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## THE CASE AGAINST SMOKING BANS

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In recent months, dozens of localities and a number of states have enacted laws banning smoking in public places.<sup>1</sup> Proponents of these sweeping bans insist that they are necessary to reduce risks to public health and welfare and to protect the rights of non-smoking patrons and employees of the regulated establishments.<sup>2</sup> This essay argues that government-imposed smoking bans represent unwise policy. Unlike regulation of the outdoor environment, smoking bans cannot be justified on market failure grounds. Nor are they justified as means of shaping preferences or on risk-reduction grounds. In fact, smoking bans ultimately reduce public welfare by preventing an optimal allocation of non-smoking and smoking-permitted public places. Such bans are therefore both unnecessary and, on the whole, welfare-reducing.

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<sup>1</sup> Prominent localities that have adopted such bans include New York City, Chicago, and Washington, D.C. See Michael Cooper, *Mayor Signs Law to Ban Smoking Soon at Most Bars*, N.Y. TIMES, Dec. 31, 2002, at B3; Fran Spielman, *City Council Snuffs Out Cigarettes: Smoking Ban Starts on Jan. 16 for Most*, CHI. SUN-TIMES, Dec. 8, 2005, at 8; *Capital Passes a Smoking Ban*, WALL ST. J., Jan. 5, 2006, at D5. States that have enacted bans include California, Georgia, Massachusetts, Connecticut, Maine, Delaware, Idaho, Florida, Montana, New Jersey, and Rhode Island. See Patricia Guthrie, *Restaurant Smoking Ban Leaves Some Folks Fuming*, ATLANTA J. CONST., July 2, 2005, at E2; Bob Anez, *Marlboro Country Imposing Sweeping Indoor Smoking Ban*, CHI. SUN-TIMES, Apr. 8, 2005, at 38; Richard L. Jones & Josh Benson, *Legislators Pass Smoking Ban in New Jersey*, N.Y. TIMES, Jan. 10, 2006, at B1; *National Briefing New England: Rhode Island: Public Smoking Ban*, N.Y. TIMES, Mar. 2, 2005, at A14. For examples of the statutes and ordinances that were enacted, see CAL. LAB. CODE § 6404.5 (West 2006); GA. CODE ANN. § 31-12A-4 (West 2005); MONT. CODE ANN. § 50-40-104 (2005).

<sup>2</sup> See Paul McIntyre, *Restaurant, Bar Workers Need Protection from Smoke; Eliminating Tobacco Smoke in the Workplace is the Duty of Every Responsible Employer in Chicago*, CHI. SUN-TIMES, July 11, 2005, at 49; Walter Tsou, *Phila.'s Smoking Ban Long Overdue*, PHILA. INQUIRER, Sept. 14, 2005, at B02; Joseph R. Perone, *A Smoldering Issue: Smoking Ban Would be a Drag for Some, but a Pleasure for Others*, STAR-LEDGER, Mar. 17, 2005, at 15; Editorial, *Let the Smoke Clear: Statewide Ban is a Step in the Right Direction, but Exemptions Keep it from Going Far Enough*, ATLANTA J.-CONST., Mar. 16, 2005, at A20; Editorial, *Pass the Smoking Ban*, STAR-LEDGER, Sept. 26, 2005, at 14 (“Bans on smoking in public places can save lives . . .”); Editorial, *Time has Come for a State Smoking Ban*, DENVER POST, Jan. 23, 2006, at B7 (“It’s a matter of health and comfort.”).

This essay consists of two parts. Part I rebuts the most commonly asserted arguments in favor of government-imposed smoking bans. Part II sets forth an affirmative argument for a laissez-faire approach to the issue of public smoking.

## I. REBUTTING JUSTIFICATIONS FOR BANS

Advocates for sweeping smoking bans in “public places”<sup>3</sup> have generally offered three justifications for the bans. First, they claim that such bans are warranted because indoor smoking involves a negative externality – the market failure normally invoked to justify regulation of the ambient environment.<sup>4</sup> In addition, ban advocates assert that smoking bans shape individual preferences against smoking, thereby reducing the number of smokers in society.<sup>5</sup> Finally, they argue that smoking bans are justified, regardless of whether any market failure is present, simply because of the health risks associated with inhalation of environmental tobacco smoke (“ETS,” commonly referred to as “second-hand smoke”).<sup>6</sup> The following subsections rebut these three arguments, which I have labeled (respectively) the externality argument, the preference-shaping argument, and the risk argument.

### A. *The Externality Argument*

The conventional justification for regulation of the ambient environment (*i.e.*, outdoor air and water) is that it is necessary to combat the inefficiencies created by negative externalities.<sup>7</sup> Negative externalities are costs that are not borne by the party in charge of the process that

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<sup>3</sup> Referring to the establishments in which smoking is prohibited under most smoking bans as “public places” is somewhat misleading, for, unless they are in government-owned buildings, such places are actually *privately* owned places to which members of the public are invited. Despite the technical inaccuracy, this essay uses the term “public places” to refer to privately owned places to which the members of the public are invited.

<sup>4</sup> See *infra* notes 7-12 and accompanying text.

<sup>5</sup> See *infra* notes 29-36 and accompanying text.

<sup>6</sup> See *infra* notes 44-58 and accompanying text.

<sup>7</sup> See, *e.g.*, TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 51-59 (3d ed. 1992).

creates the costs.<sup>8</sup> For example, the owner of a smoke-spewing factory does not fully bear the costs associated with the smoke, stench, and health-risks his factory produces; many of those costs are foisted onto the factory's neighbors. When conduct involves negative externalities, participants will tend to engage in that conduct to an excessive degree, for they bear the full benefits, but not the full costs, of their activities.<sup>9</sup> Quite often, then, government intervention (*e.g.*, taxing the cost-creating behavior or limiting the amount permitted) may be necessary to ensure that the cost-creator does not engage in the conduct at issue to an excessive degree.<sup>10</sup>

Advocates of smoking bans insist that indoor smoking involves negative externalities. First, ban advocates argue that non-smoking patrons and employees of establishments that allow smoking are forced to bear costs over which they have no control.<sup>11</sup> In addition, smokers impose negative externalities in the form of increased health-care costs, a portion of which is paid by the public fisc.<sup>12</sup> Thus, taxpayers are required to foot the bill for some of the costs associated with smoking in general. Examined closely each of these externality-based arguments for smoking bans fails.

