations; hotel and motel rooms; veterans homes; and employee break rooms).

11. See, e.g., ARIZ. REV. STAT. ANN. § 36-601.01 (2010).

exemption has the potential to turn into a significant loophole, jeopardizing public health. This Article evaluates whether theatrical productions need to be exempted from smoke-free laws on these three grounds, and provides sample legislative language that would create a narrow exemption.

II. CONSTITUTIONAL NEED

The issue of whether there is a constitutional need to exempt theatrical productions from smoke-free laws was raised in recently concluded litigation in Colorado. In the *Curious Theatre* series of cases,¹² three Colorado theaters sued the state of Colorado because the 2006 Colorado smoke-free law¹³ contained no exemption for actors on stage. The theaters argued that smoking on stage was protected artistic speech under both the U.S. and Colorado Constitutions.¹⁴

The theaters' arguments failed at every stage of the litigation, albeit for differing reasons. A Colorado district court found that smoking, even in a theatrical context, was not expressive conduct, and thus the Colorado legislature was not obligated to exempt theatrical productions from the Colorado Clean Indoor Air Act.¹⁵ On appeal, a unanimous three-judge panel of the Colorado Court of Appeals reasoned that smoking on stage was expressive conduct, but held that the smoke-free law did not impermissibly regulate the content of speech.¹⁶ The theaters then appealed to the Colorado Supreme Court, which held that "the state's legitimate interest in preserving and improving the health, comfort, and environment of the public is furthered by limiting the public's exposure to environmental smoke."¹⁷ The U.S. Supreme Court declined to review the Colorado Supreme Court's decision.¹⁸

Notably, the Colorado Supreme Court declined to determine whether theatrical smoking rises to the level of expressive conduct. Because the court did not reject the court of appeals' conclusion that smoking is expressive conduct, it is useful to examine the analysis of the Colorado Court of Appeals in arriving at this conclusion.¹⁹

12. *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't (Curious Theater II)*, 220 P.3d 544 (Colo. 2009) (en banc).

13. COLO. REV. STAT. ANN. §§ 25-14-204-205 (West 2010).

14. *Curious Theatre II*, 220 P.3d at 546.

15. *Id.*

16. *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't (Curious Theater I)*, 216 P.3d 71, 78, 84 (Colo. App. 2008).

17. *Id.* at 550.

18. *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't (Curious Theater III)*, 130 S. Ct. 3288 (2010).

19. *Curious Theatre II*, 220 P.3d at 548.

In concluding that “smoking by an actor as part of a theatrical production is expressive conduct for purposes of the First Amendment,”²⁰ the court of appeals followed the two-part test set out by the U.S. Supreme Court in *Texas v. Johnson*.²¹ For conduct to be expressive under this test, there must be an intent to convey a message and a great likelihood that the message would be understood.²² In applying the test, the court of appeals first noted that smoking by itself is not protected expressive conduct.²³ In the context of a play, however, smoking “may be used to give insight into a character’s personality, set the mood, or evoke an era.”²⁴ The court cited several examples before concluding that the *Johnson* test was met and that smoking on stage was expressive conduct.²⁵

Other courts have suggested that smoking should not be considered expressive conduct.²⁶ However, these cases involved the First Amendment protection claims of bar and restaurant patrons, which are more attenuated than the claims of theaters, especially in the realm of artistic speech.²⁷ It is therefore useful to continue to follow the Colorado Court of Appeals’ analysis.

Because the court of appeals held that smoking as part of a play was expressive conduct, the court next had to determine whether the smoke-free law was content-neutral. Content-neutral laws that incidentally restrict speech do not trigger as exacting scrutiny as laws that target specific types of speech.²⁸ The U.S. Supreme Court held in *Ward v. Rock Against Racism* that a statute is content-neutral if it “serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others.”²⁹ Applying this test, the Colorado Court of Appeals found the state smoke-free law to be content-neutral because it “focuses on the adverse health effects of tobacco smoke, not on expression.”³⁰ Other courts have

20. *Curious Theatre I*, 216 P.3d at 78.

21. 491 U.S. 397, 404 (1989).

