

Examining the Underlying Purposes of Municipal and Statewide Smoking Bans

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Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated: but those who torment us for our own good will torment us without end, for they do so with the approval of their own conscience.¹

INTRODUCTION

Beginning in the 1970s, the harmful effects of Environmental Tobacco Smoke (“ETS”), commonly referred to as secondhand smoke, on nonsmokers slowly came to light.² Shortly thereafter, efforts to curb smoking in public places began, in an attempt to reduce nonsmoker exposure to ETS. “Proposition 5, the California Clean Indoor Air Act of 1978, was the first attempt in the nation to pass a statewide clean indoor air law through the initiative process.”³ Although Proposition 5 ultimately failed, similar propositions and legislative efforts continued. Effective January 1, 1998, California successfully amended its labor code to prohibit smoking in bars and restaurants.⁴ Following California’s lead, numerous other states and municipalities have implemented regulations banning smoking in restaurants and bars,⁵ and numerous other localities are considering doing the same.⁶ This Note does not address the topic of

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1. C.S. Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK* 287, 292 (1970).

2. STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* 391 (1996).

3. *Id.* at 417.

4. CAL. LAB. CODE § 6404.5 (West 2003). California initially, in 1995, prohibited smoking in restaurants. Act of July 21, 1994, § 1, 1994 Cal. Stat. 310 (codified as amended at § 6404.5). In 1998 the Labor Code was amended to include bars as well. § 6404.5. For a brief synopsis of the history behind California’s prohibition on smoking in bars and restaurants, see Damon K. Nagami, Note, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 159, 160–64 (2001).

5. For a partial list of cities and counties with ordinances requiring smoke-free restaurants, see RONALD R. WATSON & MARK WITTEN, *ENVIRONMENTAL TOBACCO SMOKE* 115 (2001).

6. See, e.g., Jackie Crosby, *St. Paul Smoking Ban Gets Axed Again; The County Takes Up Issue Today*, STAR TRIB., Sept. 14, 2004, at 1B, available at LEXIS, News Library, STRIB File; Max Heuer, *Mass Smokers Fume Over State Butt Ban*, BOSTON HERALD, July 5, 2004, at 5; Radley Balko, *Smoking Ban Smoke Screen*, Fox News (November 20, 2003) (discussing the

smoking in all public places. Instead, this Note specifically addresses “smoking bans” in bars and restaurants.⁷

Proponents argue that smoking bans are needed to further public health, but many believe that health concerns do not actually drive the bans.⁸ Even if smoking restrictions do serve the end of public health, however, questions remain as to whether such laws are economically efficient.⁹ The purpose of this Note is to examine the motivating factors and effectiveness of smoking bans in terms of dollars and cents and in terms of utility. This Note also vigorously argues that the purported reasons for smoking bans are secondary to the real reasons smoking bans exist: to impose social norms on smokers. These social norms come at a high cost, as smoking bans are economically inefficient. This Note will ultimately suggest that, despite the noted harmful consequences of ETS, legislated smoking bans in bars and restaurants should be eliminated altogether, or, at the very least, be severely amended so that they only protect the health of persons who are in actual need of protection from ETS.

This Note consists of three primary parts. In Part I, this Note attempts to show that the primary factor behind smoking bans is not employee health, patron welfare, or smoking cessation. Rather, the primary purpose of smoking bans is to impose social control on smokers. In Part II, this Note argues that smoking bans are inefficient. Part III presents alternatives to smoking bans that are economically superior in light of the negative financial implications of smoking bans. Further, these alternatives protect the only class needing protection from ETS—children.

I. WHAT IS IGNITING SMOKING BANS?

“[P]rotecting people from the toxins in secondhand smoke not only make[s] life more pleasant; it . . . sav[es] lives,” suggests Stanton Glantz, PhD, a professor of medicine at the University of California’s San Francisco Cardiovascular Research

possible Washington, D.C. smoking ban), at <http://www.foxnews.com/story/0,2933,103588,00.html>; see also TOBACCO FREE NEBRASKA PROGRAM, NEB. HEALTH AND HUMAN SERVS. SYS., 2002 NEBRASKA GUIDE TO SMOKE-FREE DINING 2 (2002) [hereinafter TFNP] (discussing studies related to Nebraska’s consideration of a state-wide smoking ban), available at <http://www.hhs.state.ne.us/tfn/02SFdining.pdf> (last visited Jan. 20, 2005). “The Nebraska Department of Health and Human Services System is now publishing [a] statewide guide” of 100% smoke-free restaurants in conjunction with a private entity called the Group to Alleviate Smoking Pollution. *Id.* Thus, Nebraska, as well as other states, is beginning to fund state research related to smoking ban implementation.

7. For the purposes of this Note, “smoking ban(s)” shall refer to city, county, or statewide prohibition(s) of smoking in all public bars and restaurants. The term “public” often takes on a separate meaning. See, e.g., *Loyal Order of Moose, Inc. v. Bd. of Health*, 790 N.E.2d 203 (Mass. 2003) (discussing a town board of health that attempts to enforce a municipal smoking ban against a private club).

