

*Despite their popularity, government-mandated smoking bans are not justified.*

# The Case Against Smoking Bans

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In recent months, dozens of localities and a number of states have enacted sweeping smoking bans. The bans generally forbid smoking in “public” places, which are defined to include not only publicly owned facilities but also privately owned properties to which members of the public are invited (e.g., bars, restaurants, hotel lobbies, etc.). Proponents of the bans insist that they are necessary to reduce risks to public health and welfare and to protect the rights of nonsmoking patrons and employees of the regulated establishments.

Specifically, ban advocates have offered three justifications for government-imposed 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. In addition, advocates assert that smoking bans shape individual preferences against smoking, thereby reducing the number of smokers in society. Finally, proponents 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 “secondhand smoke.”

This article contends that government-imposed smoking bans cannot be justified as responses to market failure, as means of shaping preferences, or on risk-reduction grounds. Smoking bans reduce public welfare by preventing an optimal allocation of nonsmoking and smoking-permitted public places. A *laissez-faire* approach better accommodates heterogeneous preferences regarding public smoking.

## THE EXTERNALITY ARGUMENT

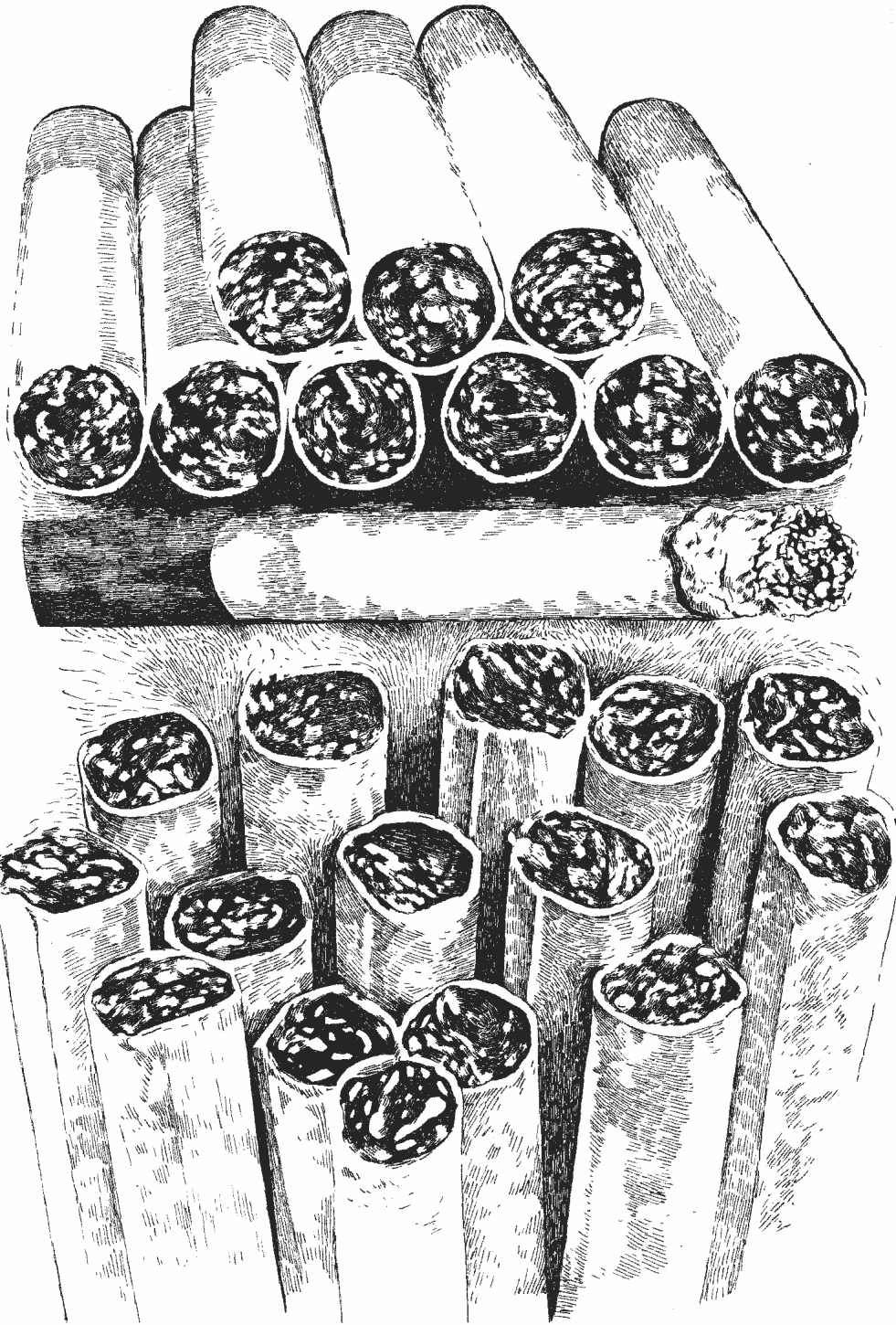
The conventional justification for regulation of the ambient environment (i.e., outdoor air and water) is that it is necessary

