

E-Cigarettes: An Unfolding Legal, Ethical, and Practical Quandary

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Abstract

This article explores the legal, ethical, and practical issues arising from the introduction and rapid growth of a controversial new tobacco product – the e-cigarette. The article examines the laws – federal, state, local, and regulatory that apply, or could apply to e-cigarettes. Even if in some circumstances legal, the authors then analyze whether e-cigarettes are moral pursuant to four major Western-based ethical theories. Particular attention is paid in the foregoing analyses to the marketing, advertising of this new tobacco product to minors. The implications of the emergence of e-cigarettes are discussed; and appropriate practical recommendations are offered to various stakeholders and groups affected by this product. A theme of this article is that e-cigarettes present a quandary, especially for government at all levels as well as employers, and including the writers of this article too, since there is not yet available definitive scientific information as to whether this popular new product is a beneficial or harmful one. Nevertheless, the federal Food and Drug Administration in the United States in April of 2014 proposed certain basic rules regarding the regulation of this new product. These rules are not law yet. The authors examine what the proposed rules do, and do not do, in regulating e-cigarettes. The authors strive to present in a fair and balanced manner all sides to this controversy and to conduct the legal and ethical analysis herein in a rational and logical manner.

Keywords: e-cigarettes, smoking, FDA, vaping, nicotine, advertising to children

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I. Introduction

Today, there is emerging a major tobacco controversy dealing with the phenomenal growth of a new smoking product – electronic cigarettes or, as popularly known, e-cigarettes. This new product has produced a heated debate between anti-smoking advocates and the manufacturers of the product and consequently a concomitant legal, ethical, and practical quandary for the stakeholders and groups affected by e-cigarettes, especially for government regulators, the medical community, and employers. Are e-cigarettes the new “evil weed” because they do contain nicotine and thus may entice people, particularly young people, to smoke and perhaps get “hooked” on much stronger nicotine tobacco products? Or are e-cigarettes a good and beneficial product, due to their low nicotine content, because, like nicotine patches, they perhaps can function as a smoking reduction and maybe cessation device? The principal problem, and the crux to solving the quandary, is that there is not yet a great deal of scientific information as to the harms or benefits that the product can cause. Nevertheless, the authors in this article will seek to present in a fair and balanced manner all the current and relevant information as well as the diverse, and often conflicting, opinions regarding e-cigarettes.

In this first section to the paper – Introduction and Overview - the authors will present a definition and functional description of the topic as well as an overview of the increasingly very lucrative e-cigarette business and the “players” involved in this business. In the Legal Analysis section of the paper, the authors will discuss what the Federal Drug Administration is planning to do in the form of proposed rulemaking regarding the regulation of e-cigarettes; and then the authors will discuss certain state and local laws that currently ban or restrict the product. Other legal doctrines that arguable could apply to e-cigarettes will also be analyzed. Yet, even if the e-cigarette product is a legal one in certain jurisdictions, nonetheless is it a moral product? Accordingly, in the Ethical Analysis section of the paper, the authors will examine the morality of e-cigarettes pursuant to four traditional, Western-based, ethical theories – Ethical Egoism, Ethical Relativism, Utilitarianism, and Kant’s Categorical Imperative – and appropriate moral conclusions will be rendered. In the final section of the article, the authors discuss the implications of this new product and make some recommendations, especially for employers, and this is followed by a brief summary.

II. Overview

E-cigarettes are battery-powered tubes that transform nicotine-laced liquid into a steam-like vapor, which is then inhaled by the user, or, as commonly called, "vaping." Vaping is not smoking, proponents of e-cigarettes contend; rather, vaping is merely inhaling e-cigarette vapor and then exhaling a wispy cloud that quickly fades. Inhaling traditional cigarettes can be a very unpleasant experience, manifested by coughing and nausea; but not so with vaping, as e-cigarettes can be readily inhaled on the first puff with no attendant immediate adverse effects. In addition to nicotine, e-cigarettes contain compounds that are generally believed to be safe, such as glycerine, which is found in many foods, and propylene glycol, which is the main ingredient in theatrical fog (McArdle, 2014) and which has not been found to be harmful to human beings (Siegel, 2014). As such, some government officials and employers are concerned as they want good wellness programs available for their employees (Cavico, Mujtaba, Muffler, and Samuel, 2014).

Electronic cigarettes typically consist of a metal tube, containing an atomizer, a battery, and a cartridge filled with a liquid nicotine solution, and a battery powering a coil that heats the solution into a vapor. When a user sucks on an e-cigarette, a light-emitting diode causes the tip to glow (but often glowing blue instead of red), and next the atomizer turns the liquid nicotine into a vapor. The user then exhales the vapor like smoke. So, the effect is to mimic a traditional tobacco product. The U.S. Federal Drug Administration provides a definition of an e-cigarette, to wit: "Electronic cigarettes, also known as e-cigarettes, are battery-operated products designed to deliver nicotine, flavor and other chemicals. They turn chemicals, including addictive nicotine, into an aerosol that is inhaled by the user. Most e-cigarettes are manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble everyday items such as pens and USB memory sticks" (Federal Drug Administration, 2014). The toxicity of an e-cigarette will depend on the variations of strength in the nicotine solutions among the various brands (Reuters, 2014).

The e-cigarette product typically includes a start-up kit, which contains the e-cigarette device, a set of nicotine cartridges, and batteries, all of which costs between \$60 and \$120.

The tobacco company, Lorillard, based Greensboro, North Carolina, maker of Kent and Newport cigarettes, and maker of one of the leading brands of e-cigarettes, Blu, makes a starter pack that comes with a charger (which also can be used as a storage chamber) and which looks just like a pack of cigarettes. In addition, the starter pack comes with two batteries and five nicotine cartridges which will last for about 150 puffs apiece. The cost is about \$80 (with shipping extra) which cost is approximately equal to the price of 8 to 6 packs of traditional cigarettes (McArdle, 2014). Lorillard, in 2012, purchased Blu for \$135 million in cash; and the company has now increased its distribution to 125,000 stores (McArdle, 2014). The Blu brand is the market leader. However, another major tobacco company Altria, is planning to buy e-cigarette company Green Smoke for \$110 million (McArdle, 2014). Since e-cigarettes can come in the form of rechargeable kits, they require a larger financial investment than a pack of regular cigarettes, but typically are less expensive in the long-run. And then there are disposable e-cigarettes, which are frequently priced similarly to regular cigarettes. The e-cigarette typically has a warning label that it contains nicotine (which is addictive, but not a cancer-causing product) (Etter, 2009). This nicotine, of course, is the same nicotine found in cigarettes and nicotine patches. However, e-cigarettes typically do not contain the tars, arsenic, and other chemicals which are common in conventional tobacco products and which have been linked to cancer (Chen, 2014). Yet, these substances may have negative side effects, such as nausea, vomiting, and eye and skin irritation, according to a recent report from the Center for Disease Control and Prevention (Kaplan, 2014), but the reports of these adverse consequences are very small for e-cigarettes compared to the health problems reported for traditional cigarettes (Kaplan, 2014).

Currently, there are three large U.S. companies, Altria (which is the largest U.S. tobacco company), Reynolds, and Lorillard, and many smaller ones (such as Njoy, Vapor, and Victory Electronic Cigarettes) that sell e-cigarettes. The market leaders in the sale of regular cigarettes are the "big three" of Lorillard, Altria, and Reynolds. Altria now has an e-cigarette called Mark Ten and Reynolds has one called Vuse. Most e-cigarettes, the *Wall Street Journal* noted, are made in China (Etter, 2009). Actually, according to *Bloomberg Businessweek* (McArdle, 2014), though there is some question as to who invented the e-cigarette, the first commercial invention of the product was done by a Chinese pharmacist, Hon Lik, and, most interesting, was introduced to the Chinese and then Asian markets in 2004 as a smoking cessation device. Many versions of e-cigarettes are very similar to regular cigarettes in appearance, including having a sleek shape and glowing tip.

Yet, no tobacco is burned or released, which distinguishes e-cigarettes from the traditional tobacco products. Thus, smoke as well as the dangerous carcinogens, carbon monoxide, and tar are not produced, as they are with traditional cigarettes. However, many e-cigarettes have vaping fluids that contain nicotine, which is the addictive agent in cigarettes. There was a 2009 study, as disclosed by the *Miami Herald* (Veciana-Suarez, 2013), done by the Federal Drug Administration, that analyzed 19 varieties of e-cigarettes found that one-half had the same carcinogens found in real cigarettes. Nicotine, according to the Surgeon General, is highly addictive and has immediate adverse biochemical effects on the brain and body, especially for young people and pregnant women (Veciana-Suarez, 2014). Nicotine it is a vasoconstrictor that narrows blood vessels and thus increases one's blood pressure. However, according to *Bloomberg Businessweek* (McArdle, 2014), there is no evidence to date that inhaling nicotine vapor by means of e-cigarettes causes cancer. Moreover, *Bloomberg Businessweek* reported on a study published in the *Journal of Public Health Policy*, which concluded that a "preponderance of the available evidence" indicated that e-cigarettes are "much safer" than traditional cigarettes as well as comparable in toxicity to other nicotine replacement products, such as patches (McArdle, 2014, p. 58).

Presently, e-cigarettes have become a "big business." In 2013, they have grown into a \$2 billion industry (Reuters, 2014; Weber and Esterl, 2014; Esterl, 2014). *Bloomberg Businessweek* (McArdle, 2014) estimates that e-cigarettes represent globally more than one-half a trillion dollars of business each year. Moreover, *Bloomberg Businessweek* (McArdle, 2014; Bloomberg View, 2014) indicates that in 2014 e-cigarette sales are projected to reach \$1.5 billion to \$3 billion. According to Euromonitor International, the global market for e-cigarettes is expected to exceed \$5 billion in 2014 (Chen, 2014). To illustrate the rise in e-cigarette use, in 2008, only 50,000 of the devices were sold; but in 2012, 5 million were sold (Weber and Esterl, 2014). To further illustrate, the *Miami Herald* (Veciana-Suarez, 2013) reported on a Wells Fargo Securities Study that predicted that retail and online sales of e-cigarettes would grow by 240% from 2013 to 2014. In Colorado, where Reynolds introduced its Vuse e-cigarette in July of 2013, *Bloomberg Businessweek* (McArdle, 2014) reports that in a few months the product achieved a 55% market share. *Bloomberg Businessweek* (McArdle, 2014), citing a projection by Bloomberg Industries, predicts that e-cigarette sales could exceed that of traditional cigarettes as early as 2023. The rapid rise in the popularity and use of e-cigarettes has presented a difficult legal issue for all levels of government – federal, state, and local.