8. See, e.g., Carol Schwartz, Statement for “Smokefree Workplaces Act Of 2003” Public Hearing (Dec. 3, 2003) (councilmember of the District of Columbia), at http://www.dccouncil.washington.dc.us/SCHWARTZ/smoke-free_workplaces_act_hearing_statement.htm; cf. ROBERT D. TOLLISON & RICHARD E. WAGNER, *SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY* 81–83 (1988) (suggesting that taxes on cigarettes are a means by which “upper-income people” exert “social control” over smokers).

9. E.g., TOLLISON & WAGNER, *supra* note 8, at 70–72.

Institute and a statistics authority.¹⁰ Glantz suggests that health concerns (i.e., saving lives) are the primary reasons smoking bans are being thrust upon society, and that the ancillary benefits (i.e., making life more pleasant) are not intended, but rather are added bonuses.¹¹

Another paternal justification for smoking bans is to “rescue nonsmokers from the ‘social costs’” that smokers emit.¹² This Part will discuss the stated health concerns associated with smoking bans and will discuss the ancillary benefits of smoking bans. This Note concludes that, despite the stated purposes of the laws, the ancillary benefits (which involve social control) are what actually drive the smoking bans.

A. California Started the Fire

The health effects of ETS are apparent and will not be debated in this Note. According to the Environmental Protection Agency (“EPA”), ETS is “responsible for approximately 3,000 lung cancer deaths each year in non-smoking adults” and “impairs and aggravates the respiratory health of hundreds of thousands of children.”¹³

The first notable smoking ban occurred statewide in California.¹⁴ California passed its smoking ban under its labor code.¹⁵ The most noteworthy part of the California Legislature’s findings and declarations is as follows:

It is . . . the intent of the Legislature to create a uniform statewide standard to restrict and prohibit the smoking of tobacco products in enclosed places of employment . . . in order to reduce employee exposure to environmental tobacco smoke to a level that will prevent anything other than insignificantly harmful effects to exposed employees¹⁶

Thus, according to the legislature, the California ban benefits the workers of California by ensuring that they are not subjected to “harmful effects” of secondhand smoke.

In many ways it seems reasonable to eliminate harmful externalities in the workforce. Subjecting an employee to secondhand smoke at the workplace is in some ways similar to forcing one to be in an environment where she is exposed to carcinogens. Given the premise that an employee is forced to work in an ETS-filled environment, it seems warranted to prevent secondhand smoke from filtering into an innocent nonsmoker’s lungs by eliminating smoke in the workplace altogether.

10. University of California San Francisco News Services, *Six-Month Public Smoking Ban Slashes Heart Attack Rate in Community* (Apr. 1, 2003), at http://www.eurekaalert.org/pub_releases/2003-04/uoc--sps032603.php.

11. *Id.*

12. TOLLISON & WAGNER, *supra* note 8, at 98. Tollison and Wagner also suggest that taxes on cigarettes are the primary means by which smokers already pay for the social costs of smoking. *Id.* at 100.

13. H.R. REP. NO. 103-298, pt. 1, at 3 (1993).

14. CAL. LAB. CODE § 6404.5 (West 2003).

15. *Id.*

16. *Id.*

In 2001, the city of Yarmouth, Massachusetts also imposed a smoking ban.¹⁷ Yarmouth's board of health enacted the smoking ban: "(1) to protect the public health and welfare by restricting smoking in restaurants; and, (2) to assure smoke free air for *nonsmokers*; and, (3) to recognize that the need to breathe smoke free air shall have priority over the desire to smoke in an enclosed public area."¹⁸ Like California, Yarmouth enacted its smoking ban in response to health concerns. However, because the regulation does not fall under the guise of "protecting laborers," the importance of protecting employees is not central to an analysis of the Yarmouth ban. Instead, an examination of the explicit collective beneficiaries of the smoking ban is needed. Here, the beneficiaries are *nonsmokers*, and the explicit benefits of the smoking ban are "protect[ion] of public health" and "assur[ances] of smoke free air for *nonsmokers*."¹⁹

It is important to note that nonsmokers who do not work at places where smoking is allowed could receive the same protection by simply avoiding such locales. Similarly, workers who are exposed to secondhand smoke on the job could simply find another profession, at least in the Yarmouth case. This assumes that there are other places in the Yarmouth area where nonsmoking workplaces exist.²⁰ The prevailing sentiment, however, is that bars and restaurants are an integral part of society and to some it is appropriate to ban smoking in such places for the benefit of all nonsmokers.

