

Air Pollution: The Role and Limits of Consent

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A top-forty singer croons to his girl friend: “All I need is the air that I breathe and to love you.” Like love, air is an essential human good: wherever we go and whatever else we do or care about in life, we all must breathe. And like love, air is found everywhere: in a dimly lit bar, on a stroll in the park, on the factory assembly line, in the office copy-machine line, in cities, suburbs, farms, wilderness.

But, along with love and air, air pollution, too, turns up in all these places. In bars and restaurants, at work and at home, nonsmokers inhale what nearby smokers exhale: one cancer epidemiologist warns that breathing other people’s cigarette smoke may bring early death to as many as 2,000 nonsmoking Americans every year. Airborne contaminants in the workplace (offices as well as factories) are responsible for the largest share of the 100,000 to 200,000 occupational disease fatalities in the United States every year. Even otherwise pristine wilderness is not untouched: the Office of Technology Assessment has estimated that “acid rain” currently threatens 9,500 lakes and 60,000 miles of streams. Some 50,000 deaths annually in the United States and Canada may be attributable to the effects of outdoor air pollution.

What moral judgment can we pass on air pollution in these different cases? On one common and persuasive moral view, it is simply wrong to cause a serious harm to another person without his consent, whatever the benefits — to you, to society generally, even to that person — of so doing. To cause disease or death, or

to destroy another's property, is on this view to violate a moral right. Peter Railton, Associate Professor of Philosophy at the University of Michigan, fleshes out this "Lockean" view with the image "of moral space as akin to a map at a registrar of deeds. Individual entitlements determine a patchwork of boundaries within which people are free to live as they choose so long as they respect the boundaries of others. To learn one's moral obligations one need only consult the map. Would a given act involve crossing another's boundary? If so it is prohibited; if not, permitted." Are pollution-caused injuries to persons or property, then, flatly ruled out?

The answer usually given is that such injuries may be permitted if those injured can be said to have given their consent to the polluting activity. Consent, as it were, opens up boundaries so that a border-crossing is no longer a moral offense. How adequate is this response in our three cases cited above — secondhand smoke, airborne hazards in the workplace, and outdoor air pollution? Can we say that the victims in these cases consented to the harms that befell them? What role does the notion of consent play in legitimizing, or condemning, current levels of air pollution — how much weight can we place on a consent requirement in setting our societal standards for air quality, and in deciding how these standards should be implemented? And where can we look instead if the concept of consent in some cases fails us?

Secondhand Smoke

Nonsmokers have always complained about having to breathe other people's smoke, but only in the past few years has the link between secondhand smoke and lung cancer been established. Suddenly the complaints have acquired a new seriousness. Most "passive smokers" don't actually contract cancer, of course, but are

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"merely" placed at a higher risk of contracting it. But risk levels are raised, Railton notes, because "some actual physical change has been wrought by [the smoker] in [the nonsmoker's] person or property. . . . each time I send some of my tobacco smoke your way you suffer some small physical change, not for the better." This counts as a harm, albeit a small one. And on the Lockean view what matters is whether or not a boundary was crossed, not the magnitude of its consequences: shoplifters have been arrested for stealing a pack of chewing gum. Nor can the smoker's alleged "right to smoke" be placed in the balance here. While

the smoker may have a right to smoke alone in her room, cheerfully contracting cancer if she likes, her right to smoke, like her right to swing her arm, ends where someone else's nose begins.

But doesn't the nonsmoking wife consent to the risk imposed upon her by marrying a smoker and staying married to him? If she can't take the smoke, she can pack her bags and head for Rio. It can be argued, more generally, that the nonsmoker bothered by someone else's fumes is at liberty to walk away. But according to Rutgers University philosopher Mary Gibson, "this will not do. He or she must work, travel, eat, attend classes and meetings, and so on, like everyone else.

. . . the more voluntary the association, the stronger the case for saying that the nonsmoker consents to the risk he undergoes. But we need to look long and hard at how voluntary the association really is.

. . . In a society in which a substantial proportion of the population smokes, avoiding involuntary exposure by eschewing all 'voluntary' associations where one might encounter secondhand smoke would make it impossible to lead anything like a normal life." She agrees that the more voluntary the association, the stronger the case for saying that the nonsmoker consents to the risk he undergoes. But we need to look long and hard at how voluntary the association really is.

In this first case, it seems, then, that the presence or absence of the nonsmoker's consent is critical in determining how much pollution the smoker is morally permitted to impose on those around him. Our societal goal should be to minimize the harms suffered by non-consenting bystanders, to zero if possible.