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<sup>8</sup> *Id.*

<sup>9</sup> See A.C. PIGOU, *THE ECONOMICS OF WELFARE* 183-94 (1920). The factory owner, for example, captures all the benefits of his operations but bears only a fraction of the costs. He will run his factory to the point at which his incremental benefits from production, which tend to fall as the level of production increases, equal his incremental costs from production, which tend to rise as the level of production increases. Since he is capturing *all* the benefits of production but only a portion of the costs, producing to the point at which his incremental costs and benefits equal each other will result in a net social loss – *i.e.*, more costs (the factory owner's *plus* those imposed on others) than benefits (only the factory owner's).

<sup>10</sup> See PIGOU, *supra* note 9, at 183-94. *But see* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (explaining that, when property rights are clearly defined and transferable and bargaining costs are not excessive, negative externalities will not lead to inefficiencies because parties will privately bargain to minimize costs).

<sup>11</sup> See, *e.g.*, Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1241 (2005) ("For cigarettes, an obvious external cost is the harm caused by environmental tobacco smoke ('ETS'), often known as 'second-hand smoke.' In this case, the smoker's consumption adversely impacts health outcomes for other people, and absent government intervention, the smoker may not take these costs into account.").

<sup>12</sup> See, *e.g.*, Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Compensation*, 107 YALE L. J. 1163, 1224 (1998) (arguing that smoking creates externalities because many of the health-care costs associated with smoking are paid under first-party insurance policies, including those provided by public health-care systems).

### 1. *Inconveniences and Risks to Patrons and Employees*

As noted, outdoor air pollution involves the sort of negative externality likely to result in both an inoptimal (*i.e.*, excessive) amount of the polluting activity and a violation of pollution victims' "rights."<sup>13</sup> When it comes to indoor air pollution, by contrast, there is no such externality. That is because the individual charged with determining how much, if any, smoking is permitted in an indoor space ultimately bears the full costs of his or her decision and is thus likely to select the optimal level of air cleanliness. Moreover, non-smokers' "rights" are not violated, for they are compensated for the inconveniences and risks they suffer.

One might wonder how this could be. Don't smokers in a public space impose costs on non-smoking patrons, who can't order them to stop? And if that's the case, won't indoor smoking entail both the inefficiency (an excessive level of pollution, since the polluters don't bear all the costs of their activity) and the injustice (an infringement of non-polluters' rights to enjoy clean air) associated with outdoor air pollution? The answer to the latter question is no. There is a crucial difference between outdoor and indoor air, and that difference alleviates the inefficiencies and injustices normally associated with air pollution.

The crucial difference is property rights. Whereas outdoor air is common property (and thus subject to the famous "Tragedy of the Commons"),<sup>14</sup> the air inside a building is, in essence, "owned" by the building owner. That means that the building owner, who is in a position to control the amount of smoking (if any) that is permitted in the building, has an incentive to permit the "right" amount of smoking – that is, the amount that maximizes the welfare of individuals within the building. Depending on the highest and best use of the space and the types of people who patronize the building, the optimal level of smoking may be zero (as in an art museum), or "as much as patrons desire" (as in a tobacco lounge), or something in-between (as in most restaurants, which have smoking and non-smoking sections). Because patrons select establishments based on the benefits and costs of patronage, they will avoid establishments with air policies they do not like or will, at a minimum, reduce the amount they are

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<sup>13</sup> See *supra* notes 7-10 and accompanying text.

<sup>14</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

willing to pay for goods and services at such places. Owners of public places thus bear the full costs and benefits of their decisions regarding air quality and can be expected to select the optimal level of air cleanliness. Moreover, customers who do not like the air policy a space-owner has selected will patronize the space only if they are being otherwise compensated by some other positive attribute of the space at issue – say, cheap drinks or a particularly attractive clientele. They are, in other words, compensated for any “rights” violation. The de facto property rights that exist in indoor air, then, prevent the inefficiencies and injustices that accompany outdoor air pollution.

But what about *workers* at businesses that permit smoking?<sup>15</sup> Isn’t there an externality in that they are forced to bear costs (and assume risks) over which they have no control? Again, the answer is no. Workers exercise control by demanding higher pay to compensate them for the risks and unpleasanties they experience because of the smoke in their workplaces. Adam Smith theorized about such “risk premiums” when he wrote that “[t]he whole of the advantages and disadvantages of the different employments of labor and stock must, in the same neighborhood, be either perfectly equal or tending to equality . . . . [T]he wages of labor vary with the ease or hardship, the honorableness or dishonorableness of employment.”<sup>16</sup> He was right. A vast body of empirical evidence demonstrates that employers do in fact pay a premium for exposing their workers to risks and unpleasanties.<sup>17</sup> Such risk/unpleasantry premiums

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<sup>15</sup> See, e.g., McIntyre, *supra* note 2 (“Workers exposed to secondhand tobacco smoke face . . . dire consequences.”); *Get Serious: Protect All Workers from Smoke*, STAR TRIB., Feb. 2, 2005, at 10A (“Bartenders are no less deserving of protection from smoke than they are of protection from asbestos or benzene.”).