Recently in St. Paul, Minnesota, Mayor Randy Kelly vetoed a smoking ban that would have banned smoking in all of the city's 850 bars and restaurants.²¹ Mayor Kelly vetoed the ban because he believes it to be too harsh.²² Mayor Kelly instead favors a ban that would exempt businesses with 50% or more of their sales coming from alcohol.²³ The position of Mayor Kelly is not abnormal, as there are many other jurisdictions that have implemented, or are in the process of implementing, similar bans.²⁴ If health is a goal worth regulation, then it also must be a goal worth consistent and fair regulation. Why is it that bars should be exempt from smoking bans? Are bartenders less susceptible to ETS? This example involving bars shows one of the real motivating forces for smoking bans—smoking offends "the sensibilities of many upper

17. See *Loyal Order of Moose, Inc. v. Bd. of Health*, 790 N.E.2d 203, 204 (2003). Massachusetts has since passed a statewide smoking ban. Act of June 18, 2004, 2004 Mass. Acts 137 (amending MASS. GEN. LAWS Ch. 270, §§ 21–22 (1992)); Heuer, *supra* note 6, at 5 (quoting a smoker in favor of the Massachusetts ban as stating that "[t]he bars won't be smelling like smoke all the time"). The quotation signifies precisely the point that this Note is trying to make—that is, that smoking bans are about the smell of smoke and social control and not about health.

18. *Loyal Order of Moose, Inc.*, 790 N.E.2d at 204 (quoting Act of June 18, 2004, 2004 Mass. Acts 137) (emphasis added).

19. *Id.*

20. Alternatively, if bartending or restaurant work is the only work the employees in question are capable of performing, the libertarian approach would suggest that the employees should find other bartending or restaurant work in Yarmouth or its neighboring communities at places where ETS is not present.

21. Crosby, *supra* note 6.

22. *Id.*

23. *Id.*

24. See, e.g., *infra* notes 96–104 and accompanying text (discussing exemptions and exceptions to smoking bans).

income people.”²⁵ Those upper-income people do not frequent bars, but rather frequent dining establishments. The stated health goal obscures the real motivation.

B. Efforts to Make Life More Pleasant Cause the Butting of Cigarettes

“[P]rotecting people from the toxins in secondhand smoke not only make[s] life more pleasant; it . . . sav[es] lives.”²⁶

Yarmouth’s smoking ban, as well as other bans, serves the purpose of “assur[ing] smoke free air for *nonsmokers*.”²⁷ This is not, on its face, an improper purpose. ETS does yield negative consequences, and assuring that nonsmokers are not exposed to ETS has positive health consequences. However, even before the ban, nonsmokers already had assurances that they would be able to breathe smoke-free air by staying home rather than going out to eat or going to get a drink. The “need to breathe smoke-free air” could easily be met by simply staying at home. So what is the purpose of the Yarmouth smoking ban, and other smoking bans for that matter?

1. Employee Health

A common tactic to gain political popularity for smoking bans is to describe smoking bans as a means to protect employees. Employees are included in the intended beneficiaries of smoking bans. However, implementing smoking bans on behalf of employees assumes that employees need protection from their own decisions to work where smoking occurs.²⁸ Could patron health also be a consideration of smoking bans? Possibly, but there is no true need for smoking bans in cities or states where the law of supply and demand exists. If there is a true demand from the patrons’ perspective to have a smoke-free environment to enjoy their meat and potatoes or Captain™ and Cokes™, then such an environment will be supplied without government intervention.²⁹ There is at least some anecdotal evidence indicating the existence of a relationship between the demand for smoke-free establishments and supply of such

25. TOLLISON & WAGNER, *supra* note 7, at 82. Certainly there are many upper-income people who smoke, but “studies have long found that poorer people tend to smoke more in both developing and developed countries. . . .” “Consumption is inversely related to socio-economic level. . . .” CBS News.com, *The Poor Smoke More* (May 28, 2004) (quoting Lee Jong-wook, Director-General of the World Health Organization), at <http://www.cbsnews.com/stories/2004/05/28/health/main620164.shtml>.

26. University of California San Francisco News Services, *supra* note 10 (quoting Dr. Stanton Glantz).

27. *Loyal Order of Moose, Inc. v. Bd. of Health*, 790 N.E.2d 203, 204 (2003) (quoting Act of June 18, 2004, 2004 Mass. Acts 137).

28. There is an argument that switching jobs from an ETS establishment to a non-ETS establishment is not plausible in many cases, because (a) there are not other jobs available to such workers outside the bar or restaurant industry, or (b) there are too few bars or restaurants that offer smoke-free options. These arguments have limited merit. See *infra* Part III.A.

29. See *infra* Part III.A (expanding on the notion that economics will eventually lead to options between smoking and nonsmoking for workers and patrons).

establishments.³⁰ Assuming that economics will ultimately take its course, in terms of patrons, smoking bans only serve to protect patrons from their own decisions to frequent an establishment where ETS is present. Therefore, either employee health actually, but unnecessarily, motivates smoking bans, or people posing smoking bans have a different reason for their activism. This Note argues that social control motivates smoking bans, and employee health is just a weapon used by those asserting control.

