

PROTECT US OR LEAVE US ALONE: THE NEW YORK STATE SMOKING BAN

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The kind of man who demands that government enforce his ideas is always the kind whose ideas are idiotic.

*Henry Louis Mencken*¹

I. INTRODUCTION

The United States of America has always placed a premium on freedom. As Americans, we have never been afraid to make sacrifices to attain and preserve the freedom that we enjoy. Nor have we hesitated in championing causes to spread our notion of freedom to other peoples of the world. We believe in freedom so strongly that our Constitution contains a Bill of Rights, which protects individuals from the power of government.² Additionally, the Fourteenth Amendment, ratified in 1868, guarantees all United States citizens equal protection, and due process, under the law.³

Given this dedication to freedom, one would assume that Americans would have the ability—perhaps the right—to perform a perfectly legal act in a private establishment. One would be mistaken though. Recently, the State of New York banned smoking in almost all indoor places, including restaurants and bars,⁴ furthering its position that benefits to public health justify

* B.A., Saint John Fisher College, 2002; Albany Law School, Class of 2005. I am not a smoker and I am not associated with any tobacco company, restaurant, bar, or interest group favoring any of these industries. I have no bias favoring tobacco industries or the restaurant and tavern industry in any way. Nor do I have any bias favoring any anti-tobacco group. As such, I have little vested interest in the outcome of the indoor smoking debate. On the other hand, several of the authors I cite to appear to favor one side of the debate regarding tobacco. For my part, I have attempted to portray the opposing sides as accurately as possible.

¹ Walter E. Williams, *Cigarettes and Property Rights*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 39 (Robert D. Tollison ed., 1988), *reprinted in* SMOKING: WHO HAS THE RIGHT? 305 (Jeffrey A. Schaler & Magda E. Schaler eds., 1998).

² U.S. CONST. amends. I–X.

³ U.S. CONST. amend. XIV.

⁴ N.Y. PUB. HEALTH LAW §§ 1399-n to -x (McKinney 2002 & Supp. 2004).

limitations on the freedom of New Yorkers.⁵

This paper asserts that the recent tobacco legislation represents a cowardly and deceitful act on the part of New York State legislators. While medical experts continuously warn of the dangers of smoking and the harmful effects of environmental tobacco smoke (“ETS”), the legislature refuses to completely ban smoking. A total ban would be the obvious step in adequately protecting public health. Instead, the legislation prevents competent adults from deciding for themselves whether and where to smoke. The argument of this paper is that the legislation takes this middle-of-the-road approach due to enormous financial, economic and societal pressures urging each side of the argument. By taking this stance, the legislature attempts to appease both the tobacco industry and anti-tobacco advocates, while neither protecting public health nor our rights as citizens of New York and the United States. Furthermore, the State of New York continues to benefit from the tax revenue generated from smoking,⁶ and legislators keep lining their pockets with the tobacco industry’s money.⁷

II. NEW YORK STATE’S SMOKING BAN

The smoking ban, codified in Article 13-E of the New York Public Health Law, prohibits smoking in almost every indoor area.⁸ This present smoking ban became effective on July 24, 2003, amending the Clean Indoor Air Act of 1989.⁹ Among the places to which smoking restrictions extend are bars and food service establishments.¹⁰ The statute defines a “bar” as “any area, including outdoor seating areas, devoted to the sale and service of alcoholic beverages for on-premises consumption and where the

⁵ Act of July 5, 1989, ch. 244, 1989 N.Y. Laws 2328 (declaring that the purpose of the Clean Indoor Air Act “is to preserve and improve the health, comfort and environment of the people of this state by limiting exposure to tobacco smoke.”).

⁶ OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEPT OF TAXATION AND FIN., 2002–2003 NEW YORK STATE TAX COLLECTIONS 26 (Jan. 2004), at http://www.tax.state.ny.us/pdf/stats/Stat_FY/2002_03_Annual_Statistical_Report_of_NY_State_Tax_Collections.pdf (last visited Oct. 26, 2004) (documenting that in fiscal year 2003 cigarette tax collections on total sales equaled \$1,047,688,876).

⁷ Joanna Dearlove & Stanton A. Glantz, Center for Tobacco Control Research and Education, *Tobacco Industry Political Influence and Policy Making in New York 1983–1999*, at 85–86 (2000), at <http://repositories.cdlib.org/ctcre/tcpmus/NY2000> (last visited Oct. 26, 2004) (detailing political expenditures of the tobacco industry between 1983 and 1998).

⁸ §§ 1399-n to -x (McKinney 2002 & Supp. 2004).

⁹ *Empire State Rest. & Tavern Ass’n v. New York*, 289 F. Supp. 2d 252, 253 (N.D.N.Y. 2003).

¹⁰ N.Y. PUB. HEALTH LAW § 1399-o(2)–(3) (McKinney Supp. 2004).

service of food is only incidental to the consumption of such beverages.”¹¹ “Food service establishment” is defined as “any area, including outdoor seating areas, or portion thereof in which the business is the sale of food for on-premises consumption.”¹² Finally, “smoking” is “the burning of a lighted cigar, cigarette, pipe or any other matter or substance which contains tobacco.”¹³

Although the law extends to almost all indoor areas, there are a few exceptions. Smoking is allowed in private homes, residences and automobiles.¹⁴ In addition, smoking is allowed in hotel rooms,¹⁵ retail tobacco businesses,¹⁶ certain membership associations¹⁷ and certain cigar bars.¹⁸ Restaurants may allow smoking in outdoor seating areas so long as there is no roof or ceiling,¹⁹ the area does not amount to more than twenty-five percent of outdoor seating,²⁰ the area is at least three feet from the non-smoking outdoor seating,²¹ and there are conspicuously placed signs designating the area as a smoking section.²²

In addition to the specific exceptions, the law also has a waiver provision.²³ In order to qualify for a waiver, the applicant must establish that compliance would cause “undue financial hardship” or that other factors make compliance unreasonable.²⁴ The statute further provides that all issued waivers shall be conditioned or otherwise limited as needed to minimize the adverse effects upon persons involuntarily exposed to ETS,²⁵ while conforming with the general purpose of the statute.²⁶

¹¹ *Id.* § 1399-n(1).

¹² *Id.* § 1399-n(3).

¹³ *Id.* § 1399-n(8).

¹⁴ *Id.* § 1399-q(1).

¹⁵ *Id.* § 1399-q(2).

¹⁶ *Id.* § 1399-q(3).

¹⁷ *Id.* § 1399-q(4).

¹⁸ *Id.* § 1399-q(5).

¹⁹ *Id.* § 1399-q(6).

²⁰ *Id.* § 1399-q(6)(a).

²¹ *Id.* § 1399-q(6)(b).

²² *Id.* § 1399-q(6)(c).

²³ *Id.* § 1399-u.

²⁴ *Id.* § 1399-u(1)(a)–(b).

²⁵ *Id.* § 1399-u(2).

²⁶ *Id.* Currently, the Empire State Restaurant and Tavern Association is challenging the constitutionality of the smoking ban. One argument that the Association has proffered is that the waiver provision is too vague, preventing it from being used to avoid severe economic harm. U.S. District Court Judge Lawrence E. Kahn rejected this argument in his opinion, which denied the Association’s request for a preliminary injunction, finding instead that the failure to grant waivers “is a problem of enforcement and not a problem with the statute itself.” *Empire State Rest. & Tavern Ass’n v. New York*, 289 F. Supp. 2d 252, 259 (N.D.N.Y. 2003); *see also* Brendan Lyons, *Court Upholds Ban on Smoking*, *TIMES UNION* (Albany, N.Y.),

A civil penalty of up to \$2,000.00 may be imposed for a violation of the smoking ban.²⁷ Persons subject to liability for violations of the smoking ban include “(1) any person or entity that controls the use of an area in which smoking is prohibited, (2) any employer whose place of employment is an area in which smoking is prohibited, and (3) any person who smokes in an area where smoking is

Oct. 22, 2003, at A1 (characterizing Judge Kahn’s ruling as “a major setback” to the 5,000-member Association, but predicting a renewed legal battle focused “on the inability of individual counties to grant waivers”).

