

MINUTES OF THE SENATE PUBLIC HEALTH AND WELFARE COMMITTEE

The meeting was called to order by Chairman Jim Barnett at 1:30 p.m. on January 29, 2009, in Room 136-N of the Capitol.

All members were present.

Committee staff present:

Nobuko Folmsbee, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Kelly Navinsky-Wenzl, Kansas Legislative Research Department
Terri Weber, Kansas Legislative Research Department
Jan Lunn, Committee Assistant

Others attending:

See attached list

Conferees appearing before the committee:

Sandy Jacquot representing Kim Winn, League of Kansas Municipalities
W. Paul Daegner, Private Citizen
Ron Hein, Kansas Restaurant & Hospitality Association and Reynolds American, Inc.
Bill Nigro, Free State Business Rights Coalition
Father H. Setter, Wichita
Tom Jacob, Cigar Chateau, Wichita
Sheila Martin, Hutchinson
Kurt Diebel, Diebel's Sportsmens Gallery
Jeff Martin, Armour Amusement
Larry Doss, Walt's Bar, Wichita
Derrick Sontag, AFT
Phil Bradley, Kansas Licensed Beverage Association

Senator Barnett recognized Amy Campbell, Kansas Mental Health Coalition who requested conceptual introduction of a bill that would provide for mental health parity language related to mental health coverage under private insurance. Senator Pilcher-Cook moved introduction of the bill; Senator Kelsey seconded the motion. The motion passed.

Representative Garcia introduced a bill related to patient safety which would provide for establishment of a data bank of available interpreters for certain purposes and development of qualifications for interpreters. Senator Kelsey moved introduction of the bill; Senator Pilcher-Cook seconded the motion. The motion passed.

Senator Barnett introduced Julia Mowers from the Kansas Board of Healing Arts. Ms. Mowers requested a bill that provides authority to the Kansas Board of Healing Arts to conduct background checks for all licensure applicants and allows the Board of Healing Arts to post disciplinary information on their web site. Senator Colyer moved introduction of the bill; Senator Haley seconded the motion. The motion passed.

Senator Barnett opened the hearing for opponents on **SB 25 - State-wide prohibition on smoking in indoor public areas.**

Senator Barnett recognized Sandy Jacquot representing Kim Winn, Director of Policy Development and Communications, League of Kansas Municipalities, who testified that to date, 34 cities and 2 counties (covering 54% of the State's population) have adopted local smoking bans (Attachment 1). A spreadsheet was provided showing those ordinances and penalties. She pointed out that if a state-wide smoking ban is legislated, all the ordinances previously in place would become null and void. She requested language in the proposed bill indicating that any city ordinance adopted prior to the effective date of the state-wide smoking ban legislation would continue with full force and effect.

Paul Daegner a private citizen spoke in opposition to **SB 25**. He testified that the legislation violates

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freedom of choice and allows state government to intrude into the private lives of citizens. Ms. Daegner's testimony is attached and becomes part of this record. (Attachment 2)

Ron Hein representing Kansas Restaurant and Hospitality Association and Reynolds American, Inc was recognized. Mr. Hein testified that there is a duty to uphold the obligation to defend the rights of business owners to make their own business choices that might aid or hinder their businesses. One of those is the right to determine their clientele (smoker or non-smoker). He emphasized that the legislation has the power to destroy lives of employees and to close businesses. Mr. Hein stated that government intervention into what should be a private property right decision is unnecessary and unwarranted (Attachments 3 and 4).

Senator Wysong inquired of Ron Hein whether Reynolds American, Inc., believes smoking hurts people? Mr. Hein responded he could not answer or speak for Reynolds American, Inc. on that subject. Senator Wysong requested follow-up from Mr. Hein, if possible.

Bill Nigro, Free State Business Rights Coalition, spoke regarding the effects of regulating small businesses such as unemployment, small businesses closing, etc. He encouraged committee members to leave this issue to small business owners in the state. (Attachment 5).

Father H. Setter, pastor of All Saints Catholic Church in Wichita and Chaplain of the International Premium Cigar and Pipe Retailers, testified that tobacco is a legal product in this nation and consumers can choose whether to use the product; business owners have the right to decide whether to allow smoking in their establishments; and from where will tax revenue come (resulting from tobacco product sales) if a smoking ban is implemented. He encouraged a compromise ordinance similar to the one enacted in Wichita (Attachment 6).

Mr. Tom Jacob, managing partner of Cigar Chateau, sells premium handmade cigars, pipes, tobacco and accessories. The business is considered a "destination shop" with customers of all demographics (Attachment 7). He encouraged the committee not to take action on **SB 25**, but in the event action is taken, he requested revision of the sales percentage of tobacco from 80% to 60% or accessories such as humidors, pipes and lighters be included in the 80% sales requirement, and that **SB 25** not supercede any smoking ordinance that is already in place or implemented.

Sheila Martin, a tavern owner from Hutchinson, testified relative to the loss of liquor excise tax revenue the state would experience if **SB 25** is passed (Attachment 8). Ms. Martin indicated that if legislation is favorably passed, her business would be closed. She indicated 85% of her patrons are smokers, and this legislation would put her out of business.

Curt Diebel, Diebel's Sportsmens Gallery in Overland Park, spoke regarding the rising health care costs and the popularity of proposing substantial savings resulting from smoking bans. He cited that cigarette smoking has declined 43 %from 1980 to 2008 (Attachment 9), however, no health care cost savings have been realized. Mr. Diebel indicated that passage of **SB 25** would do harm to his business and livelihood. He requested reduction in the 80% tobacco sales threshold should **SB 25** be favorably considered.

Mr. Larry Doss of Walt's Old Fashioned Hamburgers in Wichita was recognized. Mr. Doss testified about the implementation of the Wichita smoking ordinance and the impact on his businesses (Attachment 10). He discussed the repercussions he would experience if a smoking ban is implemented. He explained to committee members his business decisions result from being responsive to his customers, and his negative perception of putting restrictions on a legal product.

Derrick Sontag, State Director of Americans for Prosperity, spoke relating to his opposition to **SB 25** and its proposed restrictions on personal choice. He encouraged committee members to allow proprietors to determine their own smoking policies (Attachment 11).

Phil Bradley representing the Kansas Licensed Beverage Association spoke regarding the impact of local options related to smoking (Attachment 12) and, the issue of the rights of private businesses to serve their

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customers. He indicated that if a statewide ban is favorably considered, an exemption for businesses licensed for primarily on-premise liquor sales be included as well as an exemption for a "smoking establishment" similar to the "cigar bar" exemption. Mr. Bradley discussed the economic impact on Lawrence (presented at the 1/27/09 meeting) following implementation of a smoking ban. In addition, Mr. Bradley requested that if **SB 25** is passed, additional consideration be given to reducing the radius of smoking outside existing establishments and new construction and to amending criminal penalties/civil actions included in the legislation.

Chairman Barnett call attention to the following written testimony submitted in opposition to **SB 25**:

Jeff Martin, Armour Amusement, Kansas City ([Attachment 13](#))

Whitney Damron, Flint Oak, LLC and Flint Hills National Golf Course ([Attachment 14](#))

Kurt Van Keppel, President, AIKAR, Inc. ([Attachment 15](#))

Tom Devlin, Flint Hills National Golf Course ([Attachment 16](#))

Cathy Nugent, Free State Business Rights Coalition ([Attachment 17](#))

Kim Moffitt, Private Citizen ([Attachment 18](#))

Tom Conroy, Conroy's Pub, Lawrence ([Attachment 19](#))

Chuck Magerl, WheatFields Bakery and Free State Brewery, Lawrence ([Attachment 20](#))

Senator Barnett closed the hearing on **SB 25 - State-wide prohibition on smoking in indoor public areas.**

The next meeting is scheduled for February 2, 2009.

The meeting was adjourned at 2:34p.m.