2. Ventilation Systems Further Show the Real Motivation

Another topic that needs to be discussed when considering health as a motivating factor is ventilation systems. "The basic idea [of ventilation systems] . . . is to ventilate the no-smoking area with clean, outside air and suck out the smoky air in the smoking area through an exhaust system. The smoky air can't get into the no-smoking area because of air pressure."³¹ The merits of ventilation systems are not in debate in this Note, as there is strong indication that ventilation systems are effective in reducing ETS to safe levels for nonsmokers.³² Assuming that ventilation systems work to ensure that nonsmoking sections of restaurants and bars do not receive harmful ETS exposure, ventilation systems still, however, do not provide a full solution to ETS. Ventilation

30. See generally John A. Horvick, *Changes in Nebraskans' Tobacco Use, Attitudes, and Behaviors* (Dec. 30, 2003) (reporting a trend analysis conducted by the Bureau of Sociological Research at the University of Nebraska Lincoln), at <http://www.hhs.state.ne.us/tfn/TrendAnalysis.pdf>; Univ. of Neb. at Lincoln Bureau of Sociological Research, *Nebraskans' Attitudes Toward Secondhand Smoke and Their Support for Smoking Restrictions in Public Places* (July 2003) (summarizing the results of two separate studies conducted by TFNP in 2000 and 2003), at http://www.hhs.state.ne.us/tfn/SHS_03.pdf. Horvick identifies trends in the number of establishments in Nebraska that are smoke-free without implemented smoking bans in recent years (*supply*), while the Bureau of Sociological Research shows this change is aligned with patrons' attitudes regarding smoking prohibitions in certain establishments (*demand*), thus leading one in the direction of concluding that demand for smoke-free establishments creates supply.

31. Lisa Demer, *Clear the Air to Aid Smokers, Pro Tobacco Group Suggests; Hospitality Convention Becomes Center of Debate*, ANCHORAGE DAILY NEWS, Mar. 2, 2000, at A1, available at LEXIS, News Library, ANCHDN File; see also Roger A. Jenkins et al., *Environmental Tobacco Smoke in the Nonsmoking Section of a Restaurant: A Case Study*, 34 REG. TOXICOLOGY & PHARMACOLOGY 213, 213-14 (Nov. 20, 2001) (describing in detail the operation of a ventilation system).

32. The current evidence demonstrating the effectiveness of ventilation systems is persuasive. See Jenkins et al., *supra* note 31, at 219 (showing that ETS concentrations in restaurants with nonsmoking sections and ventilation systems are statistically indistinguishable from restaurants that ban smoking completely); see also H.R. REP. NO. 103-298, pt. 1, at 3 (1993) (indicating that the GSA supports a smoking prohibition to combat ETS in federal buildings because the costs of installing ventilation systems would be prohibitive, thus implying that ventilation systems are a sound method where cost is not a factor). However, what is most convincing about the effectiveness of ventilation systems is not a study, but rather a quote from Dr. Stanton Glantz: "[T]obacco control advocates don't have the benefit of scientific studies disputing ventilation claims." Stewart, *The Case Against Smoking Bans: Ventilation: Clearing the Air or Just Fanning the Flames?*, New York City C.L.A.S.H. (2003), at <http://www.nycclash.com/CaseAgainstBans/Ventilation.html> (last visited Jan. 20, 2005).

systems that allow smoking to persist in the smoking sections of bars and restaurants could arguably remain inadequate in the fight against ETS. First, smokers and nonsmokers who dine or drink in the smoking section could still potentially realize the harmful effects of ETS. It would require government intervention to protect people from their own choices in order to rectify this problem, however. The second argument against the ventilation system solution is that those workers in the smoking section would still *involuntarily* be exposed to ETS.³³ This argument rests upon the assumption that workers have no choice of where to work and that they need protection from their own choices.

3. . . . and What About the Children?

ETS has harmful effects on children, too. If the legislative purpose in enacting smoking bans is premised upon health, why does it not address the most innocent victims of all, children?³⁴ A mother in California can smoke in her own house and exhale in the direction of an infant, but a grown woman in California cannot voluntarily choose to expose herself to ETS to earn a few tips. The answer may lie in the possibility that smoking bans are not about health, but rather are an attempt to curb smoking or make life more pleasant for nonsmokers—to many there is nothing wrong with attempting to curb smoking. Taxes on cigarettes are often specifically geared toward that motive.³⁵ Whether raising taxes on cigarettes and implementing smoking bans actually encourage people to quit smoking is an open question.³⁶ The problem, however, is that there is a big distinction between attempting to curb smoking by taxing a substance and curbing smoking by making illegal what was previously legal, thereby infringing the property rights of business owners. It is not clear, then, why legislators do not simply ban smoking altogether. This would eliminate ETS in almost all circumstances and would benefit those who have no choice of whether to breathe ETS or not. Smoking bans do not protect children, and they could arguably make matters

33. See *infra* Part III.A (discussing the involuntary nature of on-the-job exposure to ETS).

34. One such bill, aimed at protecting children, was approved by California's State Senate. The bill would ban smoking in cars with small children, subject to a \$25 fine for subsequent offenses. James P. Sweeney, *Senate OKs Smoking Ban in Vehicles with Children*, SAN DIEGO UNION-TRIB., Aug. 25, 2004, at A3, available at http://www.signonsandiego.com/uniontrib/20040825/news_1n25child.html. This Note strongly favors such a bill and thinks that the \$25 fine is too low, especially considering the fact that the fine for smoking in a bar is \$100. CAL. LAB. CODE § 6404.5(j) (West 2003). The fact that smoking in a bar yields four times the fine that smoking in the car with an infant yields, reinforces the argument that smoking bans are a means of social control rather than social welfare.