The New York State Health Department (Health Department) represents twenty-one New York counties that do not have their own health departments. Tom Ernst, *Guidelines Set for Waiver from Smoking Ban in Parts of State*, BUFF. NEWS, Dec. 13, 2003, at B1, available at 2003 WL 6468398; *Smoking Back in Business?*, NEWSDAY, Dec. 13, 2003, at A15, available at 2003 WL 69081350. Following the decision in *Empire State Rest. & Tavern Ass’n*, the Health Department announced waiver provisions for the twenty-one counties it represents. In order to qualify for a waiver under Health Department provisions, a restaurant or tavern must show that it has lost fifteen percent of its profits since the smoking ban was implemented. Ernst, *supra*, at B1; *Smoking Back in Business?*, *supra*, at A15. An issued waiver remains in effect for two years, during which time the business is subject to inspection and investigation by the Health Department. Ernst, *supra*, at B1; *Smoking Back in Business?*, *supra*, at A15. In addition, a waiver is non-transferable, even if an establishment is sold. Ernst, *supra*, at B1; *Smoking Back in Business?*, *supra*, at A15.

Although the Health Department has announced these guidelines, counties with their own health departments are free to implement their own waiver provisions, and several have done so. See, e.g., Gene Warner, *Smoked Out?: Erie County Has One of the State’s Toughest, Most Heavily Enforced Bans on Smoking, and Some Bar Owners Say It’s a Death Knell for Their Business*, BUFF. NEWS, Feb. 18, 2004, at A1, available at 2004 WL 60031645 (explaining Erie County’s waiver guidelines); John Stith, *County Issues Smoking-Waiver Policy; Auburn Bar Owner Fined \$1,000 for Disobeying Ban Won’t Say If She’ll Apply*, POST-STANDARD (Syracuse, N.Y.), Jan. 28, 2004, at B1 (outlining Cayuga County’s waiver policy); Edwin Acevedo, *Smoking Ban Waiver Policy Approved; County Legislature’s Health Committee Must Set Application Fee*, POST-STANDARD (Syracuse, N.Y.), Jan. 21, 2004, at B1 (detailing Oswego County’s waiver policy). With these waiver provisions differing to varying degrees, the Empire State Restaurant and Tavern Association may have a new Equal Protection Clause argument in its pending case. Cf. Warner, *supra* (noting that application of the waiver will vary by county, giving rise to a legal argument based on “an unfair playing field for bars, restaurants and other businesses”). See also *infra* notes 88–93 and accompanying text (discussing the logic and merits of an Equal Protection Clause argument).

In December of 2003, the first waiver to be issued to any bar in the state was granted by the Onondaga County Health Department to Damon’s Party House in Cicero. Mike McAndrew, *Three More Taverns Get Smoking Waivers; Bars Win Permits from Health Department After Showing Financial Hardships from Ban*, POST-STANDARD (Syracuse, N.Y.), Jan. 29, 2004, at B6. As of February 18, 2004, twenty-four waivers had been granted in New York State. Warner, *supra*. The debate over where to set the threshold mark for granting waivers continues to be a hotly debated topic. Scott Wexler, Executive Director of the Empire State Restaurant and Tavern Association, insists that “[a]ny loss of business should constitute a waiver.” Joseph Spector, *Smoke Ban Waiver Debated*, DEMOCRAT & CHRON. (Rochester, N.Y.), Nov. 30, 2003, at 4B, available at 2003 WL 64030259. Meanwhile, Russell Sciandra of the Center for a Tobacco Free New York maintains that the fifteen percent mark is arbitrary and argues that waivers should be granted infrequently so as not to undermine the smoking ban’s purpose. Ernst, *supra*.

²⁷ N.Y. PUB. HEALTH LAW § 1399-v (McKinney 2002); *Empire State Rest. & Tavern Ass’n*, 289 F. Supp. 2d at 253.

prohibited.”²⁸ The statute leaves its enforcement mechanisms to the Board of Health of the individual counties.²⁹ In cities with populations of more than one million people, enforcement is left to the Department of Health and Mental Hygiene.³⁰ Officers from the Board of Health have sole jurisdiction to enforce the smoking ban in their respective counties,³¹ as do officers from the Board of Health and Mental Hygiene in their cities.³² The decisions of these officers may be appealed to the Commissioner of Health of the State of New York under Article Seventy-Eight of the Civil Practice Laws and Rules of New York.³³

III. BACKGROUND OF THE ANTI-SMOKING MOVEMENT IN THE UNITED STATES

Tobacco, characterized as “a purely American product in its origin, development, and domination of the world market,”³⁴ has a long and important place in the history of the United States. From its cultivation by American Indians,³⁵ to its trade by American farmers,³⁶ to its favor among American soldiers,³⁷ both the commercial and recreational values of tobacco were quickly realized. As tobacco infiltrated American culture, consumption increased dramatically, reaching an all-time high in 1952.³⁸

Yet, as popular as tobacco came to be, it was never without its critics who tried to prevent its use. King James I and Queen Victoria were both critics of smoking.³⁹ In fact, King James I denounced tobacco as “lothsome to the EYE, hatefull to the NOSE, harmful to the BRAINE, [and] daungerous to the LUNGS.”⁴⁰

²⁸ *Empire State Rest. & Tavern Ass’n*, 289 F. Supp. 2d at 253.

²⁹ *Id.*

³⁰ *Id.* § 1399-t(1) (McKinney Supp. 2004).

³¹ *Id.*

³² *Id.*

³³ *Id.* § 1399-t(5).

³⁴ PHILIP J. HILTS, *SMOKE SCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* 1 (1996).

³⁵ JORDAN GOODMAN, *TOBACCO IN HISTORY: THE CULTURES OF DEPENDENCE* 3, 24 (1993).

³⁶ GEORGINA LOVELL, *YOU ARE THE TARGET: BIG TOBACCO: LIES, SCAMS—NOW THE TRUTH* 13 (2002). In 1945, President Roosevelt declared tobacco a “protected crop.” *Id.* at 16.

³⁷ By the time of World War II, smoking had become so popular that cigarettes were “included in survival . . . rations for soldiers,” and “tobacco farmers were . . . exempted from the draft because they were ‘essential’ workers.” JOHN C. BURNHAM, *BAD HABITS: DRINKING, SMOKING, TAKING DRUGS, GAMBLING, SEXUAL MISBEHAVIOR, AND SWEARING IN AMERICAN HISTORY* 101 (1993).

³⁸ HILTS, *supra* note 34, at 2. In fact, “[a]t the middle of the twentieth century, 80 per cent [sic] of American men aged 18 to 64 used tobacco.” BURNHAM, *supra* note 37, at 102.

³⁹ Williams, *supra* note 1, at 305.

⁴⁰ LOVELL, *supra* note 36, at 13.

Furthermore, Vienna, Paris and Berlin outlawed smoking in the streets during the Napoleonic period.⁴¹ This anti-tobacco attitude was also present in the United States.⁴²

Prior to the 1800s, Americans viewed tobacco as merely a bad habit. Unlike alcohol, no general moral or social stigma attached to users or manufacturers of tobacco. In fact, Americans viewed tobacco as a positive and stable economic commodity.⁴³ The anti-tobacco campaign in the United States began around the late nineteenth and early twentieth centuries, with Lucy Page Gasten leading the way.⁴⁴ At this time, most of the opposition to the use of tobacco related to its negative effects on the health of the smoker, as tobacco use itself was not viewed as “a deviant action.”⁴⁵

Beginning in the 1950s, the notion that smoking may be seriously harmful to a person’s health began to appear in the media. Medical studies reporting such findings sparked the modern anti-tobacco movement. Drs. Ernst L. Wynder and Evarts A. Graham, from the Sloan Kettering Institute in New York, published a report in 1950 in which they concluded that “smokers had a greater risk of lung cancer than nonsmokers did.”⁴⁶ In December of 1953, *Cancer Research* printed a second paper by Drs. Wynder and Graham detailing their results from studies with mice that indicated a causal connection between cigarettes and cancer.⁴⁷ These results were published in the *New York Times* on May 27, 1950, *Reader’s Digest* on December 1952, and *Life* on December 21, 1953.⁴⁸ “For the first time, the health dangers of cigarette smoking were on the front pages of newspapers.”⁴⁹

Two reports released in the 1960s, by the British Royal College of Physicians (RCP) and the U.S. Surgeon General, announced further

⁴¹ Williams, *supra* note 1, at 305. For a historical side note concerning anti-tobacco movements, see Robert N. Proctor, *The Anti-Tobacco Campaign of the Nazis: A Little Known Aspect of Public Health in Germany, 1933-45*, 313 BRIT. MED. J. 1450 (1996), reprinted in SMOKING: WHO HAS THE RIGHT?, *supra* note 1, at 114-16, which discusses the powerful anti-tobacco movement Adolf Hitler and the Nazis initiated in Germany between the 1930s and the 1940s because of fears that tobacco might endanger the race.