There have been a deluge of questions regarding e-cigarettes: Do they pose a potential risk because of the nicotine and other chemicals; will they lead young people into traditional smoking; yet is there some health benefit associated with new products? These questions will be addressed in this article.

III. Legal Analysis

As emphasized, the development of this new product has created a series of legal questions for government regulators at all levels of government. This legal section will first address federal statutory and regulatory law, particularly the proposed rulemaking of the primary federal government regulator – the U.S. Federal Drug Administration. Next, this section will address state and local laws that ban or restrict e-cigarettes. Other legal doctrines that could impact e-cigarettes also will be discussed herein, to wit: state Lifestyle Protection statutes, the common law tort of Strict Liability for products, federal prohibitions on Deceptive Advertising, and Constitutional Law protections for “Commercial Speech.” Brief mention is made of international regulation of e-cigarettes.

A. Federal Statutory and Regulatory Law: An Overview

On the federal level, there is not yet any federal regulation for e-cigarettes, though current law bans the sale of traditional cigarettes to minors in the United States (Mujtaba and Cavico, 2014). The Federal Drug Administration (FDA), specifically its Center for Tobacco Products, does have the authority to regulate e-cigarettes; and the FDA deemed e-cigarettes to be a tobacco product; and consequently in April of 2014 the FDA commenced the rulemaking process in this area. Formerly, the FDA had not labeled e-cigarettes a tobacco product which would give the agency the authority to regulate the product (Clozel, 2014). However, until the FDA rules become law, the sale of e-cigarettes, even to minors, is legal pursuant to federal law, though one should be able to reasonably predict that there will be some type of prohibition on the federal level on the sale of the product to minors. Political pressure in part helped to convince the FDA to act in this area. For example, Representative Henry Waxman (D-Calif.) had declared that “with over a million youth now using e-cigarettes, FDA needs to act without further delay to stop the companies from marketing their addictive products to children” (Clozel, 2014, p. 3D).

And Senator Dick Durbin, along with 10 other Democratic lawmakers, had issued a report that condemned e-cigarette companies from launching what they deemed to be aggressive marketing campaigns targeting minors (Clozel, 2014).

Some legal history is revealing, to wit: in 1994, the Occupational Safety and Health Administration proposed a broad smoking ban that would have applied to more than a million workplaces. Yet the effort was eventually abandoned due to mounting criticism and threats, including death threats to government regulators; but also because employers had begun adopting their own smoking bans. So, by 2007, about 91% of U.S. employers, according to the *Wall Street Journal* (Weber and Esterl, 2014), were subject to smoking restriction policies. There is no federal ban on e-cigarettes yet, though the Federal Drug Administration (FDA) has contemplated a ban or some restrictions on selling the product, particularly to minors (Federal Drug Administration, 2014). The agency has held up regulating in this area, saying it will need more research as to the health benefits and risks of e-cigarettes (Veciana-Suarez, 2013). However, the FDA on its website does now explicitly warn consumers that e-cigarettes have not been fully studied and consequently consumers presently do not know the health risks, especially how much nicotine or other potentially harmful chemicals are actually inhaled during use, and also that consumers do not know if there are any benefits associated with the product (Federal Drug Administration, 2014). The FDA on its website, moreover, encourages consumers to report any adverse effects from using e-cigarettes and accordingly provides a Safety Reporting Portal (Federal Drug Administration, 2014). CNN.com (Wimmer, 2014) also reported that a proposal to regulate e-cigarettes has been under review at the White House Office of Management and Budget since October of 2013.

The federal Department of Health and Human Services (HHS) apparently has deferred to the FDA, stating on the HHS website that there are “many unknowns” with e-cigarettes, including the health effects of long-term use; and thus because the product is not yet approved by the FDA for “therapeutic uses,” it cannot be recommended by HHS as a smoking cessation aid (Department of Health and Human Services, 2014). HHS, however, does emphasize that e-cigarettes contain nicotine, which is a “highly addictive substance”; and the agency also has a warning regarding minors: “These products may be attractive to kids.

Using e-cigarettes may lead kids to try other tobacco products – including conventional cigarettes – which are known to cause disease and lead to premature death (Department of Health and Human Services, 2014).

There is also a bill in the U.S. Congress, introduced in the Senate in February of 2014 by Senator Barbara Boxer (D-California) to regulate the sale of e-cigarettes. The bill is co-sponsored by Senator Dick Durbin (D-Illinois) and Senator Tom Harkin (D-Iowa). The bill is called the Protecting Children from Electronic Cigarette Advertising Act of 2014 (Politics/Policy, 2014). The proposed law makes it illegal for companies to promote e-cigarette use for minors as well as to target the marketing and advertising of e-cigarettes to minors. The bill also directs the Federal Trade Commission to determine what constitutes such prohibited promotion and “targeted” marketing and advertising. The bill defines an e-cigarette as follows: “a battery operated product designed to deliver nicotine, flavor, or other chemicals and that turns chemicals, such as nicotine, into an aerosol that is inhaled by the user.” Sanctions for aiming advertising at children would be civil fines up to \$16,000 (Politics/Policy, 2014).

Furthermore, in 2013, the *Wall Street Journal* (Esterl, 2013) reported the attorneys general in 40 states have urged the Food and Drug Administration to regulate the manufacturing, sale, and advertising of e-cigarettes in order to keep them away from children. The attorneys general emphasized that certain advertisements for the product are geared to children, for example, by using cartoon characters. Ike monkeys, in the ads (as opposed to traditional cigarette makers who are banned from using cartoon characters).

B. The Federal Drug Administration’s 2014 Proposed E-cigarette Rules

As a federal regulatory agency, the Federal Drug Administration (FDA) has the authority to create and enforce regulations that carry the full force of a law. Specifically, the Federal Food, Drug and Cosmetic Act (the FDCA) gives the FDA the authority to regulate food, cosmetics, radiological products, drugs and medical devices (21 U.S.C.S. § 301). Throughout most the 20th century, the FDA did not regulate tobacco products (Paradise, 2013). However, in 1996, the FDA attempted regulation, asserting that tobacco products fall under its jurisdiction because nicotine is a “drug” and cigarettes and smokeless tobacco are “devices” that deliver nicotine to the body (FDA, 2000; see 21 U.S.C.S. §

The FDCA defines drugs, in part, as articles (other than food) intended to affect the structure or any function of the body (21 U.S.C. § 321(g)). A medical device is similarly defined, in part, as an article intended to affect the structure or any function of the body, and which does not achieve its primary intended purposes through chemical action within or on the body and which is not dependent upon being metabolized for the achievement of its primary intended purposes (21 U.S.C. § 321(h)).

Pursuant to these definitions, the FDA determined that tobacco products “affect the structure or any function of the body” because nicotine has significant pharmacological effects. Nicotine produces mood-altering effects on the brain, and thereby causes and sustains addiction, has tranquilizing and stimulating effects, and controls weight. The FDA further found that these effects were “intended” because they are so widely known and foreseeable that they may be deemed to have been “intended” by the manufacturers, consumers use tobacco products mainly to achieve these effects, and the statements and actions of manufacturers revealed that they designed cigarettes to provide pharmacologically active doses of nicotine to consumers. Finally, the agency concluded that cigarettes and smokeless tobacco are “combination products” (combination drug and medical device) because they contain nicotine as well as device components that deliver a controlled amount of nicotine to one’s body (*FDA, 2000*).

The FDA’s authority to regulate tobacco products was subsequently challenged in court, and the Supreme Court ultimately ruled that the FDA did not have such power, explaining that Congress had intended to exclude tobacco products from the FDA’s jurisdiction. The Court reasoned that one of the FDCA’s core objectives is to insure that products regulated by the FDA are safe and effective for the product’s intended use. (In other words, the potential for inflicting death or physical injury must be offset by the possibility of therapeutic benefit.) Yet, the FDA had thoroughly documented that tobacco products are unsafe, dangerous, and cause great pain and suffering from illness. Accordingly, if tobacco products were deemed “devices” under the FDCA, then the FDA would be required to remove tobacco products from the market pursuant to the FDCA’s misbranding and device classification provisions. This is not the result that Congress intended, so the FDA was not intended to have such jurisdiction (*FDA, 2000*) As a consequence, the FDA withdrew its regulations (Paradise, 2013).

Then, in 2009, Congress provided the FDA the authority to regulate tobacco products by enacting the Family Smoking Prevention and Tobacco Control Act of 2009 (TCA) (Pub. L. 111-31; 21 U.S.C. § 387a-1). As a result, pursuant to the FDCA, as amended by the TCA, the Federal Drug Administration currently has the authority to regulate cigarettes, cigarette tobacco, roll-your-own tobacco and smokeless tobacco. Under the law, to extend the FDA's regulatory authority to other products not specifically enumerated in the statute, the FDA must issue a regulation deeming them to be the subject of the FDCA (Pub. L. 111-31; 21 U.S.C. § 387a-; *Sottera, Inc.*, 2010).

The FDA creates regulations according to rules and processes defined by the Administrative Procedure Act (APA). Under the APA, the FDA must publish new regulations in the Federal Registrar at least 30 days before they take effect, and must provide a way for interested parties to comment, offer amendments, or object to the regulation. Accordingly, regulations can take several months to become final. New regulations or amendments to existing regulations are known as "proposed rules" (APA, 5 U.S.C. § 553).

On April 25, 2014, the FDA issued a proposed rule that would extend the agency's authority to cover e-cigarettes, along with cigars, pipe tobacco, gels, waterpipe tobacco and certain dissolvable tobacco products. (Option 1 of the proposed rule would extend the FDA's authority under the FDCA to all cigars, while option 2 would provide an exception for premium cigars). If the proposed products are deemed to be the subject of the FDCA, the FDCA provisions that apply to covered tobacco products would apply automatically to these newly added products. In addition, the FDA proposed three additional provisions that would apply to covered tobacco products: (1) sale to individuals under the age of 18 would be prohibited; (2) health warnings would be mandated for product packages and advertisements (this requirement would apply to cigarette tobacco and roll-your-own tobacco, in addition to otherwise covered tobacco products); and (3) vending machine sales would be banned, except when the vending machine is in a location where the retailer guarantees that individuals under 18 years of age would be unable to enter (FDA Regulations, 79 Fed. Reg. 23141, 2014). The FDA is accepting public comments until July 9, 2014. In addition to seeking comments on the general rule, the FDA specifically requested comment on a number of issues that relate directly to e-cigarettes (FDA Regulations, 79 Fed. Reg. 23141, 2014).