35. "Raising cigarette taxes is a win-win situation," said Indiana Gov. Frank O'Bannon, who is proposing a 50-cent-a-pack increase. "Teenagers are less likely to start, and adult smokers are more likely to quit when the tax is higher—so there is clearly a health benefit. . . . And the tax revenue will help us weather the recession." Patrick McMahon, *States Look to Tap Smokers' Habit*, USA TODAY, Jan. 14, 2002, at 3A, available at <http://www.usatoday.com/news/nation/2002/01/14/usat-cigtax.htm> (last visited Jan. 24, 2005).

36. See, e.g., Joni Hersch, *Teen Smoking Behavior and the Regulatory Environment*, 47 DUKE L.J. 1143, 1166 (1998) (suggesting that tax increases will likely decrease teenage cigarette consumption, but will have less of an effect on adults).

worse for children. This is because a father may now decide not to go out to eat because of a smoking ban and instead stay home and smoke in his house.

Indications that smoking bans offer no protections for children, but protect grown adults from smelling like smoke, raise questions as to the purpose of smoking bans. Similarly, given that there are plausible alternatives to smoking bans, further questions are raised as to whether smoking bans are designed to protect employees from involuntary exposure to ETS or to make the restaurant experience more pleasant for the nonsmoker.

4. Social Control

Assuming that workers have a choice in where they work and that ventilation systems are effective, there remain two possible motivations for smoking bans. The first is that people do need protection from their own choices. However, this motivation is faulty in that if one believes that people need such protection, the end (protection from personal choice) is not satisfied by the means. Smoking, which causes cancer, should be eliminated outright and not merely regulated if one buys into the argument of protecting people from their own choices. In regard to nonsmoking patrons, the argument that people need protection from themselves is ridiculous. "In a free society, people choose those with whom [and where] they associate. . . . If a person continues to associate [or work] voluntarily with [or around] . . . smoker[s] . . . , the benefits that person derives from [his or her choice] must be assumed to exceed its costs."³⁷ Thus, efforts must not be aimed at protecting people from their own choices because the legislation in fact makes workers less well-off.³⁸ This leaves the possibility that smoking bans are designed to benefit nonsmokers and workers whose marginal utility would increase if they could attend or work at restaurants and bars that are smoke free. This possibility ignores the economics of the nonsmoking workers' own desires, because given that such a demand exists, a supply will naturally and eventually follow. Further, this reasoning assumes that individuals are not "rational maximizers" of their utility—that is, that people in general are "systematically stupid."³⁹ This only leaves us with "social control" as the answer. Professors Robert D. Tollison and Richard E. Wagner offer useful insight into this accusation:

The answer is fairly clear and can be summarized by paraphrasing the Golden Rule: He who has the gold makes the rules. Smoking is more customary among the working class and the poor; lawyers, college professors, and legislators are not usually smokers. . . . [S]moking is often conducted in public places and hence offends the sensibilities of many upper-income people. . . . Rules prohibiting smoking in public places are an effective means of discrimination without

37. TOLLISON & WAGNER, *supra* note 8, at 80. See also *infra* Part III.A (discussing the costs and benefits of on-the-job exposure to ETS).

38. This makes sense when combined with the bartenders' attitudes regarding the California smoking bans. See *infra* Part II.B. There is an argument that the smoking ban makes workers better off because even though the marginal benefits from working amid ETS outweigh the costs, the workers' utility from working absent ETS will be greater. This argument, however, is faulty because workers are compensated for their exposure to ETS. See *infra* Part III.

39. See TOLLISON & WAGNER, *supra* note 8, at 81.

violating antidiscrimination laws. . . . [E]xcise taxes on tobacco products . . . reduc[e] [the lower class's] tendency to engage in distasteful . . . activities that offend the same people who regard bowling alleys as museums of primitive culture[,] . . . the outcome of which is the imposition of a highly regressive tax . . . for the . . . purpose[] of social control.⁴⁰

The message in the above quote is exemplified in California's approach to smokers' lounges. California provides an exemption to its smoking ban for "private smokers' lounges."⁴¹ Think of this exemption purely from the perspective of the smoker's lounge employee: Is this worker supposed to infer that his health is less important than other workers' health? Is this worker immune to any labor market restrictions that may impede his switching jobs? The answers to both questions are no and rest on the fact that those implementing smoking bans do not frequent smokers' lounges; thus, there is no need to exert social control over such places despite the obvious, and likely more pronounced, health concerns that employees at such places face.