How should this goal be achieved? Clifford Russell, an economist at Resources for the Future, identifies several dimensions on which we can compare different strategies for implementing air quality goals: how efficiently the goal is achieved; how achievement is monitored and enforced; what incentives polluters are given to reduce pollution still further; and whether the implementation plan is itself satisfactory on moral and political grounds.

To achieve our air quality goal in the secondhand smoke setting, Russell recommends outright prohibition of smoking in public places or the provision of segregated smokers' and nonsmokers' sections. Since "no social good is served by [smoking], and it is certainly not an inevitable result of any activity that does produce a social good," the only cost of prohibition is the discomfort experienced by the habitual smoker asked to refrain. Such discomfort can be intense, however, so where segregation can be inexpensively provided, it may be the preferred choice.

Better still would be for smokers to kick the habit

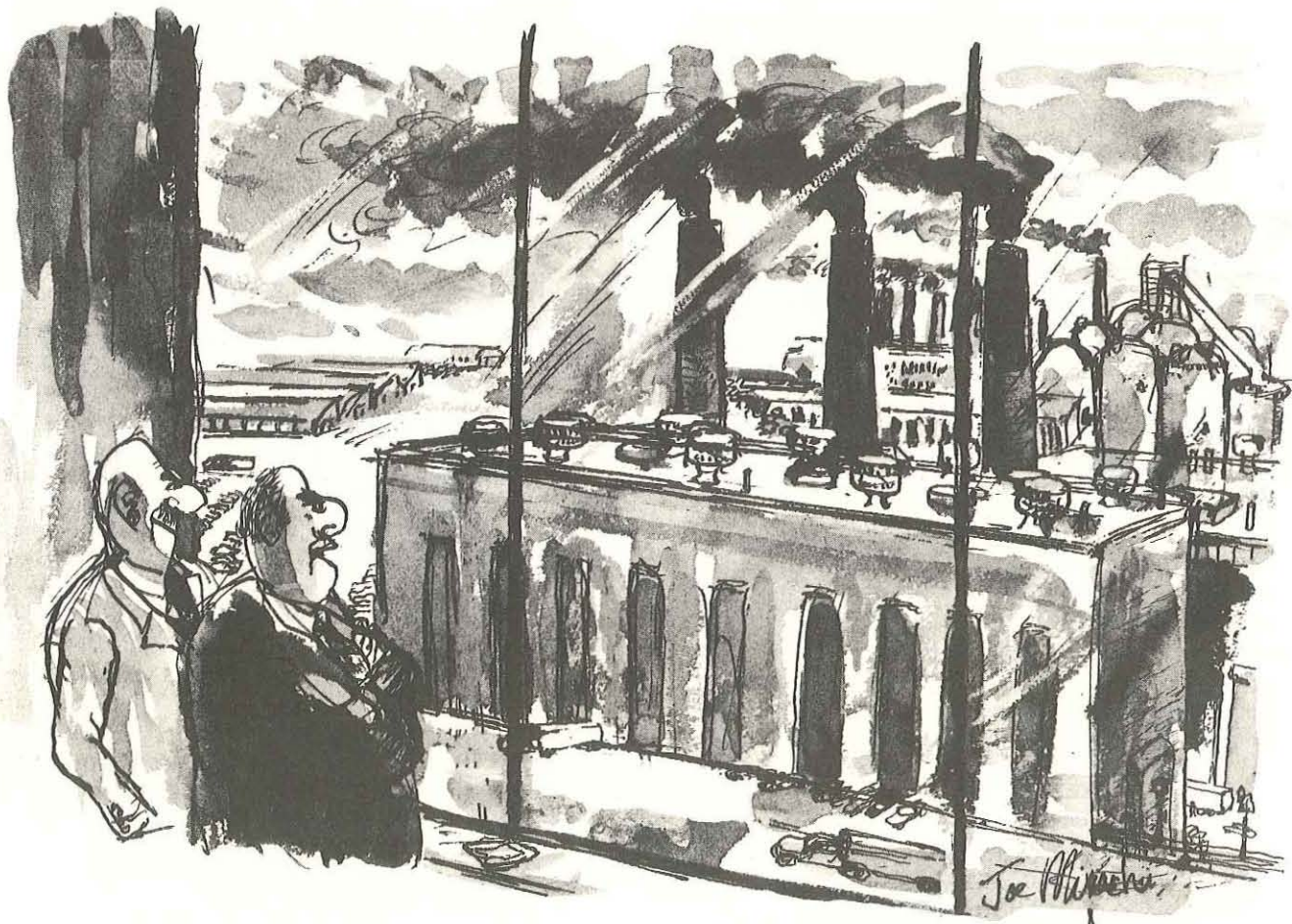
altogether. The strongest anti-smoking incentives seem to be provided by growing public disapproval (fueled by Brooke Shields commercials calling smokers "losers"). Hefty taxes placed on cigarettes, to provide a financial disincentive to smoke, run into ethical objections, on Russell's view. "Any implementation system based on a tax . . . runs squarely aground on the distributional objection that the rich can pay to pollute. . . . The burden of achieving the social goal would be shifted to the least well off rather than shared on some appealing basis such as the initial contribution to the problem."