The FDA first noted that certain tobacco products, such as e-cigarettes, are marketed with characterizing flavors that can be especially attractive to youth. However, the ban on characterizing flavors provided for in the TCA applies to cigarettes only. Accordingly, the FDA requested comments on the characteristics or other factors it should consider in determining whether a particular tobacco product is considered a “cigarette” and, thus, subject to the ban on characterizing flavors (FDA Regulations, 79 Fed. Reg. 23141, 2014). The FDA also pointed out that many people believe that new tobacco products that are noncombustible, such as e-cigarettes, may be less hazardous than combustible products, given the carcinogens in smoke and the dangers of secondhand smoke. Further, it noted the increase in e-cigarette use by youth and the availability of fruit and candy-flavored e-cigarette liquid. As such, the FDA stated that it lacks sufficient data to determine what effects e-cigarettes have on the public health. It thus sought public comment as to how such products should be regulated. In particular, it requested comment on behavioral data related to co-use of e-cigarettes and more traditional tobacco products, including data on the effects of e-cigarettes on the use of other tobacco products. Likewise, the FDA sought information as to whether all tobacco products should be required to carry an addiction warning and, if so, whether different warnings should be placed on different categories of products (FDA Regulations, 79 Fed. Reg. 23141, 2014).

Given the questions being asked, one may see additional regulations on e-cigarettes in the future. That being said, only time will tell how the proposed laws will ultimately play out. If effected, the deeming provisions and age restrictions will be implemented 30 days after the date of publication of the final rule, and the proposed health warning requirements will go into effect 24 months after the final rule is issued. Notwithstanding, manufacturers will continue to be permitted to introduce into domestic commerce existing inventory that do not contain the newly required warning statements for an additional 30 days after the health warnings take effect (FDA Regulations, 79 Fed. Reg. 23141, 2014).

C. State and Local Government Statutory and Regulatory Law

The FDA is still continuing to study e-cigarettes; and the agency will get many reports and studies during the public “comment” part of the rulemaking proceeding. Nonetheless, some states and several cities already have taken the legislative lead in regulating the product.

On the state and local government level, 24 states and the District of Columbia ban smoking in the workplace, but only four states, New Jersey, Utah, Arkansas, and North Dakota, have added e-cigarettes to their smoking bans. Clozel (2014) and Siegel (2014) point out that more than 28 states, including New York, California, and Colorado, now ban e-cigarette sales to minors, as do the cities of Boston, Seattle, Indianapolis, and Miami (Green, 2014). Miami also prohibits the sale of e-cigarettes in vending machines (Green, 2014). Miami-Dade County has banned e-cigarettes from its buildings as well as the buildings owned by the Jackson Health System (Green, 2014). Also in Florida, three cities in Broward County, Sunrise, Weston, and Lighthouse Point have recently banned the sale of e-cigarettes to minors; and Weston has also banned their sale in vending machines (Roberts, 2014; Esterl, 2013). Regarding Lighthouse Point, the rationale for the ban was written into the ordinance, to wit: "Flavored nicotine vaporizers can lead young people into a lifetime of addiction" (Roberts, 2014, p. 1). Chicago recently restricted e-cigarette use (McArdle, 2014; Nolin and Carney, 2014). Also, in Florida, a bill has been introduced in the legislature to prohibit the sale of electronic cigarettes to minors (Green, 2014; Veciana-Suarez, 2013); the bill has been passed by a Senate committee and a similar version by the House; the bill is on a "fast track" for legislative approval (McGrory, 2014). New York City too recently banned the smoking of e-cigarettes in all public places (McArdle, 2014; Winsor, 2014). The NYC ban was an amendment to the Smoke-Free Air Act, which prohibits smoking in public places, such as restaurants, bars, parks, beaches, places of employment, as well as any other areas where traditional smoking is prohibited (Winsor, 2014). Retail stores in NYC, however, can still sell e-cigarettes (Winsor, 2014). The *Wall Street Journal* (Weber and Esterl, 2014) reported that more than 100 cities ban e-cigarettes in areas where regular cigarettes are also banned. And in Idaho, Bannock County (population 80,000) banned e-cigarettes from all county buildings, including the courthouse, county jail, and fairground facilities. The reason for the county ban was that some courthouse employees complained about indoor vapors. However, Bannock County has not extended the ban to private workplaces and restaurants because local government leaders do not have enough information yet as to the health consequences of vaping.

D. State Lifestyle Protection Statutes

In addition to federal and state statutory and regulatory law in the United States, there are state statutes that can impact e-cigarettes, particularly employment policies regarding the product.

These state statutes, usually called “lifestyle protection,” protect the rights of employees to engage in lawful activities and/or to use lawful products outside of the workplace. These statutes typically forbid employers from prohibiting employees to engage in lawful activities and to have associations unless the activity or association conflicts with the employer’s business interest or harms its reputation (Davidson and Forsythe, 2011). Although these statutes were not created with employer e-cigarettes in mind, they could be interpreted to protect an employee’s “unhealthy” lifestyle or use of unhealthy but legal products, such as traditional tobacco products, which use is part of the employee’s statutory right to live his or her off-duty life free from unwanted employer intrusion, interference, and reprisal (Noll, 2010; Klein and Pappas, 2009). Other states have statutes which specifically protect the use of tobacco products, which presumably would encompass e-cigarettes. Yet these statutes typically have restrictions, for example, if the use of the tobacco product is harmful to the company (Noll, 2010; Klein and Pappas, 2009).

As noted, a number of states now have extensive statutes protecting the rights of employees to engage in lawful activities outside of the workplace or to use lawful products outside the workplace. Examples of such states are California, Colorado, New York, and North Dakota (see Cal. Lab. Code §§ 98.6 and 96(k); Colo. Rev. Stat. § 24-34-402.5; N.Y. Lab. Law §§ 201(d)(2) and 201(d)(3); N.D. Cent. Code § 14-02.4-03). These statutes could offer protection to workers who use e-cigarettes away from the office. In fact, the right to smoke cigarettes has been cited as a specific purpose of enacting this type of legislation. When describing the legislative history of North Dakota’s lifestyle discrimination statute, the North Dakota Supreme Court provided the following:

The broad provisions precluding employer discrimination for lawful activity off the employer’s premises during non-working hours were initially enacted in 1991 to expand the law prohibiting employment discrimination and preclude employers from inquiring into an employee’s non-work conduct, including an employee’s weight and smoking, marital, or sexual habits (*Clausnitzer*, 2012, p. 13, quoting, *Hougum*, 1998, quoting 1991 N.D. Session Laws Ch. 142)(emphasis added).

Notwithstanding, these statutes do provide exceptions that might limit protection in certain cases. For example, Colorado's lifestyle discrimination statute provides that it is a discriminatory or unfair employment practice to fire an employee for engaging in any lawful activity off the premises of the employer during nonworking hours. However, the employer may terminate the employee if the lawful activity (1) relates to a *bona fide* occupational requirement, (2) is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer, or (3) is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest (Colo. Rev. Stat. § 24-34-402.5). Similarly, the New York lifestyle discrimination statute prohibits employers from making employment determinations based, among other things, on an applicant's consumption of legal products while outside of work, provided that the applicant's conduct does not meet any of the exceptions, most notably, conflict with the legitimate business interests of the employer (N.Y. Lab. Law §§ 201(d)(2) and 201(d)(3)).

While in most cases it is unlikely that the use of e-cigarettes would fall into the exceptions provided under these laws, there may be certain circumstances where the courts find otherwise. For instance, under North Dakota law, it is a discriminatory practice for an employer to make employment decisions based on an employee's participation in lawful activity off the employer's premises during nonworking hours, unless the activity is in direct conflict with the essential business-related interests of the employer (N.D. Cent. Code § 14-02.4-03). This means that if the employer can somehow show that it has a vital business interest in having the employee abstain from using e-cigarettes, a ban could be permitted. Thus, in a 2012 North Dakota Supreme Court case, an employer asserted that it terminated its employee because the employee had violated the company's policy which prohibited driving a company vehicle with a blood alcohol content exceeding .04 percent (*Clausnitzer*, 2012). The employee argued that he was improperly terminated for engaging in a lawful activity because he was under the presumptive limit for driving under the influence under state law and was driving the company vehicle during off-duty hours when the incident leading to his termination occurred. Without addressing whether the activity was lawful, off-duty, or off-premises, the Supreme Court of North Dakota found that the activity was in direct conflict with the essential business-related interests of the employer.

The Court reasoned, "common sense informs us that employees who drive marked company vehicles with moderate to high blood alcohol levels pose potential legal and economic liability concerns for the employer and undermine the employer's reputation and the public's trust and confidence in the employer" (*Clausnitzer*, 2012, p. 22). In contrast, the Court pointed to an earlier case in which an employer terminated an employee after learning that she had been involved in a car accident with her own vehicle after drinking approximately two beers during nonworking hours (*Clausnitzer*, 2012; *Olson*, 1985). The employee had allegedly signed an agreement with her employer "to refrain from the consumption of alcohol, both on and off the job." Here, the Supreme Court of North Dakota found that the off-duty consumption of alcohol was not shown to pose a threat to the employer's business interests (*Olson*, 1985).

The gist of these statutes is that an employer should not have a "say" in the employee's personal life and lifestyle outside of the workplace. Thus, in the specific context of e-cigarettes, one would expect legal outcomes to be based on factual circumstances which may differ from case-to-case. In some cases, the off-the-job use of e-cigarettes by the employees may be deemed to be in direct conflict with the business interests of the employer due to the perceived harms and concomitant increased health costs; but in others it may not because the employee may well argue that the use of e-cigarette is in conformity with an employer's "wellness" policy since the product arguably is a smoking cessation device. Thus, it appears that whether lawful activity fits into the business interest exception depends on the specific details of the case. For example, if a spokesperson for an anti-electronic cigarette lobbyist is seen in public using e-cigarettes, it may be deemed permissible for the employer to terminate the employee, as the case could be made that the activity conflicts with an essential business interest. Likewise, if a minor employee illegally uses e-cigarettes, the employer may be permitted to terminate the minor because the activity would be considered unlawful. In most cases, however, e-cigarette use away from the workplace will probably be protected. Accordingly in a state that has one of the aforementioned freedoms of lawful activity, association, or lifestyle discrimination statutes, the employer must be, of course, aware of such a law, and then prepared to demonstrate how the employee's "unhealthy" or improper e-cigarette "lifestyle" conflicts with its business interests or harm its reputation.

E. The Common Law Strict Products Liability Doctrine

In addition to statutory and regulatory law, e-cigarettes as a product for sale and use would also be governed by the common law, specifically the state common law doctrine of strict liability in tort as applied to products. Pursuant to the strict liability doctrine, anyone on the marketing chain (manufacturer-wholesaler-distributor-retailer) is strictly liable (that is, without a showing of negligence or fault) if the product reaches the consumer or user without substantial change and in a “defective” condition and thereby causes harm. (Cavico and Mujtaba, 2015).