22. *Johnson*, 491 U.S. at 404.

23. *Curious Theatre I*, 216 P.3d at 79.

24. *Id.*

25. *Id.* at 79-80.

26. *See, e.g.*, *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 854 (N.D. Ohio 2004), *NYC C.L.A.S.H. v. City of N.Y.*, 315 F. Supp. 2d 461, 478 (S.D.N.Y. 2004).

27. *See, e.g.*, *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t (Curious Theatre II)*, 220 P.3d 544, 553 (Colo. 2009) (en banc) (Hobbs, J., dissenting) (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563-64 (1975) (Douglas, J., dissenting in part and concurring in part) (noting that theater is entitled to First Amendment protection because theatrical performances can convey social and political messages).

28. *Curious Theatre I*, 216 P.3d at 80.

29. 491 U.S. 781, 791 (1989).

30. *Curious Theatre I*, 216 P.3d at 80.

agreed with the Colorado Court of Appeals' conclusion that a smoke-free law is content-neutral, even if they doubted smoking could be considered expressive conduct.³¹

Having found the state's smoke-free law to be content-neutral, the Colorado Court of Appeals applied an intermediate level of scrutiny to determine if a theatrical production exemption was necessary.³² The U.S. Supreme Court laid out the analysis for this level of scrutiny in *United States v. O'Brien*.³³ Under the four-part *O'Brien* test, a content-neutral regulation is valid "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."³⁴ The Colorado Court of Appeals applied each criterion in order.

The first three prongs of the *O'Brien* test were easily met. First, as a public health law enacted pursuant to Colorado's police power, adopting the smoke-free law was within Colorado's constitutional power.³⁵ Second, "the Smoking Ban serves an important governmental interest by protecting the health of Colorado's citizens."³⁶ Third, because the court had already determined that the law was content-neutral, it also determined that it was unrelated to the suppression of free expression.³⁷

A majority of the court's analysis focused on the fourth *O'Brien* factor: whether the scope of the speech restrictions in the smoke-free law was permissible. Relying heavily on *Ward v. Rock Against Racism*, the court noted that regulations affecting expressive conduct "need not be the least restrictive or least intrusive means of" advancing a content-neutral government goal.³⁸ With this in mind, the court concluded that the smoke-free law was sufficiently narrowly tailored "because it focuses directly on the one form of conduct, smoking, upon which the state's announced interest in protecting public health depends."³⁹ The court also noted that the law allows for alternative modes of expression, including outdoor theatrical performances and prop cigarettes.⁴⁰

31. See, e.g., *Taverns for Tots, Inc.*, 341 F. Supp. 2d at 855; *NYC C.L.A.S.H.*, 315 F. Supp. 2d at 479.

32. *Curious Theatre I*, 216 P.3d at 80.

33. 391 U.S. 367 (1968).

34. *Id.* at 377.

35. *Curious Theatre I*, 216 P.3d at 80.

36. *Id.* at 81.

37. *Id.*

38. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

39. *Curious Theatre I*, 216 P.3d at 82.

40. *Id.*

Some courts may disagree with the Colorado Court of Appeals' conclusion that smoking on stage is expressive conduct,⁴¹ making the constitutionality of prohibiting smoking in theaters even more definitive. In the event such activity is considered expressive conduct, however, the court's constitutional analysis is well-reasoned and seems to be the standard that would apply in similar cases. Consequently, even though constitutional rights may apply to actors smoking on stage, the government interest in protecting public health is stronger. Therefore, content-neutral smoke-free laws need not exempt theatrical productions for constitutional reasons.

III. PRACTICAL AND ARTISTIC NEED

Although a law review article is probably not the best forum for analysis of thespian technique, it bears at least brief mention that there does not appear to be a compelling artistic or practical need for such an exemption. There are several reasons for this, including the availability of substitutes, the demands of the acting profession, and the public health risks involved in smoking.