⁴² See Williams, *supra* note 1, at 305-06 (describing early anti-smoking movements in America, attempts by Henry Ford to stop his employees from smoking and twelve state laws prohibiting or limiting the “sale or use of cigarettes”). In 1632, Massachusetts proscribed public smoking of tobacco, and Congress enacted the first tax on tobacco in 1794. LOVELL, *supra* note 36, at 15.

⁴³ BURNHAM, *supra* note 37, at 86-88.

⁴⁴ Williams, *supra* note 1, at 305-06.

⁴⁵ *Id.* at 306; BURNHAM, *supra* note 37, at 87.

⁴⁶ STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 25 (1996); HILTS, *supra* note 34, at 4.

⁴⁷ HILTS, *supra* note 34, at 4.

⁴⁸ GLANTZ ET AL., *supra* note 46, at 25.

⁴⁹ HILTS, *supra* note 34, at 4.

findings of a relationship between smoking and health problems.⁵⁰ The RCP published its findings on March 7, 1962.⁵¹ Its report concluded that “[c]igarette smoking is a cause of lung cancer and bronchitis, and probably contributes to the development of coronary heart disease and various other less common diseases.”⁵² Following publication of the RCP report, the U.S. Surgeon General commissioned the Surgeon General’s Advisory Committee on Smoking and Health to prepare a comparable report.⁵³ In 1964, the Surgeon General presented its report,⁵⁴ which concluded in part that “[c]igarette smoking is causally related to lung cancer in men,”⁵⁵ and further revealed that “[t]he risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day.”⁵⁶ The tobacco industry’s response to these findings has, at times, been despicable, but lies beyond the scope of this paper.⁵⁷

The discovery that truly launched the anti-tobacco movement as we know it today was not the discovery that smoke causes harm to cigarette smokers, but that it causes harm to non-smokers. People around smokers may inhale “sidestream” smoke, which is smoke

⁵⁰ GLANTZ ET AL., *supra* note 46, at 46–49.

⁵¹ *Id.* at 46.

⁵² *Id.* at 47 (citation omitted).

⁵³ *Id.* at 48.

⁵⁴ *Id.*

⁵⁵ *Id.* (citation omitted). The report also noted that “[t]he data for women, though less extensive, point in the same direction.” *Id.*

⁵⁶ *Id.* (citation omitted). In 1900, the rate of lung cancer was less than five cases per 100,000 men. HILTS, *supra* note 34, at 3. By 1950, that number had increased to seventy-five per 100,000 men. *Id.* According to the U.S. Census Bureau, the overall lung cancer rate was 0.6 per 100,000 in 1913 with only 371 reported cases. LOVELL, *supra* note 36, at 16. In 2001, lung cancer was the leading cause of cancer death in men and women—lung cancer having surpassed breast cancer as the leading cause of death in women in 1985. *Id.* at 16–17. In 2001, 167,000 people died of lung cancer; ninety percent were smokers or had smoked. *Id.* at 17.

⁵⁷ For further information on the tobacco industry’s response, see generally GLANTZ ET AL., *supra* note 46, at 25–56, which details the tobacco industry’s tactics for dealing with reports of health risks associated with smoking. Such tactics include false advertisements of healthier cigarettes, such as filter tip cigarettes, and the industry’s establishment of the Tobacco Industry Research Committee in 1954, which was formed for public relations purposes to cast doubt on whether smoking actually was dangerous to a person’s health. *Id.* at 25, 32–33; see also HILTS, *supra* note 34, at 6–7 (stating that “[t]he plan was to spend large amounts of money every year indefinitely into the future to prevent . . . scientists and public health officers, from warning people of a potential hazard in the normal manner.”); see also LOVELL, *supra* note 36, at 21 (outlining cease and desist orders issued in the 1950s to cigarette companies by the Federal Trade Commission for, *inter alia*, false, misleading and deceptive advertisements). Unbelievably, one of the supposed health improvements was the addition of a micronite filter by Lorillard Tobacco. *Id.* at 22. This particular filter was formed from crocidilite asbestos, “the most potent carcinogen of the various asbestos filter types.” *Id.*

that comes off the tip of a burning cigarette.⁵⁸ The combination of sidestream smoke and the smoke exhaled by smokers creates air pollution referred to as “secondhand smoke” or “environmental tobacco smoke.”⁵⁹ Research conducted in the 1970s and 1980s revealed the dangers of exposure to ETS, finding that children exposed to ETS suffered from respiratory diseases at higher rates and that non-smoking women married to smokers were more likely to die of lung cancer than non-smoking women married to non-smokers.⁶⁰ ETS was also linked to an increased risk of heart disease.⁶¹ Today, it is estimated that ETS causes between 1,000 and 4,000 cases of lung cancer per year.⁶²

Indeed, in 1992, ETS was labeled as a “Class A (known human) carcinogen” by the Environmental Protection Agency (“EPA”).⁶³ ETS is also listed as a carcinogen by the U.S. National Toxicology Program.⁶⁴ In August of 1993, the EPA issued a report entitled *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. The report concluded that “ETS is a human lung carcinogen, responsible for approximately 3,000 lung cancer deaths annually in U.S. nonsmokers.”⁶⁵ The tobacco companies responded in a similar, deceitful manner to these findings concerning health threats posed by ETS as they had to the information linking smoking itself to health problems.⁶⁶

⁵⁸ GLANTZ ET AL., *supra* note 46, at 391–92.

⁵⁹ *Id.* at 392.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² HILTS, *supra* note 34, at 104. There is opposition, however, to the claim that environmental tobacco smoke causes lung cancer in detectable levels. *See generally* JACOB SULLUM, FOR YOUR OWN GOOD: THE ANTI-SMOKING CRUSADE AND THE TYRANNY OF PUBLIC HEALTH 159–77 (1998) (describing how anti-smoking biases impact on methodological studies and contribute to misleading and inaccurate reports concerning the health risks and effects of smoking). Sullum admits that environmental tobacco smoke contains known carcinogens; he claims, however, that while there may be a slight risk increase of obtaining lung cancer for people who live with smokers for decades, “there is *no* evidence that casual exposure to secondhand smoke has any impact on your life expectancy.” *Id.* at 162, 278–79. I do feel compelled to note that Hilts claims that Sullum “works for a foundation supported by tobacco money.” HILTS, *supra* note 34, at 106. While Sullum acknowledges that tobacco companies have paid him to reprint articles in the past, he insists that he is not motivated by tobacco money. SULLUM, *supra*, at xi–xiv. Instead, he says that he writes on this subject because he “oppose[s] paternalistic policies on philosophic grounds.” *Id.* at xiv.

⁶³ GLANTZ ET AL., *supra* note 46, at 392; HILTS, *supra* note 34, at 103.

⁶⁴ *See* LOVELL, *supra* note 36, at 108, 116–17 (noting that environmental tobacco smoke contains the carcinogens 4-Aminobiphenyl, Benzene, 2-Aminonaphthalene, Vinyl Chloride, Cadmium, Nickel, and Polonium-210; and the probable carcinogens 1-Aminonaphthalene, Acetaldehyde, Acetone, Acrylonitrile, Benzo[a]pyrene, Cresol, Lead, Phenol, and Quinoline).

