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## WHEN ONE PERSON'S HABIT BECOMES EVERYONE'S PROBLEM: THE BATTLE OVER SMOKING BANS IN BARS AND RESTAURANTS

### I. INTRODUCTION

For many, smoking a cigarette while enjoying a drink while out at a bar or restaurant are activities that go hand in hand.<sup>1</sup> Despite the social popularity of this duo, recent smoking bans around the country are putting an end to smoking in bars and restaurants.<sup>2</sup> Scientists have found that smoking not only harms the smoker, but also those surrounding the smoker.<sup>3</sup> Although society once considered smoking a fashionable and generally acceptable activity, knowledge of its health risks is compelling lawmakers to pass laws prohibiting smoking in public places.<sup>4</sup> Faced with information of the health risks caused by Environmental Tobacco Smoke (ETS), legislatures throughout the country have placed health interests above the ability to smoke in public places, especially in two of the most popular social venues, bars and restaurants.<sup>5</sup> Because of the

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1. See Damon K. Nagami, Comment, *Enforcement Methods Used in Applying the California Smoke-Free Workplace Act to Bars and Taverns*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 159, 165 n.82 (2001) (citing Karen McAllister, *Fresno Bar Smoking Not "Priority,"* FRESNO BEE, Nov. 30, 1998, at A1) (describing how bar owner believes "smoking and drinking 'go together': 'It's like having a cup of coffee and reading the newspaper, or pie and ice cream.'").

2. See Smoke Free USA, <http://www.smokefreeworld.com/usa.shtml> (last visited Dec. 1, 2006) (including Washington, D.C., every state except Alabama, Iowa, Louisiana, Michigan, Nevada, New Hampshire, North Carolina, South Carolina, Tennessee, and Virginia has statewide or city laws banning smoking in some form in bars and/or restaurants).

3. See STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 392 (1996) (listing negative health effects of smoking on non-smokers). "In 1992 the Environmental Protection Agency [EPA] listed environmental tobacco smoke [ETS] as a Class A (known human) carcinogen . . ." *Id.* When burned, cigarettes produce at least forty-three carcinogens. See PHILIP J. HILTS, SMOKE SCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP 25 (1996).

4. See Matthew A. Stinnett, Note, *A Breath of Fresh Air: A Smoking Ban's Legal Invasion of Property Rights in Lexington Fayette County Food & Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 32 N. KY. L. REV. 239, 259 (2005) (articulating society's changing modern conception of smoking). Stinnett argues for the necessity of smoking bans in bars and restaurants, and he thinks that such bans are reasonably related to protecting the public health. See *id.*

5. See Mark J. Horvick, Note, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923, 923 (2005) (noting that effects of ETS, also known as secondhand smoke, became known in 1970s and sparked movement to ban smoking in public places across country). The law must evolve in order to protect the health of society as the negative effects of ETS are realized. See Stin-

high concentration of ETS in such establishments, “[t]here are especially strong arguments for curtailing smoking in bars and restaurants.”<sup>6</sup> One of these arguments is that in bars and restaurants, employees are exposed to more ETS than any other group of workers.<sup>7</sup>

Tobacco, “a purely American product in its origin, development, and domination of the world market,” now faces bans and restrictions across the nation.<sup>8</sup> In Virginia, the country’s third highest tobacco producing state, the state legislature discussed but failed to pass a statewide ban.<sup>9</sup> Currently, Virginia’s Fairfax County bans smoking in certain public places, but restaurants are free to decide whether to ban smoking in their facilities or not.<sup>10</sup> The Virginia statehouse is just minutes away from the Philip Morris plant in Richmond, a symbol of the competition between health and economic concerns surrounding the smoking ban debate.<sup>11</sup> Virginia’s

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nett, *supra* note 4, at 259. For a further discussion of legislation prohibiting smoking in bars and restaurants, see *infra* notes 102-25 and accompanying text.

6. HUGH WATERS, *THE ECONOMIC IMPACT OF SECONDHAND SMOKE IN MARYLAND* 20 (2006) (supplying reasons for banning smoking in bars and restaurants). Nationally, compared to seventy-six percent of white-collar workers, forty-three percent of food service workers are protected by smoke-free policies in their workplaces. *Id.* Restaurants contain 1.6 to 2.0 times the amount of ETS than offices, and bars contain 3.9 to 6.1 times the amount of ETS. *See id.*

7. *See id.* at 10 (noting high ETS exposure of bar and tavern employees). Adults employed in bars and restaurants are exposed to ETS at a rate of almost ninety-eight percent compared to adults employed in schools and universities, the workplace with the lowest rate of exposure of almost thirteen percent. *See id.*

8. HILTS, *supra* note 3, at 1 (summarizing industry’s response to threatening medical reports).

9. *See* Rosalind S. Helderman, *In Major Shift, Va. Senate Backs Smoking Ban for Restaurants*, WASH. POST, Feb. 13, 2006, at A1 (reporting smoking ban passed in Virginia state Senate after close vote and debate weighing consumer choice and harms caused by ETS); *see also* Rosalind S. Helderman & Ann E. Marimow, *Va. and Md. Turn Down Smoking Ban: Lawmakers Loathe to Force Businesses*, WASH. POST, Feb. 24, 2006, at B1 (reporting smoking ban unanimously defeated in Virginia in House of Delegates Subcommittee). Tobacco is the “state’s second most profitable crop.” Helderman, *In Major Shift, supra*.

10. *See* Smoke Free Virginia, <http://www.smokefreeworld.com/va.shtml> (last visited Dec. 1, 2006) (discussing Fairfax County’s limited smoking ban). Public places where Fairfax County bans smoking include museums, elevators, and health care facilities, among others. *See id.*

11. *See* Helderman, *In Major Shift, supra* note 9 (“In the summer, the smell of processed tobacco often hangs in the air of the capital city.”). The tobacco leaves that decorate the Senate chamber in the state’s Capitol building demonstrate tobacco’s historical importance to the state. *See id.* In the past, lobbyists from Phillip Morris worked to beat back antismoking legislation, but the company did not actively oppose the recent legislation. *See id.* Senator J. Brandon Bell II, the sponsor of the bill stated, “[t]his is about public health. . . . The research has come forward over the years, and it’s shown us that secondhand cigarette smoke is a very insidious health problem.” *Id.*

proposed statewide legislation represents the general trend of smoking bans considered throughout the country.<sup>12</sup>

Despite the scientific knowledge of the effects of ETS fueling anti-smoking legislation, these smoking bans have been met with a mixed reception.<sup>13</sup> Conflicting interests are at stake, and smokers' rights groups have responded to the bans with both grassroots efforts and lawsuits.<sup>14</sup> Although the smoking bans in bars and restaurants may inconvenience smokers, these bans will result in overall greater health benefits for most of the population.<sup>15</sup> A controversial issue in the smoking debate is who has the greater interest in the situation: the smoker to go about his or her own business while in public, or the nonsmoker to be free from the ETS's harmful effects while in public places.<sup>16</sup>

Section II, discussing tobacco's importance in the American economy, historical concerns of smoking, and the health effects of ETS, provides a background of smoking bans.<sup>17</sup> Section III discusses the constitutionality of smoking bans.<sup>18</sup> Section III continues with a discussion of recent efforts to pass smoking bans, their impact on businesses, and criticisms of smoking bans.<sup>19</sup> Section IV

12. *See id.* (comparing importance of tobacco to Virginia's economy with effects of ETS). A spokesman for the American Cancer Society states, "[t]his shows that Virginia is ready to move its way to where the mainstream is on health issues . . . . People are starting to see, even in Virginia and other tobacco-growing states, that there is proven science about the harmful effects of secondhand smoke." *Id.*

13. *See* Nagami, *supra* note 1, at 159 (citing increased knowledge of effects of ETS as impetus to pass antismoking legislation).

14. *See id.* at 160-61 (discussing reaction of smokers' rights groups to scientific findings regarding ETS). "People are going to smoke in bars, no matter what . . . . If people don't want to smoke, keep them at home. Smoking has been in bars forever." *Id.* at n.83 (citing Lance Williams and Marianne Constantinou, *Smoking in Bars Will be \$76 Drag*, S.F. EXAMINER, Jan. 15, 1999 at A1).

15. *See* Jeffrey Barg, *Philadelphia Smoking Ban Long Overdue*, PHYSICIAN'S NEWS DIG., May 2000, available at <http://physiciansnews.com/notebook/500.html> (advocating smoking bans in light of overall benefit to population).

16. *See* Walter E. Williams, *Cigarettes and Property Rights*, in SMOKING: WHO HAS THE RIGHT? 308-13 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998) (analyzing conflict between smokers and nonsmokers and arguing antismoking legislation is result of fact that nonsmokers are dominant force in political process). Some antismoking advocates argue that the right to breathe clean air is an unenumerated right. *See id.* at 309.

17. For a further discussion on the background of tobacco and ETS, see *infra* notes 22-48 and accompanying text.

18. For a further discussion on the constitutionality of smoking bans, see *infra* notes 55-100 and accompanying text.

19. For a further discussion of recent efforts to pass smoking bans, the impact of smoking bans on businesses, and criticisms of smoking bans, see *infra* notes 101-61 and accompanying text.

considers smoking bans passed in other countries.<sup>20</sup> Section V concludes by positing that the trend of smoking bans will continue.<sup>21</sup>

## II. BACKGROUND

### A. Tobacco as a Component of the Economy

Tobacco has been, and remains, an important component of the national economy.<sup>22</sup> Demonstrating tobacco's exalted place in the economy during World War II, tobacco farmers were "exempted from the draft because they were [deemed] 'essential' workers."<sup>23</sup> Tobacco's importance in the United States is illustrated through the decorative use of tobacco leaves to adorn the capitals of columns throughout the Capitol.<sup>24</sup> By the mid twentieth century, smoking was so embedded in the American culture that World War II soldiers' survival rations included cigarettes.<sup>25</sup> At the time however, emerging health concerns began to prevail over social custom.<sup>26</sup>

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20. For a further discussion of international anti-smoking laws, see *infra* notes 162-80 and accompanying text.

21. For a further discussion on the future of smoking bans in bars and restaurants, see *infra* notes 181-87 and accompanying text.

22. See GEORGINA LOVELL, *YOU ARE THE TARGET: BIG TOBACCO: LIES, SCAMS – NOW THE TRUTH* 13 (2002) (noting importance of tobacco products). The modern tobacco industry generates approximately \$45 billion in annual revenue. See HILTS, *supra* note 3, at 4.

23. JOHN C. BURNHAM, *BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY* 101 (1993).

24. See HENRY HOPE REED, *THE UNITED STATES CAPITOL: ITS ARCHITECTURE AND DECORATION* 98 (2005) (discussing decorative use of tobacco leaves in Small Senate Rotunda and other areas).

25. See BURNHAM, *supra* note 23, at 101 (emphasizing importance placed on tobacco in American society during World War II). Smoking was also encouraged among women during the World War II period; Rosie the Riveter was depicted with a cigarette between her lips or in her hand. See *id.* By "the end of World War II, the percentage of American women who smoked doubled." *Id.* (citation omitted).