<sup>16</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 99-100 (1776, reprinted 1937); see also W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 37 (1983). Professor Viscusi explains Adam Smith’s insight as follows:

If a worker takes a job he knows is risky, there must be some other aspect to compensate for the risk. If the other nonmonetary aspects of the job are equivalent to those for less risky jobs, this compensation will take the form of a higher wage rate. The need to pay higher wages in turn provides a financial incentive for the employer to reduce the risk.

*Id.*

<sup>17</sup> See, e.g., Richard Thaler & Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, HOUSEHOLD PRODUCTION AND CONSUMPTION 265-98, (Nestor Terleckyj ed. 1976); W. KIP VISCUSI, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE (1979)

motivate employers to select the optimal amount of smoke in their restaurants. They also alleviate any injustices occasioned by what might otherwise appear to be a violation of employees' rights. Thus, smoking in public establishments does not, in any meaningful sense, impose genuine negative externalities in the form of risks and unpleasantities to the patrons and employees of such establishments.<sup>18</sup>

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(finding that workers on jobs perceived as dangerous receive an earnings premium of 5.5%); Charles Brown, *Equalizing Differences in the Labor Market*, 94 QUARTERLY J. ECON. 113 (1980) (reviewing studies and providing fresh empirical data); W. Kip Viscusi, *Occupational Safety and Health Regulation: Its Impact and Policy Alternatives*, in RESEARCH IN PUBLIC POLICY ANALYSIS AND MANAGEMENT 281, 281-89 (John P. Crecine ed. 1981); Richard J. Arnould & Len M. Nichols, *Wage Risk Premiums and Workers' Compensation: A Refinement of Estimates of Compensating Wage Differential*, 91 J. POL. ECON. 332 (1983); Stuart Dorsey & Norman Walzer, *Workers' Compensation, Job Hazards, and Wages*, 36 INDUS. & LAB. REL. REV. 642 (1983); Greg J. Duncan & Bertil Holmlund, *Was Adam Smith Right After All? Another Test of the Theory of Compensating Wage Differentials*, 1 J. LAB. ECON. 366, 374 (1983) (finding that "[d]angerous work yields positive wage premiums of around 2%"); Shelby Gerking et al., *The Marginal Value of Job Safety: A Contingent Valuation Study*, 1 J. RISK & UNCERTAINTY 185 (1988); Henry W. Herzog, Jr. & Alan M. Schlottmann, *Valuing Risk in the Workplace: Market Price, Willingness to Pay, and the Optimal Provision of Safety*, 72 REV. OF ECON. & STATS 463 (1990) (listing, at 463, American, British, and Swedish studies documenting the existence of compensating differentials and providing, at 468, new evidence indicating that compensating differentials comprised 1.9% to 2.5% of manufacturing employees' weekly earnings); Felice Martinello & Ronald Meng, *Workplace Risks and the Value of Hazard Avoidance*, 25 CANADIAN J. ECON. 333, 343 (1992) (concluding that "workers are compensated for higher fatality risks" and "also receive additional wage premiums for higher risks of total injuries and severe injuries"); Michael J. Moore & W. Kip Viscusi, *Doubling the Estimated Value of Life: Results Using New Occupational Fatality Data*, 7 J. POL'Y ANALYSIS & MGT. 476 (1988) (using then-new National Institute for Occupational Safety and Health data to recalculate the implicit value of life revealed by compensating differentials for fatality risks); MICHAEL MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 46-52 (1990) (estimating risk premiums and the extent to which those premiums are lowered by the presence of workers' compensation). *But see* Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 INDUS. & LAB. REL. REV. 116 (1998) (disputing existence of compensating differentials).

<sup>18</sup> While indoor smoking may technically impose some costs on non-smoking patrons and employees within an establishment, the externality at issue is only a "pecuniary" externality – *i.e.*, a third-party effect that is mitigated by the price mechanism. The mitigation here occurs because a patron (employee) adversely affected by indoor smoking will take her business (provide her services) elsewhere unless compensated by the facility owner with lower prices (higher wages). Pecuniary externalities, unlike "technological" externalities (*i.e.*, third-party effects not mitigated by a change in relative prices) do not raise efficiency concerns. As Professors Haddock et al. explained:

"Externality" is a slippery concept, one less often used to elucidate a supposed "problem" than to justify government intervention to "solve" it. The efficiency issue is not whether any third-party impact takes place—that is inevitable—but whether the appropriate marginal conditions still hold. Many externalities are

## 2. Costs to the Public Health-Care System

Ban advocates also seek to justify prohibitions by pointing to externalities in the form of public health-care expenditures.<sup>19</sup> The argument here proceeds as follows: (1) smokers face disproportionately high health-care costs; (2) a portion of such costs is borne not by smokers themselves but by the public at large; (3) smokers thereby externalize some of the costs of their behavior and thus will tend to engage in “too much” smoking; and (4) smoking bans are therefore justified as an effort to cut back on the level of smoking that would otherwise exist.

This argument suffers from several weaknesses. First and most importantly, the initial premise is unsound. According to a comprehensive study in the *New England Journal of Medicine*,<sup>20</sup> smoking probably has the effect of *reducing* overall health-care costs, for smokers die earlier than non-smokers.<sup>21</sup> The authors of *The Health Care Costs of Smoking* summarize their results as follows:

Health care costs for smokers at a given age are as much as 40 percent higher than those for nonsmokers, but in a population in which no one smoked the costs would be 7 percent higher among men and 4 percent higher among women than the costs in the current mixed population of smokers and nonsmokers. If all smokers quit, health care costs would be lower at first, but after 15 years they would

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solely pecuniary; they change prices but do not raise efficiency concerns as long as prices still equal marginal cost. A problem arises only when prices and costs diverge, creating a non-pecuniary (or “technological”) externality.

David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 723 (1987).