⁶⁵ U.S. Env'tl. Prot. Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* 3 (1993).

⁶⁶ *See supra* note 57 and accompanying text; HILTS, *supra* note 34, at 106. *See* GLANTZ

Once again, these findings resulted in legislative action, at all levels of government. In 1972, Arizona enacted the “first comprehensive law protecting non-smokers from secondhand smoke,”⁶⁷ by prohibiting smoking in some public buildings.⁶⁸ In 1975, Minnesota passed the country’s first “Clean Indoor Air Law.”⁶⁹ Smoking was prohibited on all interstate buses and almost all domestic flights in 1990.⁷⁰ By 1992, local smoking ordinances numbered approximately 540.⁷¹ And, as previously discussed, on July 24, 2003, Article 13 of the New York Public Health Law took effect, prohibiting smoking in almost all indoor areas in New York State with few exceptions.⁷²

IV. HOW ARE PUBLIC HEALTH LAWS LEGAL IF THEY INFRINGE UPON FREEDOM?

The first question that one might ask is: with all the protection against government intrusion afforded to United States citizens, how can these laws be upheld? The answer is simple: the good of the many outweighs the good of the individual. In other words, because the majority of people feel that ETS is a health threat, they are perfectly justified in limiting the right of individuals to smoke where ETS may adversely affect the health of non-smokers. Such justification accounts for the great respect often afforded public health laws by the courts.⁷³

The belief that the rights of the whole outweigh the rights of the individual has existed at least since the time of the ancient philosophers. For instance, Aristotle believed that “the state . . .

ET AL., *supra* note 46, at 391–432 (detailing the tobacco industry’s response to the studies indicating that environmental tobacco smoke caused health problems). Recognizing that the future of cigarette sales in the United States was in jeopardy, tobacco companies began to diversify their assets. BURNHAM, *supra* note 37, at 110; *see* LOVELL, *supra* note 36, at 178–79 (identifying such brands as Miller Lite, Philadelphia Cream Cheese, Barnum’s Animal Crackers, Life Savers and Kool-Aid as holdings of tobacco companies).

⁶⁷ LOVELL, *supra* note 36, at 16.

⁶⁸ *Id.* at 143.

⁶⁹ GLANTZ ET AL., *supra* note 46, at 416.

⁷⁰ LOVELL, *supra* note 36, at 17. The ban applied to “all domestic airline flights lasting six hours or less.” *Id.*

⁷¹ SULLUM, *supra* note 62, at 153, 155 (adding that New York City had banned smoking in restaurants and work areas in April of 1995).

⁷² N.Y. PUB. HEALTH LAW §§ 1399-n to -q (McKinney Supp. 2004). *See supra* notes 8–33 and accompanying text.

⁷³ *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 660–62 (1887) (stating that “police powers” are conferred upon the legislative branch, allowing it “to determine . . . what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety,” while upholding Kansas’s prohibition on the manufacture or sale of “intoxicating liquors”).

continu[ed] in existence for the sake of a good life.”⁷⁴ The good life exists when an individual lives according to the true and objective good of society, rather than according to his or her own subjective good.⁷⁵ Aristotle wrote, “if all communities aim at some good, the state or political community, which is the highest of all, and which embraces all the rest, aims at good in a greater degree than any other, and at the highest good.”⁷⁶ Aristotle also believed that “the state is by nature clearly prior to the family and to the individual, since the whole is of necessity prior to the part.”⁷⁷ Additionally, Socrates is said to have believed that a “good politician’ must be someone who *has a concern for the souls* of human beings.”⁷⁸

Thus, the belief that the good of society outweighs the desires of the individual has a long history. Aristotle seems to propose the notion that the state has a duty to impose its “objective” view of what is good upon the individual. Apparently, this objective good must be forced upon the individual even if it conflicts with the individual’s “subjective” belief of what is good for her. This idea lays the foundation for the state’s authority, acting under its police powers, to impose its objective good—in the form of public health laws—upon the people. The state has a duty to enact these laws to protect the individual from possibly injuring herself or others while acting in what she believes is her subjective good.

This brief look at classical philosophy does not yet explain why the constitutional protections from government afforded United States citizens do not prohibit governmental authority from being used to enact public health laws. This is the focus of the next section of this paper.

A. *Police Power of the State*

Police power is “[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.”⁷⁹ The police power of the legislature to make laws protecting the public health has been

⁷⁴ ARISTOTLE, *Politica* (Benjamin Jowett trans.), in INTRODUCTION TO ARISTOTLE 553, 555 (Richard McKeon ed., 1st ed. 1947).

⁷⁵ 2 GIOVANNI REALE, A HISTORY OF ANCIENT PHILOSOPHY: PLATO AND ARISTOTLE 337 (John R. Catan ed. & trans., 1990).

⁷⁶ ARISTOTLE, *supra* note 74, at 553.

⁷⁷ *Id.* at 556.

⁷⁸ 1 GIOVANNI REALE, A HISTORY OF ANCIENT PHILOSOPHY: FROM THE ORIGINS TO SOCRATES 222 (John R. Catan ed. & trans., 1987) (citation omitted).

⁷⁹ BLACK’S LAW DICTIONARY 1196 (8th ed. 2004).

upheld from early in the history of the United States⁸⁰ until the present day.⁸¹ As such, a person's right to perform an otherwise legal act—say smoking in a bar or restaurant—can be regulated (and should be regulated, according to Aristotle) by the legislature if the act endangers the public at large. The legislature has the authority—perhaps even a duty—to determine the needs of society with respect to public health, morals and safety.⁸²

Furthermore, the standard employed by the judiciary to determine the validity of laws passed using police power is a deferential one. A law passed, utilizing police power, need only be rationally related to the end that the legislature intended the statute to achieve.⁸³ In fact, it is now settled that such a statute may be upheld using rational speculation. That is, “police power demands only that the State ‘*could rationally have decided*’ that the measure adopted might achieve the State’s objective.”⁸⁴ How does this deferential, rational basis review balance against personal protections afforded by the United States Constitution?

B. The Due Process and Equal Protection Clauses of the Fourteenth Amendment

The Constitution of the United States provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”⁸⁵ The Fourteenth Amendment is a direct limitation on States.⁸⁶ Thus, New York State cannot deprive a person of liberty, such as the liberty of allowing people to smoke in a privately owned bar or restaurant, without affording parties injured by the State’s

⁸⁰ See *The License Cases*, 46 U.S. (5 How.) 504, 631–32 (1847) (Grier, J., concurring) (noting that police power captures all laws that are intended to preserve the public health or morals, and this power gives states the authority to prohibit any act in furtherance of this goal).

⁸¹ See *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 492 (S.D.N.Y. 2004) (upholding the constitutionality of state and municipal smoking bans as a valid exercise of the State’s authority to protect public health under its police power).

⁸² See *Mugler v. Kansas*, 123 U.S. 623, 660–61 (1887) (noting that if it were not for public health laws, the majority would be at the “mercy of the few” who would be able to act as they please).

⁸³ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955) (declaring that a state statute governing eye examinations, passed pursuant to the State’s police power, need only be rationally related to the “evil” it intended to correct).

⁸⁴ *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)).

⁸⁵ U.S. CONST. amend. XIV, § 1.

⁸⁶ The federal counterpart is the Fifth Amendment Due Process Clause, which represents a limitation on the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) (suggesting that the Fifth Amendment applies to the federal government in the same manner that the Fourteenth Amendment applies to the states).

deprivation due process of law. A claim that the smoking ban violated the Due Process Clause would likely fail.⁸⁷

The Fourteenth Amendment also mandates that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁸⁸ Like the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause applies only to the States.⁸⁹ Equal protection prevents a state from discriminating based on arbitrary classifications.⁹⁰ Like an argument under the Due Process Clause, a claim that used the Equal Protection Clause to invalidate the smoking ban would fail.⁹¹

These hypothetical arguments against the smoking ban have been rejected by the United States Supreme Court in similar cases with similar arguments. In *Barbier v. Connolly*, the Court concluded that the Fourteenth Amendment was not intended to interfere with the police power of the State to promote public health or morals.⁹² In *Mugler v. Kansas*, the Court reinforced this notion, finding that police power legislation is not invalidated by the Fourteenth Amendment “unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.”⁹³ The question thus becomes, was the purpose of the smoking ban to promote the general well-being of the public?