26. See *Nourse v. City of Russellville*, 78 S.W.2d 761, 765 (Ky. 1935) (demonstrating effect of changing times on law). The court in *Nourse* held the city may pass sanitation laws compelling residents to connect to the central sewer system. See *id.* at 767. "Present-day ideas of general welfare and public demands should control. The obsolete methods of another day and generation must yield within reason to the modern conception and, particularizing, to progressive sanitary measures." *Id.*

## B. Historical Concerns of Smoking

Since tobacco's introduction to Europe in the sixteenth century, its effects have been questioned.<sup>27</sup> Queen Victoria and King James I were early critics of smoking, and King James stated that it was "lothsome to the EYE, hatefull to the NOSE, harmfull to the BRAINE, [and] daungerous to the LUNGS and in the black stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomlesse."<sup>28</sup> King James felt that tobacco was a "filthie noveltie," yet it took nearly 400 years before knowledge of the health consequences caused awareness about the health of smokers and ETS, and subsequent smoking bans.<sup>29</sup> Quite ahead of her time, Queen Victoria designated smoking areas within Windsor Castle, instructing her guests to smoke near the fireplaces so the smoke would go out the chimneys.<sup>30</sup> Early examples of smoking bans in public spaces included laws passed in Vienna, Paris, while some areas of Switzerland banned smoking in the streets during the Napoleonic period.<sup>31</sup> Although smoking faced objectors throughout history, it was not until the late nineteenth century when the anti-tobacco movement in the United States first began.<sup>32</sup>

## C. Health Effects of ETS

ETS is the third leading cause of preventable cancers.<sup>33</sup> The modern movement against tobacco began in 1950 when Drs. Ernst L. Wynder and Evarts A. Graham published a report concluding that smokers were more likely than nonsmokers to develop lung

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27. See Nagami, *supra* note 1, at 160 n.4 (citing GILDA BERGER, *SMOKING NOT ALLOWED* 11 (1987)) (describing concern over use of tobacco products since their introduction to world market).

28. LOVELL, *supra* note 22, at 13 (spelling and formatting from original).

29. See *id.* (discussing length of time before smoking was formally connected to negative health effects, something tobacco companies fought to keep from being disclosed).

30. See Williams, *supra* note 16, at 305 (discussing early opposition to smoking indoors).

31. See *id.* (noting historical examples of smoking bans in public places). French Cardinal Richelieu suggested that the spread of smoking could be curbed by implementing a tobacco tax. See *id.*

32. See *id.* at 305-06 (discussing early antismoking efforts of antismoking advocates in United States). The movement was not ignored; "[t]welve states had statutes that either banned or restricted the sale or use of cigarettes; however, along with the demise of the Eighteenth Amendment, these statutes were repealed." *Id.* at 306.

33. See Brandy Ouzts, *Offenses Against Public Health and Morals: Enact the "Georgia Smokefree Air Act of 2004,"* 21 GA. ST. U. L. REV. 67, 68 (2004) (attributing one-billion dollar annual costs in Georgia statewide healthcare to smoking and ETS).

cancer.<sup>34</sup> In 1953, Wynder and Graham published another paper in the journal *Cancer Research* linking smoking to cancer.<sup>35</sup> Both the *New York Times* and *Readers Digest* published the results of these studies for mainstream review.<sup>36</sup>

The movement for nonsmokers' rights began in the 1970s when scientific evidence started pointing to ETS as a dangerous health risk.<sup>37</sup> Those who are exposed to ETS are known as involuntary smokers or passive smokers, and are actually exposed to more toxic chemicals than active smokers.<sup>38</sup> The first widely known report linking ETS to cancer showed that nonsmoking women married to smokers had a higher likelihood of dying from lung cancer than women married to nonsmokers.<sup>39</sup> The Center for Disease Control and Prevention estimates that 50,000 passive smokers die annually from ETS exposure.<sup>40</sup> As little as five minutes of exposure

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34. See GLANTZ, *supra* note 3, at 25 (citing early report stating health risks of smoking). The study was published in the *Journal of the American Medical Association* and found that smoking was linked to the development of bronchiogenic carcinoma in 684 proved cases. *See id.* at 56 n.1.

35. See HILTS, *supra* note 3, at 4 (describing experiment where skin tumors developed in forty-four percent of mice on which tar had been directly painted). The significance of this study is that human lungs are made of skin. *See id.* This study prompted tobacco industry leaders to meet and discuss the future of the industry. *See id.*

36. See GLANTZ, *supra* note 3, at 25 ("These results were interpreted as important evidence that smoking could cause cancer in humans . . .").

37. *See id.* at 391 (pointing out realization that nonsmokers could be harmed by passively inhaling cigarette smoke prompted smoking restrictions in workplaces and public places).

38. *See id.* at 391-92 (elaborating upon dangers of ETS). ETS consists of "sidestream" smoke and extracted "mainstream" smoke. *See id.* at 391. Mainstream smoke is the smoke that active smokers inhale, while sidestream smoke is the smoke produced from the burning tip of a cigarette. *See id.* Sidestream smoke contains a greater concentration of toxic chemicals than mainstream smoke for two reasons: (1) it is not filtered and (2) smoldering cigarettes burn at a lower temperature, as opposed to during an inhale, so a less complete and dirtier combustion occurs. *See id.* at 391-92. For each cigarette smoked by an active smoker, a passive smoker inhales six times the amount of benzene, a carcinogen known to cause leukemia and regulated as a hazardous air pollutant. *See Waters, supra* note 6, at 2. In addition, a passive smoker inhales seventeen times the amount of 4-aminobiphenyl, a bladder carcinogen, for each cigarette smoked by a smoker, and seventy-five times the amount of N-nitrosodimethylamine. *See id.*

39. See GLANTZ, *supra* note 3, at 392 (discussing first study clearly linking ETS to lung cancer). The results of this study were widely reported. *See id.*

40. See WATERS, *supra* note 6, at 19 (estimating that 50,000 nationwide deaths caused by ETS amounts to 0.017% of national population and 1,577 adult deaths in Maryland caused by ETS equivalent to 0.028% of state population).

to ETS can “increase an individual’s risk [of] a heart attack or stroke.”<sup>41</sup>

In 1997, the California Environmental Protection Agency found that ETS is related to such conditions as Sudden Infant Death Syndrome, respiratory problems, and heart disease.<sup>42</sup> A number of additional medical studies have identified other health conditions caused by ETS.<sup>43</sup> Smoking restrictions in public areas such as bars and restaurants combat the effects of ETS.<sup>44</sup> The sponsor of the Georgia Smokefree Air Act of 2004 introduced the bill because of his own experience as a physician seeing patients dying from smoking-related conditions such as cancer and heart disease.<sup>45</sup>

The growing knowledge of ETS’s harmful effects has led to an interesting development in the law. The plaintiff in *Leichtman v. WLW Jacor Communications, Inc.*, for example, successfully sued for battery caused by ETS.<sup>46</sup> Because tobacco smoke is comprised of “particulate matter,” it is able to make unwanted offensive contact with unwilling persons.<sup>47</sup> This is a developing area of the law, and

41. Stinnett, *supra* note 4, at 255 (discussing harm caused by ETS even from exposure for short interval of time). Risk increases by twenty-five to thirty-five percent. *See id.* at 255 n.138.

42. *See* Nagami, *supra* note 1, at 160 (citing REPRODUCTIVE & CANCER HAZARD ASSESSMENT SECTION (RCHAS) & AIR TOXICOLOGY & EPIDEMIOLOGY SECTION (ATES), CAL. ENVTL. PROT. AGENCY. HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE (1997)) (reporting negative effects of ETS).

43. *See* WATERS, *supra* note 6, at 4-5 (listing health conditions caused by ETS and corresponding medical studies). In children, ETS can cause Sudden Infant Death Syndrome (SIDS), Respiratory Syncytial Virus (RSV), bronchiolitis, acute ear infections, asthma, low birth weight, and perinatal death. *See id.* at 4. In adults, ETS can cause lung cancer, nasal sinus cancer, heart disease, strokes, cervical cancer, and asthma. *See id.* at 5.

44. *See* HILTS, *supra* note 3, at 106 (describing positive effect of smoking bans on health of nonsmokers). An EPA study published in the *American Journal of Public Health* concluded that, “our study and others conducted during the past decade suggest a small but consistent elevation in the risk of lung cancer in nonsmokers due to passive smoking. The proliferation of federal, state and local regulations that restrict smoking in public places and work sites is well founded.” *Id.*

45. *See* Ouzts, *supra* note 33, at 68 (stating motivation of Georgia State Senator to introduce antismoking legislation).

46. *See* 634 N.E.2d 697, 699-700 (Ohio Ct. App. 1994) (holding intentional act of blowing smoke into another’s face is battery). In *Leichtman*, a radio host intentionally blew smoke into the face of his on-air guest, an antismoking advocate, on the day of the Great American Smokeout. *See id.* at 698. The court, however, declined to extend its holding to the theory of “smoker’s battery” which asserts that liability is imposed if cigarette smoke is to predictably reach a nonsmoker. *See id.* at 699. For more information regarding battery caused by ETS, see David B. Ezra, *Smoker Battery: An Antidote To Second Hand Smoke*, 63 S. CAL. L. REV. 1061 (1990).

47. *See* *Leichtman*, 634 N.E.2d at 699 (reviewing elements of battery). Battery is “[c]ontact which is offensive to a reasonable sense of personal dignity . . . .” *Id.* (quoting *Love v. Port Clinton*, 524 N.E.2d 166, 167 (1988)).



beyond the scope of this Comment, but it illustrates the emerging legal issues surrounding the knowledge of the harmful effects of ETS.<sup>48</sup>

### III. ANALYSIS

The main debate surrounding smoking bans is whether or not they are legal.<sup>49</sup> Another major issue regarding smoking bans is who has the greater interest in the situation: the ability of smokers to smoke in public places, or the ability of nonsmokers to be free from ETS while in public.<sup>50</sup> Generally, courts have upheld smoking bans.<sup>51</sup>

A major focus of the smoking bans in bars and restaurants is the protection of the employees.<sup>52</sup> Compared to the public as a whole, food service workers have a fifty percent greater risk of dying from lung cancer than the general population due to their constant exposure to ETS.<sup>53</sup> Eliminating these workers' exposure to ETS has

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48. See Renee Vintzel Loridas, Annotation, *Secondary Smoke as Battery*, 46 A.L.R.5th 813, §2 (1997) ("Battery is emerging as a viable cause of action for non-smokers unwillingly exposed to secondary smoke."). *But see* Pechan v. DynaPro, Inc., 622 N.E.2d 108, 117-18 (2d Cir. 1993) (rejecting employee's action for battery for secondhand smoke because she failed to show that smoke was intended for her).

49. See Ouzts, *supra* note 33, at 71 (discussing concern of legislators when debating Georgia Smokefree Air Act of 2004 and questioning constitutionality of smoking ban in private businesses). For a further discussion of challenges to the legality of smoking bans, see *infra* notes 83-100 and accompanying text.