5. Summary

Smoking bans do nothing to protect children. Smoking bans are implemented inconsistently. Smoking bans aimed at protecting workers only protect certain workers. If health is the true motivator, then smoking bans fall far short of that goal. Presumably, a majority of the populace in locations where smoking bans exist favors smoking bans; otherwise, the bans would be repealed by the democratic process. It follows that there is a demand for smoke-free bars and restaurants. Given that a demand exists for nonsmoking bars and restaurants, and that smoking bans do not serve their intended ends, smoking bans must exist out of a desire to control a socially undesirable behavior.

II. SMOKING BANS ARE INEFFICIENT⁴²

A. Unneeded Paternalism

The need to prevent involuntary exposure to ETS is valid. However, there is no such thing as involuntary exposure to ETS, except when children (nonbeneficiaries of smoking bans in bars and restaurants) are involved.⁴³ It is not reasonable to assume that a bar or restaurant worker cannot find work in a nonsmoking establishment of any kind. For example, California bartenders retain their jobs for an average of more than six

40. *Id.* at 81–83.

41. Nagami, *supra* note 4, at 163.

42. Again, the only smoking bans that are discussed in this Note are those relating to bars and restaurants.

43. *See supra* note 34. Apparently, exposing children to secondhand smoke is not as bad as exposing bar patrons. This Note strongly believes that the difference in the value of fines, and the fact that the children are only protected as an afterthought to protecting patrons, are clear evidence of the true purpose of smoking bans—that is, to impose social values.

years,⁴⁴ but this does not mean that they cannot find other work. Rather, it shows that their work is financially viable and worth the risks associated with ETS exposure.⁴⁵ Most California bartenders are not in favor of smoking bans,⁴⁶ possibly because of a fear of losing their jobs. This unfavorable attitude by bartenders came shortly after the California smoking ban was implemented,⁴⁷ and thus could be related to a preference for working in an environment where smoking is legal. This preference could also be related to the fact that individual bartenders smoke and would like to smoke on the job, or because smokers are the best tippers. The reasons, however, are irrelevant because the unfavorable attitude demonstrates that, to most bartenders, the cost of working around ETS is less than the benefit received from that work. Because smoking bans are disfavored by most of the workers the bans are intended to protect, it is reasonable to assume that smoking bans make those workers less well off. Thus, the legislative purpose of protecting workers is not fulfilled and the bans should be eliminated.⁴⁸

Another useful means of considering whether smoking bans yield positive consequences is to think of smoking bans in terms of efficiency.⁴⁹ "Efficiency is . . . determined by willingness to pay, and the only way in which willingness to pay can be determined with certainty is by actually observing a voluntary transaction."⁵⁰ It is difficult to precisely determine whether smoking bans are efficient because the transactions (the implementation of smoking bans) were not voluntary on the part of business owners, employees, and many patrons.⁵¹ However, it is suggested that in lieu

44. *E.g.*, Mark D. Eisner, M.D. et al., *Bartenders' Respiratory Health After Establishment of Smoke-Free Bars and Taverns*, 280 JAMA 1909, 1911 tbl.2 (1998).

45. Proponents of smoking regulation tend to offer no counter argument to this. Instead, this is offered: "An interesting question to ponder is why, in tight labor markets, [restaurant and bar] employees generally . . . don't gravitate toward non-smoking environments, forcing employers to compete on that dimension." Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO 207, 237 n.11 (Robert L. Rabin & Stephen D. Sugarman eds., 2001).

46. Eisner et al., *supra* note 44, at 1912-13.

47. See Jacobson & Zapawa, *supra* note 45, at 229 for additional statistics on employee attitudes toward smoking bans.

48. There is still an argument that curbing smoking through smoking bans will yield positive results in terms of reducing medical costs incurred by the general public. However, these costs are presumably already covered (or could well be covered) through taxing cigarette consumption and other means. See TOLLISON & WAGNER, *supra* note 8, at 79-83.

49. Efficiency, as used in this Note, takes on the following meaning: "'Efficiency' means exploiting economic resources in such a way that 'value'—human satisfaction as measured by aggregate consumer willingness to pay for goods and services—is maximized." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (2d ed. 1977) (emphasis in original).

50. *Id.* at 11.