Workplace Air Pollution

It may seem more persuasive to argue that workers exposed to airborne contaminants on the job have consented to the risks they bear, particularly if they are paid additional wages in exchange for the additional risk. Gibson points to evidence, however, that a "wage premium" for risky work exists "in otherwise relatively desirable jobs, i.e., those that are relatively highly paid, secure, and unionized, but not in those jobs characterized by low pay, insecure employment, and lack of

unionization." She concludes, "Inferring consent from labor-market behavior presupposes that workers are fully informed of the hazards they face before accepting (and while working at) jobs, that they have reasonable alternatives available to them if they find the risks unacceptable, and thus that they are satisfied with the wage/risk packages they currently get. Each of these assumptions is subject to serious question."

If we insist that airborne harms may not be imposed on workers without their consent, then in many cases workplace air quality will have to be considerably cleaned up, and at considerable expense. Enforcement of the consent requirement has a great deal more bite here than in the secondhand smoking case, since real social benefits derive from keeping production costs low. But our current societal consensus seems to be that workplace air pollution violates workers' rights. The Occupational Safety and Health Act mandates that permissible exposure levels for any toxic substance present in the workplace must ensure that "no employee will suffer material impairment of health or functional capacity," and this insistence on protecting worker health despite steep costs was upheld by the U.S. Supreme Court.



Drawing by Joe Mirachi; © 1985
The New Yorker Magazine, Inc.

"Where there's smoke, there's money."



These two photos of Herten Castle in the industrial Rhein-Ruhr region of West Germany were taken in 1908 (left) and 1969 (right) respectively. Stone decay caused by air pollution explains the difference.

Photographs from *Stone: Properties, Durability in Man's Environment* by E. M. Winkler, Springer-Verlag, 1973



If we can achieve this same standard more cheaply, of course, so much the better. Russell believes that the most efficient route to attainment is for the regulator "simply to announce to each industry or plant the required ambient standard and then arrange to monitor its observance. . . . A simple announcement of the standard can bring about the least-cost solution, since each firm can be presumed to minimize its cost of compliance." A less efficient alternative is to specify, not a standard to be met, but a particular technology for meeting it, since this provides a firm with no incentive for developing cheaper and better means of pollution control. Some efficiency may be sacrificed, however, for ease of monitoring and enforcement. Russell notes that it is much easier to check that a certain piece of equipment is in place than to measure constantly fluctuating air quality. On the other hand, "installation does not guarantee operation, much less proper operation." In any case, the presence of the workers themselves, who can assume some on-the-spot monitoring responsibilities, makes enforcement less of a problem.

Implementing a workplace air quality standard through regulation backed with penalties for noncompliance also sends a clear message that we as a society morally condemn the practice of endangering worker health for corporate profits. Promulgation of the regulation itself, together with the rhetoric that accompanies it, signals that workplace health and safety have a high priority on the nation's agenda.

Outside Air Pollution

Perhaps there is no one who is not adversely affected by outdoor air pollution. Even those who live in low-risk regions have reason to care when wilderness lakes and forests are rained upon by showers with the pH

of household vinegar, for wilderness — and, indeed, the air itself — is a shared resource owned jointly by all of us. Once again, in the absence of near-universal consent to current pollution levels, the "you stay within your boundaries and I'll stay within mine" view seems to entail very tight restrictions on polluting activity.

But this conclusion here seems unacceptable. In the previous two cases, it looked both feasible and fair to insist that no one be harmed by secondhand smoke or workplace air pollution without her consent. Where consent could not be obtained, pollution could not be justified. But how would one even begin to go about obtaining the actual explicit consent of every single individual affected by pollution in outdoor air? Nor does an appeal to "implicit" consent seem to be of any help, for what might initially appear instances of implicit consent — such as buying a home in a polluted area — do not hold up under scrutiny. Railton maintains, "Someone who voluntarily moves into a high-crime (or high-grime) neighborhood may have acted unwisely, but he has not laid down his rights."