50. See Helderman & Marimow, *supra* note 9 ("The bottom line is that we're not talking about a smoker's right to smoke indoors. . . . We're talking about my right not to breathe in 4,000 chemicals and 60 known carcinogens that are associated with secondhand smoke." (quoting Virginia State Senator J. Brandon Bell II)).

51. See Alan Stephens, Annotation, *Validity, Construction, and Application of Nonsmoking Regulations*, 65 A.L.R.4th 1205 §§ 3a-3d (stating federal smoking regulations are upheld based on Equal Protection Clause, Due Process Clause, fundamental rights of liberty, privacy, property, and education, and guarantee against impairment of contract obligations). Results in state courts have yielded mixed results. *See id.* at § 5. In the case of *Rossie v. State*, the court held it was in the scope of the state's police power to restrict smoking to certain areas at the Wisconsin Department of Revenue. *See* 395 N.W.2d 801, 807 (Wis. Ct. App. 1986). In contrast, the *Boreali v. Axelrod* court held that a state regulatory agency may not enact a smoking ban in all public areas. *See* 130 A.2d 107, 115 (N.Y. App. Div. 1987).

52. See Eric M. Weiss, *Williams Lets City Smoking Ban Move On to Congress for Review*, WASH. POST, Jan. 31, 2006, at B4 [hereinafter Weiss, *Williams Lets City Smoking Ban Move On*] (analyzing pros and cons of smoking ban).

53. See WATERS, *supra* note 6, at 20 (emphasizing danger of ETS to food service workers due to constant exposure at work). The danger to those working in bars and restaurants is a major argument in favor of banning smoking in these venues. *See id.*

significant health benefits and affords them the same protection that most workers in office settings already have.<sup>54</sup>

### A. Constitutional Issues

#### 1. *The Police Power*

Smoking bans are passed under a state's police power authority.<sup>55</sup> The police power lies in the legislative branch, allowing the legislature to determine what action is needed to protect the public health, morals, and safety.<sup>56</sup> Under the police power, the states can regulate the habits of their citizens if these habits endanger others.<sup>57</sup> By passing anti-smoking laws, states use their police power to prevent the dangers of ETS from harming nonsmokers.<sup>58</sup> If it were not for the police power, "society [would] be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please."<sup>59</sup>

In Kentucky, a restaurant association unsuccessfully challenged the validity of a smoking ban, arguing that the government was impermissibly infringing upon its members' rights to conduct their businesses as they chose.<sup>60</sup> In upholding the smoking ban under the police power, the Kentucky Supreme Court found that "[t]here is perhaps no broader field of police power than that of public

54. See Barg, *supra* note 15 (noting within month of California smoking ban, bartenders reported "significant drop in coughing and other respiratory problems").

55. See Justin C. Levin, *Protect Us or Leave Us Alone: The New York State Smoking Ban*, 68 ALB. L. REV. 183, 192-93 (2004) (discussing ability of police power to restrict otherwise legal behavior, such as smoking, that puts public at risk). Police power is defined as "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality and justice." BLACK'S LAW DICTIONARY 1178 (7th ed. 1999).

56. See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (stating scope and purpose of police power).

57. See *id.* at 660 (explaining state's ability to regulate conduct through police power). "If such manufacture does prejudicially affect the rights and interests of the community, it follows . . . that society has the power to protect itself, by legislation, against injurious consequences of that business." *Id.*

58. See Ida G. Ruben, *Smoke-Free Is a Winner for Maryland*, WASH. POST, Feb. 12, 2006, at B8 (asserting that when people smoke in restaurants and bars, everyone is burdened by effects such as heart disease, lung cancer, and asthma).

59. *Mugler*, 123 U.S. at 660-61.

60. See *Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't*, 131 S.W.3d 745, 752 (Ky. 2004) (setting forth argument of restaurant association). Kentucky was the first state to ban smoking where tobacco was an important cash crop. See Stinnett, *supra* note 4, at 241.

health.”<sup>61</sup> The court noted that the smoking prohibition turned on whether it was reasonably related to protecting the public health and determined that it was.<sup>62</sup> In support of its holding, the court cited “lengthy” public hearings discussing the health effects of tobacco and ETS.<sup>63</sup> Overall, the Kentucky Supreme Court has consistently held that regulations in the interest of public health are reasonable.<sup>64</sup>

## 2. *The Equal Protection Clause*

An argument can be made that smoking bans violate the Equal Protection Clause because they disallow some otherwise legal activities within private establishments while allowing others.<sup>65</sup> Claims that smoking bans violate the Equal Protection Clause of the Fourteenth Amendment, however, are not likely to succeed.<sup>66</sup> Under the Equal Protection Clause, states cannot discriminate against people through arbitrary classifications.<sup>67</sup> The Supreme Court held in *Barbier v. Connolly*, however, that the Fourteenth Amendment was not intended to interfere with the police power of the state.<sup>68</sup> The Court recognized that although the exercise of the police power may burden some members of society more than others, the purpose of the legislation was not to be burdensome.<sup>69</sup> Instead, the legislation’s purpose was to promote the general welfare.<sup>70</sup> Such

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61. *Lexington*, 131 S.W.3d at 752 (quoting *Adams, Inc. v. Louisville and Jefferson County Bd. of Health*, 439 S.W.2d 586, 589 (Ky. 1969)).

62. *See id.* (deciding that smoking prohibition was reasonably related to protecting public).

63. *See Lexington*, 131 S.W.3d at 753 (stating information on which court relied in making its decision).

64. *See Stinnett*, *supra* note 4, at 251 (discussing deference of Kentucky Supreme Court to ordinances that benefit public health).

65. *See Levin*, *supra* note 55, at 194 n.91 (questioning whether smoking bans are unconstitutional under Equal Protection Clause). For example, drinking alcohol, a legal activity that is considered to be unhealthy, is permitted in private establishments, whereas the unhealthy yet legal activity of smoking is not. *See id.*

66. *See id.* at 194 (stating claims that smoking bans violate Equal Protection Clause will likely fail due to failure of similar arguments before Supreme Court).

67. *See id.* n.90 (citing *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155-56 (1897) (holding states must have proper and not arbitrary bases for classification)).

68. *See Barbier v. Connolly*, 113 U.S. 27, 31 (1886) (holding Equal Protection Clause is not meant to negate police power of state). The purpose of the police power is “to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.” *Id.*

69. *See id.* (“Regulations for these purposes may press with more or less weight upon one than upon another . . .”).

70. *See id.* at 32 (holding legislation under police power is meant to help public in general with least inconvenience to individuals). If the purpose of the smok-

legislation does not violate the Equal Protection Clause because instead of making arbitrary classifications, it affects all similarly situated persons.<sup>71</sup>

An Equal Protection claim failed when students tried to challenge a school board's prohibition of student-held tobacco products on school grounds.<sup>72</sup> The students argued the prohibition violated the Equal Protection Clause because it prohibited them from smoking but allowed teachers to smoke in the teachers' lounge.<sup>73</sup> The court held the prohibition's justification, to prevent adolescents from becoming addicted to a harmful product, was reasonable and held that the prohibition did not violate the Equal Protection Clause.<sup>74</sup> Because of the difference between children and adults concerning the decision to smoke, the court held the distinction was proper.<sup>75</sup>

### 3. *Rational Basis Review*

The level of scrutiny applicable to antismoking laws is arguably rational basis review.<sup>76</sup> Under *Williamson v. Lee Optical Co.*, the exercise of police power only requires a rational relationship to the intended legislative effect.<sup>77</sup> Furthermore, smokers are not a suspect classification, and smoking is not a recognized fundamental right.<sup>78</sup>

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ing bans is to protect the well-being of the public, then analogically the concepts of *Barbier* are applied to the smoking ban debate. See Levin, *supra* note 55, at 194.

71. See *Barbier*, 113 U.S. at 31 (describing basis of constitutionality of legislation enacted through police power of states).

72. See *Craig v. Buncombe Bd. of Educ.*, 343 S.E.2d 222, 223 (N.C. Ct. App. 1986) (setting forth basis of lawsuit). The students asserted that students who smoke were deprived of the "fundamental right" to an education due to the tobacco product ban on school grounds. See *id.* (quotations in original).

73. See *id.* at 224 (summarizing students' argument).

74. See *id.* ("The primary justification for the smoking ban—discouraging smoking in order to prevent impressionable, susceptible adolescents from becoming addicted to tobacco products—does not apply to adults.").

75. See *id.* (stating holding of court). Further, the court held that because the teachers may only smoke in the teachers' lounge, they are not setting a bad example for the students. See *id.*

76. See Levin, *supra* note 55, at 195 (advocating rational basis standard of review should be applied to antismoking laws). Because smoking is not recognized as a fundamental right and smokers are not a suspect class, smoking bans do not require a higher standard of review. See *id.*

77. See 348 U.S. 487, 488 (1955) (stating holding of case). "[P]olice power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 843 (1987) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

78. See Levin, *supra* note 55, at 195 (explaining why antismoking laws are subjected to rational basis review). Preventing smoking in public places is rationally

In the *Gasper v. Louisiana Stadium and Exposition District*, the plaintiffs argued they had a constitutional right to prevent others from smoking in the New Orleans Superdome.<sup>79</sup> The court ruled that in the absence of a law enacted by Louisiana, the City of New Orleans, or Congress, there was no constitutional basis for the court to issue an injunction prohibiting smoking in the Superdome.<sup>80</sup> The court reasoned just as there was no constitutional basis for prohibiting smoking in public, there was also no constitutional basis for protecting it.<sup>81</sup> The argument that there is a right to breathe smoke-free air in public, however, is supported by the Montana Clean Indoor Air Act, which states that one of the purposes of the legislation is “to recognize the right of nonsmokers to breathe smoke-free air . . . .”<sup>82</sup> As the case law in this area of the law grows, the debate over rights surrounding smoking bans will hopefully become clearer.

#### 4. *The New York Ban*

The smoking ban in bars and restaurants in New York City was highly publicized and served as the basis for other smoking bans throughout the country.<sup>83</sup> In response to the New York City Smoke-Free Air Act, Citizens Lobbying Against Smoker Harassment

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related to the end of preventing people from being harmed by the known dangers of ETS. *See id.*

79. *See Gasper v. La. Stadium and Exposition Dist.*, 577 F.2d 897, 898 (5th Cir. 1978) (per curiam) (stating facts of case). The plaintiffs claimed that as non-smokers, they are subjected to harmful tobacco smoke and as a result suffer physical, mental, and emotional harm. *See id.* at 899 (Ainsworth, J., dissenting).

80. *See id.* at 898-99 (affirming district court’s dismissal of plaintiff’s complaint). The court further held the State of Louisiana or the City of New Orleans could have prohibited smoking in stadiums through the exercise of their police power. *See id.* at 898. Similarly, Congress could have also acted pursuant to its power under the Commerce Clause. *See id.* (noting Superdome itself also could prohibit smoking).