Smoke-free laws in some states prohibit smoking in all public places and places of work, but limit the definition of "smoking" to the inhalation and exhalation of combustible tobacco products.⁴² In these states, herbal cigarettes are a viable option that would enable actors to appear to be smoking tobacco on stage. Herbal cigarettes, which contain no tobacco, are indistinguishable from tobacco cigarettes and are frequently used as an alternative to tobacco cigarettes.⁴³ One newspaper noted that herbal cigarettes have been in use "in New York, the nation's theater mecca, in the four years since a smoking ban took effect."⁴⁴

In contrast to states that prohibit smoking only tobacco, other states, including Colorado, prohibit smoking any tobacco or plant product in enclosed public areas and on stage.⁴⁵ However, even these strict laws would allow for certain alternatives to smoking on stage. One such alternative is a prop cigarette that emits powder resembling tobacco

41. See generally *State v. Red Eye Enters., Inc.*, No. 70-CV-08-9559 (Minn. 1st Jud. Dist. May 15, 2008).

42. See, e.g., FLA. STAT. § 386.203(10) (2010).

43. Zachary Pincus-Roth, *No Smoking in the Theater, Especially Onstage*, N.Y. TIMES, Jan. 28, 2007, at D7, available at <http://www.nytimes.com/2007/01/28/theater/28pinc.html> ("In Ireland herbal cigarettes, which do not contain tobacco and which actors frequently use as an alternative, are permitted.").

44. Dan Mihalopoulos & Azam Ahmed, *Dropping a Curtain on Stage Smokers*, CHI. TRIB., May 5, 2007, at C1, available at http://articles.chicagotribune.com/2007-05-05/news/0705042052_1_smoking-ban-anti-smoking-aldermen.

45. COLO. REV. STAT. § 25-14-203(16)-(17) (2010).

smoke.⁴⁶ There is evidence that these props sufficiently resemble actual smoking.

During the course of the *Curious Theatre* litigation, a theater representative demonstrated these prop cigarettes in court in an effort to show that they are inferior to real cigarettes.⁴⁷ A newspaper reported that the “strategy backfired when” the judge ruled that the “simulated act looked real enough for him.”⁴⁸ Indeed, the Colorado Court of Appeals’ decision noted that theater owners “did not demonstrate that the use of substitutes is so inadequate as to outweigh the state’s strong interest in protecting the health of its citizens.”⁴⁹

As a second alternative to actual cigarettes, actors and actresses could also use an “electronic cigarette,” a device physically resembling a cigarette which vaporizes liquid nicotine into an inhalable mist.⁵⁰ These productions would not run afoul of most clean indoor air laws because no tobacco or plant matter is lighted or burned.

Even if a discerning eye could spot these imitation cigarettes, audiences are aware that activities on stage are frequently simulated. A newspaper editorial noted that

[w]hen a real play includes a murder scene, actors aren’t killed in the third act. Nor does a scene calling for intimacy demand performers engage in actual sex. And certainly no high school production of “How to Succeed in Business Without Really Trying” would include underage actors consuming genuine gin and vermouth.⁵¹

46. See, e.g., Pincus-Roth, *supra* note 43, at D7 (“Molly Ringwald, playing the title character, used a special cigarette that doesn’t light but emits a cloud of powder.”).

47. John Moore, *Tobacco Can’t Play Into Works on Stage*, DENVER POST, Oct. 31, 2006, at B1, available at http://www.denverpost.com/entertainment/ci_4575446.

48. *Id.*

49. *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t (Curious Theatre I)*, 216 P.3d 71, 82 (Colo. App. 2008).

50. U.S. FOOD & DRUG ADMIN., E-CIGARETTES: QUESTIONS AND ANSWERS, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm225210.htm> (last visited Oct. 27, 2010).

51. Editorial, *Our View: Give Proprietors Credit for Creativity, But All of Minnesota’s Bars Aren’t Stages*, DULUTH NEWS TRIB., Feb. 20, 2008. See also *Curious Theatre I*, 216 P.3d at 82.

[T]he audience is aware that the scenes are not real. Murders are not committed, actors do not fire live bullets at each other or at the audience, the theater is not set afire to illustrate the burning of Rome in *Julius Caesar*, an actor in a play about the effects of heroin does not inject the drug, and an actor depicting suicide does not hook a hose to the tailpipe of a running automobile on stage.