<sup>19</sup> Hanson & Logue, *supra* note 12, at 1224 (“The presence of first-party insurance can cause many of the costs of smoking to be externalized by smokers to nonsmokers or by heavy smokers to light smokers, if the insurers fail to make premium or coverage adjustments based on the insureds’ smoking choices. Any of the costs caused by cigarettes for which first-party insurance coverage exists can be externalized in this way. Those costs include increased health care expenses because of smoking-related illnesses . . .”).

<sup>20</sup> Jan J. Barendregt et al., *The Health Care Costs of Smoking*, 337 NEW ENG. J. MED. 1052 (1997).

<sup>21</sup> See also J.B. Shoven, J.O. Sundberg & J.P. Bunker, *The Social Security Cost of Smoking*, in THE ECONOMICS OF AGING (D.A. Wise ed., 1989) (arguing that smoking may create positive externalities in the form of decreased public health-care costs, for smokers die earlier than non-smokers); W. Kip. Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J. L. & ECON. 575 (1999).

become higher than at present. In the long term, complete smoking cessation would produce a net increase in health care costs, but it could still be seen as economically favorable under reasonable assumptions of discount rate and evaluation period.<sup>22</sup>

Moreover, even if smoking were shown to increase public health-care expenditures, the argument here would seem to prove too much. If increased health-care costs could justify government imposition of a smoking ban in privately owned places, could they not similarly justify governmental regulation of menus at fast-food restaurants or mandatory exercise regimens? Serious liberty interests would be at stake if a government were to make its citizens be healthy so as not to impose health-care costs on others.

Finally, the assumption that public smoking bans reduce the incidence of smoking (point four above) seems suspect. As discussed below, widespread smoking bans may actually increase the incidence of smoking among young people.<sup>23</sup> Externalities in the form of increased public health-care costs, then, likely cannot justify widespread bans on smoking in public spaces.

### *B. The Preference-Shaping Argument*

I argued above that smoking bans are unnecessary because market processes will ensure either that patrons' and employees' preferences regarding smoking are honored or that those individuals are compensated for not receiving their preferences.<sup>24</sup> That argument assumes that individuals' preferences are unaffected by the legal rule itself.<sup>25</sup> A number of scholars have disputed the notion of "exogenous preferences."<sup>26</sup>

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<sup>22</sup> Barendregt et al., *supra* note 20, at 1052.

<sup>23</sup> See *infra* notes 33-36 and accompanying text.

<sup>24</sup> See *supra* notes 14-18 and accompanying text, and *infra* notes 58-62 and accompanying text.

<sup>25</sup> Cf. A MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (1983) ("For example, an individual's evaluation of the desirability of cleaner air is assumed not to depend on whether the legal system establishes a right to clean air. This is known as the assumption of exogenous preferences.").

<sup>26</sup> See, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1172 (1986) (noting that "the various categories of malfunctions in a system based on private preferences justify the general conclusion that neither private nor public law should treat such

Instead, they claim that individuals' preferences regarding activities like smoking are influenced by the background legal rules themselves.<sup>27</sup> Some theorists have therefore sought to justify smoking bans on grounds that they make smokers less likely to want to smoke and/or make non-smokers more likely to appreciate smoke-free environments and thus more willing to pay a premium for such environments. In the end, neither preference-shaping argument can justify widespread bans on public smoking.

### 1. *Shaping Attitudes Toward Smoking*

In recent years, legal scholars have produced voluminous literature on the role of law in indirectly controlling conduct by shaping social norms and individual preferences.<sup>28</sup> Smoking bans provide one of the favorite “success stories” of those who laud the use of legal rules to change norms and preferences.<sup>29</sup> According to these scholars, smoking bans affect behavior, despite their lax enforcement, because they change the social norm regarding smoking in public.<sup>30</sup> With the advent of smoking bans, non-smokers who previously felt embarrassed about publicly expressing their distaste for ETS are speaking up. By providing a de facto community statement that public smoking is unacceptable, the bans embolden non-smokers to confront smokers who are inconveniencing them.<sup>31</sup> Facing heightened public hostility toward their habits, smokers

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preferences as exogenous variables . . .”).

<sup>27</sup> See, e.g., Cass R. Sunstein, *How Law Constructs Preferences*, 86 GEO. L. J. 2637 (1998); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990).

<sup>28</sup> The literature is too voluminous to cite exhaustively. For scholarship reviewing the extensive literature, see STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 598-646 (2004); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339-54 (1997); Eric A. Posner, *Efficient Norms*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 19-23 (Peter Newman ed., 1998); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 904-47 (1996).

<sup>29</sup> See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 625-28 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1025-34 (1995).

<sup>30</sup> See, e.g., Kahan, *supra* note 29, at 625-28.

<sup>31</sup> As Professor Kahan explained:

Before the 1970s, many individuals no doubt experienced second hand smoke

are likely to revise their preferences regarding smoking. Thus, by making smoking more socially costly, the theory goes, bans reduce the number of smokers.

Of course, this is a good thing only if actual social utility is increased by reducing the incidence of smoking. Ban advocates assume that reducing smoking is welfare-enhancing for the obvious reason that smoking carries serious health risks. But ban advocates generally are not in a position to judge the cost side of reducing smoking, for they do not know the degree of utility smokers experience by smoking.<sup>32</sup> Smokers themselves, who these days are aware of the risks of smoking, appear to believe that the benefits they experience from the activity outweigh the costs.<sup>33</sup> It is thus not at all clear that eliminating smoking will enhance social welfare.

But even if it were clear that society would be better off with less smoking, attempting to use smoking bans to influence social norms may not represent wise policy. Sweeping smoking bans may actually increase

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as unpleasant. But because there were neither laws nor norms against smoking in public at that time, there was little these individuals could do other than silently forbear their irritation. Once even mild antismoking regulations were in place, however, it became clear that nonsmokers were entitled to be free of smoke and that smokers were the parties obliged to forbear. Consequently, irritated nonsmokers were much more likely to express their disapproval.

Kahan, *supra* note 29, at 627-28.