The statute announces that the purpose of the Clean Indoor Air Act (which the smoking ban is part of) “is to preserve and improve the health, comfort and environment of the people of this state by

⁸⁷ See *infra* notes 92–93 and accompanying text. Such an argument might contend that a smoking ban is an arbitrary deprivation of liberty, in violation of the Due Process Clause.

⁸⁸ U.S. CONST. amend. XIV, § 1.

⁸⁹ Unlike the Fourteenth Amendment, the Fifth Amendment does not contain an Equal Protection Clause governing the federal government. Such a clause, however, has been implied in the Fifth Amendment Due Process Clause to apply to the federal government. See *Bolling*, 347 U.S. at 498–500 (indicating that while due process and equal protection are similar, equal protection provides “a more explicit safeguard of prohibited unfairness”).

⁹⁰ See *Gulf, Colo. & Santa Fé Ry. Co. v. Ellis*, 165 U.S. 150, 155–56 (1897) (noting that any classification made by the State must have a proper basis).

⁹¹ See *infra* notes 92–93 and accompanying text. It is arguable that the proposed smoking ban is unconstitutional under the Equal Protection Clause because the statute creates arbitrary classifications between private establishment owners who may allow some legal activities to occur on their property, while precluding other legal activities. For example, while a private establishment owner may allow alcohol consumption on her property, another owner may not allow smoking on his property even though both are generally considered to be unhealthy, but legal, vices.

⁹² *Barbier v. Connolly*, 113 U.S. 27, 31 (1885).

⁹³ *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

limiting exposure to tobacco smoke.”⁹⁴ Smoking is not a fundamental right and smokers are not a suspect class.⁹⁵ Thus, there is no argument to be made that a standard higher than rational basis review is warranted. Additionally, as was previously mentioned, the smoking ban (as a public health law passed using police power) need only be rationally related to the end it seeks to secure. It is an easy argument to make that prohibiting tobacco smoke, a known human carcinogen, from private establishments open to the public will preserve and improve the health of the people of the State of New York. Thus, New York has every right (Aristotle would say a duty)⁹⁶ to regulate smoking. As such, the smoking ban is perfectly legal under Fourteenth Amendment Due Process Clause and Equal Protection Clause analysis.

C. Takings

Eminent domain is “[t]he inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking.”⁹⁷ The requirement that reasonable compensation be paid to the owner comes from the Takings Clause of the Fifth Amendment, which states: “nor shall private property be taken for public use, without just compensation.”⁹⁸ Obviously, the smoking ban cannot in any way be considered a physical taking of land by the government via eminent domain. However, there is a weak argument to be made that New York’s smoking ban violates the Takings Clause. This argument ultimately must fail.⁹⁹ It is possible for a regulation to

⁹⁴ Act of July 5, 1989, ch. 244, 1989 N.Y. Laws 2328.

⁹⁵ See *Gaspar v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 898–99 (5th Cir. 1978) (holding that there is no constitutional right to either smoke or stop one from smoking in a public place); see also *Owens v. Ventura County Super. Ct.*, 42 F. Supp. 2d 993, 998 (C.D. Cal. 1999). Strict judicial scrutiny is triggered by either a fundamental right in the Due Process Clause context or a suspect or quasi-suspect classification in Equal Protection Clause analysis. Fundamental rights are rights explicitly defined in the United States Constitution, or are “‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Hawkins v. Freeman*, 195 F.3d 732, 753 (4th Cir. 1999) (citations omitted). Suspect classifications include “classifications based on race, religion, alienage, national origin and ancestry.” See *Owens*, 42 F. Supp. 2d at 998. Quasi-suspect classes “include . . . classifications based on gender and illegitimacy.” *Id.*

⁹⁶ See *supra* notes 74–78 and accompanying text.

⁹⁷ BLACK’S LAW DICTIONARY 562 (8th ed. 2004).

⁹⁸ U.S. CONST. amend. V. The Supreme Court has held that the Fifth Amendment Takings Clause is applicable to the states via the Fourteenth Amendment. See *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897); see also *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

⁹⁹ The argument would claim that the smoking ban amounts to a diminution of the value of

amount to a taking in two ways.¹⁰⁰ A regulation rises to the level of a taking when the regulation creates a “physical ‘invasion’” of the property.¹⁰¹ The second situation arises when the regulation “does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.”¹⁰²

In order for a physical invasion to occur there must be “a permanent physical occupation authorized by government.”¹⁰³ In *Loretto*, the State of New York required landlords to allow cable television companies to install equipment on the property.¹⁰⁴ Appellant argued that this installation was a taking without compensation.¹⁰⁵ The Supreme Court held that no matter how minute the physical invasion, a permanent physical occupation authorized by the government is a taking regardless of the public interest.¹⁰⁶ However, unlike *Loretto*, there is no permanent physical occupation of restaurants or bars in the smoking ban context. Thus, the ban does not amount to a taking under this theory.

The regulatory taking argument fails under the second theory as well. Although the standard of substantially advancing a legitimate state interest is well established, Supreme Court “cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ or what type of connection between the regulation and the state interest satisfies the requirement that the former ‘substantially advance’ the latter.”¹⁰⁷ It is clear, however, that when the public health and police power are involved, the regulation is almost always a legitimate state interest.¹⁰⁸ In *Mugler*, the court determined that:

the owner’s bar or restaurant. The argument would suggest that the smoking ban prevents paying customers who smoke from patronizing an establishment that they would otherwise frequent. Thus, the restaurant or bar loses money due to the regulation and compensation is required. Given the state of current Takings jurisprudence, this argument is without merit. The invalidity of this argument is discussed later. See *infra* notes 103, 108–17 and accompanying text. The theory is included in this paper, however, to highlight an additional right a person could use to challenge the smoking ban.

¹⁰⁰ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–16 (1992).

¹⁰¹ *Id.* at 1015.

¹⁰² *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted); *Lucas*, 505 U.S. at 1015–16.

¹⁰³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

¹⁰⁴ *Id.* at 423 (stating that “a landlord may not ‘interfere with the installation of cable television facilities upon his property or premises’”).

¹⁰⁵ *Id.* at 424.

¹⁰⁶ *Id.* at 426.

¹⁰⁷ *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

¹⁰⁸ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022–24 (1992) (explaining that substantially advancing legitimate state interests has evolved from the harmful or noxious use analysis of the past); see also *supra* notes 92–93 and accompanying text.

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.¹⁰⁹

The validity of the harmful or noxious use analysis has been explicitly reaffirmed in subsequent cases.¹¹⁰ In addition, it is well established “that all property in this country is held under the implied obligation that the owner’s use of it shall not be injurious to the community.”¹¹¹ Furthermore, “the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.”¹¹²

Moreover, the state is under no duty to compensate a property owner when the diminished value of the property resulted from an abatement of a public nuisance.¹¹³ A public nuisance is “[a]n unreasonable interference with a right common to the general public, such as a condition dangerous to health.”¹¹⁴ Smoking would probably constitute a public nuisance in New York because a public nuisance may be found where there is conduct offensive to the sense of smell.¹¹⁵ Thus, a taking would not occur if the activity could be considered a public nuisance. In this context, a taking would occur only if the regulation forced the property owner to forego “*all* economically beneficial uses in the name of the common good.”¹¹⁶

¹⁰⁹ *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887).

¹¹⁰ See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 488, 490 (1987) (rejecting the assertion that *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) overruled *Mugler*).

¹¹¹ *Mugler*, 123 U.S. at 665.

¹¹² *Keystone*, 480 U.S. at 492.

¹¹³ *Id.* at 492 n.22. In addition, “the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.” *Id.* at 492.