81. *See id.* at 899 (providing holding of case). The district court of Kansas held smoking in public places is not constitutionally protected conduct. *See Steffes v. City of Lawrence*, 2005 WL 3723199, at \*1 (Kan. Dist. Ct. Dec. 20, 2005).

82. *See* MONT. CODE ANN. § 50-40-102 (2005) (articulating purpose of Indoor Clean Air Act and recognizing that need for people to breathe smoke-free air takes priority over ability to smoke in public places).

83. *See* Eric M. Weiss, *D.C. Smoking Ban Approved: Mayor Weighs Veto Despite 11-1 Council Vote*, WASH. POST, Jan. 5, 2006, at A1 [hereinafter Weiss, *Smoking Ban Approved*] (noting Washington, D.C.’s smoking ban is modeled after New York City’s); *see also* John J. Goldman, *For the Unhappy Smoker, a Special Dish; Hoping to Lure Those Frustrated by N.Y.C.’s Ban, an Eatery Uses Tobacco as a Flavoring*, L.A. TIMES, Apr. 6, 2003, at 36 (discussing concerns of restaurant proprietors regarding smoking bans).

(C.L.A.S.H.) challenged the validity of the smoking ban in a case that raised multiple constitutional issues.<sup>84</sup>

C.L.A.S.H. argued the constitutionality of the smoking ban should be examined with a heightened level of scrutiny because it violated their First and Fourteenth Amendment rights.<sup>85</sup> C.L.A.S.H. claimed the smoking ban abridged the First Amendment rights of free association, assembly, and speech.<sup>86</sup> C.L.A.S.H. emphasized the importance of smoking in social situations because it claimed that for smokers, “smoking is so inherent in the act of socializing and conversing, in relaxing, and in enjoying the comforts of public life, that to bar the act of smoking in all privately owned places that are open to the public deprives smokers of a necessary venue for conducting their private social lives.”<sup>87</sup> The court disagreed with this argument, noting that smoking has nothing to do with the exercise of First Amendment rights.<sup>88</sup> The court stated further that smoking in bars and restaurants is not protected by the First Amendment because the First Amendment does not protect activities that are harmful to public health, safety, or general welfare.<sup>89</sup>

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84. *See* NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 465 (S.D.N.Y. 2004) (discussing lawsuit challenging New York smoking ban focusing on constitutional effects on smokers, particularly with respect to socializing in bars and restaurants).

85. *See id.* at 472 (recounting C.L.A.S.H.’s claim). “The Court will determine the appropriate standard of scrutiny in light of the particular constitutional provisions invoked and the nature of rights alleged to be affected.” *Id.*

86. *See id.* at 473 (explaining basis of claim). C.L.A.S.H. argued smoking bans interfere with the right of smokers “to associate with other smokers in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” *Id.* at 472-73.

87. *Id.* C.L.A.S.H. acknowledged that the smoking ban does not “technically” interrupt smokers’ ability to associate and assemble; their rights are effectively voided by the burden imposed by the smoking ban. *See id.* (quotations in original).

88. *See id.* at 473-74 (stating holding of court). The court added that C.L.A.S.H.’s focus on bars and restaurants ignores other locations with existing smoking bans where smokers are not allowed to smoke yet still engage in free association and speech. *See id.* at 474.

89. *See* NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461, 474 (S.D.N.Y. 2004) (explaining reasoning of court that if conduct such as smoking could be equated to fundamental freedoms, power of government to regulate socially or physically harmful activities would be too restricted). Responding to C.L.A.S.H.’s argument that smoking should be protected as a fundamental right under the First Amendment, the court stated, “First Amendment jurisprudence unequivocally rejects CLASH’s constitutional enhancement hypothesis.” *See id.* For example, the court cited that gatherings for the purpose of inciting imminent violence or to overthrow the government through unlawful means are not protected under the First Amendment right to freedom of association because they are harmful. *See id.* (citations omitted).

Addressing C.L.A.S.H.'s free speech claim, the court stated that "mere conduct" by itself is not protected by the First Amendment without an element of expressive speech.<sup>90</sup> The court framed the issue as whether smoking in a bar or restaurant is expressive speech protected under the First Amendment and if so, to what extent.<sup>91</sup> C.L.A.S.H. argued smokers identify themselves in part by the fact that they smoke, and the smoking bans deprive smokers from expressing this identifying element.<sup>92</sup> The court rejected this argument, holding conduct is protected when the primary purpose is the expressive component, and the primary purpose of an individual to smoke in a bar or restaurant is not for expressive reasons.<sup>93</sup> Even if an individual smokes in a bar or restaurant for expressive reasons, the court questioned whether "the message would be understood by those who reviewed it . . . ."<sup>94</sup> The court concluded by finding the smoking ban was not an unconstitutional suppression of speech because it was not aimed at suppressing expressive speech but at prohibiting smoking in certain public places where it will harm others.<sup>95</sup>

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90. *See id.* at 476-78 (holding that conduct must be "sufficiently imbued with elements of expression" to warrant protection under First Amendment). The court provided examples of expressive conduct the Supreme Court protects, including: marching in parade (*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 577 (1995)), burning the United States flag (*United States v. Eichman*, 496 U.S. 310 (1990)), and wearing a jacket with an expletive regarding the draft (*Cohen v. California*, 403 U.S. 15 (1971)). *See id.* at 476.

91. *See id.* at 476-77 (discussing that court had to determine "whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989))).

92. *See id.* at 477 (emphasizing argument of C.L.A.S.H. regarding personal expression element of smoking as element of identity). A position paper submitted to the court by C.L.A.S.H. states "smoking is indeed part of the person's life and certainly his social life and crucially, more than that, *a part of his identity.*" *See id.* (emphasis in original). In the position paper, smoking is compared to a form of political speech due to the rebellion against the government and social attitudes toward smoking. *See id.*

93. *See id.* at 478 (acknowledging that while some smokers may smoke in opposition to smoking bans, court held smoking in itself does not constitute expressive act). While there may be a "kernel" of expression in every activity, a "kernel" of expression is not sufficient to warrant First Amendment protection. *See id.* (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)) (quotations added).

94. *See NYC C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 478 (S.D.N.Y. 2004) (quoting *Johnson*, 491 U.S. at 404) (reasoning that because conduct of smoking is not likely understood as a political message of "government defiance" it does not receive First Amendment protection).

95. *See id.* at 479-80 (remarking purpose of smoking ban does not implicate First Amendment concerns because it is content neutral and reasonably related to governmental interest of protecting public from ETS). The court notes further that smoking bans do not prohibit expression through smoking in all localities,

C.L.A.S.H. argued further the smoking ban violated the Equal Protection Clause of the Fourteenth Amendment because it discriminated against smokers as a class.<sup>96</sup> The court rejected the idea that the smoking ban should receive a higher level of scrutiny because smokers are not a suspect class.<sup>97</sup> Although the court recognized that the smoking ban placed a greater burden on smokers than on nonsmokers, it did not find that particular factor by itself constituted a violation of the Equal Protection Clause.<sup>98</sup> While the goal of clean air places a larger burden on some more than others, this has always been the case in terms of compliance with environmental regulations, such as compliance with automobile emission regulations.<sup>99</sup> Because the court could find no violation of First or Fourteenth Amendment rights, the smoking ban did not require even an intermediate level of scrutiny.<sup>100</sup>

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smokers may still do so in their cars, homes, the street, or hotel rooms. *See id.* at 480.

96. *See id.* at 480-81 (describing C.L.A.S.H.'s argument that smoking ban "casts smokers as social lepers by, in effect, classifying smokers as second class citizens'") (citation omitted). C.L.A.S.H. argued that because smokers should receive protection as a class that is discriminated against, the smoking bans should be examined with strict scrutiny or an intermediate level of scrutiny. *See id.* C.L.A.S.H. provides examples of discrimination through hate e-mails received by the group and incidents of violence directed at smokers. *See id.* at 481.

97. *See id.* at 482 (explaining that suspect classifications are applied to groups that have immutable traits, lack of political power, and "history of purposeful unequal treatment." (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-43 (1985)). Smoking is a volitional act and "[t]he Supreme Court has rejected the notion that a classification is suspect when "entry into the class . . . is the product of voluntary action.'" *See id.* (quoting *U.S. v. Coleman*, 166 F.3d 428, 431 (2d Cir. 1999)).

98. *See id.* at 482 (stating greater burden placed on class of persons in application of law not in itself violative of Equal Protection Clause). The Supreme Court previously held that "persons . . . are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State.'" *Id.* (quoting *Slaughter-House Cases*, 83 U.S. 36, 62 (1872)).

99. *See NYC C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 482 (S.D.N.Y. 2004) (observing that if court were to accept C.L.A.S.H.'s argument, Automobile Association of America could argue that emissions laws "discourage driving and unequally burden motorists as a class"). Claims that environmental regulations place extra costs on motorists and thereby discriminate against them as a class would not be successful because, like the law at issue in this case, the regulations do not infringe on a fundamental right or a protected class, and there is a rational basis for the regulations. *See id.* at 482-83.

100. *See id.* at 484 (distinguishing smoking bans from direct restriction of fundamental right).



B. Clearing the Air: Recent Legislative Attempts to Pass Smoking Bans in the United States

Legislatures around the country are passing smoking bans in bars and restaurants.<sup>101</sup> Even Montana, the “Marlboro Country” depicted in cigarette ads, passed a smoking ban for all public places, including bars and restaurants.<sup>102</sup> In addition to reducing health hazards, smoking bans also reduce health care costs incurred by medical conditions caused by ETS.<sup>103</sup> Not only will the public’s health benefit from smoking bans in bars and restaurants, the amount of taxes spent to deal with these medical problems will decline as well.<sup>104</sup>

The recent legislation, however, is being met with opposition from dissatisfied proprietors.<sup>105</sup> Recently, John Steffes, a nightclub owner in Lawrence, Kansas, challenged the constitutionality of the city’s smoking ban because he felt that “[p]rivate enterprise should be allowed to run their business without the government taking it over.”<sup>106</sup> Steffes sought an injunction and challenged the ban on the grounds that it superseded state law and was unconstitutionally vague.<sup>107</sup>

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101. For a further discussion of recent antismoking legislation passed throughout the country, see *infra* notes 102-24 and accompanying text.

102. See AP, “Marlboro Country” Montana Gets Smoking Ban, Apr. 7, 2005, <http://www.foxnews.com/story/0,2933,152803,00.html> [hereinafter *Marlboro Country*] (reporting smoking ban passed in Montana). “Montana, which has served as Marlboro Country in magazine ads depicting rugged cowboys puffing on cigarettes while riding a fence line, is about to outlaw smoking just about everywhere but the great outdoors.” *Id.* The Clean Indoor Air Act states that one of the purposes of the Act is “to recognize that the need to breathe smoke-free air has priority over the desire to smoke.” See MONT. CODE ANN. § 50-40-102 (2005).