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to combat the inefficiencies created by negative externalities. Negative externalities are costs that are not borne by the party in charge of the process that creates them. 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. Quite often, then, government intervention (e.g., taxing the cost-creating behavior or limiting the amount permitted) may be desirable as a means of ensuring that the cost-creator does not engage to an excessive degree in the conduct at issue.

Advocates of smoking bans insist that indoor smoking involves negative externalities. First, ban advocates argue that nonsmoking patrons and employees of establishments that allow smoking are forced to bear costs over which they have no control. In addition, smokers impose negative externalities in the form of increased healthcare costs, a portion of which is paid from the public fisc. 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.

**PATRONS AND EMPLOYEES** 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. 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, nonsmokers’ “rights” are not violated, because they are compen-



Tragedy of the Commons), 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 nonsmoking 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 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

sated for the inconveniences and risks they suffer.

One might wonder how this could be. Because smokers in a public space impose costs on nonsmoking patrons, who cannot order the smokers to stop, will indoor smoking not entail both the inefficiency (an excessive level of pollution) and the injustice (an infringement of non-polluters’ rights to enjoy clean air) associated with outdoor air pollution? In a word, no. There is a crucial difference between outdoor and indoor air, and that difference alleviates the inefficiencies and rights-violations normally associated with air pollution.

The crucial difference is property rights. Whereas outdoor air is common property (and thus subject to the famous

compensated by some 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? Is there not 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 unpleasantries they experience because of the smoke in their work-

places. Adam Smith theorized about such “risk premiums” when he wrote in *The Wealth of Nations*:

The 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.

He was right. A vast body of empirical evidence, including most notably that produced by economist W. Kip Viscusi, demonstrates that employers do in fact pay a premium for exposing their workers to risks and unpleasantities. Such risk/unpleasantness premiums 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. Any externalities produced are merely “pecuniary” externalities – that is, externalities that are mitigated by the price mechanism and thus do not create inefficiencies and injustices.

**PUBLIC COSTS** Ban advocates also seek to justify prohibitions by pointing to externalities in the form of public healthcare expenditures. The argument here proceeds as follows:

- Smokers face disproportionately high health care costs.
- A portion of such costs is borne not by smokers themselves but by the public at large.
- Smokers thereby externalize some of the costs of their behavior and thus will tend to engage in “too much” smoking.
- Therefore, smoking bans are 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* in 1997, smoking probably has the effect of reducing overall health care costs because smokers die earlier than nonsmokers. The study’s authors concluded that in a population in which no one smoked, health care 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. The authors further determined that if all smokers were to quit, health care costs would be lower at first, but after 15 years they would become higher than at present.

Even if smoking were shown to increase public health care expenditures, the argument here would seem to prove too much. If increased healthcare 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? Seri-

ous 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 seems suspect. As discussed below, widespread smoking bans may actually increase the incidence of smoking among young people. Externalities in the form of increased public health care costs, then, likely cannot justify widespread bans on smoking in public spaces.

### THE PREFERENCE-SHAPING ARGUMENT

The argument above concludes 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. That argument assumes, though, that individuals’ preferences are unaffected by the legal rule itself. A number of scholars have disputed the notion of “exogenous preferences.” Instead, they claim that individuals’ preferences regarding activities like smoking are influenced by the background legal rules themselves. Some theorists have therefore sought to justify smoking bans on grounds that they make smokers less likely to want to smoke and/or make nonsmokers 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.

**SHAPING ATTITUDES** In recent years, legal scholars have produced a voluminous literature on the role of law in indirectly controlling conduct by shaping social norms and individual preferences. Smoking bans provide one of the favorite “success stories” of those who laud the use of legal rules to change norms and preferences. According to these scholars, smoking bans affect behavior, even if under-enforced, because they change the social norm regarding smoking in public. With the advent of smoking bans, nonsmokers 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 nonsmokers to confront smokers who are inconveniencing them. Facing heightened public hostility toward their habits, smokers 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 because they do not know the degree of utility smokers experience by smoking. 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. 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 the incidence of smoking. A large percentage of smokers acquire the habit at a young age, 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.” 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.

**WILLINGNESS TO PAY** 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 psychol-

ogy suggest that smoking bans might similarly influence the preferences of nonsmokers, making them more willing to pay a premium for smoke-free environments and thereby encouraging more business owners to adopt no-smoking policies.

porting 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. 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. In other words, ownership enhances subjective value.