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE GUEST LIST

DATE: 1-29-09

NAME	REPRESENTING
Rep. Delia Garcia	Committee Bill Intro
PAUL DEGENER	CAFIT
Julia Mowers	K.S.B.H.A.
Melissa P. Ness	St. Francis Comm Services
LARRY DOSS	WALTS SPORTS BAR & GRILL
Ron Hein	Reynolds American Inc Ks Restaurant & Hospitality Assn
Chad Austin	KHA
Jessie Noble	KDHE
Chondra Ayers	KDHE
Paula Clayton	KDHE
Susan King	KDHE
Travis Lowe	Pinegar, Smith & Assoc
Julie Hein	Hein Law Firm, KRHA
Sandy Jaquast	LKM
Mike Boehm	City of Lenexa
Anna Lamberton	Kansas Health Consumer Coalition
Tracy Russell	KHCC
Patrick Broxterman	KSAG
TODD GAMBAL	Jaywalkers Bar & Grill

SENATE PUBLIC HEALTH AND WELFARE COMMITTEE GUEST LIST

DATE: 1-29-09

NAME	REPRESENTING
Don Saylor	KS Restaurant & Hospitality Assoc.
Jan Furgason	Clean Air Toxics
Sheila Martin	Myself a taxpayer
Anna Spiess	American Cancer Society
Dave Rememan	" " "



League of Kansas Municipalities

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To: Senate Public Health & Welfare Committee
From: Kim Winn, Director of Policy Development & Communications
Date: January 27, 2009
Re: SB 25

Thank you for the opportunity to appear before this Committee regarding this very important issue. The League of Kansas Municipalities (LKM) does not have a specific position regarding whether the State of Kansas should adopt a smoking ban. However, we do have very strong positions in favor of local control and we are concerned about the preemption that would result from this legislation. For this reason, we must oppose SB 25 in its current form. We offer two key considerations:

- **Cities Have Been Leaders in this Area.** To date, 34 cities and 2 counties (covering 54% of the State's population) have adopted local smoking bans. I have attached a spreadsheet which provides an analysis of these ordinances and resolutions. Each of these communities went through a different process to reach this level of regulation. Some of the ordinances were the result of citizen petitions and elections, some were initiated by citizen study groups, and others were initiated at the request of the elected city council. In each of these cases, a unique solution was crafted to fit each of the communities involved.
- **Request to Leave these Ordinances in Place.** LKM respectfully requests that SB 25 be amended to grandfather in those cities that have already taken the step to regulate smoking in their communities. This amendment would have the effect of allowing the State to develop a statewide smoking ban, while still allowing for those communities that take affirmative action to adopt their own local regulations. Suggested Language:

New Section ____. Any city ordinance adopted prior to the effective date of this Act shall continue with full force and effect. Nothing contained herein shall limit the ability of cities to exercise the authority granted to them in Article 12, Section 5 of the Kansas Constitution.

Thank you for the opportunity to share our concerns. I would be happy to stand for questions at the appropriate time and I look forward to working with the Committee on this very important piece of legislation.

Basic Information

City or County	Pop.	Region	Ordinance Number	Date Adopted	Enclosed Public Places	Enclosed Places of Employment	Distance Req.
Abilene	6,305	NE	3037	6/27/2005	Prohibited	Prohibited	Reasonable
Bel Aire	6,704	SC	431	11/1/2005	Prohibited	Prohibited	None
Concordia	5,171	NC	2005-2889	5/18/2005	Not Regulated	Not Regulated	None
Derby	22,058	SC	1885 & 1951	4/10/2007	Prohibited	Prohibited	20 feet
Emporia	26,662	NE	08-44	12/3/2008	Prohibited	Prohibited	10 feet
Fairway	3,832	NE	Code 6-1001 <i>et seq.</i>	11/13/2005	Prohibited	Prohibited	20 feet
Garden City	26,629	SW	Code 50-73 <i>et seq.</i>	8/8/2006	Specified Places Only	Not Regulated	50 feet
Hesston	3,701	SC	010-2007-172	10/9/2007	Prohibited	Prohibited	20 feet
Hutchinson	40,668	SC	2004-08	2/24/2004	Not Regulated	Not Regulated	None
Kansas City	142,320	NE	0-91-08	12/18/2008	Prohibited (except "smoker friendly" until 2011)	Prohibited	None
Lawrence	89,852	NE	Code 9-801 <i>et seq.</i>	5/11/2004	Prohibited	Prohibited	None
Leawood	31,012	NE	2195C	11/20/2006	Prohibited	Prohibited	10 feet
Lenexa	45,681	NE	4965	7/3/2007	Prohibited	Prohibited	10 feet
Lyons	3,471	SC	1685	7/7/2003	Not Regulated	Not Regulated	15 feet
Maize	2,872	SC	762	7/24/2008	Prohibited	Exempt in Non-Public Areas	None
Manhattan	51,748	NE	6737	11/4/2008	Prohibited	Prohibited	20 feet
Merriam	10,790	NE	1038	6/15/1987	Designated Smoking Areas (DSA)	Not Regulated	None
Mission	9,743	NE	1261 & 1269	5/21/2008	Prohibited	Prohibited	25 feet
Mission Woods	159	NE	160	6/6/2006	Prohibited	Prohibited	Reasonable
Newton	18,017	SC	4646-07	11/13/2007	Prohibited	Prohibited	20 feet
North Newton	1,567	SC	525-07	12/10/2007	Prohibited	Prohibited	20 feet
Olathe	118,034	NE	35582	8/15/2006	Prohibited	Prohibited	10 feet
Ottawa	12,828	NE	3657-07	12/5/2007	Prohibited	Not Regulated	None
Overland Park	169,403	NE	POC-2632	11/6/2006	Prohibited	Prohibited	10 feet
Park City	7,588	SC	803-2007	9/25/2007	Designated Smoking Areas (DSA)	Not Regulated	None
Parsons	11,122	SE	6100	9/18/2006	Specified Places Only	Not Regulated	None
Prairie Village	21,422	NE	2109	11/21/2005	Prohibited	Prohibited	None
Roeland Park	6,951	NE	793	4/7/2006	Prohibited	Prohibited	None
Salina	46,458	NC	02-10077	5/6/2002	Not Regulated	Not Regulated	None
Shawnee	59,958	NE	2860	9/24/2007	Prohibited	Prohibited	None
Topeka	122,642	NE	Code 78-226 <i>et seq.</i>	12/19/2000	Designated Smoking Areas (DSA)	DSA (up to 50% of the area)	None
Walton	287	SC	297	9/6/2005	Prohibited	Not Regulated	None
Westwood	1,478	NE	883	12/13/2007	Prohibited	Prohibited	25 feet
Wichita	361,420	SC	47-892	6/3/2008	Any place of business (except "smoker friendly")	DSA	10 feet
Harvey County	7,289	SC	2007-23	11/5/2007	Prohibited	Prohibited	20 feet
Johnson County	4,749	NE	001-07	1/4/2007	Prohibited	Not Regulated	10 feet
	1,500,591						
Kansas Pop.	2,775,997				Kansans Covered Under a Smoking Ordinance	54%	

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Specific Locations

City or County	Outdoor Theaters/ Recreation	Indoor Theaters/Recreation	Indoor Bars/Drinking Establishments
Abilene	Prohibited	Prohibited	Exempt (if less than 45% food)
Bel Aire	Not Regulated	Prohibited	Prohibited
Concordia	Not Regulated	Not Regulated	Exempt (if less than 30% food)
Derby	Not Regulated	Prohibited	Prohibited
Emporia	Prohibited (within 10 feet of food vendors)	Prohibited	Prohibited
Fairway	Not Regulated	Prohibited	Prohibited
Garden City	Prohibited (if publicly owned)	Prohibited (if publically owned)	Prohibited
Hesston	Prohibited	Prohibited	Prohibited
Hutchinson	Not Regulated	Not Regulated	Exempt (if less than 50% food)
Lawrence	Not Regulated (except enclosed places)	Prohibited	Prohibited
Leawood	Not Regulated	Prohibited	Prohibited
Lenexa	Not Regulated (except enclosed places)	Prohibited	Prohibited
Lyons	Not Regulated	Not Regulated	Exempt (if less than 30% food)
Maize	Not Regulated	Prohibited	Prohibited
Manhattan	Prohibited (in Seating Areas & Enclosed Areas)	Prohibited	Prohibited (& Outdoors)
Merriam	Not Regulated	DSA	DSA
Mission	Prohibited (within 20 feet of food & seating)	Prohibited	Prohibited
Mission Woods	Not Regulated	Prohibited	Prohibited
Newton	Prohibited (within 20 feet of food vendors)	Prohibited	Prohibited
North Newton	Not Regulated	Prohibited	Prohibited
Olathe	Not Regulated	Prohibited	Prohibited
Overland Park	Not Regulated (except enclosed places)	Prohibited	Prohibited
Park City	Not Regulated	DSA	DSA
Parsons	Not Regulated	Not Regulated	Prohibited (except after 9:00 p.m.)
Prairie Village	Not Regulated	Prohibited	Prohibited
Roeland Park	Not Regulated	Prohibited	Prohibited
Salina	Not Regulated	Exempt	Exempt (if less than 30% food)
Shawnee	Prohibited	Prohibited	Exempt (if less than 30% food)
Topeka	Not Regulated	DSA	Exempt
Walton	Not Regulated	Prohibited	Prohibited
Westwood	Not Regulated	Prohibited	Prohibited
Wichita	Unclear	DSA	DSA
Harvey County	Prohibited in seating and concession areas	Prohibited	Prohibited
Johnson County	Not Regulated (except enclosed places)	Prohibited	Prohibited
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Specific Locations