<sup>32</sup> Cf. Jason Scott Johnston, *Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of Risk Regulation*, 151 U. PA. L. REV. 747, 759 (2003) (“Smoking, overeating, hang gliding, and other risky behaviors are chosen by individuals. They are objects of consumption. Individual choice reveals that individual utility functions are such that the individuals who choose to engage in these behaviors get positive utility from so doing.”).

<sup>33</sup> Professor Larry Lessig has rejected this deferential stance toward informed smokers’ revealed preferences on grounds that smoking is addictive. He explains,

[I]f a commodity is addictive, then an individual, knowing all the relevant facts, may actually consume more of a commodity than is utility maximizing. Simply stated, because cigarettes are addictive, individuals may consume more than they actually want. Thus there may be reasons to take steps to reduce consumption below the level demanded when all facts are known—and therefore a public justification for efforts to reduce cigarette smoking below the “invisible hand of demand.”

Lessig, *supra* note 29, at 1028-29 (1995). *But see* Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675, 694-95 (1988) (explaining how unhealthy behaviors, such as smoking and other addictive habits, can be utility maximizing within an intertemporal utility function and thus consistent with the rational actor model).

the incidence of smoking. A large percentage of smokers acquire the habit at a young age,<sup>34</sup> and they frequently do so because smoking is “cool.” Smoking is cool, of course, because it is rebellious. The harder anti-smoking forces work to coerce people into quitting smoking, and the more they engage the government and other establishment institutions in their efforts, the more rebellious – and thus the “cooler” – smoking becomes. Even advocates of the use of smoking regulation to alter social norms acknowledge that overly intrusive regulations may result in this sort of “norm backlash.”<sup>35</sup> As an empirical matter, then, it is not clear whether sweeping smoking bans – highly intrusive regulatory interventions – actually reduce the incidence of smoking in the long run.<sup>36</sup>

## 2. *Influencing Willingness-to-Pay for Non-Smoking Environments*

The preference-shaping argument analyzed above focuses on the potential for smoking bans to shape the preferences of smokers (and potential smokers) by manipulating social norms. Insights from cognitive psychology suggest that smoking bans might similarly influence the preferences of non-smokers, making them more willing to pay a premium for smoke-free environments and thereby encouraging more business owners to adopt no-smoking policies.

Advocates of a laissez-faire approach to the issue of indoor

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<sup>34</sup> PRABHAT JHA & FRANK J. CHALOUKKA, *CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL* (1999) (World Bank Study) (finding eight out of ten smokers in high-income countries start as teenagers while most smokers in low to middle-income countries start smoking in their early twenties).

<sup>35</sup> See, e.g., Lessig, *supra* note 29, at 1030 (“What is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodations for smokers.”); Sarah E. Waldeck, *Using Male Circumcision to Understand Social Norms as Multipliers*, 72 U. CIN. L. REV. 455, 501 (2003) (“If a law condemns behavior more than the average individual does, it is likely to engender backlash and resistance.”); Kahan, *supra* note 29, at 632-33 (discussing backlash occasioned by (alcohol) Prohibition).

<sup>36</sup> While it is admittedly anecdotal evidence, the history of the anti-tobacco movement in Germany in 1933-45 is consistent with the notion that overly stringent efforts to regulate smoking may encourage the behavior as a signal of resistance or rebellion. See Robert N. Proctor, *The Anti-Tobacco Campaign of the Nazis: A Little Known Aspect of Public Health in Germany, 1933-45*, 313 *BMJ* 1450 (1996) (observing that while “Germany had the world’s strongest antismoking movement in the 1930s and early 1940s, . . . German smoking rates rose dramatically in the first six years of Nazi rule, suggesting that the propaganda campaign launched during those early years was largely ineffective.”).

smoking maintain that an unregulated market will produce an optimal number of smoking and smoke-free establishments as business owners respond to the demands of patrons and employees.<sup>37</sup> If patrons and employees are willing to pay more for a smoke-free environment (via, respectively, higher prices for the business's goods and services or lower wages) than smokers are willing to pay for the right to smoke, then business owners will be motivated to ban smoking. Otherwise, they won't. Thus, there's no need for the government to force establishments to go non-smoking; the market will provide an optimal number of non-smoking facilities.

This argument assumes, though, that non-smokers' willingness to pay for smoke-free environments is unaffected by the smoking laws themselves. If the laissez-faire approach depresses the amount non-smokers are willing to pay for a smoke-free environment, then intervention in the market in the form of smoking bans may be justified.

So why might the background rules on when and where smoking is permitted affect non-smokers' willingness to pay for smoke-free environments? In recent decades, cognitive psychologists have conducted a number of experiments purporting to demonstrate an "endowment effect," whereby an individual's valuation of an asset is determined, in part, by whether or not she owns that asset.<sup>38</sup> The general finding is that people attach a greater value to things they own than they would attach to those things if they did not own them and had to purchase them.<sup>39</sup> In other words, ownership enhances subjective value.

With regard to smoking bans, ban advocates may argue that legal prohibitions effectively endow non-smokers with the right to smoke-free air, causing them to value it more than they would if they had to "buy" it.<sup>40</sup> If that is indeed the case, then the laissez-faire approach to indoor

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<sup>37</sup> See *supra* notes 14-18 and accompanying text, and *infra* notes 58-62 and accompanying text.

<sup>38</sup> See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L. Q. 59, 66-85 (1993) (summarizing studies purporting to provide empirical evidence of endowment effect).

<sup>39</sup> See *id.* at 68-69 (concluding that weight of experimental evidence establishes that "willingness to accept" – *i.e.*, the minimum amount one would require to give up an asset she owns – tends to exceed "willingness to pay" – *i.e.*, the maximum amount one would pay to acquire the same asset in the first instance).