The finding of a defect in the product is the key to strict liability in tort. Accordingly, pursuant to this legal doctrine, a product can be deemed “defective” in three ways. It can be flawed, contain no or inadequate warnings, or be defectively designed. A flawed product is simply one that does not meet the manufacturer’s own standards for the product. That is, no showing of fault or negligence is required; rather, merely a comparison of the product to the manufacturer’s own standards and specifications for that type of product which shows that the product does not meet those standards. Note that even if a product flaw is at the manufacturing level, for example, by the e-cigarette manufacturer, all other entities on the marketing chain, such as the retailers of e-cigarettes, would also be liable under strict liability. Secondly, a product can be deemed defective if it lacks a warning or the warning is inadequate. Note, though, that the warning is not required if the risk of harm to the product is one that a reasonable and rational person would be aware of, such as that a knife is sharp and can cut (Cavico and Mujtaba, 2015). Of course, when it comes to tobacco products, the presence and prevalence of warnings has been mainly a federal regulatory phenomenon. Of course, even without federal requirements, manufacturers “err on the side of caution” regarding products, as it is safer (and cheaper) to warn than to litigate. That is why one now sees certain warnings in e-cigarette packages and labels, for example, warning against sales to minors. The manufacturers are aware of the ramifications of failure to warn pursuant to strict liability as well as cognizant that the federal government may soon require such warnings anyway as well as many others, as they have done with traditional cigarettes (Cavico and Mujtaba, 2015).

The final way that a product can be deemed “defective” arises if it is defectively designed. This is the most interesting and most expansive aspect of strict products liability law.

The product is not flawed; it has adequate warnings; yet nonetheless, based on the state-of-the-art (that is, the level of science, engineering, and technology that existed when the product was made), the product could have been made safer with additional features and modifications. However, there are three constraints to the doctrine, that is, the product could have been made safer with modifications, but only if they were feasible practically as well as economically. In the first scenario, the product with safer features still must be able to function as a product of that type (for example, a knife can be made very safe, but it will not cut); and in the second scenario the product's safety features cannot be so costly that no one will be able to afford a product of that type (for example, a small economy car with so many safety features that it is not affordable as an economy car) (Cavico and Mujtaba, 2015). This third aspect of "defectiveness" has been applied to traditional cigarettes, mainly without success, since, realistically, what more can be done to make a traditional cigarette safer and still have it function as a traditional cigarette. Now what more can be done to make an e-cigarette safer, and still have it function as a "smoking" type product, is an interesting question indeed, which will eventually be litigated. Yet, perhaps one can say that the tobacco companies are providing a safer alternative to traditional cigarettes by now manufacturing and marketing e-cigarettes.

F. Federal Prohibitions on Deceptive Advertising

Any marketing and advertising of e-cigarettes, therefore, must be truthful and not deceptive or misleading pursuant to regulations by the Federal Trade Commission as well as the Federal Drug Administration. A deceptive ad can be false, that is, an outright lie or misrepresentation, as well as misleading. A misleading ad is one that causes the reasonable consumer to reach an erroneous conclusion. Moreover, the "reasonableness" standard for an ad that is geared to a target audience, particularly a susceptible one such as young people, is determined by reference to that target group and not consumers as a whole. Furthermore, a misleading ad can also be a "half-truth" ad, wherein something significant about the product, especially if health or safety related, is omitted in the advertising or marketing of the product (Cavico and Mujtaba, 2015). Therefore, any advertising of nicotine cartridges in e-cigarettes must state truthfully, accurately, and fully just what they are supposed to contain. And, of course, the advertising cannot be deceptive or misleading as to any health benefits to be derived from the product.

G. "Commercial Speech" and Constitution Protections for Advertising

Advertising and marketing activities have been construed by the federal courts as "speech" and expression in the form of "commercial speech," even though the speech is motivated by money; and advertising and marketing are protected from government interference and infringement by the First Amendment to the U.S. Constitution. Moreover, the Supreme Court has ruled in the seminal 1996 case of *44 Liquormart v. Rhode Island* that commercial speech is protected even if the product or service being advertised or marketed had been traditionally regarded as a "vice," assuming of course the product or service is a legal one and the advertising is truthful and not deceptive. However, government can regulate and punish commercial speech if government has a "substantial government interest" to do so (as opposed to the much more strict "compelling government interest" for political speech). In the *Liquormart* case, the Supreme Court ruled that the government attempting to protect an adult from an adult-like (but legal) "vice" product, like liquor, was not sufficient to trigger the "substantial government interest" test and thus for the state of Rhode Island to restrict liquor advertising. However, the Supreme Court also stated that if a product or service is a traditional "vice" one, *and* if the advertising is aimed at minors, then government does have a "substantial government interest" to protect minors from adult-like vice products and services (Cavico and Mujtaba, 2015). Consequently, any advertising and marketing of e-cigarettes that is aimed at minors, for example, advertising or marketing that is deemed to be "sexy," "cool," or "trendy," that underscores peer acceptance and "likeability," that promotes flavored products, and that features celebrity spokespersons who appeal to minors, very likely will trigger the "substantial government" interest prompting regulation and sanctions.

H. International Regulations

Internationally, the *Wall Street Journal* (Esterl2, 2013) noted that Mexico, Brazil, and several Asian countries restrict e-cigarette sales; and that France and the European Union are considering limits to the sale of the product. Britain in 2014 indicated that it would ban the sale of e-cigarettes to minors under the age of 18 (as it has with conventional cigarettes) because of the possible adverse health effects as well as the need for further medical research (Reuters, 2014). However, *Bloomberg Businessweek* (McArdle, 2014) pointed out that in October of 2013 the European Parliament rejected a proposal to regulate e-cigarettes as medical devices.

Yet in February of 2014, *Bloomberg Businessweek* (Bloomberg View, 2014) also pointed out that the European Parliament has promulgated several restrictions on e-cigarettes, to wit: a ban on advertisements, a requirement for childproof packaging, a requirement of pictorial safety warnings, and a limit on the nicotine content of the product.

Legal analysis conclusion. As the old saying goes, “the law is always trying to catch up to technology,” and that maxim is perfectly illustrated with the new product of the e-cigarette. More research clearly is needed to ascertain the specific health benefits or harms of e-cigarettes. Nonetheless, the FDA has commenced the rulemaking process in attempt to promulgate rules to regulate e-cigarettes. Thus, there are two principal conclusions that can be drawn from the foregoing legal analysis: first, there are some laws that apply to e-cigarettes, many that could apply, and very soon may apply, to e-cigarettes, especially regarding their sale to minors; and second, to date, there is not a great deal of guidance from the legislatures, courts, and regulatory agencies on how all these legal principles will be applied to this new product. The result, as underscored, is a legal quandary, and not just for government entities, but for other stakeholders and groups affected by the product. Yet, until there is more law, in many jurisdictions today the e-cigarette is a legal product, even when sold to minors. But the question thus emerges: even if legal, is it a moral product too? Any question as to morality naturally leads one into the field of Ethics.

IV. Ethical Analysis

Ethics is a branch of philosophy; ethics consists of ethical theories and principles that one uses to reason to moral conclusions. In this article, the authors will use four fundamental Western-based, reason-premised ethical theories to determine if e-cigarettes are moral or immoral, good or bad, and right or wrong. These theories are Ethical Egoism, Ethical Relativism, Utilitarianism, and Kantian ethics.

A. Ethical Egoism

The ethical theory of Ethical Egoism harkens back to ancient Greece and the Sophists and their teachings of relativism and promotion of self-interest. This ethical theory maintains that a person ought to promote his or her self-interest and the greatest balance of good for himself or herself. Since this theory is an ethical theory, one thus has a moral obligation to promote one's self-interest; and so "selfishly" acting is also morally acting; and concomitantly an action against one's self-interest is an immoral action; and an action that advances one's self-interest is a moral action. An ethically egoistic person, therefore, will shrewdly discern the "pros" and "cons" of an action, and then perform the action that performs the most personal good, which also is the moral course of action. However, the Ethical Egoists counsel that one should be an "enlightened" ethical egoist; that is, one should think of what will inure to one's benefit in the long-run, and accordingly be ready to sacrifice some short-term pain or expense to attain a greater long-term good – for oneself, of course. Also, the prudent ethical egoist would say that as a general rule it is better, even if one has a lot of power as well as a big ego, to treat people well, to make them part of "your team," and to "co-op" them. Why should one treat people well? One reason is certainly not because one is beneficent, but rather because one is "selfish." That is, one is treating people well because typically it will advance one's own self-interest in the long-term to do so. One problem with ethical egoism is that one's own "good" must be defined. What exactly is one maximizing? Is it one's knowledge, power, money, pleasure, comfort, prestige, success, or happiness? Ethical egoists agree that people ought to pursue and advance their own good; but they disagree as to the type of good people should be seeking (Cavico and Mujtaba, 2013).

The authors will focus on employers in the private sector in conducting this Ethical Egoism analysis. That is, what is in the long-term self-interest of the employer regarding e-cigarette policies and practices? Many employers today simply will not hire employees who smoke and pursuant to wellness programs employers may ban current employees from smoking even off-the-job. Yet, what is the challenge with the new "smoking" product of e-cigarettes? Should they be covered under traditional employer wellness policies that ban any type of tobacco use? Or should they be offered as a smoking cessation alternative? Will banning – on- or off-premise – e-cigarettes – help or hurt the company?

Should employees be allowed to vape, should customers, should clients, and should vaping be permitted in the employer's office and facilities. Ultimately, from an egoistic perspective, it will come to the basic "pros" and "cons" for the employer, whose egoistic self-interest is, of course, profit-centered.

Initially, the employer must be aware of any law, such as state lifestyle protection statutes, that allow the employees to smoke off-the-job. These statutes would presumably cover "smoking" of e-cigarettes. Moreover, the employer must be cognizant of any laws regulating the use of e-cigarettes in the work place. The aforementioned U.S. laws mainly do not regulate e-cigarette use in the private sector. Consequently, vaping at work now is also a very difficult issue facing employers. The *Wall Street Journal* (Weber and Esterl, 2014) pointed out that some companies, like Exxon-Mobil and CVS Caremark, ban workers from using e-cigarettes and regular ones at their corporate facilities. The airlines and Amtrak also ban e-cigarettes. At Starbucks Corporation and Wal-Mart, e-cigarettes are not allowed for employees and customers. Yet at McDonalds and United Parcel Service patrons as well as employees are allowed to engage in vaping. However, in the latter two cases, it is interesting to note that the companies charge tobacco users as well as e-cigarette smokers both a \$150 extra in monthly insurance premiums.