103. See Ruben, *supra* note 58 (arguing health care costs of employers, individuals, hospitals, and insurance companies will decrease due to reduced number of health conditions caused by ETS). Dr. Steve Bruner of Lawrence Family Medicine & Obstetrics reports that indoor smoking bans lead to a twenty-seven to forty percent reduction in the incidence of heart attacks a short period of time after a smoking ban is instituted. See Laura McHugh & John Niccum, *Effects of City’s Smoking Ban Still in Dispute*, LAWRENCE J.-WORLD, Jan. 15, 2006, available at [http://www2.ljworld.com/news/2006/jan/15/effects\\_citys\\_smoking\\_ban\\_still\\_dispute/](http://www2.ljworld.com/news/2006/jan/15/effects_citys_smoking_ban_still_dispute/).

104. See Ruben, *supra* note 58 (arguing that smoking bans will reduce amount taxpayers pay into Medicaid due to tobacco related illnesses).

105. For a further discussion of proprietors opposing smoking bans in bars and restaurants, see *infra* notes 146-61.

106. See Chad Lawhorn, *Judge Upholds City Smoking Ban*, LAWRENCE J.-WORLD, Dec. 23, 2005, available at [http://www2.ljworld.com/news/2005/dec/23/judge\\_upholds\\_city\\_smoking\\_ban/?city\\_local](http://www2.ljworld.com/news/2005/dec/23/judge_upholds_city_smoking_ban/?city_local) (discussing view of Lawrence, Kansas nightclub owner opposing smoking ban).

107. See *Steffes v. City of Lawrence*, 2005 WL 3723199, at \*1-2 (D. Kan. Dec. 20, 2005) (setting forth plaintiff’s challenges to city’s smoking regulations). Steffes argued that the law was vague. See Lawhorn, *supra* note 106. In response, the court

A New Jersey smoking ban prohibits smoking in bars and restaurants but not casinos.<sup>108</sup> Casinos provide a great deal of revenue to New Jersey, and lawmakers and smokers' rights groups claimed the law needed the exemption to pass.<sup>109</sup> The exemption is receiving criticism from those in the bar and restaurant business.<sup>110</sup> The New Jersey Restaurant Association (NJRA) believes the ban is discriminatory because of the casino exemption and announced that it would take legal action due to the ban.<sup>111</sup> The NJRA followed up by filing a lawsuit with other hospitality and entertainment groups against the State of New Jersey seeking declaratory and injunctive relief.<sup>112</sup> Casinos may have to join bars and restaurants in the smok-

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held "[t]he City's smoking laws are clear in what conduct is prohibited: smoking is prohibited in most enclosed places and places of employment . . ." *Id.*

108. See AP, *New Jersey Gov. Signs Smoking Ban, Casinos Excepted*, Jan. 15, 2006, <http://www.foxnews.com/story/0,2933,181719,00.html> [hereinafter New Jersey AP] (articulating scope of New Jersey's statute).

109. See *id.* (reporting exemption was supported by \$5 billion per year gambling industry in Atlantic City, which claimed that smoking ban would result in decrease of profits, state tax revenue, and jobs). The casino industry pointed to economic losses in Delaware when smoking was banned at racetracks with slot machines. See *New Jersey Lawmaker Wants Casinos Added to Smoking Ban*, CASINO CITY TIMES, Jan. 19, 2006, <http://www.casinocitytimes.com/news/article.cfm?contentID=155969> [hereinafter CASINO CITY TIMES].

110. See New Jersey AP, *supra* note 108 (conveying concern of bar and restaurant owners close to casinos that casinos will have unfair advantage due to smoking exemption). One restaurant owner feels that the smoking ban with the casino exemption is "'going to kill me, I know it is. Do you know how many conventioners eat here and come out to the bar to smoke afterward? You can kiss them goodbye, now. They won't even leave the casino.'" *Id.* (quoting Alan Angeloni). The executive director for the New Jersey Group Against Smoking Pollution supports the smoking ban with the casino exemption because "[w]e had a choice of protecting 98 percent of the people, or zero, and it was an easy choice." *Id.* (quoting Regina Carlson).

111. See *id.* (explaining objection of restaurant owners to New Jersey smoking ban). The casino exception in the smoking ban is also drawing criticism from the National Coalition Against Legalized Gambling. See *id.* Executive director Tom Grey disapproves of economic interests superseding health issues. See *id.* Casino workers organized a rally to protest the exception of the smoking ban for casinos. See Elaine Rose, *NJ Casino Workers Rally for Inclusion in NJ Smoking Ban*, ASH, Aug. 26, 2006, <http://no-smoking.org/aug06/08-28-06-4.html> (describing rally featuring speakers addressing medical consequences due to ETS, health organizations, and petitions for smoke-free casinos). One speaker at the rally is a casino employee who got lung cancer despite never having smoked himself. See *id.*

112. See Complaint, *New Jersey Hospitality Coalition for Fairness v. State*, No. 06-1025 (D.N.J. filed Mar. 7, 2006) (stating basis of claim that New Jersey Smoke Free Air Act violates right to equal protection and right to due process). The plaintiffs claim that their right to equal protection is violated because casinos are given preferential treatment under the Act due to the exception. See *id.* The due process claim argues the Act is unconstitutionally vague. See *id.* The court denied a Temporary Restraining Order to postpone the enforcement of the smoking ban. See New Jersey Restaurant Association, [http://www.njra.org/singlenews.asp?item\\_ID=1580&comm=0](http://www.njra.org/singlenews.asp?item_ID=1580&comm=0) (last visited Dec. 2, 2006).

ing ban, however, because legislation that would include casinos in the Smoke-Free Air Act has been introduced in both the New Jersey House and Senate.<sup>113</sup>

A recent attempt at a smoking ban in bars and restaurants occurred in the Maryland General Assembly.<sup>114</sup> Three counties in Maryland already have smoking bans in force in bars and restaurants, and members of the General Assembly attempted to pass a statewide ban.<sup>115</sup> Johns Hopkins's health economist, Dr. Hugh Waters, presented a report at a hearing that lent major support to passing a statewide smoking ban in bars and restaurants.<sup>116</sup> In the report, Waters estimated that for the 2005 calendar year, the total economic costs to individuals, employers, and society caused by exposure to ETS in Maryland amounted to \$597.6 million.<sup>117</sup> Commenting on the total cost attributable to ETS in Maryland, Waters states:

“[t]hese are conservative estimates of the true cost of secondhand smoke exposure in Maryland. It does not reflect the total impact of second smoke, because it does not include costs for outpatient treatment and prescription

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113. See CASINO CITY TIMES, *supra* note 109 (describing attempts to include casinos in New Jersey Smoke-Free Air Act). Assemblyman Jim Whelan opposes the casino exemption because he feels that the 40,000 casino employees should receive the same protection from ETS as the rest of the state. See *id.* State Senator John Adler says that banning smoking from casinos is a “logical step” in completing the antismoking legislation. See *id.* Governor Richard J. Codey signed the bill as a political compromise but expects that the issue will be revisited in the legislature. See *id.*

114. See JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, PUBLIC HEALTH NEWS CENTER, *Secondhand Smoke Cost Marylanders \$597 Million in Lost Lives and Medical Costs in 2005*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, Feb. 14, 2006, [http://www.jhsph.edu/publichealthnews/articles/2006/waters\\_secondhandsmoke.html](http://www.jhsph.edu/publichealthnews/articles/2006/waters_secondhandsmoke.html) [hereinafter Public Health News Center] (discussing hearings before Maryland House of Delegates regarding statewide smoking ban in bars and restaurants).

115. See Tom Stuckey, *Hopkins Report Intensifies Smoking Ban Debate: Cost of Secondhand Exposure Put at \$600 Million a Year in Maryland*, Feb. 14, 2006, [http://www.smokefreebc.org/content\\_misc.php?c=91](http://www.smokefreebc.org/content_misc.php?c=91) (reporting that Prince George's, Montgomery, and Talbot counties have smoking bans in place and state legislators are looking to expand ban in order to protect health of entire state). Major sponsor, Delegate Barbara Frush, said most Marylanders support smoke-free bars and restaurants and felt that the bill had a high likelihood of passing. See *id.*

116. See *id.* (indicating Waters's report was influential at legislative hearing). Sponsors of the bill cited the report as a reason to pass the smoking ban. See *id.*

117. See WATERS, *supra* note 6, at 1 (detailing total economic cost caused by ETS exposure in Maryland). \$73.8 million is attributable to costs related to children and \$523.8 million to adults. See *id.* These estimates do not include other health problems that may be causally related to ETS and additional medical care costs, such as outpatient and pharmacy costs, as well as the opportunity cost of time lost while ill or in the hospital. See *id.* at 17.

drugs. It also does not include any indirect costs associated with losing time from work or other activities due to illness and medical care."<sup>118</sup>

When the time came to vote on the smoking ban in bars and restaurants, however, tobacco won out over health concerns and the proposed measure failed.<sup>119</sup> One state senator felt that even though the smoking ban would be beneficial to the majority of the population, it would be too deleterious to small businesses.<sup>120</sup>

After Philadelphia voted down a smoking ban in 2005, the Philadelphia City Council introduced a new bill that would prohibit smoking in all workplaces.<sup>121</sup> Recognizing that seventy-five percent of Pennsylvanians do not smoke, the Clean Indoor Air Worker Law sought to protect nonsmoking Pennsylvanians from the harms of secondhand smoke, especially employees in bars and restaurants.<sup>122</sup> Political bickering prevented the law's passage in 2005, but the new bill's sponsors were optimistic about the 2006 legislation.<sup>123</sup> On

118. PUBLIC HEALTH NEWS CENTER, *supra* note 114 (quoting Hugh Waters).

119. *See* Helderman and Marimow, *supra* note 9 (reporting proposed smoking ban in bars and restaurants in Maryland was defeated). Representative Sue Kullen stated, "[f]or me, it's the tobacco legacy I'm wrestling with. It's just not good to demonize the tobacco leaf . . ." *Id.* Rep. Kullen added, however, that "[tobacco] does have health implications." *Id.* Kullen was absent from the vote, but indicated that "[she] was leaning in favor of the bill . . . but was still concerned about the effect on business." *Id.*

120. *See* George Altman, *Md. Lawmakers to Propose Smoking Ban for Bars Again*, Jan. 26, 2006, <http://www.wtopnews.com/index.php?nid=25&sid=680431> (explaining opposition to Maryland smoking ban because of possible business loss). Senator Robert Hooper expressed concern over the proposed smoking ban stating, "I wouldn't want to face anybody that I just helped put out of business." *Id.* The Restaurant Association of Maryland was a strong opponent to the ban and has been able to beat it back for the past four years. *See* Jill Rosen, *Secondhand Smoke Costs Are Estimated*, BALT. SUN, Feb. 2, 2006, at 5B. Virginia state delegate David B. Albo was in favor of smoke-free restaurants himself but stated that "in America, you don't pass a law to tell a private business owner who is paying rent or mortgage payments what he can and can't do in his own place." Helderman and Marimow, *supra* note 9.