¹¹⁴ BLACK’S LAW DICTIONARY 1097–98 (8th ed. 2004).

¹¹⁵ See *People v. Stover*, 191 N.E.2d 272, 276 (N.Y. 1963) (noting that conduct offending the sense of smell “may be a valid subject of regulation under the police power”); see also *People v. Rubinfeld*, 172 N.E. 485, 486 (N.Y. 1930) (stating that the sense of smell has generally been protected by the law).

¹¹⁶ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

As was discussed previously, the state may regulate smoking in areas frequented by the public using its police powers.¹¹⁷ Thus, it appears that the state may enforce the smoking ban against owners of restaurants and bars without compensating them because they hold their property with the obligation that they will not use it to harm others. Compensation for diminution in the value of property is also improper because property owners are still capable of profiting from other economic uses, such as food and drink. Therefore, the Takings Clause presents no constitutional issue to the smoking ban. This leaves a flawed law which is perfectly constitutional and legitimate.

V. ULTERIOR MOTIVES

The ill effects of smoking have been well documented for many years.¹¹⁸ Indeed, the Surgeon General announced that smoking was related to lung cancer in 1964¹¹⁹ and the EPA has recognized ETS as a known human carcinogen since 1992.¹²⁰ Thus, it is unquestionably a proper exercise of New York State's police power to regulate smoking.¹²¹ The action that New York took to regulate smoking, however, is somewhat lackluster. As was previously mentioned, the purpose of the smoking ban "is to preserve and improve the health, comfort and environment of the people of this state by limiting exposure to tobacco smoke."¹²² If the goal of the law truly is to protect New Yorkers from the health risks of smoking and ETS, then why is smoking still allowed at all? It seems obvious that the greatest protection from smoking and ETS is to have no smoke whatsoever.¹²³ One answer to the question posed may be that the legislature wishes to protect the rights of smokers. Other substances, however, including marijuana, have been proscribed

¹¹⁷ See *supra* notes 79–84 and accompanying text.

¹¹⁸ See *supra* notes 46–47, 50–56, 60–66 and accompanying text.

¹¹⁹ GLANTZ ET AL., *supra* note 46, at 48.

¹²⁰ *Id.* at 392.

¹²¹ See *supra* notes 79–84 and accompanying text.

¹²² Act of July. 5, 1989, ch. 244, 1989 N.Y. Laws 2328.

¹²³ It seems clear that New York could use its police power to completely ban cigarette smoking in New York State as it has with other substances. See *supra* notes 79–84 and accompanying text (discussing the extent of states' police powers generally). For example, New York State has proscribed the use of other substances that the Legislature determined presented unacceptable health risks to people. See N.Y. PENAL LAW §§ 221.00–221.55 (McKinney 2000) (proscribing and criminalizing the possession and sale of "marihuana"); see also N.Y. PENAL LAW §§ 220.00–220.65 (McKinney 2000) (proscribing and criminalizing the possession and sale of controlled substances, including hallucinogens, narcotics, stimulants, and depressants).

and banned without any regard to the rights of their users.¹²⁴ The true answer is, as usual, completely economic. New York State would be left in a financial crisis if smoking were made illegal. A great deal of tax revenue is collected from the sale of cigarettes. In addition, the tobacco industry is able to influence certain legislators enough to protect their vested interest in the continuing legality of the product that they sell. These economic factors will be discussed in turn.

A. Tax Revenue and the Tobacco Settlement

This vice brings in one hundred million francs in taxes every year. I will certainly forbid it at once—as soon as you can name a virtue that brings in as much revenue. —*Napoleon III (1808–73)*¹²⁵

Apparently this notion was as prevalent in the 1800s as it is today. New York State brings in an enormous amount of money each year from excise taxes placed on the sale of tobacco.¹²⁶ Cigarettes and excise taxes have a long history together. “[T]he state seized on tobacco as a revenue generator: throughout the fiscal history of tobacco the only question asked by the state was how great a tax burden could tobacco carry Tobacco’s tax burden . . . has always played an important role in the finances of the state.”¹²⁷ New York first placed an excise tax on cigarettes in 1939, ten years after its first excise tax on gasoline and six years after the first excise tax on alcohol.¹²⁸

The New York State excise tax on a pack of cigarettes was raised to \$1.50 per pack effective April 1, 2002.¹²⁹ Further, New York City raises about \$115 million per year from its excise tax of \$1.50, which is added to state tax for a total of \$3.00 per pack.¹³⁰ The state sales tax of 4% also applies to the purchase of cigarettes.¹³¹ Finally, the

¹²⁴ See generally ED ROSENTHAL & STEVE KUBBY, WHY MARIJUANA SHOULD BE LEGAL 7–22 (1996) (arguing that marijuana laws violate a number of constitutional amendments).

¹²⁵ GOODMAN, *supra* note 35, at 191.

¹²⁶ REPORT TO THE CHAIRMAN OF THE SENATE FINANCE COMMITTEE, NEW YORK STATE ECONOMIC AND REVENUE REVIEW 2004–05 (2004), at <http://www.senate.state.ny.us/SenateReports.nsf/> (last visited Nov. 1, 2004).

¹²⁷ GOODMAN, *supra* note 35, at 216.

¹²⁸ Tax Foundation, *Years of Adoption of Major State Excise Taxes*, at <http://www.taxfoundation.org/stateexciseyearadopted.html> (last visited Nov. 1, 2004).

¹²⁹ N.Y. TAX LAW § 471–a (McKinney 1999 & Supp. 2004).

¹³⁰ Allan Drury, *N.Y. Snuffs Online Cigarette Sales*, THE JOURNAL NEWS, June 18, 2003, at 1D, available at 2003 WL 20385412.

¹³¹ R.J. Reynolds Tobacco Company: New York State View, at <http://www.rjrt.com/TI/TiTaxStateView.asp?State=ny> (last visited Nov. 1, 2004).

federal excise tax adds another \$.39 per pack.¹³² In New York, tobacco products, other than cigarettes, are taxed at a rate of 37% of the wholesale price.¹³³ The \$1.50 per pack is the fifth highest excise tax on cigarettes in the nation.¹³⁴ Only Massachusetts, Connecticut, New Jersey and Rhode Island tax cigarettes at a higher rate than New York.¹³⁵ Not only is New York's tax rate the fifth highest, but also considerably higher than the average rate, 68.44 cents per pack, and the lowest rate.¹³⁶ Washington State has the lowest excise tax on a pack of cigarettes at 1.425 cents per pack.¹³⁷

The tax rates on cigarettes are also quite high when compared to New York's excise tax rates on other products. New York taxes gasoline at 32.7 cents per gallon, beer at 11 cents per gallon, and wine at 19 cents per gallon.¹³⁸ To put these numbers into perspective, 197.5 six-packs of beer or 400.6 bottles of wine must be sold to account for the same amount of excise tax revenue as one carton of cigarettes.¹³⁹ The total amount collected from excise taxes on tobacco products in New York was almost six times greater than the amount collected on alcohol excise taxes and almost twice as much as those taxes collected on gasoline.¹⁴⁰

All these taxes add up to a very large sum of money. In 2001, New York State collected \$1,020,302,000 in state excise taxes on cigarettes.¹⁴¹ This was the second most collected by any state. Only California, which raised \$1,150,856,000, created more revenue from excise taxes on cigarettes.¹⁴² Incredibly, New York's excise tax revenue from cigarettes was 11.8% of the \$8,651,459,000 total raised by all fifty states.¹⁴³ In 2002, New York State's excise taxes on cigarettes amounted to \$1,006,266,887, while State sales taxes collected on cigarettes totaled \$153,327,216.¹⁴⁴ In addition,

¹³² *Id.*

¹³³ N.Y. TAX LAW § 471-c (McKinney 1999 & Supp. 2004).

¹³⁴ Tax Foundation, *Various State Tax Rates*, at <http://www.taxfoundation.org/variousrates.html> (last visited Nov. 1, 2004).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ R.J. Reynolds Tobacco Company: New York State View, at <http://www.rjrt.com/TI/TiStateView.asp?State=ny> (last visited Nov. 1, 2004).