Companies today certainly have an incentive to encourage their workers to quit smoking, particularly considering the substantial rise in health care costs, but employers are unsure if allowing their employees to "smoke" e-cigarettes is the answer, especially in the office. Some employees may find the use of e-cigarettes by their co-workers annoying and disturbing as well as possibly injurious to their health. Vaping, though less invasive and harmful than conventional smoking, nonetheless will produce some vapors, steam, and odors. Yet even the mere appearance of e-cigarettes in the workplace can cause concern and produce disruption. Some employees, customers, and clients may not "take kindly" to seeing employees who are vaping on the job. Nevertheless, some employers may allow employees to smoke e-cigarettes so long as other employees, customers, or clients do not object. Perhaps even productivity will increase with e-cigarettes if vaping is allowed in the office, since certain employees will not have to take time off for their usual and usually frequent cigarette breaks. At a minimum, employers now must be heedful of any federal, state, and local government restrictions on e-cigarettes.

B. Ethical Relativism

Ethical Relativism as an ethical theory also harkens back to ancient Greece and the philosophical school of the Sophists as well as the philosophical school of the Sceptics. Ethical relativists deny that there are any objective, universal moral rules which one can construct an absolute moral system. Ethical relativists deny that there are moral rules applicable to all peoples, in all societies, and at all times. There thus are no universal moral standards by which to judge an action's morality; rather, morality is merely relative to, and holds for, only a particular society at a particular time. "When in Rome, do as the Romans," said the ethical relativists. Morality, therefore, is a societal-based notion; it is nothing more than the morality of a certain group, people, or society at a certain time. What a society believes is right is in fact right for that society; the moral beliefs of a society determine what is "right" or "wrong" in that society. However, different societies may have different conceptions of what is right or wrong. What one believes is right, the other may believe as wrong.

Consequently, the same act can be morally right for one society but morally wrong for another. Since pursuant to ethical relativism there are no moral standards which are universally true for all peoples, in all societies, and at all times, and since there is no way to demonstrate that one set of beliefs is true and the other false, the only way to determine an action's morality is to determine what the people in a particular society believe is right or wrong at a given time. Of course, ascertaining exactly what a society is a daunting challenge. Even within a homogeneous society, there are diverse cultures, subcultures, social classes, kinship, and work groups; and in a heterogeneous society there will be many smaller sub-societies that co-exist. All these components of society may reflect different standards, mores, customs, and beliefs, including moral standards and beliefs. Yet pursuant to the doctrine of ethical relativism, one must attempt to find the pertinent "society" and then try to ascertain that society's moral beliefs; but when one does ascertain the societal beliefs, standards, and practices regarding morality, one simply has to conform and adopt, and one will be acting morally, at least according to the ethical theory of ethical relativism (Cavico and Mujtaba, 2013).

There is today a social stigma to smoking. It is perceived to be immoral, stupid, and, perhaps even worse, a "low-class" phenomenon. Smoking has declined dramatically in the U.S. since the Surgeon General first warned of its dangers back in the early 1960s.

The decrease in smoking has also been motivated by an unremitting public relations campaign to paint it as harmful, socially unacceptable, and unethical too. As a result, according to *Bloomberg Businessweek* (McArdle, 2014) smoking is very rare among “middle class” people; and rather today smoking is perceived as more of a “lower-class,” lower-income, or “poor person” vice. Now if e-cigarettes become similarly stigmatized by society then they too might be condemned as an immoral product pursuant to Ethical Relativism. But what if e-cigarettes become socially acceptable and perhaps even a “cool” fad? And if e-cigarettes are considered to be “trendy,” the product actually may make conventional smoking not only acceptable again, but also trendy, sexy, or glamorous, or even beneficial to one’s health (like the tobacco ads featuring doctors in the “old days”). An editorial in *Bloomberg Businessweek* expressed concern on the potential effect of advertising on children’s perceptions of the product, to wit: “The e-cigarette ads that have been created so far look familiar to anyone who remembers ads for regular cigarettes, which have been banned from TV and radio for 45 years. They use images that blatantly appeal to teenagers. Instead of discouraging tobacco use, they present e-cigarettes as kind of gateway vice, safer than cigarettes but just as subversive. In doing so, they undermine the progress that has been made in stigmatizing cigarettes for children and adults alike” (*Bloomberg View* (2), 2014, p. 16).

The result of possibly changing societal mores may be that smoking again be considered by society to be an appropriate and normal practice and perhaps a moral one too. Moreover, if today the glamorous, chic, trendy, celebrity “set” can be considered a “society,” the vaping could be construed as morally appropriate, of course. To illustrate, mention was made in the media (and mainly critically) of a famous actress/comedienne who was “caught” vaping on a recent awards ceremony on television. The question is, however, whether the criticism was superseded by the fact that some “cool” celebrity was pictured vaping.

Furthermore, smoking in enclosed spaces has been deemed to be particularly socially unacceptable these days; but the use of the e-cigarette, which produces “merely” a vapor and not smoke, may make “smoking” socially acceptable in buildings, offices, movie theatres, restaurants, and other public places. The perceived reduction in health risks combined with changing societal mores (shaped perhaps by some “sophisticated” marketing) may remove some of the social stigma to smoking; and maybe using e-cigarettes will be construed as a moral societal practice.

Yet if e-cigarettes are seen as “just another” tobacco product, and one which is being heavily marketed to children, then society is likely to take the ethical stance that the product is immoral. And a societal outcry of immorality in such a situation will compel the legal system to ban the sale of the product to children. So, as society (however defined) “goes,” so “goes” the moral conclusion pursuant to Ethical Relativism!

C. Utilitarian Ethics

Utilitarianism is a major ethical theory in Western civilization; it was created principally by the English philosophers and social reformers Jeremy Bentham and John Stewart Mill. Their goal was to develop an ethical theory that not only was “scientific” but also would maximize human happiness and pleasure (in the sense of satisfaction). Utilitarianism is regarded as a consequentialist ethical theory, also called a teleological ethical theory; that is, one determines morality by examining the consequences of an action; the form of the action is irrelevant; rather, the consequences produced by the action are paramount in determining its morality. If an action produces more good than bad consequences, it is a moral action; and if an action produces more bad than good consequences it is an immoral action. Of course, ethical egoism is also a consequentialist ethical theory. The critical difference is that the Utilitarians demand that one consider the consequences of an action not just on oneself, but also on other people and groups who are affected directly and indirectly by the action. The scope of analysis, plainly, is much broader, and less “selfish,” pursuant to a Utilitarian ethical analysis. In business ethics texts and classes, the term “stakeholders” is frequently used to indicate the various groups that would be affected by a business decision. Furthermore, the Utilitarians specifically and explicitly stated that society as a whole must be considered in this evaluation of the good and/or bad consequences produced by an action. The idea is to get away from a “me, me, me” mind-set and consider other people and groups affected by an action. Utilitarianism is a very egalitarian ethical theory since everyone’s pleasure and/or pain gets registered and counted in this “scientific” effort to determine morality. Yet, there are several problems with the doctrine. First, one has to try to predict the consequences of putting an action into effect, which can be very difficult if one is looking for longer-term effects. However, the Utilitarians would say to use one’s “common storehouse of knowledge,” one’s intelligence, and “let history be your guide” in making these predictions.

Do not guess or speculate, but go with the probable or reasonably foreseeable consequences of an action. Also, if one is affected by an action, one naturally gets counted too, but if that same one person is doing the Utilitarian analysis, there is always the all-too-human tendency to “cook the books” to benefit oneself. The Utilitarians would say that one should try to be impartial and objective in any analysis. Next, one now has to measure and weigh the good versus the bad consequences to ascertain what prevails and thus what the ultimate moral conclusion will be. The Utilitarians said that not only was this ethical theory “scientific,” but it was also mathematical (“good old-fashioned English bookkeeping,” they called it). But how does one do the math? How does one measure and weigh the good and the bad consequences? And for that matter how does one measure different types of goods? The Utilitarians, alas, provided very little guidance. Finally, a major criticism of the Utilitarian ethical theory is that it may lead to an unjust result. That is, the “means may justify the ends.” Since the form of the action is irrelevant in this type of ethical analysis, if the action produces a greater overall good, then the action is moral, regardless of the fact that some bad may be produced in this effort to achieve the overall good. The good, though, outweighs the bad; accordingly, the action is moral; and the sufferers of the bad, who perhaps were exploited or whose rights were trampled, got counted at least. Such is the nature of Utilitarianism (Cavico and Mujtaba, 2013).

1. Stakeholders

After determining the action to be evaluated, the next step in the Utilitarian analysis is to determine the people and groups, that is, the stakeholders or constituent groups, affected by the action. In the context herein, the action is: “Are e-cigarettes moral? This section will designate the affected stakeholders, to wit:

2. Stakeholder Analysis

a. **Smokers.** Presently, more than 40 million people in the United States are smokers; and smoking is the leading preventable cause of death (Esterl3, 2014). There are positive consequences for the “smoker” stakeholder group for e-cigarettes, to wit: Since the e-cigarette is a smokeless, but nicotine-filled, electronic cigarette a growing number of people may be using them to try to help them quit smoking “real” cigarette. E-cigarettes are certainly safer than traditional cigarettes (Siegel, 2014).

Nonetheless, the *Wall Street Journal* (Etter, 2009) reported that many smokers “swear” by the e-cigarette as a tool for quitting smoking. And *Bloomberg Businessweek* (McArdle, 2014) pointed to a study that indicated that e-cigarette use with only minimal nicotine exposure will reduce the cravings for traditional cigarettes in a substantial minority of smokers. Like tobacco smoke, the vapor can be inhaled and exhaled, thereby producing a cloud that resembles cigarette smoke, but which dissipates more quickly and thus does not produce the lingering odor of tobacco smoke. Since being afflicted with cancer is, clearly, the main problem with traditional tobacco products, a means to have nicotine delivered to a person without lighting-up a traditional cigarette is a very appealing scenario. Of course, as of the writing of this article, e-cigarettes have not been approved by the FDA as an “official” method to quit smoking. But considering there is less nicotine in the product, vaping an e-cigarette would be less harmful to the smoker than smoking a conventional cigarette.

E-cigarette smokers who enjoy the product naturally want to continue to use it with as few restrictions as possible. As such, for smokers who want to continue to smoke, but who want to avoid bans on smoking in public or smoking restrictions on company premises or restaurants, the e-cigarette may fulfill that need and desire. Another benefit for smokers, at least according to the e-cigarette industry, is that the cost of using their product is less expensive than the cost of regular cigarettes in the long-run on a “cost-per-puff” basis. One reason is taxation. Nicotine cartridges are also exempt from tobacco taxes, which make up a large part of the retail cost of a traditional cigarette, and thus the price of an e-cigarette is more competitive with traditional tobacco products. E-cigarettes can also be shipped to one’s home, as opposed to traditional tobacco cigarettes, which are not legally allowed to be sent to the mail (McArdle, 2014).