121. *See* Michael Currie Schaffer, *New Antismoking Legislation Introduced in City Council*, PHILA. INQUIRER, Feb. 3, 2006, at B1 (announcing introduction of bill to prohibit smoking in bars and restaurants in Philadelphia after year of political deadlock). A previous smoking ban bill failed even with multiple amendments. *See id.*

122. *See* Phila., Pa., Ordinance 050063-A (Feb. 3, 2005) ("This Ordinance is enacted to further protect the public's health and welfare from the dangerous, unnecessary and involuntary health risks associated with exposure to secondhand smoke. . . ."). The proposed ordinance also recognized that while seventy-five percent of office workers are protected by antismoking legislation, less than thirteen percent of bartenders and twenty-eight percent of wait staff are protected by antismoking legislation. *See id.*

123. *See* Schaffer, *supra* note 121 (discussing political disagreement that prevented passage of 2005 smoking ban). The bill's 2005 sponsor, Councilman

September 14, 2006, proponents of the smoking ban were rewarded for their efforts when Mayor Street signed the smoking ban into law after a six year campaign.<sup>124</sup>

### C. Criticisms of Smoking Bans

A major argument in opposition of smoking bans is that non-smokers are free to patronize bars and restaurants that do not allow smoking, thereby making it their choice to enter a bar or restaurant that does allow smoking.<sup>125</sup> By the same logic, some argue that nonsmokers could choose to work in establishments that do not allow smoking, instead of banning smoking in all locales for the benefit of employees.<sup>126</sup> If there was such a demand for nonsmoking environments, smoke-free workplaces could be accomplished through market forces without government intervention.<sup>127</sup> In a protest demonstration using market forces, the New York grassroots

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Michael A. Nutter, accused Mayor Street of effectively defeating the legislation by not lobbying for it, while Mayor John Street contended that Nutter secretly negotiated changes that hindered the purpose of the legislation. *See id.* Sponsor of the new bill, Councilwoman Marian Tasco, commented on the situation, “[t]ime has passed since we tried this before, and hopefully calmer minds will prevail and we can get this passed . . . .” *Id.*

124. *See* Michael Currie Schaffer, *No Smoking: Street OKs, Then Rips Ban*, PHILA. INQUIRER, Sept. 15, 2006, at A1 (describing passage of smoking ban surrounded by political tension between Mayor Street and former City Councilman Michael Nutter). Although the bill was passed by the City Council in June, Mayor Street waited until the last possible day to sign the legislation and stated the day before the signing that he had not yet decided whether he would approve the legislation. *See id.*

125. *See* Williams, *supra* note 16, at 312 (arguing nonsmokers assume risk of entering establishments in which smoking is permitted and that remedy available to nonsmokers is to not enter these establishments in first place). D.C. Councilwoman Carol Schwartz, the lone dissenter in the recent vote to enact a smoking ban there, states “[d]on’t make me out that I like smoking, because I don’t . . . . Bar and restaurant workers have a choice of where to work, and patrons have a choice of where to patronize.” Weiss, *Smoking Ban Approved*, *supra* note 84.

126. *See* Horvick, *supra* note 5, at 926 (explaining argument that employees who wish to work in nonsmoking environments should not seek work in establishments that allow smoking). This argument assumes that there are nonsmoking workplaces available where these employees could find the same kind of work. *See id.*

127. *See id.* at 934, 939 (suggesting that antismoking legislation is not appropriate in cities where demand for smoke-free bars exists because nonsmoking customers will cease to patronize establishments, causing bar owners to forbid smoking in their bars in order to attract business). Horvick criticizes smoking bans because they eliminate choice, the element at the heart of a free market economy. *See id.* For instance, there may be a market for smoke-free restaurants where patrons would be willing to pay more not to be exposed to ETS. *See id.* at 939. Additionally, there may be workers who would be willing to work amidst ETS for a pay raise. *See id.* Maryland Delegate Eric M. Bromwell states, “[i]f this is something everybody wanted, everybody would go smoke-free’ without a law being passed.” *See* Rosen, *supra* note 120.

organization C.L.A.S.H. sells “I’m Not Calling Cards” to make bar and restaurant owners aware of lost business through the boycott of an unsatisfied smoker.<sup>128</sup> Smoking ban supporters counter the market forces argument by acknowledging the government’s responsibility to respond to the desire of a citizenry that does not want to be exposed to ETS while patronizing bars and restaurants.<sup>129</sup>

Some view the justification of protecting nonsmokers from the effects of ETS in public places as paternalistic control of smokers.<sup>130</sup> Opponents of smoking bans view antismoking legislation along the same lines as motorcycle helmet and seatbelt laws: acts promulgated by the “government-as-nanny.”<sup>131</sup> Similarly, antismoking legislation may be argued to have a paternalistic effect on nonsmokers, implying that they need protection from their own choice to go to a public place where smoking may occur.<sup>132</sup> The same arguments are made regarding the bar and restaurant workers that the legislation aims to protect: these employees can choose for themselves where they want to work, and antismoking legislation imposes protection

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128. See NYC C.L.A.S.H., <http://www.nycclash.com> (last visited Dec. 2, 2006) (quoting card: “I’M SORRY, I’D LOVE TO STAY FOR MORE DRINKS, BUT NOT IF I CAN’T SMOKE. THE LAW HAS TAKEN AWAY FREE CHOICE — YOURS AND MINE. THIS IS HOW I CHOOSE TO PROTEST IT.”).

129. See Stinnett, *supra* note 4, at 259 (stating argument that government should respond to demands of citizens for smoke-free environments). The law must adapt to social concerns of the day. See *id.*

130. See Horvick, *supra* note 5, at 925 (criticizing justification of smoking bans to “rescue nonsmokers from the “social costs”” of smokers as paternalistic) (quoting ROBERT D. TOLLISON & RICHARD E. WAGNER, *SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY* 98 (1988)). A citizen testified before the D.C. Council’s Public Works and the Environment Committee: “I mean, really, you’re treating us like children,” before the smoking ban was enacted in D.C. restaurants and bars. Eric M. Weiss, *Smoking Ban Gaining in D.C.: Bills Would Cover Restaurants, Bars*, WASH. POST, June 15, 2006, at A1 [hereinafter *Smoking Ban Gaining in D.C.*] (quoting writer Christopher Hitchens).

131. See Weiss, *Smoking Ban Gaining in D.C.*, *supra* note 130 (presenting antismoking legislation opponents’ point of view). Lawmakers in Virginia voted down a ban in bars and restaurants in the state, “which has a long history of rejecting measures its members say amount to government nannyism.” Helderman and Marimow, *supra* note 9.

132. See Horvick, *supra* note 5, at 930 (arguing that if people were really protected from their choices then smoking would be banned completely and not just in certain locations). “In a free society, people choose those with whom [and where] they associate . . . . If a person continues to associate [or work] voluntarily with [or around] . . . smoker[s] . . . , the benefits that person derives from [his or her choice] must be assumed to exceed its costs.” *Id.* (quoting ROBERT D. TOLLISON & RICHARD E. WAGNER, *SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY* 80 (1988)) (punctuation in original).

on them that they may not necessarily want.<sup>133</sup> Some purport the argument that smoking bans in bars and restaurants will protect workers is an excuse to get the smoking bans passed.<sup>134</sup> Montana State Senator Joe Balyeat feels that the smoking ban in his state goes too far by regulating personal choices that he may personally view as “stupid,” but are nevertheless beyond the scope of legislation.<sup>135</sup>

The tobacco industry remains the group with the most to lose due to smoking bans, and it has worked against antismoking legislation from the start.<sup>136</sup> A confidential memorandum circulated within the tobacco giant Brown and Williamson noted passive smoking as a concern facing the industry, maintaining that “[t]he antismoking lobby is using the issue of the alleged health effect of smoking on the non-smoker to generate media publicity.”<sup>137</sup> The memorandum further stated that “[t]he real purpose [of the antismoking lobby] is symbolic to make smoking socially unacceptable and by limiting the public areas where it is permitted.”<sup>138</sup> Brown

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133. *See id.* at 926 (discussing paternalistic nature of smoking prohibitions in bars and restaurants and how such laws supersede freedom of choice in whether to work in these establishments). *But see* Waters, *supra* note 6, at 10 (demonstrating that secondhand smoke in workplace falls more heavily on those without college degrees). The group of adults in Maryland who are most exposed to ETS in the workplace are those without a high school education (35.6%) compared to those with a college education (15.5%). *See id.* at 9.

134. *See* Altman, *supra* note 120 (opining that employee health is not real motivation for smoking bans in bars and restaurants). A spokesperson for the Restaurant Association of Maryland stated, “[t]he employees are being used as political pawns by folks on the other side who want to use government to interfere with customer choice, employee decisions about where they want to work and the free market system.” *Id.* (quoting Melvin Thompson).

135. *See* *Marlboro Country*, *supra* note 102 (“Smoking is just plain stupid . . . . But if this Legislature decided to outlaw stupidity, I think two-thirds of us would be behind bars. I just don’t think we can legislate against stupidity.”). While lawmakers in Montana acknowledged the health dangers caused by ETS, they argued whether the legislation was too “heavy-handed” and whether it would bode well with a state that prides its individualism. *See id.*

136. *See* GLANTZ, *supra* note 3, at 416 (recounting that tobacco industry lobbied against federal government’s authority to pass antismoking legislation in 1960s and 1970s). Brown and Williamson’s vice president sent a “Privileged” memorandum in 1978 to senior executives in the company addressing legal actions the company should take to beat back antismoking legislation. *See id.* at 259-60. These actions included litigating laws preventing smoking in bars and restaurants and combating the Federal Trade Commission’s plans to restrict cigarette advertising. *See id.* at 260.

137. *Id.* at 248 (arguing that health concerns regarding passive smoke were unfounded and that “[t]here is no medical evidence concerning the health effects of passive smoking.”). (quoting Pepples memorandum).

138. *Id.* Brown and Williamson identified ETS as an issue at the time the first studies were conducted connecting ETS to respiratory problems in children and ten years before the first reports were published. *See id.*

and Williamson responded to the antismoking movement by supporting scientific research to counter findings that smoking causes harmful medical conditions and through information campaigns against the antismoking lobby, among other measures.<sup>139</sup>

Some propose ventilation systems as an alternative to smoking bans in public places, so that people will be able to smoke without disturbing others.<sup>140</sup> These systems work by ventilating the non-smoking areas while drawing out air from the smoking sections.<sup>141</sup> In 1999, Philip Morris and the National Licensed Beverage Association, along with other companies, began a campaign to educate the Association's members about the benefits of ventilation systems.<sup>142</sup> According to antismoking groups, ventilation systems are an unequal and poor substitute for smoking prohibitions because they do not provide the same amount of protection as an outright ban.<sup>143</sup> For instance, ventilation systems would not protect workers who work in the smoking sections of bars and restaurants.<sup>144</sup> Multiple studies contributed to the conclusion that "no feasible ventilation

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139. *See id.* at 254 (listing efforts by tobacco industry to counter antismoking movement). Other measures taken by Brown and Williamson to quiet the antismoking movement include developing cigarettes that filter more tar and voluntarily complying with some of the demands of the antismoking movement. *See id.*

140. *See* Horvick, *supra* note 5, at 928 (discussing alternate option of ventilation systems as opposed to outright smoking bans).