¹⁴⁰ *See id.* New York collected \$1,066,093,000 from tobacco excise taxes while collecting \$178,200,000 from alcohol and \$583,000,000 from gasoline.

¹⁴¹ Tax Foundation, *State Tobacco Excise Tax Collection by State*, at <http://www.taxfoundation.org/statetobaccotaxes.html> (last visited Nov. 1, 2004).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ R.J. Reynolds Tobacco Company: New York State View, at <http://www.rjrt.com/TI/TiStateView.asp?State=ny> (last visited Nov. 1, 2004).

\$28,319,600 in local excise taxes were collected in New York City.¹⁴⁵

The State of New York is also scheduled to receive \$25,000,000,000, over time, from the 1998 multi-state settlement agreement with the tobacco industry.¹⁴⁶ Forty-six State Attorneys General settled with the tobacco industry for \$206,000,000,000, the largest civil settlement in United States History.¹⁴⁷ New York has established a “tobacco settlement fund” that holds the money received from the settlement.¹⁴⁸ The State receives 51.2% of the funds secured from the settlement, New York City receives 26.6% and the other 22.2% is shared by the other fifty-seven counties of New York.¹⁴⁹ In 2002, New York received \$913,194,475 from the tobacco settlement.¹⁵⁰ Since November 23, 1998, the cigarette industry has paid New York \$2,976,037,554.¹⁵¹

Including state and local excise taxes, state sales taxes, and tobacco settlement payments, New York raised \$2,101,108,178 in 2002.¹⁵² Without this enormous amount of money, New York State would not be able to operate effectively. It certainly would need to raise taxes in other areas. Raising taxes is always extremely unpopular with the people who pay these taxes. Unhappy constituents, who are paying higher taxes, are likely to vote out their representatives in the New York State Senate and Assembly. As a result, the revenue produced from cigarettes stops the New York State legislators from completely banning smoking, rather than raising taxes.

Most disturbing is the fact that legislators want to ride the popularity of the anti-smoking movement while gladly accepting this revenue to run the state. As State Senator John Sabini admitted, “I think in many ways we’re sort of working both sides of

¹⁴⁵ *Id.*

¹⁴⁶ Dan Burns, *Cigarette Makers Ready Historic Price Increase*, BUFF. NEWS, Nov. 24, 1998, at A1, available at 1998 WL 6055451.

¹⁴⁷ *Id.*

¹⁴⁸ N.Y. STATE FIN. LAW § 92-X (McKinney 2002).

¹⁴⁹ Campaign for Tobacco-Free Kids, *State Tobacco Settlement: New York*, at <http://www.tobaccofreekids.org/reports> (last visited Nov. 1, 2004); see, e.g., Gersh Kuntzman, *City Stumbles Trying to Get More Cig \$*, N.Y. POST, December 25, 1998, at 16, available at 1998 WL 25333118 (reporting that a State Supreme Court Judge upheld the settlement formula); see also Joel Stashenko, *State to Reap Windfall of Tobacco Cash*, TIMES UNION, June 30, 2003, at B2, available at 2003 WL 5022906 (discussing the breakdown in tobacco settlement money for certain New York counties).

¹⁵⁰ R.J. Reynolds Tobacco Company: New York State View, at <http://www.rjrt.com/TI/TiStateView.asp?State=ny> (last visited Nov. 1, 2004).

¹⁵¹ *Id.*

¹⁵² *Id.*

the street.”¹⁵³ Both sides of the street represents feigning a tough stance against cigarettes on one hand, while happily accepting revenue raised from tobacco on the other.

Remember, the purpose of the smoking ban “is to preserve and improve the health, comfort and environment of the people of this state by limiting exposure to tobacco smoke.”¹⁵⁴ So while 3,185,800 adults smoke in New York (22.4% of New York’s adult population), this legislation supposedly protects health.¹⁵⁵ This is simply not true. The health of smokers is not protected at all. Perhaps the purpose of the smoking ban should read to “preserve and improve the health of non-smokers while they are in a restaurant or tavern.” If this is the goal of this legislation, it is a noble one. There can be no argument that protecting non-smokers while they are patronizing restaurants from ETS is a good thing. Legislators, however, should not take credit for preserving the health of all New Yorkers, because that can only be accomplished by completely banning cigarettes altogether. Further, since smoking is not completely banned, then the right of a person to perform a legal act in a private establishment (assuming the establishment wishes to allow smoking) should be honored.

B. The Tobacco Industry’s Money

The tobacco industry has a great deal of money and is willing to use that money to preserve the product it sells. Victor L. Crawford, a former lobbyist for the Tobacco Institute, commented that “[o]ur resources were enormous. Money was simply no object. Whatever I wanted in support, I could get.”¹⁵⁶ Mr. Crawford also noted that “[t]he job of lobbying for tobacco was to kill bills and to amend them, to weaken them.”¹⁵⁷ It seems that this was precisely the case with respect to the smoking ban in New York State.

New York State does not allow lobbyists to run unchecked in Albany. New York has statutes regulating “the registration and reporting requirements of lobbyists and their clients, the amount of money that may be given to and received by candidates for public

¹⁵³ Jay Gallagher, *Albany Ambivalent About Kicking Habit*, OBSERVER-DISPATCH (Utica, N.Y.), Mar. 30, 2003, at 4, available at 2003 WL 13287068.

¹⁵⁴ Act of July 5, 1989, ch. 244, 1989 N.Y. Laws 2328 (amending the public health law relating to smoking restrictions).

¹⁵⁵ Campaign for Tobacco Free Kids, *The Toll of Tobacco in New York*, at <http://www.tobaccofreekids.org/reports/settlements/TobaccoToll.php3?StateID=NY> (last visited Nov. 1, 2004).

¹⁵⁶ HILTS, *supra* note 34, at 181, 184.

¹⁵⁷ *Id.* at 181.

office, the registration and reporting requirements of Political Action Committees and the ethical obligations of public officers and employees.”¹⁵⁸ In 1977, the Lobbying Act was passed to monitor spending by lobbyists.¹⁵⁹ The Act seeks to protect “the constitutional right of the people to petition government and seek redress of grievances,” while also requiring “public disclosure of the identities, activities and expenditures of those who seek to influence legislation, rules, regulations and ratemaking actions of New York State and local government.”¹⁶⁰ The act was amended in 2002 to monitor contributions given to local representatives as well as state representatives.¹⁶¹

The Lobbying Act created an agency called the New York Temporary State Commission on Lobbying (“the Commission”).¹⁶² The Commission’s primary function is to monitor lobbying activities and report these activities to the public.¹⁶³ The Commission also has the power to enforce the Lobbying Act via investigations and private and public hearings, including Civil Penalty Hearings.¹⁶⁴

The Lobbying Act defines a lobbyist as “every person or organization retained, employed or designated by any client to engage in lobbying.”¹⁶⁵ A lobbyist must register with the Commission unless the lobbyist spends less than \$2,000 per year of reported compensation and expenses.¹⁶⁶ In addition, lobbyists must produce reports once every two months detailing the contributions that they made during that time.¹⁶⁷ Elected officials are prohibited from receiving any gift worth seventy-five dollars or more.¹⁶⁸ A gift includes, “money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence.”¹⁶⁹

Although lobbying is monitored by the Commission, its effects are still enormous. The amount of dollars spent on lobbying

¹⁵⁸ James D. Featherstonhaugh & Elizabeth K. Clyne, New York, *in* LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK 741 (Peter C. Christianson et al. eds., 2001).

¹⁵⁹ New York Temporary State Commission on Lobbying, *2002 Annual Report*, at <http://www.nylobby.state.ny.us/annreport/02artext.html> (last visited Nov. 1, 2004).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ N.Y. LEGIS. LAW § 1–c(a) (McKinney 1999 & Supp. 2004).

¹⁶⁶ *Id.* § 1–e(a)(3).

¹⁶⁷ *Id.* § 1–h(b)(5)(i).