<sup>40</sup> Cf. Robert D. Rowe et al., *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MGMT. 1 (1980) (purporting to demonstrate existence of endowment effect with regard to

smoking appears troubling, for it is not, as its advocates maintain, merely a neutral policy that facilitates satisfaction of existing preferences. Rather than providing a level playing field on which privately adopted non-smoking and smoking-permitted policies can compete, it biases the outcome of competition in favor of smoking-permitted policies. Since a truly neutral market solution is really impossible, ban advocates may call for the government to weigh in on the side of public health and force the no-smoking policies that will be under-produced by the inherently biased free market.<sup>41</sup>

There are several problems with this analysis. First, there is a great deal of debate over the extent to which the endowment effect really exists and the extent to which it applies to ownership of intangible rights (*e.g.*, the right to smoke-free air) as well as to ownership of tangible property.<sup>42</sup> In addition, given the number of public establishments that have already gone smoke-free, thereby “endowing” their patrons with the right to smoke-free air, the argument is a little late in time. Non-smokers have now been exposed to enough facilities in which they have been endowed with the “right” to smoke-free air that they likely have adjusted upward their subjective valuation of that commodity (assuming endowment would, in fact, occasion an upward adjustment). Finally, the endowment effect argument would support, at most, temporary smoking bans – *i.e.*,

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right to clean air).

<sup>41</sup> While I am not aware of any scholar besides Ms. Peerson who has expressly articulated this argument, the argument would seem to be a logical application of the broader view that the law should interfere with private preferences where they appear to be inherently biased in one direction by the allocation of legal entitlements. *See generally* Sunstein, *supra* note 26, at 1172 (noting that “the various categories of malfunctions in a system based on private preferences justify the general conclusion that neither private nor public law should treat such preferences as exogenous variables . . . . [T]he nature and extent of these malfunctions will support considerable legislative and judicial intrusion into private preference structures.”); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106, 132 (2002) (arguing that, because law will inevitably shape preferences, largely because of endowment effect, law should aim to push preferences in desirable directions); Hoffman & Spitzer, *supra* note 38, at 112-13 (discussing, in general terms, how endowment effect calls for increased paternalism in allocating endowments so as to shape preferences in desirable directions).

<sup>42</sup> *Cf.* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2468 (2001) (noting experimental conclusion “that the endowment effect is stronger when the asset is a physical thing than when it is a financial asset”). *But see* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. REV. 1227, 1261 (2003) (observing that “an endowment effect has been shown to exist for [intangible] financial assets as long as they have an uncertain value”).

bans that persisted long enough to move the amount non-smokers would be willing to pay to avoid smoke from a “willingness to pay” measure to a “willingness to accept” measure.<sup>43</sup> If the justification for the bans is a need to enhance non-smokers’ valuation of smoke-free spaces so as to encourage market creation of such spaces, then the bans need not be permanent.

### C. *The Risk Argument*

The first two arguments for smoking bans focus, to some degree, on citizens’ preferences: the externality argument focuses on a purported market failure that allegedly prevents the satisfaction of preferences regarding smoking, and the preference-shaping argument focuses on the law’s inevitable role in shaping those preferences. By contrast, the third common argument for smoking bans ignores citizens’ smoking preferences altogether. That argument asserts that smoking should be banned in public places, regardless of individuals’ smoking preferences, because the health risks it presents are simply too great. In other words, smoking bans are justified on risk-based grounds even if there’s no need to remedy a market failure or to correct a preference-shaping bias in the law.

Policy-makers frequently invoke excessive risk as a sufficient ground for regulating an activity, even when that activity does not involve a market failure or reflect preferences that have been skewed by the background legal rules.<sup>44</sup> Consider, for example, mandatory seat belt laws. There’s not much of an externality involved in the failure to wear a seat belt (the costs of the conduct are borne by the person deciding to engage in it). While mandatory seat belt laws may have the effect of altering preferences, there’s no reason to think that the background legal rule had previously biased preferences against wearing seat belts, and risk-

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<sup>43</sup> Experimental evidence indicates that “the disparity between [willingness-to-accept] and [willingness-to-pay] arises very quickly,” which suggests that “preferences might change rather quickly as a result of policy changes.” Hoffman & Spitzer, *supra* note 38, at 112-13.

<sup>44</sup> Shi-Ling Hsu, *On the Role of Cost-Benefit Analysis in Environmental Law: A Book Review of Frank Ackerman and Lisa Heinzerling’s Priceless: On Knowing the Price of Everything and the Value of Nothing*, 35 ENVTL. L. 135, 158 (2005) (“Governmental policy also takes this approach, or should. Certain activities and substances pose a risk to human health and the environment, and if the risk is great enough, we consider regulation or a ban.”).

avoidance is the sole reason for altering citizen preferences in the first place. Thus, the predominant justification for mandatory seat belt laws, which have been enacted in every state except (“Live Free or Die”) New Hampshire,<sup>45</sup> is risk-reduction – not externalities or a need to shape preferences for some end other than risk-reduction. Similarly, ban advocates argue, public smoking bans may be justified solely on grounds of risk-avoidance.<sup>46</sup>

But a purely risk-based argument likely cannot justify a sweeping smoking ban. While risk, standing alone, is sometimes deemed sufficient to justify government prohibition of private conduct, such prohibition seems appropriate only when the harm avoided is relatively great and the regulation’s intrusion on personal liberty is relatively small. Again, consider mandatory seat belt laws. The risk associated with not wearing a seat belt is huge, and the regulation’s intrusion on personal liberty is minor – no more than a slight inconvenience. Hence, the laws may be justifiable on risk-reduction grounds. Consider, by comparison, whether the government could invoke risk as a legitimate basis for banning driving after 1:00 A.M. Such behavior certainly presents a heightened risk (late-night drivers are far more likely to fall asleep at the wheel), but the magnitude of risk presented does not justify the degree of liberty intrusion occasioned by the regulation. Smoking bans look more like late-night driving bans than mandatory seat belt laws and thus likely cannot be justified solely with reference to risk.