141. *See* Lisa Demer, *Clear the Air to Aid Smokers, Pro-Tobacco Group Suggests; Hospitality Convention Becomes Center of Debate*, ANCHORAGE DAILY NEWS, Mar. 2, 2000, at A1 (describing that ventilation systems work by "ventilat[ing] the no-smoking area with clean, outside air and suck out smoky air in the smoking area through an exhaust system. The smoky air can't get into the no-smoking area because of the air pressure.").

142. *See id.* (describing effort of Phillip Morris and restaurants to institute ventilation systems instead of smoking bans). An analyst for Chelsea Group Limited, a group of business owners, urges bar and restaurant owners to "[m]ake [smoking bans] work for you before the government comes." *Id.* (quoting Ky Ajayi).

143. *See id.* (discussing that there is no proof ventilation systems ameliorate effects of ETS). The promoters of such systems have not made claims that the ventilation systems clear the air of carcinogens in ETS. *See id.* Founder of the Foundation for a Smokefree America, Patrick Reynolds stated, "[t]here is no safe level of secondhand smoke . . . . It causes lung cancer and heart disease [in] involuntary smokers." *See* Raul Garces, *Public Smoking Ban Takes Effect in Uruguay*, Mar. 2, 2006, <http://washingtonpost.com/wp-dyn/content/article/2006/03/02>.

144. *See* Horvick, *supra* note 5, at 929 (emphasizing potential harm to workers even with ventilation systems). This argument assumes that these workers do not have a choice not to work in these sections. *See id.* Advocates of the ventilation systems argue that the air would be cleaner with the ventilation systems than it would be without them and that the workers could decide whether or not to work in the smoking sections. *See* Demer, *supra* note 142.



system can reduce secondhand tobacco smoke exposure to a safe zero level.”<sup>145</sup>

#### D. Impact on Business for Bars and Restaurants

Bar and restaurant owners are often opposed to smoking bans because of the concern that smoking customers will take their business to locations without the bans.<sup>146</sup> When the Washington, D.C. legislature was considering smoking bans in bars and restaurants, local establishments raised the concern that they would lose business to their neighbors in Maryland and Virginia.<sup>147</sup> To prevent restaurants from losing business to other smoke-free cities, the California Restaurant Association supported a statewide smoking ban because it would establish uniform state standards so that restaurants would not have to worry about variation.<sup>148</sup> Instead of driving away potential customers, San Diego Councilman Bob Filner asserted that smoking bans in the city could actually serve “‘as a competitive advantage by advertising San Diego as a smoke-free city.’”<sup>149</sup>

In the wake of the ban in Lawrence, Kansas, however bars, restaurants, and music venues experienced a loss of business.<sup>150</sup> In

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145. See Stinnett, *supra* note 4, at 255 (discussing ineffectiveness of ventilation systems in negating harm caused by ETS). The Occupational Safety and Health Administration has determined that ventilation systems are not sufficient to protect workers from the harmful effects of ETS. See Phila., Pa. Ordinance 050063-A § 1(g) (Feb. 3, 2005).

146. See Ken Ellingwood, *Cities Moving Cautiously on Smoking Bans*, L.A. TIMES, July 8, 1993, at J1 (reporting how restaurants in West Hollywood worried smoking ban in restaurants would “shoo” smoking diners to neighboring locales without smoking bans). Philadelphia restaurant owners are worried that the passage of the smoking ban there will drive smoking Philadelphians to other counties. See Julie Stoiber & Dafney Tales, *At Bars and Restaurants, Opinions Fill the Air*, PHILA. INQUIRER, Sept. 15, 2006, at A12.

147. See *D.C. Smoking Ban Approved*, *supra* note 83 (discussing concern that D.C., heavily dependent on tourist income, will lose business to nearby cities without smoking bans).

148. See H.G. Reza, *Broad Ban in Smoking Considered*, L.A. TIMES, July 16, 1992, at B1 (conveying concern of losing business to other areas in state if city-specific smoking bans were enacted). Similarly, when the Georgia Smokefree Air Act of 2004 was debated, Senator Don Balfour argued that the statewide smoking ban would improve business overall because all the restaurants would be under the same regulations without variations from county to county. See Ouzts, *supra* note 33, at 70. One restaurant owner in Philadelphia said that “‘if [the smoking ban] was statewide [he] would be 100 percent for it,’” but objects to the city-specific ban. See Stoiber & Tales, *supra* note 146 (quoting Robert Bitros).

149. See Reza, *supra* note 148 (describing competitive advantages of smoke-free businesses).

150. See McHugh & Niccum, *supra* note 103 (discussing negative effects on business caused by smoking bans in “‘all enclosed public places’”). As a consequence of the smoking bans according to one bar owner, “[d]owntown is taking a

response to the smoking bans, many venues have created outdoor seating areas, where smoking is allowed under the ban.<sup>151</sup> Local nightclub owners are also concerned that musicians are bypassing Lawrence for Kansas City, a smoker-friendly city.<sup>152</sup> To help businesses deal with a major loss of patrons, smoking bans, such as New York's, often allow establishments to apply for a waiver if they can show that "compliance with a specific provision of this article would cause undue financial hardship."<sup>153</sup> A waiver does not give the establishment a complete pass from complying with the law, however, the establishment must still work to minimize ETS's effects.<sup>154</sup>

The American Beverage Institute reported in 1998 that over fifty-nine percent of the bars and nightclubs surveyed lost business after the smoking ban in California came into effect.<sup>155</sup> Despite an initial decrease, however, a general upswing occurred after a period of time and statewide tourism increased as well.<sup>156</sup> Instead of driv-

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major hit . . . . There are a handful of places right now that are contemplating, 'Is it even worth being in business?'" *Id.* (quoting Nick Carroll).

151. *See id.* (discussing adaptations of venues after smoking bans were enacted). One bar owner saw his inside revenue reduce by sixty percent after the ban while the outside revenue rose by the same amount. *See id.* Other bar owners without decks originally are unhappy with the new expenses that the smoking bans have caused in order to successfully compete, such as building patios and providing outdoor heaters. *See id.*

152. *See id.* (stating concern of nightclub owner that smoking ban is deterring potential acts for his club). Another nightclub owner, however, feels that while bands initially avoided Lawrence after the ban, there will not be a long term negative impact. *See id.*

153. *See* N.Y. PUB. HEALTH LAW § 1399-u(1)(a) (McKinney 2006) (detailing waiver provision). Under the Philadelphia law, private clubs and certain drinking establishments may qualify for a waiver from the law. *See* PHILA. CODE §10-602(3)(b). The waivers for the drinking establishments expire on January 7, 2008. *See id.* §(3)(b)(.6)(viii.).

154. *See* N.Y. PUB. HEALTH LAW § 1399-u(2) ("Every waiver granted shall be subject to such conditions or restrictions as may be necessary to minimize the adverse effects of the waiver upon persons subject to an involuntary exposure to second-hand smoke and to ensure that the waiver is consistent with the general purpose of this article.").

155. *See* Nagami, *supra* note 1, at 166 (discussing effect of smoking ban on business). Bars not connected to restaurants experienced the greatest loss in business with over an eighty percent decrease. *See id.* Other problems reported were an increase of complaints, loss of regular customers, and a decrease in tips. *See id.* A study conducted in 1999 by U.C. San Francisco medical professor Stanton A. Glantz, however, found that after the smoking ban was enacted, tourism increased. *See* Eric Bailey, *Smoking Ban's Effect on Tourism Studied*, L.A. TIMES, May 26, 1999, at A3. The study concluded that "these ordinances may even be beneficial for business." *See id.* The National Smokers Alliance criticized the study as "'an advocacy piece masquerading as research.'" *Id.* (quoting president Thomas Humber).

156. *See* Bailey, *supra* note 155 (stating that although smoking bans caused initial losses, they resulted in long run gains). Skip Regan, Vice President of the Hotel-Motel Association, expressed concern that smoking bans would lead to a

ing off customers, smoking bans attracted new customers who favored a smoke-free environment, such as pregnant women, those with asthma, and families with children.<sup>157</sup>

Bars and restaurants in New York and Massachusetts have not suffered great losses in the wake of antismoking laws, suggesting that smoking bans are not fatal to business.<sup>158</sup> In fact, the New York City smoking ban has increased restaurant patronage, indicating that smoke-free environments are able to attract customers in certain markets rather than driving them away.<sup>159</sup>

As more states pass antismoking legislation without suffering the economic losses that were initially predicted, the economic hardship argument will weaken.<sup>160</sup> Due to the costs associated with health care and lost life, there is an economic justification to ban smoking in bars and restaurants.<sup>161</sup>

#### IV. INTERNATIONAL BANS

Smoking bans in bars and restaurants due to ETS concerns are not limited to the United States; smoking bans in public places are also being passed around the world.<sup>162</sup> Turkey, a country with one

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decrease of foreign tourists because “an extraordinarily high percentage of Japanese and Europeans smoke.” Reza, *supra* note 148.

157. See Editorial, *Tobacco, Dethroned*, WASH. POST, Feb. 14, 2006, at A14 (discussing appeal of smoke-free environments to certain groups of customers).

158. See *D.C. Smoking Ban Approved*, *supra* note 83 (reporting that after 2003 ban in New York, business at bars and restaurants did well and there was little or no change in industry after 2004 ban in Massachusetts). Despite initial fears of lost business to bars and restaurants, in many cases, employment rates and tax revenues have increased. See *Tobacco, Dethroned*, *supra* note 158. After a smoking ban was passed in Montgomery County, Maryland in 2003, a study conducted by the University of Maryland and Andrew Hyland of the Roswell Park Center Institute found that the county tax revenue was not affected by the ban. See Ruben, *supra* note 58. Compared to other counties in the state without smoking bans at the time, Montgomery County’s employment in restaurants rate grew at a faster rate. See *id.*

159. See Ruben, *supra* note 58 (citing 2004 Zagat Survey). By a margin of nearly six to one, 30,000 New York City restaurant patrons go to restaurants more often now due to the smoking ban. See *id.* The number of liquor licenses and business receipts for restaurants has increased since the ban was passed in 2003. See *id.* After the ban was passed in Lawrence, Kansas, Mayor Boog Highberger stated that although the smoking ban is not popular with some in the city, the overall population favors the ban. See McHugh & Niccum, *supra* note 103.

160. See CASINO CITY TIMES, *supra* note 109 (“As other states ban smoking, the economic argument will not hold water anymore.” (quoting acting New Jersey Governor Richard J. Codey)).

161. See Public News Center, *supra* note 114 (“We now know enough about the effects of secondhand smoke to show that there is a strong economic rationale for this type of legislation.”).