¹⁶⁸ N.Y. PUB. OFF. LAW § 73(5) (McKinney 2001).

¹⁶⁹ *Id.*

representatives has risen from \$5,700,000 in 1978 to \$92,000,000 in 2002.¹⁷⁰ Further, in 2002 there were 3,332 lobbyists representing 1,835 clients in New York.¹⁷¹ Big business tobacco realizes the possibilities of lobbying. Tobacco companies are among the largest contributors in New York State.

According to reports filed with the Commission, the tobacco industry spent over \$3,000,000 lobbying in New York State in 2000 and 2001.¹⁷² In 2001, Philip Morris Management Corporation was represented by ten lobbyists.¹⁷³ Through these lobbyists, Philip Morris alone contributed \$781,835 in compensations, reimbursements and expenses to representatives of New York.¹⁷⁴ In 2002, Philip Morris was represented by twelve separate lobbyists.¹⁷⁵ Philip Morris gave \$987,414 worth of compensations, reimbursements, and expenses to New York legislators in 2002.¹⁷⁶

Not only do the legislators accept legal money and gifts from tobacco companies, but some legislators have been caught taking questionable gifts from Philip Morris as well. In 1999 Philip Morris was assessed a civil penalty of \$75,000, the sixth largest civil penalty ever imposed by the Commission.¹⁷⁷ The fine was imposed after it was disclosed during the tobacco settlement that "Philip Morris spent more than \$500,000 on dinners, gifts and lobbying the Senate and Assembly between 1996 and 1999."¹⁷⁸ This was more than double the amount they had originally disclosed to the

¹⁷⁰ New York Temporary State Commission on Lobbying, *2002 Annual Report*, at <http://www.nylobby.state.ny.us/annreport/02artext.html> (last visited Nov. 1, 2004).

¹⁷¹ *Id.*

¹⁷² Common Cause, *Connect the Dots: The Tobacco Lobby & The Battle for Smoke-Free Restaurants*, at http://www.commoncause.org/states/newyork/NY_CTD_Tobacco.pdf (last visited Nov. 1, 2004). At this time, the smoking ban legislation was being considered in the New York State Legislature.

¹⁷³ See New York Temporary State Commission on Lobbying, *Lobbyist/Client Search Results*, at <http://www.nylobby.state.ny.us/lobbysearch.html> (last visited Nov. 1, 2004) (listing the ten lobbyists as John Boltz; Bond Schoeneck & King, LLP; Davidoff & Malito, LLP; Hill & Gosdeck; McCulley & Associates, Inc.; Janice A. McDaniel; Martin J. McLaughlin; Brian R. Meara Public Relations, Inc.; The Rutnik Law Firm; and Statewide Corporate Strategies.)

¹⁷⁴ *Id.* This total was obtained calculating the contributions of the ten lobbyists.

¹⁷⁵ *Id.* (listing the twelve lobbyists as John J. Boltz; Bond Schoeneck & King, LLP; Davidoff & Malito, LLP; Hill & Gosdeck; JFG Associates; McCulley & Associates, Inc.; Janice A. McDaniel; Martin J. McLaughlin Communications; Brian R. Meara Public Relations, Inc.; The Rutnik Law Firm; Statewide Corporate Strategies; and Daniel Tubridy).

¹⁷⁶ *Id.* This dollar amount includes \$31,538 that was contributed in the name of Miller Brewing Company, which is wholly owned by Philip Morris.

¹⁷⁷ New York Temporary State Commission on Lobbying, *2002 Annual Report Appendix K: Largest Civil Penalty Fines Imposed*, at http://www.nylobby.state.ny.us/annreport/app_k.html (last visited Nov. 1, 2004).

¹⁷⁸ Students4Reform.com, *Tobacco Company Reveals More Gifts to State Legislators*, at <http://www.students4reform.com/toccigifts.shtml> (last visited Nov. 1, 2004).

Commission.¹⁷⁹ Between 1996 and 1999, sixty New York State representatives accepted illegal gifts, gifts worth more than seventy-five dollars, from Philip Morris.¹⁸⁰ Fifty-eight legislators voted no or did not vote on the smoking ban.¹⁸¹ Of these fifty-eight legislators, eleven accepted illegal gifts from Philip Morris.¹⁸²

Author Philip Hilts concludes that, “[i]t is hard to be shut off from an easy source of campaign cash . . . it is even harder to put one’s self in line to be a target, knowing that your opponent will get extra cash and help from tobacco companies.”¹⁸³ Through the Lobbying Act, New York has attempted to monitor the activity of lobbyists and their contributions. The tobacco companies give large amounts of money to legislators in order to influence the tough decisions that lawmakers face. Although votes cannot be bought, gifts and other donations to legislators certainly have an impact. The money helps legislatures finance projects that will help them get re-elected and those monetary contributions are certainly repaid to the tobacco companies through various avenues, such as a vote in their favor.

VI. CONCLUSION

Smoking has a long history in the United States. Tobacco was grown in America before it was discovered by the Europeans and, after all this time, people still use tobacco for a variety of reasons. Indeed, people continue to smoke despite the fact that medical research has indicated that smoking causes cancer and several other terminal diseases. Over the last thirty-five years a debate has raged over ETS and its health implications on non-smokers. The New York State Legislature believes that ETS is dangerous and has

¹⁷⁹ *Id.*

¹⁸⁰ Students4Reform.com, *New York Lawmakers on Tobacco Company’s Spending List for Lobbying*, at <http://www.students4reform.com/legislatorlist.shtml> (last visited Nov. 1, 2004) [hereinafter *Students*]; Clifford J. Levy, *Phillips Morris Gifts to Albany Legislators Put Focus on Ethics*, N.Y. TIMES, Nov. 18, 1999, available at 1999 WL 30548683.

¹⁸¹ New York City Citizens Lobby Against Smoker Harassment, *How Did the State Legislators Vote?*, at <http://www.nycclash.com/NYSban2003.html#LegislativeVote> (last visited Nov. 1, 2004).

¹⁸² *Cf. Students*, *supra* note 180. The State Senator who accepted an illegal gift and voted no on the smoking ban was Efrain Gonzalez Jr., (D) Bronx. Michael A.L. Balboni, (R) Nassau, accepted illegal gifts and was absent from the vote. In the Assembly, Peter J. Abbate Jr., (D) Brooklyn; Patricia L. Acampora, (R) Suffolk; Thomas F. Barraga, (R) Suffolk; Steven L. Labriola, (R) Nassau; Charles H. Nesbitt, (R) Orleans; Robert C. Oaks, (R) Seneca; Robin L. Schimminger, (D) Erie; and George H. Winner Jr., (R) Chemung, accepted illegal gifts and voted no. Carmen E. Arroyo, (D) Bronx, accepted illegal gifts and was absent from the vote. In addition, twenty-two of the fifty-eight no or absent votes were cast by legislators elected after the illegal gifts were revealed.

¹⁸³ HILTS, *supra* note 34, at 184.

banned smoking in almost all indoor areas, excluding the home.

This smoking ban has been justified on the grounds of protecting health. The health of smokers, however, is not protected at all as they are permitted to continue smoking a cancer causing agent so long as it is not inside public places. In addition, the rights of smokers to smoke a legal product in places where smoking has always been welcomed has been eliminated. Moreover, private property owners who may wish to allow smoking in their bars and restaurants are prevented from doing so. So why did the legislature create a smoking ban that does not adequately protect public health? In addition, why does the legislature feel the need to prevent rational, consenting adults from smoking in an establishment that permits people to smoke?

The answer is that lawmakers want to catch the windfall of public support that comes along with a seemingly tough, protective smoking law. Legislators realize, however, that if smoking were banned, the tax revenue loss would be disastrous for the fiscal health of the State. In addition, any legislator who voted to ban cigarettes completely would certainly lose any contributions made by the tobacco industry through lobbying. Thus, we are left with the smoking ban as it has been codified. This law does not adequately protect human health in New York and it forces many private business owners to ban smoking when they may not wish to do so. My response to New York State legislators and the smoking ban is this: protect us or leave us alone.