There are also negative consequences for the “smoker” stakeholder group for e-cigarettes, to wit: The main problem for smokers is that e-cigarettes may not in fact be harmless. Nicotine is an addictive substance, whether delivered in a regular cigarette or by means of an e-cigarette (Wimer, 2014). However, there is not yet, according to *Bloomberg Businessweek* (McArdle, 2014), a study as to the health effects of inhaling e-cigarettes on a long-term basis. The problem is, and for many stakeholders too, is that the potential harm from vaping or from exposure to second-hand vaping is just not known presently.

b. **Non-Smokers.** There are also positive and negative consequences for non-smokers too. Non-smokers will benefit from not being around and exposed to conventional “second-hand smoke” of the users of conventional tobacco products; rather, they will “merely” be exposed to some cloud-like mist. Non-smokers may be tempted to try the new product. It can be, and is, being advertised as “cool” and “trendy,” and some of the advertising is targeted at women (Alvarez, 2014). Yet e-cigarettes do contain nicotine. But nicotine does have some beneficial health aspects, for example, acting to regulate one’s mood, serving as an appetite suppressant, and functioning as a cognitive enhancer (McArdle, 2014). Yet e-cigarettes do contain nicotine and may not be harmless; and may in fact serve as a “bridge” or “gate-way” to nicotine addiction for non-smokers, who will try e-cigarettes and then become “hooked on” regular nicotine-laden cigarettes, which plainly are harmful due to the prevalent nicotine content. However, e-cigarettes may not have enough nicotine to cause the product to be labeled as an addictive one. The problem is that consumers presently do not know the potential health risks, as well as benefits, from the e-cigarette product, in particular, how much nicotine is ingested when vaping e-cigarettes and what is the effect of that nicotine. More research plainly is needed as to the health implications of e-cigarettes for the consequences to non-smokers, who may be motivated to try the product, to be ascertained.

c. **Minors.** Health officials clearly are worried about vaping and minors. As noted, several states and local governments ban the sale of cigarettes to minors. And it seems fairly certain that the Food and Drug Administration will ban the sale of the product to minors. However, according to Dr. Marc Siegel (2014), “few are paying attention. Minors in those states can still purchase e-cigarettes on line, or borrow them from their parents.” The *Miami Herald* (Green, 2014; Veciana-Suarez, 2013) thus reported that public health officials are very concerned about a growing trend of e-cigarette use by minors, which has doubled among high school and middle school students from 2012 to 2013. Miami-Dade County, for example, is considering adding e-cigarettes to the traditional cigarette ban in the Student Code of Conduct. Currently, the county school board leaves it up to the judgment of the teachers whether to confiscate e-cigarettes as they would regular ones. School officials, educators, and public health officials are particularly fearful that e-cigarettes may be the “gate-way drug” or entry point to the use of conventional tobacco products.

The *Miami Herald* (Veciana-Suarez, 2013) pointed out that the Center for Disease Control indicates that about 90% of all smokers began smoking as teenagers; and that in 2012 an estimated 1.78 million children and teenagers in the United States used e-cigarettes last year. CNN.com (Wimmer, 2014) and FoxNews.com (Siegel, 2014) report that 1 in 10 high school students have used an e-cigarette. Why is there such extensive use? The products are promoted on social media, such as Twitter, Facebook, and Instagram, which are extensively used by young people (Clozel, 2014). The products are also perceived as “glamorous,” “cool,” readily accessible, look like traditional cigarettes, come in a variety of designs and flavors, and are cheap. They are also perceived as less harmful than traditional tobacco products. To illustrate the preceding point, the *Miami Herald* (Veciana-Suarez, 2013) that 53% of young adults who have heard of e-cigarettes believed they were less harmful than traditional cigarettes. Moreover, the *Miami Herald* (McGrory, 2014) and the *Wall Street Journal* (Esterl, 2013) reported on a government survey from the Centers of Disease Control and Prevention that showed that the percentage of middle- and high-school students who have tried e-cigarettes increased to 10% in 2012, more than doubling from 4.7% in 2011. The *Sun-Sentinel* (Chen, 2014) reported on one study, published in the journal *JAMA Pediatrics*, which indicated that young smokers who reported using an e-cigarette had six times the odds of smoking a traditional cigarette than those who had never tried the product.

The concern of anti-smoking advocates, plainly, is that e-cigarettes, especially if advertised by attractive celebrities, will lure children into using the product and then convert them into smoking traditional tobacco products, as indicated by the aforementioned study. To illustrate the marketing concerns, critics point to e-cigarette marketing campaigns where popular celebrities are used to promote the product, for example, rapper Chris Brown and pop singer Sevnyn Streeter (Clozel, 2014). Further, both of the aforementioned celebrities were featured in a music video which included a product placement of an e-cigarette (Clozel, 2014). Moreover, one doctor (Alvarez, 2014) pointed disapprovingly to the fact that the actress and awards nominee, Julia Louis-Dreyfus, was seen “puffing” on an e-cigarette at the 71st Annual Golden Globe Awards. This doctor also condemned actress Jenny McCarthy as a “poor example” for young people for promoting e-cigarettes, particularly in a sexy manner, in commercials (Alvarez, 2014).

The doctor further explained that young people are easily influenced, especially by glamorous actors and celebrities, when it comes to picking up habits, such as smoking, and consequently these famous people should exercise a degree of social responsibility and not promote products that could be dangerous, especially to young people (Alvarez, 2014).

d. Medical and Public Health Community. The medical and public health communities are certainly affected by e-cigarettes. Yet the major problem for these stakeholders is that sufficient scientific knowledge does not yet exist as to the harms or benefits to be derived from e-cigarettes. There does exist one medical study from the British medical journal, *Lancet*, which found that many people were able to quit traditional cigarettes by using e-cigarettes as using a nicotine patch (Seigel, 2014). Accordingly, one doctor (Siegel, 2014) suggests that e-cigarettes should be available by prescription only until they can be properly regulated pursuant to greater scientific knowledge. Another doctor advised that more research has to be done before the medical community can say that e-cigarettes are a “safe” alternative to smoking “real” cigarettes (Alvarez, 2014).

e. Groups Opposing Smoking. Groups opposing smoking naturally want smoking banned; they also want e-cigarette “smoking” banned, especially for minors, and also in public places. These groups are pleased with the FDA’s proposed rules; but many critics do not think they go far enough. They are fearful that these basic proposed rules on e-cigarettes will still allow young people to become addicted to nicotine. One leading critic of e-cigarettes, Senator Dick Durbin (D.-III), in response to the FDA’s proposed rules, declared “Shame on the FDA. Parents across America lost their best ally in protecting their kids from this insidious product” (Esterl3, 2014, p. B2). Several anti-tobacco and anti-smoking organizations, such as the American Lung Association, the American Cancer Society, the American Heart Association, and the Campaign for Tobacco-Free Kids have demanded that e-cigarettes be completely removed from the market. E-cigarettes still contain nicotine, which is an addictive substance. These groups and other critics contend that the product has not yet been proven safe, and also that children may be attracted to the product. Groups opposing e-cigarettes fear that the product, especially if it becomes glamorous or “trendy” or “cool” will encourage people who are not currently smokers to take up the habit, which perhaps may lead to smoking traditional cigarettes.

And not only new smokers might be influenced by e-cigarettes to start smoking; former smokers who have quit the nicotine habit may be lured back to it by e-cigarettes.

Critics in particular fear the effect on minors. The critics stress that some of the e-cigarettes come in flavors, such as chocolate and strawberry, which may be appealing to children (Etter, 2009). To illustrate, the e-cigarette company, Blu, offers such exotic flavors as peach, vanilla, cherry, and pina colada; other flavors are grape and bubblegum (Green, 2014; McArdle, 2014). Anti-tobacco advocates contend that, regardless of any position by e-cigarette companies against sales to minors, they are marketing their product to minors, just like the traditional manufacturers were accused of doing. Evidence cited includes e-cigarette celebrity endorsers, such as TV personality Jenny McCarthy and rock musician Courtney Love, which opponents cite as examples of "cool," "trendy," and "sexy" marketing designed to attract teenagers to the product, as well as the fact that the product is sold in such flavors as chocolate, strawberry, and pina colada. And the fact that e-cigarettes do not have much odor will make it more difficult for parents to detect the use of the product. The *Miami Herald* (Green, 2014, p. 6B) quoted a spokesperson from the Tobacco-Free Work Group who stated that the tobacco companies were preying on children by marketing e-cigarettes in order "to replace the number of adults dying from their products." Of course, one might cynically say that all this "bad" publicity is nonetheless "good" publicity for the manufacturers of the product.

f. E-cigarette Manufacturers. The manufacturers of e-cigarettes, encompassing traditional tobacco companies and e-cigarette entrepreneurs, naturally want to increase revenue and attract new consumers, including, critics would say, non-smokers and even young people. And the fewer laws and rules there are, of course, the more scope is granted to the manufacturers marketing and advertising activities. As to the FDA's proposed rules for e-cigarettes, the *Wall Street Journal* (Esterl3, 2014, p. B2) reported that the industry "breathed a big sigh of relief" because for now at least the product is going to be treated differently from conventional combustible cigarettes, and thus e-cigarettes are not going to be regulated as heavily and extensively as conventional cigarettes. For example, advertising of e-cigarettes is not banned, and neither is Internet sales or flavored products. Accordingly, there should be more investment, development, production, and marketing of the product.

Obviously, there is criticism of the product – even if it is mostly, it appears, legal. Yet e-cigarette manufacturers and other proponents of e-cigarettes counter such criticism by saying their product is safe and a better alternative to “real” cigarettes because there is no tobacco or combustion or smoke involved. E-cigarettes also represent a very lucrative business opportunity for the established tobacco companies as well as entrepreneurial ones. *Bloomberg Businessweek* (McArdle, 2014) relates that the market is still a growing one with over a few hundred companies in the market, with the smaller ones using the Internet as a marketing tool; but that 10 companies control over 70% of the market. Sales of conventional cigarettes have been falling due to the intense anti-tobacco advertising campaigns as well as the bans on smoking in public places as well as in the private sector. Also, federal and state tax increases have made the price of traditional cigarettes even more expensive.