With regard to smoking bans, ban advocates may argue that legal prohibitions effectively endow nonsmokers with the right to smoke-free air, causing them to value it more than they would if they had to “buy” it. If that is indeed the case, then the laissez-faire approach to indoor 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 nonsmoking and smoking-permitted policies can compete, it biases the outcome of competition in favor of smoking-permitted policies. Because 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

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ogy suggest that smoking bans might similarly influence the preferences of nonsmokers, 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 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. 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 will not. Thus, there is no need for the government to force establishments to go nonsmoking; the market will provide an optimal number of nonsmoking facilities.

This argument assumes, though, that nonsmokers’ willingness to pay for smoke-free environments is unaffected by the smoking laws themselves. If the laissez-faire approach depresses the amount nonsmokers 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 nonsmokers’ willingness to pay for smoke-free environments? In recent decades, cognitive psychologists have conducted a number of experiments pur-

the no-smoking policies that will be under-produced by the inherently biased free market.

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

### THE RISK ARGUMENT

The first two arguments for smoking bans focus, to some degree, on citizens’ preferences: the externality argument focus-

es 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 is no need to remedy a market failure or to correct a preference-shaping bias in the law.

Policymakers 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. Consider, for example, mandatory seatbelt laws. There is not much of an externality involved in the failure to wear a seatbelt because the costs of the conduct are borne by the person deciding to engage in it. While mandatory seatbelt laws may have the effect of altering preferences, there is no reason to think that the background legal rule had previously biased preferences against wearing seatbelts, and risk-avoidance is the sole reason for altering citizen preferences in the first place. Thus, the predominant justification for mandatory seatbelt laws, which have been enacted in every state except "Live Free or Die" New Hampshire, 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.

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 seatbelt laws. The risk associated with not wearing a seatbelt 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 seatbelt 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 and may not even reduce its incidence, the risk the bans aim to avert is not the risk to smokers themselves. It is instead the risk to nonsmokers — 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 and their customers.

If one were to rely on the stated conclusions of federal

agencies (and/or the media reports discussing those conclusions), one might conclude that the risks associated with ETS inhalation do justify significant liberty restrictions. First consider the Environmental Protection Agency's 1992 report, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. That study, which concluded that ETS is a Class A (known human) carcinogen, purported to show that inhalation of ETS causes 3,000 lung cancer deaths per year. Not surprisingly, the study fueled efforts to impose smoking bans.

As it turns out, the study hardly amounted to sound science. A congressional inquiry into the methods the EPA used in the study found that "the process at every turn [was] characterized by both scientific and procedural irregularities," including "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." 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."

The findings of the EPA's 1992 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 in the case *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA* criticized the agency's analysis in terms that can best be described as scathing. The court concluded:

[The EPA] publicly committed to a conclusion before research had begun; . . . adjusted established procedure and scientific norms to validate the Agency's public conclusion[;] . . . disregarded information and 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.

Thus, the EPA's purported 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, should be discounted.

Apparently undeterred by these congressional and judicial reprimands, the U.S. surgeon general recently released a report entitled *The Health Consequences of Involuntary Exposure to Tobacco Smoke*, which purports to settle once and for all the debate over the risks of ETS inhalation. In releasing the report, Surgeon General Richard Carmona confidently proclaimed:

The scientific evidence is now indisputable: secondhand smoke is not a mere annoyance. It is a serious health hazard that can lead to disease and premature death in children and nonsmoking adults.

In presenting the report, the surgeon general's office emphasized to the news media that even brief exposure to ETS poses immediate and significant health risks. The press release

accompanying the report stated that “there is no risk-free level of exposure to secondhand smoke” and that “even brief exposure to secondhand smoke has immediate adverse effects on the cardiovascular system and increases risk for heart disease and lung cancer.” In his remarks to the media, the surgeon general stated, “Breathing secondhand smoke for even a short time can damage cells and set the cancer process in motion.” In a “fact sheet” accompanying the report, the surgeon general explained, “Breathing secondhand smoke for even a short time can have immediate adverse effects on the cardiovascular system.” These and similar statements, faithfully repeated by the news media, create the impression that science has determined that simply being in a smoke-filled room exposes one to significant health risks.

Examined closely, the surgeon general’s report established

begin with. A 20 percent increase in a tiny risk is, well, really tiny — certainly too tiny to justify the substantial liberty infringement involved in smoking bans. Indeed, risk alone has not justified a ban on smoking itself, an activity that increases the risk of heart disease by 100 to 300 percent and that of lung cancer by 900 percent. How, then, could a much smaller risk justify highly intrusive regulation of the voluntary actions of individuals gathered on private property?