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City or County	Private Clubs & Fraternal Organizations	Indoor Restaurants	Tobacco Shops	Designated Hotel and Motel Rooms	Bowling Alleys
Abilene	Exempt (if less than 45% food)	Prohibited	Exempt	Exempt (up to 40%)	Exempt
Bel Aire	Prohibited	Prohibited (except private functions)	Exempt	Exempt (up to 25%)	Prohibited
Concordia	Exempt	Prohibited	Not Regulated	Not Regulated	Exempt
Derby	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
Emporia	Prohibited	Prohibited	Exempt	Prohibited	Prohibited
Fairway	Prohibited	Prohibited	Prohibited	Exempt (up to 25 %)	Prohibited
Garden City	Prohibited	Prohibited	Not Regulated	Not Regulated	Not Regulated
Hesston	Exempt	Prohibited (& Outdoors)	Prohibited	Exempt (up to 25%)	Prohibited
Hutchinson	Exempt (if less than 50% food)	Prohibited	Not Regulated	Not Regulated	Not Regulated
Lawrence	Exempt	Prohibited	Exempt	Exempt (up to 25%)	Prohibited
Lawrence	Prohibited	Prohibited (except private functions)	Exempt	Exempt (up to 25%)	Prohibited
Leawood	Prohibited	Prohibited	Exempt	Prohibited	Prohibited
Lenexa	Prohibited	Prohibited	Exempt	Prohibited	Prohibited
Lyons	Exempt (if less than 30% food)	Prohibited	Not Regulated	Not Regulated	Not Regulated
Maize	Prohibited	Prohibited	Exempt	Exempt (up to 25%)	Prohibited
Manhattan	Prohibited	Prohibited (& Outdoors)	Prohibited	Prohibited	Prohibited
Merriam	DSA	DSA	DSA	DSA	DSA
Mission	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
Mission Woods	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
Newton	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
North Newton	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
Olathe	Exempt	Prohibited	Exempt	Exempt (up to 25%)	Prohibited
Olathe	Exempt	Prohibited	Exempt	Exempt (upt to 25%)	Prohibited
Overland Park	Prohibited	Prohibited	Exempt	Prohibited	Prohibited
Park City	DSA	DSA	DSA	DSA	DSA
Parsons	Exempt	Prohibited	Not Regulated	Exempt	Not Regulated
Prairie Village	Prohibited	Prohibited	Prohibited	Exempt (up to 25%)	Prohibited
Roeland Park	Prohibited	Prohibited	Prohibited	Exempt (up to 25%)	Prohibited
Salina	Exempt	Prohibited (before 9:00 p.m.)	Not Regulated	Not Regulated	Exempt
Shawnee	Prohibited	Prohibited	Exempt	Exempt (up to 25%)	Prohibited
Topeka	DSA	Prohibited (under 30 persons only)	Exempt	Rooms rented to guests	DSA
Walton	Prohibited	Prohibited	Prohibited	Prohibited	Prohibited
Westwood	Prohibited	Prohibited	Exempt	Prohibited	Prohibited
Wichita	DSA	DSA	DSA	DSA	DSA
Harvey County	Prohibited	Prohibited	Exempt	Exempt (up to 25%)	Prohibited
Johnson County	Exempt	Prohibited	Prohibited	Prohibited	Prohibited

Specific Locations

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City or County	Private Residences	Child Care/Health Care Facility	Area Separately Ventilated	Gaming Area/Bingo Hall
Abilene	Exempt	Prohibited	Exempt	Prohibited
Bel Aire	Exempt	Prohibited	Exempt	Prohibited
Concordia	Not Regulated	Not Regulated	Not Regulated	Exempt
Derby	Exempt	Prohibited	Prohibited	Prohibited
Emporia	Exempt	Prohibited	Prohibited	Prohibited
Fairway	Exempt	Prohibited	Prohibited	Prohibited
Garden City	Not Regulated	Not Regulated	Not Regulated	Not Regulated
Hesston	Exempt	Prohibited	Prohibited	Prohibited
Hutchinson	Not Regulated	Not Regulated	Exempt	Not Regulated
Lawrence	Exempt	Prohibited	Exempt (break rooms)	Prohibited
Leawood	Exempt	Prohibited	Prohibited	Prohibited
Lenexa	Exempt	Prohibited	Prohibited	Prohibited
Lyons	Not Regulated	Not Regulated	Exempt	Not Regulated
Maize	Exempt	Prohibited	Prohibited	Prohibited
Manhattan	Exempt	Prohibited	Prohibited	Prohibited
Merriam	Not Regulated	DSA	DSA	DSA
Mission	Exempt	Prohibited	Prohibited	Prohibited
Mission Woods	Exempt	Prohibited	Exempt	Prohibited
Newton	Not Regulated	Prohibited	Exempt	Prohibited
North Newton	Not Regulated	Prohibited	Intermittent Only	Prohibited
Olathe	Exempt	Prohibited	Prohibited	Prohibited
Overland Park	Exempt	Not Regulated	Prohibited	Prohibited
Overland Park	Exempt	Prohibited	Prohibited	Prohibited
Park City	Not Regulated	DSA	DSA	DSA
Parsons	Not Regulated	Not Regulated	Exempt	Not Regulated
Prairie Village	Exempt	Prohibited	Prohibited	Prohibited
Roeland Park	Exempt	Prohibited Indoors	Prohibited	Prohibited
Salina	Not Regulated	Not Regulated	Exempt	Exempt
Shawnee	Not Regulated	Prohibited	Prohibited	Prohibited
Topeka	Not Regulated	DSA	Exempt	DSA
Walton	Exempt	Prohibited	Prohibited	Prohibited
Westwood	Exempt	Prohibited	Prohibited	Prohibited
Wichita	Not Regulated	DSA	Exempt	DSA
Harvey County	Exempt	Prohibited	Prohibited	Prohibited
Johnson County	Exempt	Prohibited	Prohibited	Prohibited
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Enforcement

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City or County	Sign Posting Requirement	Non-Retailiation Clause	Owner/Operator Penalty	Individual Penalty
Abilene	Yes	Yes	\$100/day	\$100/day
Bel Aire	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Concordia	Yes	No	Up to \$500/6 months	\$25
Derby	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50
Emporia	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50
Fairway	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50
Garden City	Yes	No	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Hesston	Recommended	Yes	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Hutchinson	Yes	No	Up to \$500/1 month	Up to \$500/1 month
Kansas City (Unified Govt.)	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50
Lawrence	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Leawood	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Lenexa	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Lyons	Yes	No	Up to \$500/6 months	Up to \$500/6 months
Maize	Yes	No	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Manhattan	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50/\$100/\$200 (within 1 year)
Merriam	Yes	No	\$50	\$20
Mission	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Mission Woods	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Newton	Encouraged	No	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
North Newton	Recommended	Yes	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Olathe	Yes	Yes	\$50/\$100/\$250 (within 1 year)	\$50
Ottawa	Yes	No	\$50/\$100/\$250 (within 1 year)	\$50/\$100/\$250 (within 1 year)
Overland Park	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Park City	Yes	No	Up to \$500/1 month	Up to \$500/1 month
Parsons	Yes	No	\$25	\$25
Prairie Village	Yes	Yes	\$1000/179 days	\$1000/179 days
Roeland Park	Yes	Yes	\$100/\$200/\$500 (within 1 year)	\$50
Salina	Yes	No	\$500/6 months	\$25
Shawnee	Yes	No	\$50/\$100/\$250 (within 1 year)	\$50
Topeka	Yes	Yes	\$25	\$25
Walton	Yes	No	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Westwood	Yes	No	\$100/\$200/\$500 (within 1 year)	\$50
Wichita	Yes	No	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Harvey County	Recommended	Yes	\$100/\$200/\$500 (within 1 year)	\$100/\$200/\$500 (within 1 year)
Johnson County	Yes	No	\$50/Day	\$50/Day

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SUBJECT: SB 25 State Wide Smoking Ban

Sunday, January 25, 2009

Mr. Chairman and members of the committee, thank you for allowing me to appear before this body.

My name is Paul Degener, I am the president and lobbyist of a local grass roots organization, "Citizens Against Illegal Immigration, Topeka, www.caiitopeka.org. However, I am not here today representing CAIIT, but rather as a concerned citizen.

I am here today in opposition to SB 25, the state wide smoking ban.

Several years ago I had the freedom to start smoking and subsequently several years later I had the freedom to choose not to smoke. That was a personal choice, not a decision made by government.

I appreciate visiting facilities that are non-smoking; however, this response is not about smokers vs. non-smokers, it is about the freedom of choice in a free state.

If this legislation is passed, the legislators of the state of Kansas will be discriminating against two classes of citizens, owners of private businesses and smokers and at the same time showing preferential treatment to the non-smoking citizens of Kansas.

If the state of Kansas on the other hand would be silent on the issue, everyone, to include the non-smokers, would be allowed to exercise their freedom of choice on the matter.

First, business owners would be able to exercise their right to designate their respective establishment as smoking or non-smoking. Business owners would make this decision based on their desire to accommodate their clientele, whether they are smokers or non-smokers and their perceived ability to make the most money, these are the reasons they are in business. Additionally, they would have the ability to reverse that decision at a later date.

Smokers would have the choice of frequenting businesses that allow smoking or make a choice to give up smoking while in a non-smoking establishment.

And finally, non-smokers would also have the freedom to take their business to establishments that do not allow smoking or make the decision to tolerate the smoke while visiting a smoking allowed establishment.

This solution is a win-win-win situation for all parties concerned.

On page 3, Section 3 (a) No person shall smoke in an enclosed area or at a public meeting including but not limited to:

(3) Restrooms, lobbies, hallways and other common areas in public and **PRIVATE BUILDINGS, CONDOMINIUMS AND OTHER MULTIPLE RESIDENTIAL FACILITIES.**

This is amazing. I live in a private building, my home and this legislation would prevent me from allowing smoking in my home. Condominiums and multiple residential facilities are the homes of Kansas Citizens. This is unbelievable.