Indeed, creating convincing illusions is what acting is about.

Not only does there appear to be no compelling artistic need to exempt theatrical productions from clean indoor air laws, but policy considerations may militate against such an exemption. Such exemptions trivialize the serious public health risks involved in smoking. These risks include the effect of secondhand smoke on the audience, cast, and crew members,⁵² as well as the direct effects of inhaled smoke on the actors and actresses who smoke on stage.⁵³ Some roles require a considerable amount of smoking. One news account noted that an actress playing a rebellious teenager in *Crossing California* “fires up six or seven cigarettes in each performance.”⁵⁴

A theater owner could respond to health-related arguments by stating that actors and actresses have the ability to decline to smoke real cigarettes, but this argument would favor proponents of including theatrical productions in smoke-free laws. If the decision to use real tobacco or to simulate smoking can be left to the personal discretion of each actor, then it can hardly be argued that the use of tobacco is essential to the artistic integrity of the performance.

Alternatively, the decision could be left to the director, but this would introduce a host of new health concerns. If it is against the public interest to force a worker to breathe secondhand smoke,⁵⁵ then it is far more unacceptable for a worker to be compelled, as a condition of employment, to ingest chemicals that are deadly and addictive. This concern is not merely speculative. In some circumstances, actors and actresses are required to decline auditioning for roles if they do not wish to jeopardize their health by smoking.⁵⁶

IV. POLITICAL NEED

Even though there is neither a constitutional nor an artistic need to exempt theatrical productions from clean indoor air laws, legislators may yet support such exemptions for other reasons. First, they may misunderstand the constitutional issues surrounding these exemptions. Or, in legislators' minds, a theater may not appear to be a workplace in

Id.

52. See, e.g., U.S. SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE (2006), available at <http://www.surgeongeneral.gov/library/secondhandsmoke/index.html>

53. See, e.g., U.S. SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING (2004), available at <http://www.surgeongeneral.gov/library/smokingconsequences/index.html>.

54. Mihalopoulos & Ahmed, *supra* note 44, at C1.

55. COLO. REV. STAT. § 25-14-203-204 (2010); MINN. STAT. § 144.412 (2010).

56. *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't (Curious Theatre II)*, 220 P.3d 557, 558 (Colo. 2009) (en banc) (Hobbs, J., dissenting).

the same way as an office. Finally, and perhaps most significantly, even if legislators have thoroughly considered the constitutional and policy considerations of theatrical production exemptions, they may feel political pressure to exempt theatrical productions from clean indoor air laws.

The political clout of theaters was highlighted during the legislative debates surrounding Minnesota's clean indoor air law. When the Minnesota legislature was considering the law, the bill's chief author in the House of Representatives stated that "he 'was a little nervous' when Guthrie Theater officials asked for an exception for plays."⁵⁷ In spite of this understandable concern, he relented and the Minnesota law now contains an exemption for theatrical productions.⁵⁸ It is probably no coincidence that this theater spent \$271,000 on lobbying from 2004 to 2009.⁵⁹ The fact that eleven states and the District of Columbia explicitly exempt theatrical productions from their clean indoor air laws suggests that legislators may feel political pressure to allow smoking on stage.

V. DRAFTING AN EXEMPTION

Given that legislatures may exempt theatrical productions from clean indoor laws despite the lack of a constitutional or artistic need to do so, it is important that any such exemption be carefully drafted to avoid problems. The statute might be underinclusive, failing to account for many venues widely viewed as legitimate theater, such as improvisational theater (if a statute were limited to productions with a script) or plays involving audience participation (if a statute were limited to productions with only professional or volunteer actors). In contrast, an overinclusive statute might be drafted so vaguely that almost any venue could be considered a theater.

The specter of overinclusiveness was raised recently in Minnesota. Minnesota's smoke-free law allows "smoking by actors and actresses as part of a theatrical performance" but states that "[n]otice of smoking in a performance shall be given to theater patrons in advance and shall be included in performance programs."⁶⁰ This exemption had not been

57. Don Davis, *Huntley: Smoking 'Plays' Illegal*, BEMIDJI PIONEER, Feb. 16, 2008, http://legacy.inforum.com/politics/index.cfm?page=article_bureau&id=40741&legislative_tag=1.