This analysis even assumes that the conclusions of the surgeon general’s report are accurate. In fact, they probably are not. The report is a meta-analysis, meaning that the authors did not collect their own epidemiological data but instead combined the results of previously published ETS studies. Meta-analyses are useful analyses, but they are no more compelling than the underlying studies upon which they are based.

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## The question is whether the risks of secondhand smoke justify a significant intrusion on the personal liberty of business owners and their customers.

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no such proposition. The underlying studies upon which the surgeon general’s report was based considered the effects of chronic exposure to ETS on individuals, such as long-time spouses of smokers. The studies simply did not consider the health effects of sporadic exposure to ETS and thus cannot provide empirical support for the surgeon general’s statements about short-term ETS exposure.

Moreover, those statements are theoretically unsound, for they conflict with the basic toxicological principle that “the dose makes the poison.” According to a study published in the *New England Journal of Medicine* in 1975, when many more individuals smoked and there were much higher ETS concentrations in public places, exposure to an hour’s worth of prevailing levels of ETS was equivalent to smoking 0.004 cigarettes. Put differently, one would have to breathe smoke-filled air for 4,000 hours in order to inhale as much tobacco smoke as a smoker inhales in a single cigarette. Given those concentration levels, it seems implausible that short-term exposure to ETS poses serious health risks. Possessing neither empirical foundation nor theoretical plausibility, the Surgeon General’s public statements about the health risks of brief exposure to ETS were misleading.

But what about the actual findings of the surgeon general’s report, as opposed to the hyperbolic (and widely reported) accompanying statements? Those findings — even taken at face value — do not provide a risk-based rationale for highly intrusive smoking bans. The report concludes that chronic ETS exposure increases the risks of lung cancer and heart disease by 20 to 30 percent. While those numbers sound fairly large, one must remember that the underlying risks of lung cancer and heart disease in nonsmokers are quite small to

In this case, the meta-analysis rests on findings from a number of discredited studies, including the 1992 EPA study. Moreover, the analysis treats all studies equally, regardless of their scope and rigor. A number of the underlying studies purporting to document correlations between chronic ETS exposure and cancer or heart disease were quite small, and most employed “case study” methodologies in which individuals with diseases were polled regarding spousal smoking habits or the presence of ETS at their workplaces. A superior study would involve a large number of subjects — some routinely exposed to ETS, some not — and would follow them over time. This sort of “cohort study” is more difficult to perform than after-the-fact case studies, but it is also more accurate.

In fact, an extremely large cohort study has recently been conducted. In 2003, James Enstrom of UCLA and Geoffrey Kabat of the State University of New York, Stony Brook, published a study of the health histories of more than 35,000 never-smoking Californians who were married to smokers. Using information gathered by the American Cancer Society, the researchers collected data on the never-smokers for 39 years (from 1959 to 1998). Their investigation revealed no heightened lung cancer risk among study subjects. In fact, the authors found no “causal relationship between exposure to [ETS] and tobacco-related mortality,” though they acknowledged that “a small effect” cannot be ruled out. Enstrom and Kabat’s massive study, which has been vociferously criticized by anti-smoking forces, was not even included in the surgeon general’s meta-analysis, which covered only studies published through 2002.

The bottom line is that the research on ETS reveals, at most, that even chronic ETS exposure creates only a negligible absolute risk of cancer and heart disease. Advocates of

smoking bans must therefore base their risk arguments on non-disease risks.

Some have acknowledged that the purported link between ETS and cancer or heart disease is dubious 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 and heart disease. 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 “surely that is enough of a reason to justify the protection of all workers” via a sweeping smoking ban.

Surely it is 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.

### THE SUPERIORITY OF LAISSEZ-FAIRE

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 nonsmokers have the right to smoke-free air? In other words, who “owns” the air? A smoking ban effectively gives nonsmoking 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), nonsmokers (by banning smoking), or to try to accommodate both by designating some parts of the establishment nonsmoking but permitting smoking elsewhere within the space.

However owners allocate the right to air among smokers and nonsmokers, 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 thus, as Ronald Coase explained, an unavoidable reciprocal harm inherent in

any allocation of the right to the indoor air at issue. Adoption of a smoking-permitted policy harms nonsmokers, but adoption of a no-smoking policy harms smokers.

In light of this unavoidable, 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. So, if smoking customers value the right to smoke in a particular place more than nonsmoking customers value the right to be free from such smoke, that place should allow smoking. Conversely, if nonsmoking patrons 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 nonsmoking 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 that values it most.

### CONCLUSION

Government-imposed smoking bans are unwise. Considered closely, the arguments used to justify them 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 because 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. **R**

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