51. *But cf.* Nagami, *supra* note 4, at 164 (indicating that a fair number of business owners favored the California ban). However, those business owners supporting the prohibition sought a statewide California ban to alleviate inconsistencies throughout the state that were due to certain municipalities having imposed smoking bans while neighboring cities did not. See WATSON & WITTEN, *supra* note 5, at 113 (listing cities in California with smoking bans prior to the statewide ban). It was thought that a statewide ban would create a level playing field. The business owners did not seek the ban because they were necessarily in favor of smoking bans; rather, they were tired of competing with businesses that either did not comply with municipal smoking bans or were located directly outside the municipality. Nagami, *supra* note 4, at 164.

of a voluntary transaction to judge efficiency, it is useful to judge efficiency based on the following question: "if a voluntary transaction had been feasible . . . would [it] have occurred[?]"⁵² Here, the voluntary transaction can be thought of in three ways: (1) a policy of no smoking that all bar or restaurant owners implement (or individual bars implement) by their own volition; (2) a policy of no longer working where ETS exists; or (3) a patron (individual or collective) induced boycott of bars and restaurants that allow smoking. In some cases, the first hypothetical transaction would, and did, occur.⁵³ This means that smoking bans are inefficient for those places that did not implement a smoking prohibition on their own.⁵⁴ Smoking bans are not collectively efficient for bar and restaurant owners. If they were efficient, bars and restaurants would have already implemented their own no smoking policies. Smoking bans are also inefficient for employees. This is because employees in some ways are compensated for their exposure to ETS at greater levels than the costs they incur from ETS exposure. As for consumers, the evidence indicates that fewer people are frequenting bars and restaurants where smoking bans exist.⁵⁵ This indicates that smoking bans are collectively inefficient for customers.

Some may argue that smoking bans actually increase efficiency for customers. This is because patrons in favor of the bans have increased their utility functions more than the utility lost by those not frequenting restaurants. Another argument for increased efficiency as a result of the bans is that cigarette consumption has decreased. This increases utility because workers now prefer working absent ETS.

However, these arguments "involve an impermissible interpersonal comparison of utilities."⁵⁶ In fact, there is ample evidence that indicates smoking bans are not efficient

52. POSNER, *supra* note 49, at 11.

53. See, e.g., Schwartz, *supra* note 8.

54. For an example of where a volitional smoking ban is efficient, see H.R. REP. NO. 103-298, pt. 1, at 3. The ban on smoking in federal buildings was implemented "because of excessive costs associated with providing adequate ventilation systems in each office space." *Id.* Thus, *because of costs*, federal buildings no longer allow smoking in most areas.

55. Michael K. Evans, *Review of Cornell Survey on Smoking Ban in New York City*, at 2 (Apr. 1996), available at <http://www.data-yard.net/evhosp/misc002.pdf> (last visited Jan. 24, 2005); see also Otto J. Mueksch, *Smoking Ban Impact on California Restaurants*, available at <http://www.forces.org/evidence/files/ban-csr.htm> (noting that from 1994 to 1999 California's taxable statewide sales increased by 31.9%; California fast food establishments' (non-smoking establishments prior to the smoking ban) sales grew at a rate of 38.4%; California's restaurant and bar sales also increased, but at 28.6%, a rate below California's overall economic growth); Nagami, *supra* note 4, at 166 (discussing a July 1998 study indicating that 59% of California establishments and 81.3% of standalone bars "experience[d] a decrease in business" and an increase in "customer complaints and fights," while regular customers frequented their establishments less and bar and serving staff reported less revenues in tips). *But see* Jacobson & Zapawa, *supra* note 45, at 230 (describing New York City's smoking ban in restaurants as having positive financial consequences).

56. POSNER, *supra* note 49, at 11 (internal quotations omitted). The reason that an "interpersonal comparison of utilities" is impermissible is because people value marginal utility differently. *Id.* at 344-46. For example, a rich man may have so much money he does not care about the \$10,000 he has in his pocket and would not be as sad about losing the \$10,000 as a certain poor man would be happy about finding \$10,000. Still, there are rich men whose marginal utility does not fall so rapidly, just as there are poor men who do not care about money

because, but for smoking bans, the transactions (making bars and restaurants smoke-free and attending smoke-free bars and restaurants) would not have occurred. This argument leads to the recurring conclusion that allowing patrons, employees, and business owners to determine their own economics, absent legislative interference, will result in the inevitable choice between smoking and nonsmoking for workers and patrons. Even more salient is that such choices do currently exist.

B. Compliance: Additional Inefficiencies Created by Smoking Bans

Legislated smoking bans can be ineffectual without proper compliance.⁵⁷ Smoking bans, if implemented, need stringent enforcement policies, lest bars and restaurants decide to ignore the ban and allow smoking. Even though California does have compliance checks, smoking bans may go largely unenforced. A study of San Francisco's bars indicated that as many as half were not in compliance with California's smoking ban at the time.⁵⁸ Furthermore, "despite San Diego's [aggressive] efforts to [enforce the smoking ban] . . . only 51% of the city's stand-alone bars were in compliance with the ban."⁵⁹ These examples of noncompliance indicate that it was more financially rewarding to risk the penalty associated with not being in compliance than it was to comply with the ban.⁶⁰ Despite California's compliance mechanisms, the "high fines imposed by the police" have merely "prompted several bar owners and operators to devise a clever way to get around the law."⁶¹ The scheme relies on *bartenders* to call other bars to let them know a sting is on the way.⁶²