Section 3 (d) The provisions of this section shall not apply to:

(2) Private homes or residences

NOTE: Which is it? Not allowed in private buildings (homes), condominiums and other multiple residential facilities (homes) **OR** smoking allowed in private homes and residences.

(4) The Kansas Soldiers Home

(5) That portion of an adult care home

(6) That portion of a licensed long-term care unit of a medical care facility

NOTE: This is a little hypocritical. This legislation is going to control the lives of citizens from the age of 21 or so until they reach an age that requires some sort of long term care. I interpret this as don't worry about the old geezers, they are a drag on society, just let them smoke themselves to death, but we are control everything else.

I spent 36 years of my life in the United States army under the delusion that I was protecting our Constitution and our freedoms under the Bill of Rights. Now, we continue the fight to protect those rights not from a foreign invader, but from our own government.

This is not only a matter of freedom of choice by the citizens of a free state, but also a matter of state government overstepping their bounds and intruding into the private lives of its citizens.

Thank you for your time.

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Ronald R. Hein
Attorney-at-Law

Email: rhein@heinlaw.com

Testimony Re: SB 25
Senate Public Health and Welfare Committee
Presented by Ronald R. Hein
on behalf of
Kansas Restaurant and Hospitality Association
January 28, 2009

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am Legislative Counsel for the Kansas Restaurant and Hospitality Association (KRHA). The Kansas Restaurant and Hospitality Association, founded in 1929, is the leading business association for restaurants, hotels, motels, country clubs, private clubs and allied business in Kansas. Along with the Kansas Restaurant and Hospitality Association Education Foundation, the association works to represent, educate and promote the rapidly growing industry of hospitality in Kansas.

KRHA opposes SB 25 for the following reasons.

For a number of years, the Kansas Restaurant and Hospitality Association has been one of the leading defenders of the right of business owners to make their own business decision about the use of legal products in private businesses operated by our members. In short, the KRHA believes that our business owners know best what food to serve, what business decisions to make, and what customers they seek for the best success for their personal businesses. The KRHA has always believed that the business owner, not the government regulators, is in the best position to determine their customer base. As such, the KRHA has generally opposed governmental smoking bans.

The KRHA has explored alternatives that allow for increasing the number of locations which are non-smoking, while recognizing the adverse economic impact which smoking bans have on numerous other food and beverage businesses. The KRHA has worked with other business interests, and we have developed legislation which would establish a ban that would be acceptable to these opponents of these types of smoking ban legislation. This year, on behalf of a coalition of such businesses, I requested introduction of a compromise bill, SB 81.

In SB 81, the KRHA has agreed to a major concession, which is that the ban would prohibit smoking areas in restaurants unless the smoking area was in a separate and

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distinct room, separated by floor-to-ceiling walls and separately ventilated. This should eliminate any exposure for non-smokers. SB 81 also protects age-restricted venues and other businesses/operations which do NOT threaten the rights of non-smokers..

According to our best information, the vast majority of hospitality industry establishments in the state have chosen to be non-smoking, and we believe many businesses are choosing to be non-smoking every day. Non-smokers have plenty of choices of food service establishments if they desire to avoid a facility that allows smokers. Many businesses have gone to tremendous lengths, cost and effort to provide facilities which can cater to both smokers and non-smokers. Discussion of a smoking ban seems to be addressing a problem which is correcting itself.

There have been erroneous comments made to the effect that there will be no negative economic impact to restaurants when a smoking ban is passed, which is an oversimplification. Smoking bans have no effect on some restaurants while they may have a devastating effect on others, which the market as a whole does not recognize. While the effects of the total market are gauged by sales tax trends, sales are naturally increasing every year due to more people eating out more often.

KRHA believes we owe a duty to uphold our obligation to defend the rights of our business owners to make their own business choice regarding decisions that may make or break their businesses. One of these fundamental rights is the right to determine their clientele, especially given the significant amount of investment required for restaurant and other hospitality businesses in today's world.

Therefore, although we urge the committee to oppose SB 25, if the Committee were to take action on SB 81, we would not oppose enactment of that legislation.

Thank you very much for permitting us to submit written testimony and to appear briefly in opposition to SB 25.

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Ronald R. Hein
Attorney-at-Law

Email: rhein@heinlaw.com

Testimony re: SB 25
Senate Public Health and Welfare
Presented by Ronald R. Hein
on behalf of
Reynolds American, Inc.
January 28, 2009

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for Reynolds American, Inc. (RAI).

RAI is unequivocally opposed to the types of smoking bans which have been proposed in the past, which do not reflect any concern for the adverse economic impact suffered by restaurants, bars, taverns, and casinos when smoking bans are imposed. RAI is also specifically opposed to SB 25.

When the gaming act was passed, many legislators voted to oppose smoking bans on the casinos, apparently because the legislators recognized that the casinos would lose business, and thus the state would lose income if a smoking ban were imposed on the casinos. Since the casinos are required to be "state owned and operated" by the Kansas Constitution, it would seem inappropriate if the state were to exempt themselves from a smoking ban so that their business interests are protected, while denying such protection to restaurants, bars, taverns, or other private interests owned by private citizens.

SB 25, which primarily provides for exceptions for private homes and private cars, ignores the realities facing numerous business in Kansas today, whether it be drivers of commercial motor carries, or the interests of numerous other private businesses from private clubs to taverns to restaurants.

SB 25 basically overrides local governing powers by making unlawful actions which many local units have deemed to be permissible. I understand that approximately 20-something communities have imposed smoking bans, but there are 924 local communities in this state, and many of them already have smoking regulations which do not involve a total ban. Some of these local ordinances provide protections for their local businesses that would be stripped through this state mandate. I would question, if passage of this bill causes such businesses, or others, to go out of business, will the state provide just compensation to its citizens who lose their business and livelihood?

In non-hospitality related workplaces, smoking is virtually non-existent. In fact, the

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Occupational Safety and Health Administration (OSHA) in Washington declined to issue workplace smoking rules, in part, because of that fact. In America and in Kansas, the free market is already deciding this issue. Government intervention into what should be a private property right decision is unnecessary and unwarranted.

Some proponents of smoking bans have stated that smoking bans have no economic impact on private businesses, especially in bars and restaurants. Those statements do not bear accurate witness to the facts. One has to look only as far as Lawrence to see the impact of draconian smoking bans. In 2004, as reported in the *Lawrence Journal-World*, a survey conducted by the paper indicated an average 25% decrease in business following the smoking ban.

One restaurant owner in Lawrence is quoted as saying the ban has "killed" his business. Another reported his business is down 20%.

The loss of business that Lawrence restaurant and bar owners experienced is seen wherever business owners' rights are taken away by smoking bans. In New York, a study by the New York Nightlife Association and the Empire State Restaurant Association showed 2,000 jobs were lost along with almost \$30 million in wages and salary payments since a statewide smoking ban took effect in 2003. In Dallas, Texas, the Dallas Restaurant Association reported sales of alcoholic beverage declined \$11.7 million following the passage of their citywide smoking ban.

The Restaurant Association of Maryland reported that one county that passed a smoking ban (Talbot County) has seen not only a decrease in sales but a decrease in the number of actual businesses with alcohol licenses. Specifically, the organization reported that, according to sales tax figures from the Maryland Comptroller, May through December numbers following the ban, sales at Talbot County restaurants/bars with liquor licenses declined by \$2,906,100 (or 11 percent) when compared to the same period the previous year. Moreover, the total number of Talbot County restaurants/bars with liquor licenses (per state sales tax records) declined from a high of 39 establishments in November before the ban to a low of only 29 by the end of December following the ban.

Business owners are not the only ones to suffer economically. Smoking ban bills are ostensibly meant to protect restaurant and bar workers. In reality, workers are oftentimes financially damaged by smoking bans. Tips are down for numerous employees in numerous areas since smoking bans were enacted. Without a doubt, smoking bans economically hurt those they are argued to protect.

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Philosophically, smoking ban legislation is the epitome of government infringing on the personal property rights of the state's citizens and the state's businesses. Ironically this bill would take away private business owners' rights to make decisions for themselves and their properties at the same time that businesses are voluntarily providing more and more smoke-free dining options. We underestimate (and a statewide smoking ban would undermine) the power of a free-market to determine these issues.

With these comments made, RAI recognizes that non-smokers are entitled to make choices which permit them to avoid smoking or second-hand smoke. In short, there should be room for a compromise that would acknowledge the rights of smokers, non-smokers, and business owners. Accommodation is the answer. Therefore, RAI has participated with other business groups and has presented SB 81, which legislation RAI would NOT oppose.

SB 81 establishes a state-wide smoking ban which would insure that non-smokers are protected while exercising their rights to patronize businesses of their choice. The exceptions have been carefully crafted to apply to areas which are age-restricted or which otherwise protect the non-smoking public. Restaurants and class B clubs must provide separate smoking areas where non-smokers are not affected. Other exceptions are similarly designed to insure that motor carriers and other businesses are not denied their rights to utilize a legal product in a legal way, or to insure that businesses may determine their own clientele.

