

A Hypocritical Society:

Participation in Legal Activities May Be Deemed Criminal

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“Over my cold, dead, cancer-ridden body,” exclaimed Lisa Tirella, a junior at American University, upon learning about the proposed smoking policies to be implemented in the spring of 2003 on American University’s campus. Ms. Tirella expressed her concern, rather forcefully, in terms of this specific deprivation of liberty. However, she is not the only person crying out in rage over this violation of her fundamental right, that is, the right to smoke. Citizens all over the country are disgruntled about the previously instituted smoking bans in California, as well as the proposed bans in states such as Maryland and New York. I propose that these bans are a violation of smoker’s rights and an example of the government’s attempt to continually deprive its citizens of their liberty. This is despite the fact that our government makes a substantial amount of profit from the tax of cigarette sales.

One of the most publicized smoking bans is that of the state of California. California Labor Code Section 6404.5 prohibits smoking in places of employment (Cal/OSHA Consultation Service, 1997). This particular code was instituted January 1, 1995. It was this code that led the way for the current legislation banning smoking in public restaurants and bars. The intent of the 1995 Labor

Code was to protect employees, in an enclosed space, from exposure to environmental tobacco smoke (ETS) that has the potential to impose harmful effects (Cal/OSHA Consultation Service, 1997). Initially, gaming clubs, bars, and taverns, were exempt from this particular code. As of January 1, 1998, new legislation prohibited smoking in these establishments as well. Under this new law, the only exempt establishments are casinos on Indian Reservations and owner-operated businesses that have no employees (White, 1998). The 1998 law is a follow-up to the 1995 code in terms of protecting bartenders and other employees from ETS. With this new law in place, law enforcement officers have the right to impose fines on the owners of establishments that do not comply, as well as customers.

Fines for an establishment can range anywhere from \$100 to \$7,000. Cathy Crawley, a California resident, had this to say about the 1998 law, "It doesn't make me angry that I can't smoke. What makes me angry is that the government can dictate to a restaurant owner what they can and can't do (White, 1998, para. 2)." The organization "Californians for Smoker's Rights" had a similar statement. "It not only deprives smokers of the right to consume a legal product within a private establishment, but it also takes the right away from the owner of a restaurant or bar...the right to decide how he or she wants to run their business (White, 1998, para. 13)." However, the extension of smoking bans has not stopped with restaurants and bars. A few Californian "communities are extending smoking restrictions into the outside world by banning puffing in parks, at bus stops, and on public sidewalks (Gaura, 1998, para. 2)." In Santa Cruz,

officials are also stating that it is the smoker's responsibility to control their second-hand smoke so that it does not drift into public buildings and eating areas (Gaura, 1998). In summary, laws that have been enacted in the state of California have banned smoking in places of employment, restaurants, bars, and have extended into the outside world.

California is not the only state that has instituted smoking bans. Friendship Heights, Maryland, has also placed smoking restrictions that were later re-called by its community. Even the state of California did not place such radical restrictions on its residents as those in Friendship Heights, Maryland. Not only were bans in place for restaurants and bars, but also measures were taken to potentially ban smoking in private residences (Reel, 2002). If this particular law had passed, it would have banned smoking in outdoor "public" places. In December of 2000, the Montgomery County Council passed a law giving law enforcement officers the right to fine people \$100 for smoking in public parks, sodden areas, or on a sidewalk (Mizejewski, 2001). "Discarding tobacco products like cigarette butts in public also was banned. Smoking was not prohibited in vehicles, residential outdoor areas or private lawns, driveways or business areas (Mizejewski, 2001, para. 9&10)."

On a more personal level, many colleges and universities are taking steps toward smoking bans on their campuses. American University plans on implementing its "Smoke-Free 2003" policy in the spring of 2003. This policy will restrict smokers from participating in perfectly legal activities in front of residence halls and other University buildings. These bans are particularly disturbing since

the majority of college students smoke. A similar case is that of Riverside Community College in Riverside, California. Riverside District officials hope to rid their campuses of smoking altogether (Ahern, 2002). Existing regulations include: "RCC students and faculty are already barred from lighting up inside and within 20 feet of campus buildings, as well as at Wheelock Field, the campus football stadium (Ahern, 2002, para. 14)." One startling difference between the two cases is that American University is a private institution whereas Riverside Community College is a public institution.

According to federal law, at the age of 18 years or older it is perfectly legal to purchase, possess, and use tobacco products. Not only is it legal to smoke, but also a substantial amount of money is collected by the government through cigarette sales tax. Why, then, are our state governments so adamant about instituting smoking bans? The restrictions on smoking make it almost impossible to smoke anywhere. It seems ridiculous to ban smoking yet allow tobacco products to remain legal. Suggested reasons for the bans have been things such as protecting employees and innocent bystanders from ETS. Since when is the government so concerned about the health of its citizens, particularly when it has been profiting off of smokers and their slow demise for years?

The government's increasingly long tendrils appear to be creeping into private territory. Laws enacted in California and potentially Maryland are intruding on the private sector. Of course, a publicly owned establishment is obligated to follow state laws no matter how absurd the laws are. However, a privately owned establishment is not, and should not be subject to these state

laws to the same degree. A perk of being a private business owner is *choice*. These smoking bans eliminate this aspect for private business owners and is therefore denying them the freedoms this country prides itself on.