This further indicates that workers are not in favor of smoking bans and have higher marginal utility working around ETS.⁶³ If the study indicated that a considerably smaller amount of bars were not in compliance with smoking bans, then one could argue that workers have no control over their employer's decision to allow smoking. Given the large number of bars in question, it seems reasonable that many employees favor their employer's decision based on marginal cost. Otherwise, they would switch jobs to one of the roughly 50% of bars that are in compliance. Moreover, it is the *bartenders* that are foiling the sting operations.

or the things it can buy. The same goes for smoking bans. Some bar owners do not care about their right to allow smoking on their property as much as a nonsmoking patron cares about not smelling like smoke, while in other situations the bar owner cares tremendously while the nonsmoking patron cares very little. As one can intuit quite easily, if the bar owner cared relatively less, and the patron cared relatively more, the transaction would have occurred naturally.

57. Jacobson & Zapawa, *supra* note 45, at 231.

58. Jonathan Curiel, *S.F. Ready to Stub Out Illegal Smoking in Bars: Surprise Visits, Fines Part of New Directive*, S.F. CHRON., Jan. 15, 1999, at A1 (discussing a recent study of San Francisco's bars). This lack of compliance also helps explain why, if smoking bans are financially burdensome, California bars may not have been financially impacted by the smoking ban as much as anticipated.

59. Nagami, *supra* note 4, at 169.

60. For a similar analysis regarding criminal laws, see Richard S. Murphy & Erin A. O'Hara, *Mistake of Federal Criminal Law: A Study of Coalitions and Costly Information*, 5 SUP. CT. ECON. REV. 217, 226-30 (1997).

61. Nagami, *supra* note 4, at 169.

62. *Id.*

63. See TOLLISON & WAGNER, *supra* note 8, at 67-72.

Lack of compliance, resulting in compliance checks, creates inefficiency and waste. For employers to have sufficient incentive to comply with smoking bans, the marginal benefits of compliance must outweigh the costs. Noncompliance requires a punishment severe enough to make compliance the most appropriate option. Compliance can be encouraged in a variety of ways. For example, bars and restaurants could be forced to post signs that have certain contact information to report establishments not in compliance.⁶⁴ Regardless of the mechanism for compliance, there are social costs imposed on everyone by the increased taxes required to enforce smoking bans.

Proponents of smoking bans may argue that the costs associated with smoking bans (i.e., increases in taxes) should be close to zero because the cost of compliance will come from citations issued by compliance officers. This argument, though, ignores two important factors. First, costs will be incurred by non-business owners because "the burden the tax [or compliance citation] imposes on the economy will exceed the amount of . . . revenue collected . . ." ⁶⁵ For example, assume that to a bar owner, *A*, it is worth an additional citation of \$500 per month to not comply with the smoking ban. Any cost lower than \$500 will result in noncompliance with the smoking ban, indicating that the law is ineffective. However, if the cost of noncompliance is greater than \$500, the owner will comply with the smoking ban.⁶⁶ For *A*, policymakers must have fines equal to \$500; otherwise, *A* will not comply. Every establishment is different, and the marginal benefit of not complying will differ based on the cost of noncompliance and the bar's revenues and clientele. For example, the optimal citation to *B* might be \$1000 per month, while for *C* it might be \$0 per month. However, for the smoking ban to be fully effective for all establishments, the citation must be enough to prevent the bar with the highest cost of compliance from ignoring the law.⁶⁷ In this example, the fine must be more than \$1000 per month. Otherwise, *B* will not comply, and workers and patrons at *B* will not receive protection from ETS. Given the cost of noncompliance, all the bars in this example will comply with the law. However, *C* is the only establishment that will not pass the cost of compliance on to the consumer, while *A* and *B* will have \$1500 less in revenue each month. Thus, to meet the same profits, those bar owners must either raise the price of their drinks by an amount that will cover the lost revenue of \$1500 per month or simply absorb loss in revenue. If the costs of food and drinks are raised, consumers pay for those costs. If the costs remain the same, business owners absorb all the costs of compliance. If the costs are absorbed by the owner, there will be times when the bar loses too much money to stay in

64. See Nagami, *supra* note 4, at 170 (noting that Los Angeles has such a reporting system, which could theoretically allow workers to report violations as well).

65. TOLLISON & WAGNER, *supra* note 8, at 87. This also makes sense when one looks at San Diego's enforcement methods, which result in two officers' responding to a smoking ban violation because of the fear of violence breaking out at the scene. Nagami, *supra* note 4, at 169.

66. See Murphy & O'Hara, *supra* note 60, at 226-30.

67. One could make the argument that if there is less smoking in some places then the ban is still effective. This argument, however, only reinforces the point that this Note attempts to make. Smoking bans are applied inconsistently, and any argument that smoking bans are effective because most places are smoke-free with smoking bans simply bolsters this Note's thesis.