Accordingly, RAI would not object or oppose action on SB 81, but would respectfully request this committee to report SB 25 adversely.

Thank you for permitting me to submit this written testimony and to testify briefly..

Mr. Chairman and Members of the Judiciary Committee:

Good Morning, my name is Bill Nigro, and I am resident of Overland Park, a member of the Free State Business Rights Coalition, and President of Kansas City Business Rights Coalition. These organizations are small business organizations with members in Kansas and Missouri dedicated to protecting the rights of small businesses. I am here today to testify before you on behalf of our Kansas members, and to urge you to strongly oppose a statewide smoking ban for the state of Kansas.

I have been a business owner and property on both sides of the state line for over 20 years, and I know from my firsthand experiences the devastating effects of excessive regulation of small businesses. Many of my friends and members in the bar and restaurant industry in places that have enacted smoking bans, which includes Overland Park, Lawrence, Lees Summit and Independence, have had to lay off employees and some have even had to close their doors.

Do you really want to see the loss of Kansas jobs and Kansas businesses go under because you enacted a needless government regulation? This is a non-issue. No one is forced to involuntarily expose themselves to second hand smoke. The free market place is already taking care of this issue. More and more businesses are going smoke free every day for people that do not like smoking to patronize and for employees that want to work in a smoke free bar and restaurant environment.

Furthermore, it is amusing to me that our state government is considering raising the tobacco tax, and then they are also considering smoking ban legislation that would cut down on the number of places where someone could smoke the very same product that they are looking to increase taxes on to raise revenue. Our state government should be focused on issues that really matter like schools, roads and lowering taxes. The state government has no role in taking away the property rights of small businesses and how they run their business.

Please leave this issue up to the small business owners in our state, and do not run us out of business with another needless government regulation.

Sincerely,

Bill Nigro
13312 W. 142nd St.
Overland Park, KS 66221

Testimony against Senate Bill No. 25

Members of the Senate Public Health and Welfare Committee: thank you for the opportunity to address you today in opposition of Senate Bill No. 25

My name is Father H Setter. I am the pastor of All Saints Catholic Church in Wichita. I am the Chaplain of the International Premium Cigar and Pipe Retailers, along with being a nationally recognized cigar connoisseur. In addition, I am a philanthropist as the Founder and Chairman of the Setter Foundation which raises monies for local charities. Attached you will find a list of those agencies and organizations my foundation has assisted over the last twelve years by hosting my Annual Benefit Cigar Dinners for Local Charity. This event happens once a year and is the sole source of raising funds for my charity because of my unique affiliation with the cigar industry as a consumer and cigar personality. Passage of Senate Bill 25 with no exemptions would literally eliminate the possibility of me continuing this endeavor and kill my fundraising event.

In addition, I would like to express testimony against this bill on four different levels.

First on a moral level: tobacco products are a legal product in this nation and individual adults get to decide and choose whether or not they consume them, just like all other legal products such as food, entertainment, consumable goods, etc. Hence, the need for legitimate places designated for tobacco consumption. This takes me to the next level.

Second on the level of a business owners right: since tobacco products are legal, private business owners should continue to have the right to decide whether they believe their businesses will be better off or not by allowing tobacco products to be consumed at their business, providing age sensitive laws that are in place with respect to tobacco are complied with. Comprehensive bans have and will force some businesses to close.

Third on a financial level: let's not kid ourselves, tobacco products generate enormous amounts of income though taxes for you as government leaders. One has to honestly ask where the tax dollars that will be lost through a comprehensive ban will be made up and come from.

Fourth on the level of health and well being: since the inception of this country, the bar has been the designated place to consume alcohol and tobacco, since both of these products are age sensitive. If a comprehensive ban is put in place that relegates the designated place to smoke into the home. How can that possibly be the best thing for people under the age of 18 when you know as well as I do, that most people who smoke are not going to go outside all the time in order to smoke. How does that really help young children when parents are forced to smoke in the home exclusively?

I believe compromise is the answer. Not comprehensive. Please continue to let local governments at the city level legislate this issue or adopt a compromise bill. May I suggest that you carefully examine and review the compromise ordinance that the city of Wichita put in place last year? To date it seems to be working quite well. In my opinion, no one was "thrown under the bus" completely. All of us had to give something up, and I think it is safe to say with all honesty, we all believe that we have gained something as well. Compromise can and does work. I thank you for your time.

Father H Setter

Public Health and Welfare
Date:
Attachment:

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Senate Public Health and Welfare Committee Attachment

Father H's Annual Benefit Cigar Dinner Beneficiaries

- 1997 Orpheum Theater Renovation Effort \$3,600
- 1998 Guadalupe Clinic \$8,000
- 1999 Kansas Foodbank \$20,000
- 2000 Anthony Family Shelter \$18,000
- 2001 Literacy Resources of the Metropolitan Area \$21,000
- 2002 Lord's Diner \$18,000
- 2003 Center of Hope \$18,000
- 2004 A.C.P./Dodge House \$16,000
- 2005 Shelter the Heart Campaign \$20,000
- 2006 Gerard House, Cigar Family Foundation, Center of Hope & Several Donations to area charities \$10,500
- 2007 Mother Mary Anne Clinic, Union Rescue Mission, The Lord's Diner, Center of Hope, Gerard House, The ARC \$13,000
- 2008 Cigar Family Foundation, Center of Hope, ARC of Sedgwick County, Girard House for Unwed Mothers, The Lord's Diner, Mother Mary Anne Clinic, Union Rescue Mission \$15,000

Total To Date: \$181,100.00

CHAPTER 7.56. SMOKING AT PUBLIC MEETING PLACES*

***Editor's note:** Ord. No. 47-892, §§ 1--9, adopted June 3, 2008, effective September 4, 2008, amended Ch. 7.56, in its entirety, to read as herein set out. Prior to inclusion of said ordinance, Ch. 7.56 pertained to similar subject matter. See also the Code Comparative Table.

Sec. 7.56.010. Definitions.

Sec. 7.56.020. Prohibition of smoking in certain places.

Sec. 7.56.021. Conditions under which smoking at a place of business is permitted.

Sec. 7.56.022. Promotion of occasional smoke-free events at smoker-friendly places of business.

Sec. 7.56.030. Posting of signs.

Sec. 7.56.040. Permits and fees.

Sec. 7.56.050. Violations and penalties.

Sec. 7.56.060. Enforcement.

Sec. 7.56.070. Severability.

Sec. 7.56.010. Definitions.

The following words and phrases, whenever used in this chapter, shall be construed as defined in this section:

- (a) Business means any sole proprietorship, partnership, joint venture, corporation or other business entity formed for profit-making purposes, including retail establishments where goods or services are sold as well as professional corporations and other entities where legal, medical, dental, engineering, architectural or other professional services are delivered.
- (b) "Charitable fundraising event" means for the purposes of this chapter, an event conducted for solicitation or receipt by any person of any money, property or other benefit if, before or in the course of any such event, the person conducting the event represents: (1) that the purpose of that soliciting or receiving, or (2) that the purpose of an activity or enterprise of which that soliciting or receiving is a part, is or includes any charitable purpose deemed to be benevolent, philanthropic or patriotic. It does not matter whether the money or benefit concerned is solicited or received in person or by other means (such as by mail, telephone or facsimile transmission), or as a direct donation at the event.
- (c) "Employee" means any person who is employed by an employer in consideration for direct or indirect monetary wages or profit, and any person who volunteers his or her services for a non-profit entity.
- (d) "Employer" means any business which employs the services of one or more individual persons.
- (e) "Place of business" means any premises under the control of an employer where activities in furtherance of its profit-making purposes are carried out, including, but not limited to, manufacturing activities, as well as the sale or delivery of goods or services to patrons or customers.
- (f) "Smoking" means possession of a cigarette, cigar, or pipe partially or wholly consisting of or containing burning vegetation, or possession of any other device containing burning vegetation that is used for the introduction of smoke from the burning vegetation into the human body. For the purposes of this definition, the term vegetation

includes, but is not limited to, tobacco, but does not include any controlled substance listed in K.S.A. 65-4105 through K.S.A. 65-4113 inclusive, and amendments thereto.

(Ord. No. 47-892, § 1, 6-3-08)

Sec. 7.56.020. Prohibition of smoking in certain places.

It is unlawful for any person to engage in smoking, or (with respect to subsection (E)) for any business to permit smoking, in any of the following places within the city:

- (a) Chambers of the City Council;
- (b) Elevators, restrooms, hallways, stairways accessible to the general public located within any building owned or maintained by the city or any political subdivision of the city. This shall not include buildings owned by the city that are leased under the Industrial Revenue Bond Act and portions of buildings which are leased to tenants of the Wichita Airport Authority at Wichita Mid-Continent Airport;
- (c) Every room, chamber, place of meeting or political assembly under the control of the city, or any political subdivision of the city, during such time as a public meeting is in progress;
- (d) Within buses operating under the authority of the Metropolitan Transit Authority; and,
- (e) Any place of business, except as otherwise provided in Section 7.56.021.