What constitutes a public place? Judith A. Douville states, “A public place is defined as any enclosed area in which the public is permitted or to which the public is invited (Douville, 1990, p.92).” Furthermore, she addresses the issue of smoking in public places when she states, “The extent and acceptability of smoking restrictions in public areas is influenced by whether ownership is public or private; whether or not smoking was previously permitted; the degree to which persons are exposed to involuntary smoking (Douville, 1990, p.92).” Once again the issue of public or private ownership surfaces. Our country separates itself from others because we supposedly have a private sector that our government cannot fully control. However, the implementation of smoking bans on private establishments is slowly eliminating this private sector.

Not only has our government overstepped its bounds by eliminating smoking in private establishments, but as in the case of Friendship Heights, Maryland, has tried to eliminate smoking in private vehicles and residences. This is a complete intrusion on the private lives of citizens. Citizens of legal age should not be restricted in their own vehicles and homes. They have a fundamental right to smoke on their own property.

Suffolk University Law School professor Alvan Brody argues:

“Where does this ‘right’ come from? It is not conferred by the common law or by statute. On the contrary, the common law from its earliest origins established a contrary principle – that everyone has a right to the integrity of his body, a right not to have his body

unnecessarily intruded upon by others. Under basic common law principles a smoker's 'right' to smoke stops when his smoke intrudes upon another's body without his consent or acquiescence (Weis & Miller, 1985, p.74)."

Brody (Weis & Miller, 1985) has a sound argument. However, I am not arguing that public places (enclosed areas as Douville states) shouldn't have smoking restrictions. I *am* arguing that it is a violation of rights as well as a deprivation of liberty to allow the government to place restrictions on private establishments and to extend these restrictions to open areas as well as private residences and vehicles. These particular restrictions are an attempt at social control on the part of our government. Since when can the government intrude on the private lives of citizens? Leonard Pitts Jr., an advocate for smoking bans in public buildings, appears to agree, "As far as I'm concerned, my right to preserve my health and conduct my business in a comfortable atmosphere supersedes anyone else's right to smoke in a public building (Pitts, 2001, para.2)." However, he goes on to state, "Yet the community of Friendship Heights, Maryland, just imposed a new ban on smoking, and I'm against it (para.4). Because Friendship Heights has extended its ban beyond buildings to include outdoor spaces – parks, sidewalks, streets (para. 5). Why ban smoking out-of-doors, where all one has to do to escape smoke is take a step or two away (Pitts, 2001, para. 7)?" Pitts's opinion on the smoking bans in Friendship Heights, Maryland, can be summarized as such, "It's mean, it's abusive, it's antithetical to the concept of individual liberties, and it's something else, too. It's dumb (Pitts, 2001, para. 12)."

The problem with this new legislation (smoking bans), as stated previously, is that it has been applied to private establishments. The concern for employees exposed to ETS is understandable, especially since significant and prolonged involuntary smoke exposure does increase the risk of lung cancer, as well as other ailments associated with smoking (Meyer, 1990). Such ailments include coronary heart disease, stroke, chronic obstructive pulmonary disease, peripheral vascular disease, peptic ulcer disease, many types of cancer, emphysema, as well as general irritation to the eyes, nose, throat, and gums (Brodish, 1998). However, are employees exposing themselves involuntarily to ETS if they choose to work in a restaurant or bar that permits smoking? The counter-argument is that many people do not have a choice as to where they are employed. If we limit the number of job opportunities for non-smokers, we are violating their right to work and support themselves. Granted, this may be perceived as a deprivation of liberty. However, if the element of *choice* has not been eliminated, it is perfectly acceptable. A deprivation of liberty occurs only when an individual is not allowed to make decisions for themselves and therefore make a choice. Therefore, our government is depriving private business owners of their liberty by placing smoking bans on their establishments, thereby eliminating the owner's choice.

Is it possible to find a happy medium or solution to this violation of rights? As for restrictions on smoking in vehicles and private residences, these bans should be abolished completely for being unconstitutional. In these specific cases, smokers are only harming themselves. As for private restaurants and

bars, I propose that these establishments be specifically labeled smoking and non-smoking. This provides a consumer with the choice to be exposed to ETS. With this in mind, it will be understood that smoking will not occur in non-smoking establishments. In the same manner, if an establishment is labeled smoking, patrons must realize that they will be exposed to ETS. Governor Wilson of California stated in an attempt to have the state ban overturned, "It seems to me that if you have a cigar bar or a smokers' bar, people ought to have the option of choosing. I think that smokers ought to have some sort of sanctuary (Smith, 1998, para.4)." Also, "If they don't want (a bar that allows smoking), then I think they can stay away and find a no-smoking bar (Smith, 1998, para.8)."

The smoking bans that appear to be sweeping the country should be of serious concern to civil rights advocates. While the bans may be appropriate for public establishments, they are certainly a violation of private citizens' and private business owners' rights. Smoking bans eliminate *choice* and *choice* is the most fundamental liberty we have in America. If our government insists on depriving its citizens of their liberty, then they might as well label all smokers with a giant 'S' on their foreheads and blame them for all of society's problems. Perhaps a similar situation has happened in the past. Either way, our government is harassing law-abiding citizens by forcing them to become social outcasts, and essentially criminals.

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