Yet, the more heavily e-cigarettes are regulated and taxed by the government the more difficult it will be for the smaller new e-cigarette companies, such as V2Cigs, to enter the market and be successful since the larger tobacco companies are so well established, possess substantial market share, and have more marketing capability, as well as lobbying and political “clout” with legislators and regulators. Conversely, the less the government interferes in the e-cigarette market, the greater the possibility of the smaller companies gaining and expanding their market share, thereby enhancing competition, lowering prices, and attracting even more users to the product. However, because of the Tobacco Master Settlement Agreement that the tobacco companies made with the states in 1998, it will be difficult for the big tobacco companies to use established brands, like Camel and Marlboro, as vehicles to promote e-cigarette versions of these name-sake brands (McArdle, 2014). One disadvantage for smaller e-cigarette companies is the registration process mandated by the FDA’s rules (assuming, of course, they become law). The Smoke Free Alternatives Trade Association, which is a lobbying group comprised of about 100 mainly smaller e-cigarette companies, stated that the FDA’s registration process would impede smaller and middle-size producers due to the time, effort, and expense involved (Clozel, 2014).

It is also important to note that the e-cigarette industry supports a ban on the sale of the product to minors, just like the ban on regular tobacco products, which the FDA is expected to promulgate into law.

For example, the *Wall Street Journal* (Esterl, 2013) pointed out that one of the leading manufacturers of e-cigarettes, Lorillard, Inc., maker of “Blu” and NJOY (which according to a 2013 study is the leading brand with a 35.6% share of the market), have come out in support of age limits. The company, which does advertise on television, also says it requires verification of online sales. Moreover, the *Miami Herald* (Veciana-Suarez, 2013) noted that VMR, the parent company of V2, the third-largest e-cigarette seller in the country, does not sell or market to minors. They voluntarily label their products “Underage Sale Prohibited,” and support bans to minors. Of course, it is in the long-term self-interest of the e-cigarette industry not to sell to minors, because to do so would further inflame anti-smoking advocates and bring down the wrath of government regulators in the form of tighter restrictions, thereby endangering the financial health of the industry.

g. Distributors and Retailers. Distributors and retailers will have to obey pertinent federal, state, and local laws, especially regarding the sale of the product to minors. Even so, e-cigarettes present a value-maximizing opportunity not just for manufactures, but also the whole e-cigarette industry, encompassing distributors and retailers and their stakeholders. Since Lorillard purchased Blu for \$135 million in cash in 2012, the company has now increased its distribution to 125,000 stores (McArdle, 2014). The Blu brand is the market leader. To further illustrate, one simply has to go to a “convenience” type store and see prominently displayed the advertisements and product placements for e-cigarettes, and usually the Blu brand. Furthermore, the more e-cigarettes proliferate, the more valuable the current distribution networks will be and the more valuable the shelf space in retailers’ stores, thereby benefitting distributors and retailers. And since the FDA has not required that the e-cigarette liquid be sold in sealed cartridges, on-line retailers and so-called ground “vape shops” will benefit since they allow consumers to mix liquids and as a result may take sales away from more traditional companies that sell sealed e-cigarettes at higher prices (Esterl3, 2014).

However, some big retailers, like Target and the CVS pharmacy chain (which is the nation’s second largest) have stopped selling traditional cigarettes, and one would assume that this ban would encompass e-cigarettes. In the case of Target Corporation, they have banned the sale of e-cigarettes as well. Many firms, including the Florida based Publix Super Markets, have asked their employees and customers not to use e-cigarettes within their stores. Yet what if e-cigarettes are demonstrated to be a beneficial smoking cessation device?

Then would not retailers who have abjured the sale of traditional cigarettes be motivated by financial and public health reasons, especially in the latter case for a major drug-store chain, to sell such a beneficial product as e-cigarettes?

h. **E-cigarette Lobbying Groups.** E-cigarette users and their lobbying groups naturally argue for the increased production and distribution of the product with the fewest legal restrictions. There is actually an e-cigarette lobbying group, called the National Vapors Club (Siegel, 2014). Their spokesperson argues that e-cigarettes have a major advantage over the nicotine patch as a smoking cessation device because the e-cigarette smoker can put something into his or her mouth to simulate smoking (Siegel, 2014). Nicotine ingestion in the form of a patch or gum is insufficient, it is argued; rather, smokers need to feel that they are smoking; and that is why e-cigarettes are held up to be a smoking replacement therapeutic device by their advocates (Siegel, 2014).

i. **Employers.** Employers, especially private sector employers are, as underscored by the title to this article, are in a quandary – a legal, ethical, and practical one. One would assume that employers want to grant to their employees as much freedom of choice as possible, not only at the workplace but certainly pertaining to their off-the-job lifestyle choices. But employer are very concerned about e-cigarette use both off- and on-premises. Legally, as noted, there are many laws could apply to e-cigarettes; but presently there is not a great deal of guidance from the legislatures, courts, and regulatory agencies on how all these legal principles will be applied. Consequently, an employer has to be very careful in creating and implementing e-cigarette policies, especially in conjunction with workplace wellness programs and, as such, the prudent employer be cognizant of legal developments and certainly must consult with legal counsel before promulgating workplace e-cigarette policies. In the absence of laws, some employers, “erring on the side of caution,” have banned the use of e-cigarettes in the workplace; but others have not. Of course, when there is law, one point is clear, of course, and that is to obey the law regarding e-cigarettes, for example, the NYC ban on places of employment. Yet, since e-cigarettes do not have much odor they are more difficult for employers or co-workers to detect.

Should the employer have a policy of banning smoking, including “vaping,” off-the-job as well as on-site, assuming the former is not prohibited by a lifestyle protection statute?

Employers do have legitimate concerns about rising health care costs as well as the safety of the workplace. Yet if the use of e-cigarettes emerges as a smoking cessation device then the prevalence of traditional smoking by employees will be reduced and the employer's health care and insurance costs will decrease. Furthermore, employers may not want to reject otherwise qualified applicants, or discharge current proficient employees, because off-the-job they use e-cigarettes or, for that matter, even traditional tobacco products. Moreover, an employer may be subject to criticism for being unfair and immoral for not hiring applicants or terminating employees who use e-cigarettes. Employers thus will have to balance these conflicting values and design, develop, and implement appropriate e-cigarette policies.

j. **Employees.** For employees who like to smoke, but who cannot do so within the company or for that matter in many cases anywhere on company premises, the e-cigarette may be the means to "light-up" indoors where legally permitted. Moreover, if e-cigarettes ever get government approval as a smoking cessation device employees can use them as a means to receive reduced insurance premiums on based on well programs that many employers have today, which give rebates or reductions to employees who do not smoke or who take smoking-cessation measures (Cavico and Mujtaba, 2013).

k. **Insurance Companies.** If e-cigarettes become merely a replacement product for existing traditional smokers, then health care expenses should go down and thus the product will be a "win" for the insurance companies. Yet if e-cigarettes encourage more people to smoke and maybe to smoke the more traditional product, health care costs will rise, thereby harming the insurance industry.

l. **Government.** The Food and Drug Administration's proposed rules for e-cigarettes has commenced the federal rulemaking process. Accordingly, there will be a great deal of debate within the agency, within Congress, and among all the interested parties allowed to participate in the "public comment" aspect of the administrative law rulemaking process. Furthermore, drugs and drug delivery devices also must first obtain FDA approval before being marketed. The e-cigarette companies may contend that the FDA lacks jurisdiction because the product is merely an alternative to smoking tobacco, and neither a conventional tobacco product nor a drug device aimed at helping people quit smoking. Nicotine cartridges are also exempt from tobacco taxes, which make up a large part of the retail cost of a traditional cigarette.

Consequently, government may view this new product as a potential source of tax revenue. Nonetheless, a key decision that the FDA apparently has made is that e-cigarettes are one means to introduce minors to nicotine products and consequently get them “hooked” on nicotine and addicted to stronger traditional tobacco products. Furthermore, the FDA is still studying the impact of e-cigarettes and thus could propose more strict regulations in the future (Esterl3, 2014).

Society. E-cigarettes are more than just a “mere” legal and practical issue. The product has emerged as a health, monetary, as well as freedom of choice issue. Tobacco generates a great deal of money for government at all levels in taxes; and presumably government will use that tax revenue wisely to benefit the “general welfare.” Tobacco also creates jobs for the employees of the tobacco companies as well as the employees of the distributors and retailers of the tobacco products. Again, government can tax these tobacco-produced salaries and wages for revenue. Tobacco generates a great deal of profits for manufacturers, distributors, and retailers of the product, as well as marketing and advertising agencies and outlets. So, the “evil weed” (that is, today, tobacco) provides a great deal of money and jobs, which obviously are good for society. Concomitantly, e-cigarettes will also produce profits and revenues which will benefit society as a whole. Finally, if e-cigarettes are considered to be “safe” smoking alternative, or at least relatively so compared to conventional tobacco products, and especially if used as a smoking cessation device, there may be fewer traditional smokers, and thus less contaminants, both directly and by means of “second-hand smoke,” and related illnesses in society, which naturally is a benefit to society as a whole.

However, in addition to these social benefits, there are “negatives” for society too, particularly the health costs associated with smoking. Society as a whole will have to take additional measures to prevent e-cigarettes from getting into the hands of minors. If e-cigarettes are in fact determined to be harmful, presumably societal health care costs will increase because of the higher number of people, including former non-smokers, who are influenced by the product. These health costs are exacerbated by the fact that smoking today is more of a low income phenomenon (Auerbach, 2014). This situation means in part that their concomitant health costs will have to be borne in large part by society as whole.

Moreover, tobacco consumption in the U.S. may be in the range of 10-20% of the population for the foreseeable future, meaning that deaths from tobacco will remain in the hundreds of thousands annually (McCardle, 2014). If current smokers use e-cigarettes as a means to wean them off traditional cigarettes, society will benefit from their improved health and the concomitant reduction in health care costs. Any reduction in smoking deaths and smoking-related illnesses can be regarded as a public health “win” and thus a benefit for society. Similarly, health insurance costs will be reduced and performance and productivity in the workplace should improve too – again, another “win” for society.

But if people who do not presently smoke try e-cigarettes and then transition to traditional cigarettes society will be harmed by the increase in smoking deaths and the rise in health care costs. If the use of e-cigarettes loses some of the social stigma associated with smoking then more and more people in society will be exposed to nicotine. The gain to society of switching current traditional cigarette users to e-cigarettes will have to be weighed against the harm of introducing new people to the new nicotine product and then, potentially, to the traditional cigarette product too. Does society want more people, especially young people, to be “smoking” anything? The critical question for society is whether the e-cigarette product is a “gateway drug” to further nicotine addiction or rather is an efficacious method for traditional smokers to cut-back and perhaps quit smoking conventional tobacco products. And if e-cigarettes can compete successfully with the traditional versions of the product, then perhaps traditional smoking could be substantially reduced and maybe phased out, thereby greatly benefitting society as a whole. So, are e-cigarettes a new safer way to “smoke” or a new addictive alternative to “real” cigarettes, especially one aimed at children? One point is clear, and that is society must grapple with this quandary since the popularity of e-cigarettes are rapidly grown in recent years.