(Ord. No. 47-892, § 2, 6-3-08)

Sec. 7.56.021. Conditions under which smoking at a place of business is permitted.

Notwithstanding the general prohibition in Section 7.56.020(E), a business may elect to permit smoking (and if it so elects, persons eighteen (18) years of age or older may lawfully engage in smoking) at its place of business or designated portion thereof as follows:

- (a) In any, unenclosed, outdoor smoking area, provided such smoking area is located more than ten (10) feet from any building entrance;
- (b) In any clearly posted, designated smoking room which is subject to inspection by the City of Wichita's Office of Central Inspection during the Office's regular operating hours, and which meets all of the following requirements:
 - (1) The smoking room is enclosed on all sides by solid, impermeable walls or windows extending from the floor to ceiling with self-closing doors; and
 - (2) Access to the smoking room is restricted to the employees, customers and vendors of the facility; and
 - (3) The smoking room maintains a negative air pressure (meaning more air is exhausted from the room than is directly supplied by the heating, ventilation, and air conditioning (HVAC) system); and
 - (4) The smoking room's smoke-contaminated air is exhausted directly to the outdoors and is not returned to the HVAC system; and
 - (5) The smoking room and any equipment contained therein are maintained and serviced when the room is not occupied by smokers; and
 - (6) There is no need for employees, customers or vendors to pass through the smoking room to access restrooms, break areas, or any other portion of the

place of business which they might need to access, and the business does not require employees, customers or vendors to enter the smoking room when it is occupied by smokers; and

(7) Non-smoking employees and vendors of the business have access to a separate, enclosed, non-smoking break room accessible only to the employees and vendors of the business which is of equal or larger size and has amenities comparable to the smoking room; and

(8) The business has obtained, and annually renews, a permit for the smoking room from the City of Wichita and the City of Wichita's Office of Central Inspection has verified compliance with the provisions of this ordinance.

(c) In all or a designated portion of the individual guest rooms, apartments or other residential units rented by hotels, motels, apartment buildings or residential landlords.

(d) At any place of business clearly posted at each entrance as a smoker-friendly facility where smoking is permitted, provided:

(1) The business either, a) can establish that it has no legal ability to exclude customers and patrons under eighteen years of age, or, b) has the legal ability to continuously exclude, and does continuously exclude, all customers and patrons under eighteen years of age; and

(2) The business has no employees at the place of business who are under eighteen years of age, except for any such employees who were already employed at that place of business on the effective date of this ordinance; and

(3) The employer has obtained, and has on file, from each employee working at such place of business, a signed acknowledgment that such employee has been advised of the causal links between environmental tobacco smoke and health conditions such as cardiovascular disease, lung cancer, asthma and emphysema, and also that no level of environmental tobacco smoke has been identified as safe; and

(4) The place of business and its records reflecting the age of current employees, as well as the signed employee acknowledgments of the dangers of environmental tobacco smoke, are available for and subject to inspection by the City of Wichita's Office of Central Inspection during the regular operating hours of such department; and

(5) The business has obtained, and annually renews, a permit from the City of Wichita to operate the place of business as a smoker-friendly facility.

(e) The place of business, or a portion thereof has been rented to or reserved by the sponsor of a charitable fundraising event that incorporates tobacco products, provided:

(1) The place of business, or portion thereof so reserved, is clearly posted at all entrances, at least two hours prior to the fundraising event, with signs warning customers and patrons that smoking is being permitted on the premises during the fundraising event; and

(2) The business has the legal ability to continuously exclude, and does continuously exclude, all customers and patrons under eighteen years of age, from the place of business, or the portion thereof reserved for the fundraising event, for the duration of the fundraising event; and

(3) The business has no employees at the place of business, or in that portion of the place of business reserved for the fundraising event, during the fundraising event, who are under eighteen years of age; and

(4) The employer has obtained, and has on file, from each employee working at such place of business, or in that portion of the place of business reserved for the fundraising event, during the fundraising event, a signed acknowledgment that such employee has been advised of the causal links between environmental tobacco smoke and health conditions such as cardiovascular disease, lung cancer, asthma and emphysema, and also that no level of environmental tobacco smoke has been identified as safe; and

(5) The business has put in place reasonable steps to prevent smoke from intruding into any portions of the place of business occupied or in use by customers or patrons not participating in the fundraising event; and

(6) The business has obtained from the City of Wichita a permit to allow smoking at the place of business for the duration of the specific fundraising event.

(Ord. No. 47-892, § 3, 6-3-08)

Sec. 7.56.022. Promotion of occasional smoke-free events at smoker-friendly places of business.

An operator of a place of business that desires to schedule and promote an occasional smoke-free event on premises normally operated as a smoker-friendly place of business shall ensure that all indoor smoking on the premises is discontinued at least twelve hours prior to the scheduled commencement of the smoke-free event, and, during the smoke-free event, shall replace or cover its smoker-friendly signage with signage advising that smoking is prohibited.

(Ord. No. 47-892, § 4, 6-3-08)

Sec. 7.56.030. Posting of signs.

(a) The owner, manager or other person having control of buildings or businesses where smoking is prohibited by this Chapter shall have a conspicuously posted sign clearly stating that smoking is prohibited at each entrance and within the building or other areas where smoking is prohibited.

(b) Such "No Smoking" signs shall have bold lettering of not less than one inch in height. The international "No Smoking" symbol may also be used (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with red bar across it).

(c) The owner, manager or other person having control of places of business which elect to permit smoking under one or more subsections of Section 7.56.021 shall have a conspicuously posted sign clearly stating the places at and conditions under which smoking is permitted:

(1) At each designated outdoor smoking area established pursuant to Section 7.56.021 (A);

(2) Immediately outside or on the outer surface of each door into each smoking room established pursuant to Section 7.56.021(B);

(3) Immediately outside or on the outer surface of each door at each entrance to a place of business operated as a smoker-friendly facility pursuant to Section 7.56.021(D) (which sign shall also contain the universal symbol for a smoker-friendly facility, consisting of a depiction of a burning cigarette on a green background); and

(4) During and for two hours prior to charitable fundraising events held under 7.56.021 (E), immediately outside or on the outer surface of each door at each entrance to the

place of business or portion thereof where the fundraising event is being conducted (which sign shall also contain the universal symbol for a smoker-friendly facility, consisting of a depiction of a burning cigarette on a green background).

Such signs shall also advise persons under eighteen years of age not to seek entry to such posted areas.

(Ord. No. 47-892, § 5, 6-3-08)

Sec. 7.56.040 Permits and fees.

For each place of business which an operator elects to operate as a smoker-friendly facility, pursuant to Section 7.56.021(D), or at which the operator elects to maintain a smoking room pursuant to Section 7.56.021(B), the operator shall be required to obtain from the City of Wichita an annual permit, and to undergo an inspection of the permitted place of business by the City of Wichita's Office of Central Inspection. For each charitable fundraising event at which the operator of a place of business desires to permit smoking pursuant to Section 7.56.021(E), the operator shall be required to obtain from the City of Wichita a permit for the event, and to undergo an inspection of the permitted place of business by the City of Wichita's Office of Central Inspection. A non-refundable fee of two hundred fifty dollars shall be required for each permit application hereunder (unless the place of business is applying under 7.56.021(D), and is already restricted by law from admitting persons under age 18, or has demonstrated that it cannot exclude persons under age 18), which fee shall be used exclusively to defray a portion of the costs of enforcement, inspection, and education relating to the hazards of tobacco products. Permits may be denied, and once issued, may be revoked, if inspection of the place of business permitted or proposed to be permitted reveals that the facility design or the smoking activities there conducted or proposed to be conducted are not in conformity with the requirements of this chapter. All permits issued hereunder shall be conspicuously posted by the applicant on the premises of the permitted place of business.

(Ord. No. 47-892, § 6, 6-3-08)

Sec. 7.56.050 Violations and penalties.

(a) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any premises subject to regulation under this chapter to fail to comply with all of its provisions.

(b) It shall be unlawful for any person who owns, manages, operates or otherwise controls any premises subject to regulation under this chapter to allow smoking to occur where prohibited by this chapter. Any such person allows smoking to occur under this section if he or she:

- (1) Has knowledge that smoking is occurring, and;
- (2) Acquiesces to the smoking under the totality of the circumstances.

(c) It shall be unlawful for any person to smoke in any area where smoking is prohibited by the provisions of this chapter.

(d) It shall be unlawful for any person who owns, manages, operates or otherwise controls the use of any place of business to allow a person under eighteen years of age to enter:

- (1) Any smoking room maintained under Section 7.56.021(B) while smoking is occurring; or
- (2) The premises of the place of business or portion thereof in use for a charitable fundraising event wherein smoking is permitted pursuant to Section 7.56.021(E), while smoking is being permitted at such event; or

(3) Any place of business operated as a smoker-friendly facility pursuant to Section 7.56.021(D), unless such person under eighteen (18) years of age was already employed at that facility on the effective date of this chapter.

Each person under eighteen years of age who is allowed entry in violation of this section will give rise to a separate violation, and each instance in which a given individual under eighteen years of age is allowed entry in violation of this section will give rise to a separate violation.