162. For a further discussion of smoking bans in bars and restaurants internationally, see *infra* notes 163-80 and accompanying text.

of the highest smoking rates in the world, passed a ban that prohibits smoking in most public places.<sup>163</sup> During the Ottoman Empire, coffeehouse patrons would enjoy smoking tobacco through water pipes as a part of daily life.<sup>164</sup> The current law is a great departure from past traditions and is so strict that even in a private vehicle, smoking is not permitted if a nonsmoker is present.<sup>165</sup> In addition to protecting its citizens from the effects of ETS, the motivation to ban smoking in public places also stems from the general efforts Turkey is taking to westernize in its efforts to join the European Union.<sup>166</sup> As one Turkish citizen comments, “[y]ou have to respect the rights of the non-smokers. . . . That’s the European and American mentality.”<sup>167</sup>

The smoking ban in Italy, however, received a considerably cooler welcome.<sup>168</sup> In response to the ban, the Italian Defense Minister stated, “I’ve been smoking since age 18. It’s my sacred

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163. See *Smoking Ban Passed by Commission*, TURKISH DAILY NEWS, Jan. 28, 2006, <http://www.turkishdailynews.com.tr/article.php?newsid=34314> [hereinafter Turkish Daily News] (reporting passage of smoking prohibition by Turkish Parliament’s Health Commission). Other provisions of the ban prohibit television shows from depicting smoking and requires television stations to air ninety minutes of educational broadcasting regarding the harmful effects of smoking. See *id.*; see also Yigal Schliefer, *Turkish Leaders Push for Smoking Ban*, THE CHRISTIAN SCI. MONITOR, Jan. 9, 2006, at 7 (stating prevalence of smoking in Turkey). In Turkey, sixty percent of men smoke, twenty percent of women smoke, and almost twelve percent of schoolchildren smoke. See *id.*

164. See Schliefer, *supra* note 163 (noting tradition of smoking in Turkey in coffeehouses). A Turkish restaurant owner states, “Turkish people smoke just as they sleep and eat bread. It is part of life.” *Id.* (quoting Yildirim Arslan).

165. See Turkish Daily News, *supra* note 163 (describing provisions of smoking prohibition).

166. See Schliefer, *supra* note 163, at 7 (emphasizing Turkey’s desire to join European Union and general economic and political actions taken in order to do so). Cevdet Erdol, a cardiologist who is the chairman of the Turkish Parliament’s Health Committee states “[i]t’s important for Turkey to have health standards on the level with Europe and the United States.” *Id.*

167. *Id.* (quoting Murat Koksall). Smoking bans are not limited to the United States and Europe, however. See Garces, *supra* note 143. For instance, a smoking ban for many public indoor areas went into effect in Uruguay on March 1, 2006. See *id.* Uruguay’s President, Tabare Vazquez, an oncologist, pushed for the legislation. See *id.* In parts of Mexico, restaurants must provide non-smoking sections, and Cuba has limited smoking in most public places, including the smoking of cigars. See *id.*

168. See *Italians Fume over Cigarette Curb*, BBC NEWS, Jan. 10, 2005, <http://news.bbc.co.uk/2/hi/europe/4159587.stm> [hereinafter *Italians Fume*] (discussing resistance of smokers and bar and restaurant owners toward ban). The first fine was issued in Naples, Italy a few minutes after the ban came into effect. See *id.* Businesses face a fine if they do not prevent patrons from smoking, and some businesses announced that they would not report patrons who smoked in their establishments. See *id.* Fines are doubled if one smokes in the presence of children or pregnant women. See *id.* Fines are also increased for repeat offenses. See *id.*

right.’”<sup>169</sup> The law allows smoking in rooms sealed off with ventilation systems, but few establishments are building rooms especially for smoking due to the cost of establishing such systems.<sup>170</sup> The ban, one of Europe’s strictest, caused cigarette sales to decline within two weeks of its passage.<sup>171</sup>

Montenegro, the European country with the third highest smoking rate, recently passed a law banning smoking in most public places as well.<sup>172</sup> Second only to Greece, Spain is Europe’s greatest per capita consumer of tobacco, and it passed a smoking ban effective January 1, 2006 that prohibits smoking in most public places.<sup>173</sup> Spain’s ban is less strict than others in Europe, in that it gives bars and restaurants the choice to designate less than one hundred square feet for smokers or nonsmokers, while larger establishments must designate nonsmoking sections.<sup>174</sup> Economic concerns relating to smoking bans are not unique to bar owners in the United States; potential loss of business is also an incentive for owners not to comply in other countries.<sup>175</sup>

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169. *Id.* (quoting Antonio Martino) (indicating attitude toward ban). Rome’s newspaper, *La Repubblica*, described the atmosphere in the wake of the ban as “‘a climate of pedantic rows, battles of principle, farewell parties and legal disputes, and amid continuing protests and confusion.’” *Id.*

170. *See id.* (discussing reluctance of bar and restaurant owners to install automatic doors and ventilation systems).

171. *See Ban Stubs out Italy Tobacco Sales*, BBC News, Jan. 21, 2005, <http://news.bbc.co.uk/2/hi/business/4195249.stm> (reporting twenty-three percent drop in cigarette sales since passage of ban). At the time of the ban, smoking was the leading cause of preventable, premature death in Italy. *See Italians Fume*, *supra* note 168. Health Minister Girolamo Sirchia, a doctor, stated: “[m]ost of the population is tired of being poisoned by smoking in the air where they work or where they play . . . . [M]ost Italians, three quarters of them, are with us.” *Id.*

172. *See* Matt Prodger, *Montenegro Bans Smoking in Public*, BBC News, Aug. 2, 2004, <http://news.bbc.co.uk/2/hi/europe/3527234.stm> (discussing forty percent smoking rate of Montenegro as among highest in Europe). The two countries that had a higher smoking rate at the time were Greece and Turkey. *See id.*

173. *See* Reuters, *Hot Debate over Spain Smoking Ban*, CNN, Jan. 1, 2006, <http://edition.cnn.com/2006/WORLD.europe/01/01/spain.smoking.ban.reut/> (announcing passage of smoking ban). The Spanish government aims to reduce smoking by five percent through the law. *See id.* Pharmacies stocked up on nicotine patches and gum in anticipation. *See id.*

174. *See id.* (detailing ban’s provisions). While over half of Spaniards consider smoking an unrestricted right, seventy-seven percent support the legislation. *See id.*

175. *See id.* (explaining bar owners’ reluctance to comply with smoking ban due to economic concerns). Bar manager Antonio Pallare does not plan to go smoke free for fear of losing business because most of the bar’s patrons are smokers. *See id.*

Workers' health in bars is a concern both in the United States and abroad.<sup>176</sup> In Bermuda, where tobacco use is the number one cause of preventable illness and premature death, the purpose of the smoking ban is to protect employees and the public from ETS.<sup>177</sup> The British Parliament passed a smoking ban in all bars, pubs, and restaurants on February 14, 2006, which the British Heart Foundation hailed as "the best possible Valentine's gift from [Members of Parliament] to bar workers."<sup>178</sup> Due to the ban, the British government predicts that about 600,000 smokers will give up smoking altogether, but this is hotly contested by restaurant associations' and pro-smokers' groups.<sup>179</sup> The debate over smoking bans will continue as more countries around the world, such as France, consider implementing smoking bans.<sup>180</sup>

## V. CONCLUSION

The recent passage of smoking bans, both domestically and abroad, suggests that such laws will become the norm in bars and restaurants.<sup>181</sup> The recent smoking ban in Washington, D.C. is viewed as a symbolic precedent because the nation's capital has

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176. See e.g., *Smoking Ban in All Pubs and Clubs*, BBC NEWS, Feb. 14, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4709258.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4709258.stm) [hereinafter *Pubs and Clubs*] (discussing smoking ban in England). Liberal Democrat health spokesman Steve Webb states, "[t]he key issue has always been the health and safety of people who work in public places." *Id.*

177. See Matthew Taylor, *No-Last Gasp Reprieve for Smokers*, THE ROYAL GAZETTE, Sept. 29, 2006, <http://www.theroyalgazette.com/apps/pbcs.dll/article?AID=/20060929/NEWS/109290141&SearchID=73258639464675> (reporting smoking ban in effect in Bermuda after six-month grace period from fines). Although there was a committee to investigate possible exemptions for certain bars, restaurants, and private clubs at the time of the ban's passage, none were granted. See *id.*

178. See *Campaigners Welcome Smoking Ban*, BBC NEWS, Feb. 15, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4714992.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4714992.stm) [hereinafter *Campaigners Welcome Smoking Ban*] (recognizing support of British health organizations for ban and noting Cancer Research UK lauded ban as well). While the Cabinet originally considered exempting pubs and clubs that did not serve food, a full ban was passed instead. See *id.*

179. See *Pubs and Clubs*, *supra* note 176 (predicting outcome of smoking ban); see also *Campaigners Welcome Smoking Ban*, *supra* note 178 (rejecting idea that smokers will stop smoking due to bans in pubs and restaurants). The executive chairman of the London and Edinburgh Swallow Group, a hotel and pub association in the United Kingdom, predicts that the ban will cause smokers to smoke more frequently in their homes, which would adversely affect their children. See *id.*

180. See Reuters AlertNet, *France to Ban Smoking in Public From Jan 1- Minister*, Sept. 28, 2006, <http://www.alertnet.org/thenews/newsdesk/L28154989.htm> ("The question is no longer whether we will ban smoking in public places but how and when." (quoting Health Minister Xavier Bertrand)).

181. For a further discussion of domestic and international smoking bans, see *supra* notes 102-24 and notes 163-80 and accompanying text.

chosen to make its bars and restaurants smoke-free.<sup>182</sup> The vice president of government affairs for the American Cancer Society states that the ban in D.C. “puts an exclamation point on what we see as a national trend.”<sup>183</sup> Knowledge concerning ETS proves that smoking does not just harm the smoker but those surrounding the smoker as well.<sup>184</sup> Many states have passed or have attempted to pass smoking bans in bars and restaurants to protect citizens from ETS.<sup>185</sup> These bans, however, are being met with resistance from proprietors due to a fear of lost business and smokers’ groups arguing these bans infringe upon their freedoms.<sup>186</sup> While alternate means of ameliorating ETS in bars and restaurants have been suggested, it is unclear whether these will adequately protect against ETS.<sup>187</sup> As knowledge of the dangers of ETS increases and smoking bans in bars and restaurants become more prevalent, such bans will become the norm of American nightlife, instead of a novelty.

*Marot Williamson*

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182. See *Smoking Ban Approved*, *supra* note 83 (discussing symbolic significance of smoking ban passed in nation’s capital).

183. *Id.* (noting impact of smoking ban in Washington, D.C.). The president of the Campaign for Tobacco-Free Kids hails the ban as a “historic victory for the public’s right to breathe clean air in the nation’s capital . . . . [It] adds to the growing momentum to enact such laws across the country and around the world.” *Williams Lets Smoking Ban Move On*, *supra* note 52.

184. For a further discussion of the health effects of ETS, see *supra* notes 33-48 and accompanying text.

185. For a further discussion of recently passed and proposed smoking prohibitions, see *supra* notes 102-24 and accompanying text.

186. For a further discussion of criticisms of smoking bans, see *supra* notes 125-45 and accompanying text.

187. For a discussion of ventilation systems, see *supra* notes 140-45 and accompanying text.