To see why this is so, we must first isolate the relevant risk. Because public smoking bans do not prohibit smoking altogether<sup>47</sup> and may not even reduce its incidence,<sup>48</sup> the risk the bans aim to avert is not the risk to smokers themselves. It is instead the risk to non-smokers – *i.e.*, the risks associated with inhalation of ETS. The key question, then, is whether these risks are of sufficient magnitude to justify a significant intrusion on the personal liberty of private business owners.

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<sup>45</sup> See David A. Mobley, *Revisiting Alabama’s Seat Belt Defense: Is the Failure to Buckle Up a Defense in AEMLD?*, 53 ALA. L. REV. 963, 969 (2002).

<sup>46</sup> See, e.g., Jody Hodgdon, Comment, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49, 53 (2004) (“Due to these health concerns, the state . . . should focus on ways to eliminate environmental tobacco smoke from all restaurants . . .”).

<sup>47</sup> Smokers are still free to smoke outdoors and in private places.

<sup>48</sup> See *supra* notes 34-36 and accompanying text.

The latest science on ETS suggests that the risks it poses cannot justify this degree of liberty intrusion. The contrary view (*i.e.*, that ETS poses major health risks) is deeply ingrained in public discourse, thanks largely to a 1993 EPA study purporting to show that inhalation of ETS causes 3,000 lung cancer deaths per year.<sup>49</sup> The findings of that study, however, have been severely undermined since its publication. A congressional inquiry into the methods the EPA used in the study, which concluded that ETS is a Class A (known human) carcinogen, found that

The process at every turn [was] characterized by both scientific and procedural irregularities. . . . [T]hose irregularities include[d] conflicts of interest by both Agency staff involved in the preparation of the risk assessment and members of the Science Advisory Board panel selected to provide a supposedly independent evaluation of the document.<sup>50</sup>

The congressional inquiry further concluded that “the Agency ha[d] deliberately abused and manipulated the scientific data in order to reach a predetermined, politically motivated result.”<sup>51</sup>

The findings of the EPA’s 1993 study have also been undermined by court opinion. Charged with evaluating the Agency’s risk assessment in determining that ETS constitutes a Class A carcinogen, a federal district judge criticized the Agency’s analysis in terms that can best be described as scathing. The court concluded that the EPA

[P]ublicly committed to a conclusion before research had begun; . . . adjusted established procedure and scientific norms to validate the Agency’s public conclusion, and aggressively utilized the [Radon] Act’s authority to disseminate findings to establish a de facto regulatory scheme intended to restrict Plaintiffs’ products and to influence public opinion[;] . . . disregarded information and

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<sup>49</sup> U.S. EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (1992). This study is available for download at <http://cfpub2.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835>.

<sup>50</sup> STATEMENT OF HON. THOMAS J. BLILEY, JR. BEFORE THE HEALTH AND ENVIRONMENT SUBCOMMITTEE OF THE COMMITTEE ON ENERGY AND COMMERCE, U.S. HOUSE OF REPRESENTATIVES (July 21, 1993), available at <http://ftp.demon.nl/doc/liberty/FORREST/bliley.txt>.

<sup>51</sup> *Id.*

made findings on selective information; did not disseminate significant epidemiologic information; deviated from its Risk Assessment Guidelines; failed to disclose important findings and reasoning; and left significant questions without answers.<sup>52</sup>

Thus, the EPA's finding that ETS poses a serious cancer risk, a finding that has been extremely influential in motivating state and local smoking bans throughout the United States, is simply incredible.

So how great are the health risks associated with inhalation of ETS? According to the latest and most complete scientific studies on the matter, not very. In 1998, the World Health Organization's International Agency on Research on Cancer ("IARC") published the results of a ten-year study covering so-called "second-hand smokers" in seven European countries. It found no statistically significant lung cancer risk for non-smokers who either lived with or worked with smokers.<sup>53</sup> In fact, the study's only statistically significant finding was that children of smokers demonstrated a slightly *decreased* risk of lung cancer in later life.<sup>54</sup>

The general findings of the IARC study have recently been confirmed by research from the American Cancer Society. In its Cancer Prevention Study ("CPS1"), published in 2003, the Cancer Society followed more than 35,000 never-smoking Californians who were married to smokers. Researchers collected data on the never-smokers for thirty-nine years (from 1959 to 1998). The tabular data revealed no heightened lung cancer risk among study subjects and, in fact, showed a slightly decreased risk of lung cancer compared to the general population of never-smokers.<sup>55</sup> Thus, even the research from

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<sup>52</sup> *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 4 F. Supp.2d 435, 465-66 (M.D.N.C. 1998), vacated on other grounds, 313 F.3d 852 (4th Cir. 2002).

<sup>53</sup> Paolo Bofetta et al., *Multicenter Case-Control Study of Exposure to Environmental Tobacco Smoke and Lung Cancer in Europe*, 90 J. OF THE NAT'L CANCER INST. 1440, 1443-44 (1998), available at <http://jncicancerspectrum.oxfordjournals.org/cgi/reprint/jnci;90/19/1440.pdf>.

<sup>54</sup> *Id.* at 1445.

<sup>55</sup> James E. Enstrom & Geoffrey C. Kabat, *Environmental Tobacco Smoke and Tobacco-Related Mortality in a Prospective Study of Californians, 1960-98*, 326 BMJ 1057 (2003), available at <http://bmj.bmjournals.com/cgi/content/full/326/7398/1057>.

organizations likely to support widespread smoking bans concludes that ETS does not create a significant risk of cancer.