(e) It shall be unlawful for any person under eighteen years of age to enter:

(1) Any smoking room maintained under Section 7.56.021(B) while smoking is occurring; or

(2) Any place of business or portion thereof which is in use for a charitable fundraising event wherein smoking is permitted pursuant to Section 7.56.021(E), while smoking is being permitted; or

(3) Any place of business operated as a smoker-friendly facility pursuant to Section 7.56.021(D), unless such person under eighteen (18) years of age was already employed at that facility on the effective date of this chapter.

Each instance in which a person under eighteen years of age gains entry in violation of this section will give rise to a separate violation.

(f) Any person who violates any provision of this chapter shall be guilty of a misdemeanor, punishable by:

(1) A fine not exceeding one hundred dollars for the first violation.

(2) A fine not exceeding two hundred dollars for a second violation within a one-year period of the first violation.

(3) A fine not exceeding five hundred dollars for a third or subsequent violation within a one-year period of the first violation.

(4) For the purposes of this subsection, the number of violations within a year shall be measured by the date the smoking violations occur.

(g) In addition to the fines established by this Section, violation of this chapter by a person having control of a place of business may result in the suspension or revocation of any permit or license issued for the premises on which the violation occurred.

(Ord. No. 47-892, § 7, 6-3-08)

Sec. 7.56.060 Enforcement.

(a) The authority to administer the provisions of this article is vested in the Office of Central Inspection and Environmental Services and his or her duly authorized representative(s), and whenever the need arises, the Superintendent of the Office of Central Inspection and the Director of Environmental Services may call upon the Wichita Police Department, and other departments of the City to aid in the enforcement of this chapter.

(b) Notice of the provisions set forth in this chapter shall be given to all applicants for a City business license.

(c) Any person may register a complaint under this chapter to initiate enforcement with the Police Department.

(d) The Wichita Police Department, the Office of Central Inspection and the Office of Environmental Services shall, while an establishment is undergoing otherwise mandated inspections, inspect for compliance of this chapter, and each such department may also enforce

the provisions of this chapter through investigation of complaints filed and unannounced inspections of the premises and records regarding compliance with this chapter.

(e) Any owner, manager, operator or employee of any premises regulated by this chapter shall be responsible for informing persons violating this chapter of the provisions through appropriate signage.

(Ord. No. 47-892, § 8, 6-3-08)

Sec. 7.56.070 Severability.

If any provision, clause, sentence or paragraph of this chapter or the application thereof to any person or circumstances shall be held invalid, such invalidity shall not affect the other provisions of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

(Ord. No. 47-892, § 9, 6-3-08)

TESTIMONY

TO: The Honorable Jim Barnett, Chair
And Members of the Senate Committee on Public Health and Welfare

FROM: Thomas Jacob
On behalf of Cigar Chateau, LLC

RE: SB 25 – Statewide Smoking Ban Legislation

DATE: January 26, 2009

Mr. Chairman and Members of the Committee:

My family owns Cigar Chateau, LLC in Wichita. We are tobacconists, not a smoke shop. We sell premium handmade cigars, pipes, pipe tobacco and accessories to compliment their enjoyment. Cigar Chateau is a destination shop with customers that are of all ages and demographics, they are adult men and women.

Throughout the year we host a variety of events that feature visiting manufacturers who want customers to sample their newest cigar blends. Customers need to be able to taste the product, smell the aroma as the tobacco burns, and fully investigate the tobacco product in order to make a well-informed purchase decision. I appreciate the exemption that is allowed for tobacco shops in SB 25, however I would like to share a few facts about our business. In 2008 and 2007 while we would be able to meet the 80% tobacco sales in SB 25, it would have only been possible due to the slow sale of accessories (humidors, pipes & lighters) during those years. While the average sale of tobacco premium cigars would be under \$5, humidors would average \$75, pipes \$50, and lighters \$25, it is easy to see that only a slight bump in accessory sales could effect the tobacco percentage very quickly. Therefore, I would request the tobacco percentage be lowered to 60% or those accessories of humidors, pipes, and lighters are included in the 80% sales requirement.

Cigar Chateau has within its space a private “Diamond Crown Cigar Lounge” (one of forty licensed lounges throughout the US). This space is ventilated as per a City of Wichita ordinance that also requires various other very restrictive policies. The Federal Government research lab acknowledges that technology does exist that **will** and **does** filter smoke from enclosed areas; our cost was over \$200 per square foot.

On behalf of Cigar Chateau, LLC, I respectfully request this Committee not take action on SB 25, without revising the sales percentage of tobacco as outlined above, and the SB 25 not supercede any smoking ordinances that now exist in many cities and counties throughout the State that allow for smoking in cigar lounges, drinking establishments and private clubs under local restrictive criteria.

Cigars are more a choice than habit. The truth is, smoking premium cigars is more like enjoying a glass of fine wine. It helps make ordinary moments special and special moments extraordinary. Premium tobacco is a product of **leisure, pleasure and socializing – a life style choice.**

Cigar Chateau, LLC

*3049 N. Rock Road * Wichita, Kansas*

Public Health and Welfare

Date:

Attachment:

01/29/09

Senate Committee on Public Health and Welfare
Page 2 of 2
January 26, 2009

Thank you.

Tom Jacob
Cigar Chateau, LLC
3049 N Rock Road
Wichita, KS 67226
(316) 636-2433
www.cigarchateau.com

Cigar Chateau, LLC Partners:

Mr. Thomas Jacob – Managing Partner
Mrs. Misha Jacob – Warren
Mr. Christopher Jacob

Sheila Martin
Bar Owner Testimony
January 29, 2009

For the past 27 years, I have operated my own small business in Hutchinson--what I call a "tiny" bar as liquor establishments go. Last year, I paid the State of Kansas \$14,000 in liquor excise taxes.

I come before you today to make certain that you will never doubt my strong opposition to a bill which, if passed, would end my career as a bar owner. And that's why I am speaking out against a statewide smoking ban.

The reason a smoking ban would put me out of business is simple. My bar is very small, but 85% of my customers are smokers and I am not exaggerating. Many have come in for years to socialize after work, shoot pool and hopefully take their minds off these terrible economic times. Obviously my nightly take would not be enough to withstand the customer loss I would suffer if a statewide smoking ban were imposed. As a bar owner for more than a quarter of a century, I can tell you that people who can't smoke and drink aren't going to come back into a smoke-free establishment--no matter how loyal a customer they have always been.

The city council in Hutchinson, after hearing from many of our local bar owners, decided on a unanimous vote that they would not impose a smoking ban. And, in Emporia, bar owners have gathered petitions and believe they have enough votes to overturn the smoking ban recent passed there. Many city council members understand that it is not their job to put small bars out of business and reduce the taxes coming into the city treasury.

And speaking of taxes, I have just completed reading a report sent to me by our state organization which discusses Arizona. A year after that state imposed a smoking ban, 35 "small bars" had gone out of business. If the same circumstances would happen in Kansas, the state would be out about half-a-million dollars in alcohol taxes at least--since I paid \$14,000 last year. Multiply that by 35 and you can see it's not a good situation for the state--which is already coming up short on tax collections because of this recession.

Running a bar for 27 years has been a good occupation for me because I enjoy my customers. I have certainly not gotten rich doing this job and rarely had a day off. But one thing I can say: I have never asked any government, state or local, for welfare or and handout. I have worked hard to abide by all state laws which can be tough in the bar business.

But one thing is for certain. The last thing I expect from state government is to pass a law that will do great harm to me financially or that would affect the individual liberties of my customers who chose to use a legal product. Aside from the financial disaster a smoking ban would cause bar owners, it would also drive a stake into the heart of my own personal property rights which are guaranteed in the Constitution that so many of veterans through the years have fought for.

One reason that I have always felt good about Kansas is that we live in a conservative state where individual freedom is still important both to elected officials and voters. That's why it would be an awful thing for Kansas legislators to go the way of New York, New Jersey and California and impose an unwanted and unreasonable statewide smoking ban.

DIEBEL'S SPORTSMENS GALLERY

4829 W 119th Street Overland Park Kansas 66209 913-663-0123



My father started our business in 1954. We are in our 55th year. I employ 14 people. I sell cigars. A legal product that is as old as our great country. Premium * Imported * Luxury * All tobacco * Hand-made by Artisans in the Caribbean and Cental America. There are no chemicals. There are no additives. None of my customers are addicted. My customers are all old enough to fight in Iraq. We do not sell to kids. The great majority of my customers are college educated. My customers smoke cigars for the taste, relaxation and camaraderie of fellow smokers. I hold events in my store to introduce new products. If you were going to try a new cigar, wouldn't it be reasonable to expect to do so in my store? I appreciate the tobacco shop exemption. It is certainly appropriate. The 80% threshold is too high. I also sell gift items for men. Am I to be penalized for selling other items successfully? My suggestion would be a dollar threshold or a lower percentage.

A smoking ban is political correctness taken to the nth degree. The citizens are not mandating a smoking ban. . In Overland Park, Neil Sader ran for mayor in 2005 on an anti-smoking platform. He lost – nearly 2 to 1. Our neighboring state Missouri has twice defeated a statewide referendum seeking increases in cigarette and cigar taxes. A Kansas City mayoral candidate ran on an anti-smoking platform in 2007 and secured <1% of the vote. A survey is not mandate enough to take away the personal rights of the citizens of Kansas. Let the free market work. Already 80% of restaurants are smoke-free.