58. MINN. STAT. § 144.4167, subd. 9 (2010).

59. MINN. CAMPAIGN FIN. BD., LOBBYIST PRINCIPAL EXPENDITURES (2011), http://www.cfboard.state.mn.us/lobby/LobPrincipalExpend_Current.html (last visited Oct. 22, 2010).

60. MINN. STAT. § 144.4167, subd. 9 (2010).

included in the versions of the legislation passed by the House of Representatives and Senate, but was added during conference committee negotiations.⁶¹ According to a newspaper account, a bill author “went along with the exception for theatrical productions, which was added just before the [smoke-free law] passed, because he thought its definition would be narrow enough to prevent anyone from circumventing the ban.”⁶²

However, Mark Benjamin, an attorney connected with several Minnesota bars, attempted to exploit what he viewed as a poorly drawn statute.⁶³ According to Mr. Benjamin, in the legislators’ “haste they forgot to define where ‘theatrical productions’ could be performed. And they forgot the words of the Bard, ‘All the world’s a stage, and all the men and women merely players.’ If we have Shakespeare in the park, can’t we have Shakespeare in the bar?”⁶⁴ Spurred by Mr. Benjamin, numerous bars throughout Minnesota began hosting “Theater Nights” at which customers could purchase a button identifying them as actor and allegedly enabling them to smoke.⁶⁵ To comply with the notice requirement in the Minnesota statute, these bars would post playbills and distribute programs informing customers that smoking would occur during the “performances.”⁶⁶

After nearly a month, the Minnesota Department of Health began issuing cease-and-desist orders to bars hosting “Theater Nights.”⁶⁷ In the end, the Minnesota Court of Appeals ruled that “Theater Nights” violated the state smoke-free law.⁶⁸ The court based its decision on statutory interpretation and did not address constitutional issues.⁶⁹

“Theater Nights” were ultimately shut down, but the few months during which they persisted were embarrassing for public health officials in Minnesota, who seemed surprised by the “revolt.” Further, because of the extensive media coverage of the issue, many saw the

61. See MINN. HOUSE OF REPRESENTATIVES, BILL COMPARISON SUMMARY OF SENATE FILE 238/HOUSE FILE 305 (2007), <http://www.house.leg.state.mn.us/hrd/bs/85/sf0238comp.html> (last visited Oct. 22, 2010).

62. Janna Goerd, *Virginia Bar Joins The Cast of Taverns Using Smoking Ban Loophole*, DULUTH NEWS TRIB., Feb. 24, 2008, at A8.

63. See Mark W. Benjamin, Op-Ed., *Bars Could Stage a Challenge to Statewide Smoking Ban*, STAR TRIBUNE, Feb. 8, 2008, <http://www.startribune.com/opinion/commentary/15443781.html?elr=KArksUUUoDEy3LGDiO7aiU>.

64. *Id.*

65. Judy Keen, *Curtains May Fall on Faux Theater*, USA TODAY, Mar. 7, 2008, at A3, available at http://www.usatoday.com/news/nation/2008-03-06-smoking-ban_N.htm.

66. See *State v. Marinaro*, 768 N.W.2d 393, 394 (Minn. Ct. App. 2009).

67. Brady Gervais, *State Sues Bar to Halt ‘Theater Night’ Smoking*, ST. PAUL PIONEER PRESS, May 3, 2008, at B3.

68. *Marinaro*, 768 N.W.2d at 394.

69. *Id.* at 399.

smoke-free law as flawed and controversial. “Theater nights” would have been less likely had the exemption been drafted more concisely in the first place.