More crucially, an insistence on actual unanimous consent, even if feasible, seems unreasonably — and unfairly — strict. Should one individual, perhaps only marginally affected, be entitled to veto any polluting activity, however much it may benefit others? We may feel more inclined to scrap the consent requirement than to shut down all polluting industry. It seems that in the outdoor air pollution case, we have reached the limits of consent as a tool for setting air quality standards.

At this point Gibson suggests that we stop and ask ourselves what it was about consent that struck us as so important and look to this more basic, underlying notion to guide our policies. On her view, what lies behind consent requirements is a concern for autonomy,

for self-determination, a concern "that one's life be one's own." Railton identifies the motivating factor behind the Lockean view as the Kantian idea of respect for persons as ends, not merely as means. If we look beyond consent to autonomy, or respect for persons' control over their own lives, what can we say about outdoor air pollution?

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Gibson draws this conclusion: "There can be no substitute for actual, direct, informed, and meaningful participation in the formation, adoption, and implementation of public policy concerning air pollution by the persons whose lives, health, and values are potentially at risk." In particular, she rejects technocratic solutions that appeal to notions of "hypothetical consent" — speculations on the part of economists and bureaucrats as to what rational, well-informed individuals *would* consent to if they were consulted. "What we need, if we are to respect and promote autonomy," she argues, "are not more sophisticated algorithms for making decisions, but better ways of involving those whose lives will be affected by those decisions in making them." There is no magic formula, no neat cost-benefit analysis, for determining how much pollution we as a society can tolerate, given the clearly intolerable costs of achieving zero pollution. Gibson thus looks to democratic institutions and procedures to help us arrive at some kind of societal consensus.

Railton also sees the solution as lying in a process of social balancing and compromise. For him, the failure of the notion of individual consent to guide our public policies on outdoor air pollution shows that the Lockean conception of morality "that pictures individuals as set apart by property-like boundaries" cannot do justice to "the fact that we find ourselves situated in, and connected through, an environment." A workable policy on air pollution will not come from a rigid and narrow focus on individual rights, but from a fundamentally social dialogue.

Once we have arrived through democratic processes at a societal standard for outdoor air pollution — as we have through the Clean Air Act — by what strategy should it be implemented? The current approach, following the strategy for workplace pollution, again simply promulgates the standard, with penalties for noncompliance. But Russell argues that stronger incentives for technological innovation are provided by systems that, rather than flatly forbidding any pollution that exceeds the standard, set a charge or price on any excess discharges: "for any particular source, an incentive system that puts a fee on the discharge remaining

after control will create a greater incentive to change than will a regulation specifying that same level of discharge." He believes there is little to choose between the two approaches as far as monitoring and enforcement are concerned, since accurate measurements are needed to assess both charges and fines.

The idea of emission charges has met with political resistance. It is felt that polluters already have a good enough reason not to pollute: that it's wrong. We don't let litterers pay to toss beer cans out of their cars; instead we post signs saying, "Littering is filthy and selfish so don't do it!" "By making pollution into an activity that one can pay to engage in," Russell explains this objection, "the charge approach implicitly judges it to be ethically neutral — like buying a shirt. Those who judge pollution to be wrong in itself, as a crime against other persons, do not approve of that result."

On the Lockean view, of course, any amount of pollution, however small, is a wrong to which a clear moral stigma should be attached. But part of the reason for moving away from that view is the realization that a certain amount of pollution is inevitable in any production or consumption process. The fact that we set non-zero levels of pollution, Russell argues, sends the same ethical message as establishing a charge. So a case can be made for a charge approach, if it can receive democratic endorsement from those who will in the end be affected by the policy chosen.

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Conclusion

Air pollution, as Railton concludes, makes us take seriously the fact that we exist, not as isolated entities secure behind our fences, but as fellow creatures in a shared and threatened environment. While in some settings — when looking at secondhand smoke or workplace hazards — we can insist that individual consent remains fundamental, in others we may have to look beyond consent to autonomy and beyond the individual to a deeper sense of community. If anything is our birthright, it is the air that we breathe. The fervent outpouring of public support for the Clear Air Act suggests that we are serious about doing something to protect it.

The information in this article, and the quotes from Peter Railton, Mary Gibson, and Clifford Russell, are taken from essays in *To Breathe Freely: Risk, Consent, and Air*, edited by Mary Gibson, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1985). To order, see page 15.