3. Utilitarian Moral Conclusion

Although there are many negatives associated with e-cigarettes, particularly when considering the effect on minors, based on the current state of medical science as well as the law, one reasonably can say that there are more positive and beneficial consequences than negative and harmful ones; and thus pursuant to a Utilitarian ethical analysis e-cigarettes are moral.

D. Kantian Ethics

The German professor and philosopher, Immanuel Kant, condemned Utilitarianism as an immoral ethical theory. How is it logically possible, said Kant, to have an ethical theory that can morally legitimize pain, suffering, exploitation, and injustice? Disregard consequences, declared Kant, and instead focus on the form of an action in determining its morality. Now, of course, since Kantian ethics is also one of the major ethical theories in Western civilization, a huge problem arises since these two major ethical theories are diametrically opposed. Is one a Kantian or is one a Utilitarian? (Or is it all relative as the Sophists and Machiavelli stated?) For Kant, the key to morality is applying a formal test to the action itself. This formal test he called the Categorical Imperative. "Categorical" meaning that this ethical principle is the supreme and absolute and true test to morality; and "imperative" meaning that at times one must command oneself to be moral and do the right thing, even and especially when one's self-interest may be contravened by acting "rightly."

The Categorical Imperative has several ways to determine morality. One principal one is called the Kingdom of Ends test. Pursuant to this Kantian precept, if an action, even if it produces a greater good, such as an exploitive but profitable overseas "sweatshop," is nonetheless disrespectful and demeaning and treats people as mere means, things, or as instruments, then the action is not moral. The goal, said Kant, is for everyone to live in this "Kingdom of the Ends" where everyone is treated as a worthwhile human being with dignity and respect. Related to the Kingdom of Ends precept and also part of the Categorical Imperative is the Agent-Receiver test, which asks a person to consider the rightfulness of an action by considering whether the action would be acceptable to the person if he or she did not know whether the person would be the agent, that is, the giver, of the action, or the receiver. If one did not know one's role, and one would not be willing to have the action done to him or her, then the action is immoral. Do your duty, said Kant, and obey the moral "law," based on his Categorical Imperative (Cavico and Mujtaba, 2013).

Pursuant to Kantian ethics, in order to be deemed a moral product, the product should not be sold to minors. One would not want this product sold to one's minor children; and thus a "rule" of Kantian universal "law," one would not want this product to be sold to any children.

Moreover, the advertising and marketing of e-cigarettes must be truthful and non-deceptive and not misleading as well as, of course, not aimed at minors. Even if e-cigarettes are supposed to help people to quit smoking tobacco products, they could by suggestive advertising overly influence young people to try, and perhaps get "hooked on" tobacco products. Manufacturers should abjure the use of flavored products which would appeal to children as well as abjure the use of cartoon characters (like the old, and reviled, Joe Camel) to market the product. E-cigarettes also must contain warnings of any adverse consequences emanating from the use of the product. It would be considered immoral pursuant to Kantian ethics to allow young people to make decisions regarding adult-like products which they are not well versed on and too immature and inexperienced to fully understand.

However, if the foregoing limitations regarding minors are adhered to, one can say that an adult is treated with dignity and respect by being given a choice as well as truthful information about a legal product, even one traditionally regarded as a "vice." For a Kantian, government is not one's "Big Brother" or mother or father; and thus a free, rational, thinking adult can make his or her informed decision as to whether to try e-cigarettes or for that matter any tobacco product. Smoking a legal product when fully informed of any and all risks is simply a part of one's own private and personal life, a Kantian would argue. As the old saying goes, "You can find your own way to heaven, or (the other place)!"

E. Ethical Conclusion

Based on the information currently available, one can say that pursuant to Ethical Egoism e-cigarettes are moral from the vantage point of the manufacturer as the "good" to the manufacturer outweighs the "bad." And if e-cigarettes can and do help to reduce traditional smoking, the employer may benefit in the long-run too, thus reinforcing the moral conclusion pursuant to Ethical Egoism. As for Ethical Relativism, if e-cigarettes are considered to be acceptable or even desirable by society, or certain segments of society, then again the product will be considered a moral one pursuant to that ethical theory. Kant, of course, would condemn e-cigarette advertising, marketing, and sales to minors as immoral pursuant to the Categorical Imperative. Yet Kant would likely argue that the product is moral for adults due to the dignity and freedom of choice that must be accorded to adults in making decisions as to legal products, even those that may be regarded as a "vice," so long as they are adequately informed of any risks.

The Utilitarian stakeholder analysis conducted herein was challenging to do, since it is very difficult to make predictions as to the consequences of e-cigarettes since the full health ramifications of the product are not yet known. Nevertheless, it seems that presently the benefits to the stakeholders of this new product outweigh the harms, and thus the product is a moral one pursuant to the Utilitarian ethical theory.

V. Implications and Recommendations

E-cigarettes are certainly producing controversy, especially in the workplace. Many companies have policies, including strict rules, on the prohibition of smoking, and not only in the workplace but also off-premises too. The critical question is whether companies should decide to bring e-cigarettes into the ban of smoking conventional tobacco products. The prudent company must be cognizant of the law, of course, as well as medical developments, but also must be aware of societal mores and trends pertaining to vaping. To illustrate the latter, even if permissible, allowing the employees to vape at work in front of customers, clients, and the general public may be considered “unprofessional” by certain segments of society to the detriment of a firm. Legally, though there is no federal law that protects smokers in the workplace or off-the-job” and prevents discrimination against them, the employer must be aware that any enforcement of smoking policies, including use of e-cigarettes, which is done in a discriminatory manner, may trigger a federal lawsuit pursuant to the Civil Rights Act if the discriminated group is a member of a protected category, such as minorities. Furthermore, even if an employer has a smoking policy which is neutral on its face but which has a disparate (disproportionate) adverse impact against a protected category, such as minorities, a federal civil rights lawsuit could ensue.

The health benefits of e-cigarettes are still being hotly debated. Some health experts say that because they provide nicotine without combustion, they are less risky to one’s health, and actually may, like nicotine patches, help people quit smoking. But the use of e-cigarettes by minors has doubled in recent years. Young people may think that “vaping” is harmless, but there may be adverse health ramifications for young people since nicotine is present. So, though e-cigarettes may be useful in smoking cessation, they may be dangerous to young people because they are attractive products which actually come in appealing “kid” flavors such as chocolate and cherry.

Regulation, therefore, is needed to keep the product from children; and as such the Food and Drug Administration is now proposing a rule banning the sale of the product to minors. Even in the absence of regulation, manufacturers of e-cigarettes should be proactive, socially responsible, and well as ethically egoistic and join the “campaign” to prevent minors from purchasing the product. Another socially responsible suggestion would be for e-cigarette manufacturers to place the liquid cartridges of the product in childproof containers to keep them away from very young children (Kaplan, 2014).

Some health experts condemn e-cigarettes as just another harmful toxin or pollutant (Green, 2014). Yet, according to the *Miami Herald* (Green, 2014) there is no definitive science as to the long-term effects of e-cigarette use. Thus, the problem for government regulators, as well as public and private sector employers, is that health experts cannot agree on whether e-cigarettes are an efficacious means to help smokers quit or merely a less harsh, but still potentially dangerous, alternative to regular cigarettes. And if the former, one recommendation for an employer would be to allow job applicants and current employees, as part of a wellness program, to use e-cigarettes, even if the employer has a ban on smoking off-site, as a smoking cessation device and then give the employees a reasonable period of time to quit the e-cigarette “habit.”

Manufacturers and sellers of e-cigarettes should be direct and truthful with their literature and warning labels, particularly when informing consumers of the chemicals and other ingredients in the product. They also must adhere to pertinent laws and thus enforce age restrictions on the purchase of the product. The socially responsible, as well as ethically egoistic e-cigarette manufacturer should contribute part of their profits to research as to the medical effects of the product as well as donate a portion of their profits to the American Cancer Association and other organizations seeking to find a cure for cancer. Another socially responsible suggestion for manufacturers would be help smokers control and lessen their addiction to nicotine, for example, by gradually lowering the amount of nicotine in the product. This would reinforce the “image” of the product as a true smoking cessation device, which surely is in the ethically egoistic interest of the manufacturers.

VI. Summary

The issue – legally, ethically, and practically - for e-cigarettes is whether they lead to nicotine addiction and thus ultimately will this new product produce more, as opposed to fewer, traditional smokers. That question still has not been answered, though one would expect a great deal of debate during the Food and Drug Administration's public comment part to the rulemaking procedure. Thus, the subject of e-cigarettes presents a quandary for all the stakeholder groups, including and especially the government and society as a whole, examined in this article. Are e-cigarettes helpful, or are they harmful? E-cigarettes may be a viable way for addicted smokers to quit traditional tobacco products; and thus they may be moral in that regard. Yet they may not be moral if e-cigarettes induce non-smokers, especially minors, to become consumers of the product. Presently, e-cigarettes seem to be a "step in the right direction" in the sense of being preferable for smokers than "real" cigarettes; but there is a "long way to go" before definitive answers can be provided. The dilemma is that this new product has not been fully studied; and thus there is no preponderance of the evidence, let alone clear and convincing evidence, that the product will do harm to anyone, or, for that matter, benefit anyone. The federal government, despite the proposed FDA rules, still does not have sufficient definitive evidence regarding harm vs. benefits to exercise control over the product. However, several states and local government entities have taken action, particularly regarding sales to minors. Mainly, the product, legally, is now in the testing, analysis, discussion stage, though that discussion is now going to be conducted in a very formal and legalistic manner during the FDA's rulemaking process. Certain points are evident, though. First, the product is being widely and successfully promoted; and thus the e-cigarette industry is growing very rapidly. Second, government and society as a whole cannot take a "hands-off" approach when dealing with this new product, especially regarding sales to minors. To do so would be socially irresponsible. The FDA's proposed rules are naturally a "step in the right direction." Yet is the e-cigarette a safe, effective substitute for traditional smoking or a smoking cessation tool? Or is it some type of Machiavellian device to get people, especially young people, "hooked" on the "evil weed" of tobacco. Though the conclusions in this article tended to the legality and morality of the product, plainly, more research and studies have to be done to ascertain the long-term health effects – good and/or bad – of e-cigarettes. That is the e-cigarette quandary today!

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