Underinclusiveness and overinclusiveness are not the only potential traps into which drafters of legislation can fall. A theatrical production exemption might also be drafted in a way that it is not content-neutral and would fail the test set out in *Ward v. Rock Against Racism*.⁷⁰ This could occur, for example, if the statute exempted only theatrical productions that were “of genuine artistic merit.” As Mr. Benjamin stated: “You can’t have the government in the business of defining art.”⁷¹

There are content-neutral methods of exempting theatrical productions that still pose problems. One such approach would be to limit the exemption to performances that occur in buildings used exclusively as theaters. “Theater” could be defined by some neutral criterion or set of criteria that could include, for example, the presence of a distinct stage set apart from an audience seating area and devoted exclusively to performances; or the presence of permanent seating accommodations for an audience of a certain minimum size. This approach would have the shortcoming of excluding many forms of genuine theater, from impromptu and experimental performances, to traveling performances staged in buildings other than theaters, such as library community rooms and schools. Conceivably, a “legitimate” theatrical production could even occur in a bar.

A related approach would be to use a “grandfather clause,” where smoking could occur only in theaters which have conducted performances prior to a set date. This would have the benefit of excluding pure efforts to circumvent a smoke-free law. The drawback to this approach is that any new “legitimate” theater would also be prohibited from allowing smoking. As such, this approach lacks merit.

Another approach would be to allow smoking only by members of actors’ unions, such as Actors’ Equity Association, the American Federation of Television and Radio Artists, or the Screen Actors Guild. This approach would have the benefit of objectivity: it could readily be determined whether a performance meets the requirement or not. Of course, not all professional actors belong to such an organization. Thus, this approach would divide the arts community. Further, of course, it would not reach performances by unpaid actors in community theater, college and school productions, and so on. This approach, if it required smoking by union actors, might even run afoul of some union contracts,

70. 491 U.S. 781, 791 (1989).

71. Jesse White, *You Can Light Up On ‘Theater Night,’* MESABI DAILY NEWS, Feb. 22, 2008, at A1.

and would be self-defeating.⁷²

VI. MODEL LANGUAGE

One approach that may have merit has already been mentioned: allowing actors and actresses to smoke herbal cigarettes that do not contain tobacco. This approach is being used with apparent success in New York and in the Republic of Ireland.⁷³ Allowing the use of herbal cigarettes on stage maintains the appearance of smoking tobacco without exposing actors to the addictive properties of nicotine in tobacco.

Theater owners have argued that the ability to exhale smoke is critical to making stage smoking appear realistic, and actors concerned about the addictive properties of tobacco cigarettes often use herbal cigarettes as a substitute.⁷⁴ The experiences of jurisdictions such as New York and the Republic of Ireland, where smoking herbal cigarettes on stage is permitted, suggests that herbal products are sufficiently unappealing to consumers,⁷⁵ and that allowing their use in theatrical performances does not lead to widespread circumvention of the law. The herbal cigarette's lack of appeal might lead to an additional public health benefit of discouraging smoking when it is not essential to the plot of a play.

Any exemption allowing actors and actresses to smoke herbal products on stage will have to account for the definition of "smoking" within the smoke-free bill or law. If "smoking" is defined broadly to include the inhalation of all tobacco and plant products,⁷⁶ any herbal cigarette exemption would need to specify that the definition of "smoking" within the law does not apply in the case of theatrical productions. If "smoking" is defined narrowly to include only the inhalation of combustible tobacco products,⁷⁷ a written exemption

72. See, e.g., Jason Hoppin, *Smoking Foes Don't Want 'Show' to Go On*, ST. PAUL PIONEER PRESS, Mar. 3, 2008, at A1. ("[A] contract with the Actors' Equity Association forbids the use of tobacco cigarettes, [St. Paul's Park Square Theater Artistic Director Richard] Cook added. Instead, an herbal substitute is used. 'We don't want to inflict any of the harmful effects of smoking on our talent,' Cook said.")

73. Pincus-Roth, *supra* note 43, at D7.

74. See, e.g., Tim Engstrom, *Finding a Smoking Ban Loophole*, ALBERT LEA TRIB., Feb. 26, 2008, at A11 ("On TV shows such as AMC's 'Mad Men,' where smoking is prolific in the script, the actors often use herbal cigarettes, even during close-ups. Remember of [sic] the Cigarette Smoking Man on 'The X-Files'? William B. Davis was an ex-smoker, so he knew how to use the prop but didn't want to restart the habit . . .").

