

Smoking out artistic integrity

Imagine going to see *Who's Afraid of Virginia Woolf?* or *Jersey Boys* without the signature clouds of cigarette smoke. Or try to imagine Hal Holbrook playing the great American humorist in *Mark Twain Tonight!* without puffing a cigar.

"Whoever makes the conclusion that there is not reason for a character to smoke on stage, in my opinion, seems to have no concept of the requirements of creating a character," Holbrook told the *Denver Post*. The Emmy- and Tony-Award winning actor says the cigar is "an essential prop," and was "as much a part of Mark Twain as his wonderful head of white hair and his eagle eyes."

Across the country, public health is trumping freedom of expression.

Holbrook canceled his 2007 performance in Denver because of Colorado's indoor smoking ban but has since relented — unhappily and sans cigar — because so many other states have enacted similar legislation.

Across the country, public health is trumping freedom of expression.

Twenty-four states have indoor smoking bans, which ensure that employees will have a workplace safe from secondhand smoke, and that everyone can breathe clean, smoke-free air when eating out or spending a night on the town.

While some legislators have carved out an exception for smoking by actors in plays, many state and local bans extend to smoking onstage, even when necessary to the integrity of the play, and even when the audience is given advance notice and the opportunity for refunded tickets if the smoke offends them. In some jurisdictions, including Colorado, the bans include herbal cigarettes, cloves or any plant product that is used for smoking.

When the script calls for lighting up, or when the character being depicted in a

play would likely have smoked in real life, should the show be allowed to be produced as written? For the three Colorado theatres, and many of their peers in the professional theatrical community, the answer is a resounding "yes."

"I figure the audience is going to get into their cars and inhale more pollution on the drive home than they ever would from whatever smoke comes from a cigar."

— Hal Holbrook

The Colorado theatres — Denver's Curious Theatre Company, Paragon Theatre and Boulder's Theatre 13 — sued in state court to win an exemption from their state's theatrical smoking ban.

They argued that smoking onstage is expressive behavior and that Colorado's Clean Indoor Air Act violates their First Amendment rights.

A Denver district judge rejected that argument in 2006, as did a three-member appellate court in 2008. The case went on to the Colorado Supreme Court, which upheld the earlier decisions last year.

In May, the U.S. Supreme Court declined to review the Colorado Supreme Court's ruling — the first state court decision denying a theatrical exemption — effectively ending a four-year legal battle.

While both the state's Court of Appeals and Supreme Court acknowledged that smoking in theatrical performances could amount to expressive conduct meriting First Amendment protection, the courts said the ban on smoking in public places is constitutional because it aims to protect public health rather than to suppress free speech.

Writing for the majority, Colorado Supreme Court Justice Nathan B. Coats also suggested that the "use of a fake or prop cigarette...like the theatrical use of substitutes for virtually every other type of dangerous or illegal conduct, is capable of

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amply communicating to an audience an intended message.”

While the theatre’s business is make-believe, would George and Martha’s verbal punches in *Who’s Afraid of Virginia Woolf?* be as vicious without the boozy veil of real smoke?

Would blowing talcum powder in their living room allow the audience to suspend their disbelief?

In his dissenting opinion, Colorado Supreme Court Justice Gregory J. Hobbs, Jr. called alternative devices “untenable and even laughable.”

Hobbs also said the law “is not narrowly tailored to meet the state’s legitimate interest in protection of the public’s health, safety and comfort.”

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Colorado’s ban is among the most restrictive in the country. But smoking is a hot-button issue in many other communities.

According to Theatre Communications Group (TCG), the national service organization for nonprofit professional theatre, 18 states have smoke-free laws that do not provide an absolute exception for theatrical smoking.

And TCG reports that the interpretation and enforcement of the laws is inconsistent. “A view from the field suggest that theatres react differently to the uncertainty of how states enforce indoor-smoking bans,” TCG noted in its amicus brief to the U.S. Supreme Court. “Frequently this uncertainty leads theatres to self-censor.”

The bottom line for theatre companies is to know when they might run into problems not only with law enforcement officials but also with their licensing agreements, which may prohibit unauthorized modifications — like removing smoking.

What about Missouri and Illinois?

Missouri’s Indoor Clean Air Act has an exception for “performers on stage” if smoking is part of the performance. In St. Louis, the Indoor Clean Air Code, adopted in St. Louis County and St. Louis City and going into effect on Jan. 2, 2011, mirrors Missouri’s exception for smoking by performers on stage as part of a performance.

But the smoking ordinances recently approved by voters in Kirkwood and Brentwood do not include an exemption. Generally, municipal ordinances can be stricter (but not less strict) than state or county laws.

Across the river, the Smoke-Free Illinois Act (effective Jan. 1, 2008), which prohibits all smoking in public places, including theatres, defines “smoking” as “the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment.”

In Chicago, enforcement of local and state bans is lax. But when the national tour of *Jersey Boys*, the musical about Frankie Valli and The Four Seasons, which is set in the smoke-filled 1950s and 1960s, ran there toothpicks replaced herbal cigarettes after an irate patron lodged a complaint.



Michael Ensminger

Curious Theatre founder Chip Walton says the U.S. Supreme Court non-decision could undercut his mission, artistic vision and competitive business practices.

Read his statement.