Advocates of smoking bans must therefore base their risk arguments on non-cancer risks. Some have acknowledged that the purported link between ETS and cancer is trumped up but have nonetheless maintained that other health risks justify sweeping bans. For example, Dr. Elizabeth Whelan of the pro-ban American Council on Science and Health chastised her fellow ban advocates for “threaten[ing]” their cause with “hyperbole about the likely effects of ETS” – *i.e.*, claims that ETS causes cancer.<sup>56</sup> Maintaining that the advocates should have “simply stated that ETS caused irritation of the eyes, nose and respiratory tract and aggravated preexisting asthma,” she insisted that “[s]urely that is enough of a reason to justify the protection of all workers” via a sweeping smoking ban.<sup>57</sup>

Surely it’s not. As noted above, paternalistic regulations aimed solely at reducing risks, not at correcting a legitimate market failure, are justifiable only when the risk is relatively serious and the liberty intrusion occasioned by the regulation is relatively minor. Here, the potential harms at issue (a greater number of watery eyes and runny noses, and aggravation of complications among asthmatics who voluntarily patronize establishments where smoking is permitted) do not seem great enough to justify a governmental command that private business owners force their invitees to refrain from an activity that affects only other invitees. Hence, widespread smoking bans are not justifiable solely on risk-based grounds.

## II. WHY A LAISSEZ-FAIRE APPROACH IS SUPERIOR

Part I of this essay attempted to rebut the arguments in favor of smoking bans. This part sets forth an affirmative argument in favor of a laissez-faire approach to the issue of smoking in public spaces.<sup>58</sup> For

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<sup>56</sup> Elizabeth M. Whelan, Editorial, *Warning: Overstating the Case Against Secondhand Smoke Is Unnecessary—and Harmful to Public Health Policy*, AM. COUNCIL ON SCI. AND HEALTH (Aug. 1, 2000), available at [http://www.acsh.org/healthissues/newsID.248/healthissue\\_detail.asp](http://www.acsh.org/healthissues/newsID.248/healthissue_detail.asp).

<sup>57</sup> *Id.*

<sup>58</sup> Recall that “public places,” as used herein, actually refers to privately owned spaces to which members of the public are invited. See *supra* note 3.

reasons explained below, such an approach maximizes social welfare (*e.g.*, the aggregate happiness of citizens) by providing the optimal allocation of smoking and smoke-free establishments.

Controversies over smoking in public places are ultimately controversies over property rights: does a smoker have the right to fill the air with his or her smoke, or do non-smoking patrons have the right to insist upon clean air? In other words, who “owns” the air? A smoking ban effectively gives non-smoking patrons the right to the air. By contrast, the *laissez-faire* approach effectively permits the owner of the establishment to determine the proper allocation of air rights within his or her space. The owner may choose to give the rights to smoking patrons (by permitting smoking), to give them to non-smokers (by banning smoking); or to “split the baby” (by designating some parts of the establishment non-smoking but permitting smoking elsewhere within the space).

However owners allocate the right to air among smokers and non-smokers, there will be some “winners,” whose preferred policy is adopted and whose happiness is therefore increased, and some “losers,” whose preferred policy is rejected and whose happiness is therefore diminished. There is, in other words, an unavoidable, reciprocal harm inherent in any allocation of the right to the indoor air at issue.<sup>59</sup> Adoption of a smoking-permitted policy victimizes non-smokers, but adoption of a no-smoking policy victimizes smokers.<sup>60</sup>

In light of this reciprocal harm, social welfare would be maximized if smoking policies were set to favor the group whose total happiness would be most enhanced by implementation of its favored policy.<sup>61</sup> So, if smoking customers value the right to smoke in a particular place more than non-smoking customers value the right to be free from such smoke, that place should allow smoking. Conversely, if non-smoking patrons

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<sup>59</sup> See Coase, *supra* note 10 (discussing the reciprocal harm involved in any dispute over legal entitlements).

<sup>60</sup> For a contemporary example of how a smoking ban injures smokers, see Monica Davey, *As Smoke Clears, Tobacco Maker Opens Lounge*, N.Y. TIMES, Jan. 19, 2006, at A1 (discussing effort of smoking ban advocates to shut down recently opened tobacco lounge in Chicago).

<sup>61</sup> Professor Coase recognized this point. See Coase, *supra* note 10, at 2 (noting that the central issue is “should A be allowed to harm B or should B be allowed to harm A?” and the ultimate goal should be “to avoid the more serious harm”).

value an establishment's clean air more than smoking patrons value the right to light up, the establishment should ban smoking.

It should thus be clear why a laissez-faire approach of permitting establishment owners to set their own smoking policies will create more welfare than a ban on smoking in public places. Under the laissez-faire approach, a business owner, seeking to maximize his or her profits, will set the establishment's smoking policy to accommodate the patrons who most value their preferred policy (and thus are most willing to pay a premium to be in the proprietor's space). This will result in a variety of smoking policies at different establishments, as business owners respond to the preferences of their customers. Under a smoking ban, by contrast, business owners are not permitted to cater to smoking patrons' demands *even when* those patrons value the right to smoke more than non-smoking patrons (and employees) value the right to be free from smoke. A smoking ban, then, is less likely to maximize social welfare than a laissez-faire approach, which ensures that the right to any particular public place's air is allocated to the group who values it most.

### III. CONCLUSION

Government imposed smoking bans are unwise. Considered closely, the arguments ban advocates offer to justify such bans falter. The externality argument fails because indoor smoking creates, at worst, a pecuniary externality that will be mitigated by the price mechanism. Preference-shaping arguments are weak because heavy-handed government restrictions create a substantial risk of "norm backlash." Risk-based arguments are insufficient, for the slight risks associated with ETS cannot justify the substantial privacy intrusion occasioned by sweeping smoking bans. In the end, a laissez-faire policy that would permit private business owners to tailor their own smoking policies according to the demands of their patrons is most likely to maximize social welfare by providing an optimal allocation of both smoking and smoke-free establishments.