75. See *id.* ("Though herbal cigarettes can taste awful, it isn't tobacco . . .").

76. See, e.g., MINN. STAT. § 144.413, subd. 4 (2010).

77. See, e.g., FLA. STAT. § 386.203(10) (2010).

would not be needed at all, because smoking herbal cigarettes would not be prohibited under such a law.

Despite their lack of addictive properties, the health hazards of herbal cigarettes could be just as serious as that of tobacco-based cigarettes.⁷⁸ Herbal cigarettes contain tar and a level of carbon monoxide similar to traditional cigarettes containing tobacco, and are themselves carcinogenic.⁷⁹ Further, the purpose of most smoke-free laws is to protect the public from the known hazards of secondhand smoke,⁸⁰ and the secondhand smoke of herbal cigarettes may pose a health hazard to the audience and to non-smoking actors and actresses. If it does prove necessary to include an exemption for theatrical productions, however, an herbal cigarette exemption may at least minimize the risk to firsthand smokers and discourage abuse of the exemption.

Any exemption should include “backstop” language to prevent willful attempts to circumvent the law. Language such as this has been included in smoke-free laws which contain exemptions that allow smoking in cigar bars and private clubs.⁸¹ These exemptions have been used to evade the requirements of smoke-free laws in a similar manner to poorly drafted theatrical production exemptions.⁸²

It is also important that any exemption in a state law not preempt the ability of local units of government to adopt stronger regulations. Local governments often protect public health more aggressively than state or federal governments⁸³ and may be regarded as a “laboratory” for strong policy.⁸⁴ To further this goal, the exemption should not be phrased in a way that confers an affirmative right to smoke upon actors. Rather, it should state merely that the law does not prohibit actors from smoking. Explicit, non-preemptive language would further clarify this point.

With these considerations in mind, here is sample legislative language that could be used to allow actors and actresses to smoke herbal cigarettes on stage as part of theatrical productions:

78. See, e.g., *Alert over Herbal Cigarettes*, BBC NEWS (Feb. 5, 1999), http://news.bbc.co.uk/2/hi/health/background_briefings/smoking/272145.stm.

79. See *id.*; Engstrom, *supra* note 74, at A11. *Contra* *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t* (*Curious Theatre II*), 220 P.3d 544, 556 (Colo. 2009) (en banc) (Hobbs, J., dissenting).

80. See, e.g., MINN. STAT. § 144.412 (2010).

81. See, e.g., N.C. GEN. STAT. § 130A-496(b)(2) (2010).

82. See, e.g., *Taverns for Tots, Inc. v. City of Toledo*, 341 F.Supp.2d 844, 847 (N.D. Ohio 2004).

83. Memorandum for the Heads of Exec. Dep’t & Agencies (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemptio n/.

84. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

This act does not prohibit the smoking of herbal cigarettes by actors and actresses as part of a theatrical production. Notice of smoking in a production shall be given to theater patrons in advance and shall be included in performance programs. Patrons must be given the opportunity to obtain a refund for their tickets after receiving such notice. For purposes of this subdivision, "herbal cigarettes" means any product that does not contain tobacco and is made primarily of an herb or combination of herbs, and is intended to be smoked in any of the methods that tobacco is smoked, including but not limited to, as a cigarette, cigar or pipe filler. This exemption does not apply in places where smoking is prohibited by the fire marshal or other laws, ordinances, or regulations, nor does it apply to activities conducted for the sole or primary purpose of avoiding compliance with this act.

This language also contains a notice requirement so that theater patrons would not be inadvertently exposed to secondhand smoke.

VII. CONCLUSION

Although there is neither a constitutional nor an artistic need to exempt theatrical productions from clean indoor air laws, legislators may feel a political necessity to do so. In this event, it is essential to ensure that the exemption is narrowly crafted in a way that minimizes the harm to the public health. One potential way to do this is through an exemption allowing actors and actresses to smoke herbal cigarettes as part of theatrical productions. Although such an approach does not eliminate the risks of smoking to public health, it does lessen these risks, as well as the possibility of exploitation of the exemption.