Where is common sense in this issue? Doctors, scientists and public health officials present us with statistics of death. The KC Star front-page states: "Fewer are smoking, fewer are dying in KC". The headline implies the anti-smokers have found the "silver bullet" – the cause and effect solution to reduce deaths and healthcare expenses. The American Heart Association website states: "from 1994 to 2004, death rates from cardiovascular diseases declined 24.7%" and makes no mention of smoking bans. The GRACE study credits "new drugs and more angioplasty" to nearly halving "the number of hospitalized heart attack victims who die or suffer severe heart failure". Again, no mention of smoking bans. The Kansas City Health Director states, "1 to 2 people die every week in Kansas City from secondhand smoke". Yet he offers no death certificates. The Surgeon General states, "There is no safe level of exposure to secondhand smoke". Haven't we all been exposed to secondhand smoke? Many times? Do these bold statements seem reasonable? Why is OSHA so quiet?

This proposed ban would cause direct and undue hardship upon my business. I am not big business. I am not Big Tobacco. Please do not write this bill with a blind eye to the effects upon the true tobacconist.

Thank you,

Curt Diebel
President
816-931-2988
DiebelSG@gmail.com

Public Health and Welfare
Date:
Attachment:

01/29/09

The following is summary of the points that I will be presenting before the committee on Wednesday.

1. Present Wichita Smoking Ordinance- How it has affected my business.
2. The repercussions I will encounter with a state wide smoking ban.
3. To explain to the committee my 39 successful years of owning and operating my own business

Warmest Regards

Larry Doss



AMERICANS FOR PROSPERITY

K A N S A S

January 28, 2009

Mister Chairman and Members of the Committee:

On behalf of the thousands of members of Americans for Prosperity Kansas, we oppose Senate Bill 25 and its' proposed restriction on personal choice.

We oppose this bill because it infringes upon business and personal property rights and freedoms.

Kansas citizens can and do choose the businesses and locations they visit.

And in fact, the marketplace is working. Many Kansas workplaces and businesses have already made their locations smoke-free. They made this decision based on market conditions.

In light of this fact, we can see that the market has responded therefore intervention by the government is unneeded.

Smoking bans violate property rights. The proprietor of an establishment should have the right to set policies for the use of his or her property. This is fundamental to our economic system. Smoking bans tell bar and restaurant owners that the government will determine how they run their businesses.

There is little justification for usurping private property rights by banning smoking in private establishments, when citizens already have the option of visiting smoke-free establishments without such a ban.

Smoking bans are a reckless expansion of government and set a dangerous precedent. While the science of second hand smoke is still disputed, even if it is dangerous exposure is voluntary. Smoke is visible and avoidable. In addition, no employee who wants to avoid smoke is forced to take a job in a bar or restaurant.

Consumer protection is not an adequate justification for smoking bans. Unlike health and sanitation regulations that protect consumers, smoking bans stop an activity that is clearly visible to consumers who can make their own informed decisions. To the contrary, allowing proprietors to determine their own smoking policies has been successful, with restaurants offering separate smoking and non-smoking sections for customers.

Sincerely,

Derrick Sontag
AFP Kansas State Director

2348 SW Topeka, Suite 201 ■ Topeka, Kansas 66611
785-354-4237 ■ 785-354-4230 FAX

www.afpks.org

Public Health and Welfare

Date:

Attachment:

01/29/09



**Kansas
Licensed
Beverage
Association**

**CEO
Philip Bradley**

**P.O. Box 442066
Lawrence, KS
66044**

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F: 785.331.4282
www.klba.org
info@klba.org**

January 29, 2009
Testimony on SB 25, Senate Public Health and Welfare Committee

Mr. Chairman, and Senators of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Assn., the men and women, in the hospitality industry, who own, manage and work in Kansas bars, breweries, clubs, caterers, hotels and restaurants where beverage alcohol is served. These are the over 3000 places you frequent, enjoy and the tens of thousands of employees that are glad to serve you. Thank you for the opportunity to speak today.

First the good news! In 2007, the Kansas Supreme Court's decision to not overturn, the case against locally imposed bans, means that the system is currently working. Voluntary and mandatory smoke free areas and establishments are increasing. Smoking rates are down. And by these measures, health considerations are improving. It is for these reasons the 07 Interim Committee took the position that the local options were working, local governments were acting and reponding.

Now to the crux of the matter. Since local options are working and the options of local elections exist already, why would the State and this committee feel it necessary to act? We believe that the only reason is to create a statewide standard. It would seem that if there is to be an amended statute, it must be uniform **and include preemption** in order to achieve the goal of an equal opportunity and level playing field. Without such this is a just a action for appearances. Yesterday you heard from the proponents that an essential reason for this measure is to, pardon the paraphrase, prevent a "patchwork" which is unacceptable. A bill without preemption, allowing local elections and allowing local ordinances guarentees just such a patchwork. And you heard much about a "level playing field". That is an argument about economic impact. ***If there is no economic impact then there is no need for a "level playing field"***. It would not matter.

We oppose smoking ban proposals previously introduced, and we oppose SB 25 and efforts to limit the choices of adults and businesses about a legal product. Please consider these points.

If this is an air quality issue, why are we not addressing air quality. There are many more air contaminates than environmental smoke and if it is the desire of this body to protect all citizens from them then an air quality standard bill would be in order. This would set the desired "level playing field" and allow all businesses to meet this standard for all the air particulates and gasses. This is the fair and most effective way to address the issue and removes the emotional element. This would allow for the advancement of science and the creative capabilities of industry to work and continually improve lives and living conditions. If however the real goal is to get rid of all smoking then the legislature should propose the prohibition of smoking and vote on that issue and the subsequent loss to the general fund revenue. ***Please do not make the hospitality establishments the unwitting victims in a battle between the anti-tobacco activists and the smoking public!***

Public Health and Welfare
Date:
Attachment:

01/29/09

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Second, this is an issue of the rights of private businesses to serve their customers. ***You allow smoking as a legal activity*** and the establishments that are targeted in this bill are private property with public access, places that all persons have a choice, whether or not they enter and frequent. All are very responsive to their customers. If their customers were to stop coming due to conditions at the venue, then owners would change their place to accommodate and re-win those customer. If not they would soon be out of business. There are a majority of non-smoking venue options.

Third, if you believe you must pass a statewide ban we ask for an exemption for businesses licensed for primarily on-premise liquor sales. Most local ordinances to expand smoking bans, already allow an exemption for smoke-shops, and cigar bars based upon the belief that those that work or frequent these smoke shops have a reasonable expectation of being exposed to environmental smoke and have made a choice. We believe that the same is true for licensed establishments with proper signage. Further, with that expectation and choice, that individuals are taking responsibility for their own actions and whatever risks that are present. Furthermore, the current crops of city ordinances are considering comprimises and exemptions. The highly touted Lawrence ban includes exemptions.

Fourth, if you still must include licensed establishments, we ask you to amend this bill to include a class of establishment that would be a "Smoking Establishment" similar to the "cigar bar" exemption. ***This exemption exists in most statewide bans including California.*** With a separate permit and requirements, such as adequate signage, time limitations and/or age restrictions to make sure all who approach and enter have the information to make a rational choice knowing that by entering or working here they have the expectation of being exposed to environmental smoke.

Fifth allow me to discuss the argument that this will save the state money. We have had smoking bans in this state in large population areas for many years. Some as many as 8 years, where is the savings in these communities? Where is the figures of real KANSAS savings. You were told that bans have this effect and yet are given no proof that that has been the case here in our state. Those should be avalible now and leads one to question why they are not cited. And if bans would mean return to Kansans of health care premiums, how much have premiums been reduced in those Kansan communities that have bans now? And how much have the premiums been reduced in Nebraska, and Iowa and the other states with bans?

And finally in review if there is to be an amended statute, we would ask that it be uniform **and include preemption** in order to achieve the goal of an equal opportunity and level playing field.

I am available for your questions. Thank you for your time.



Philip B. Bradley

The difficulty in life is the choice

. The Bending of the Bough. Act iv.

Philip Bradley, Ph.D.

CEO

Kansas Licensed Beverage Association

phil@klba.org 785-766-7492



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Attachments

Word document containing;

Newsflash, Heart attacks increase in Scotland.

Article excerpt By Phil Williams

Physician, Freedom Lover, says Second-Hand Smoke Science is Junk

By John Dale Dunn MD JD

Clearing the Haze? New Evidence on the Economic Impact of Smoking Bans

By Michael R. Pakko Attached.

Separate

Attached separately as a PDF file;

Smoking Bans Negative Impact on Bar Revenues Proven for Two States.

Article Published: 27/07/2007

Opposition to Smoking Bans Heats Up V

By Norman E. Kjono, February 27, 2007 By Link

Running the Gauntlet Once Again: Secondhand Fat

Article Published: 27/07/2007

ETS Environmental Tobacco Smoke in Perspective: New ASHRAE 62.1 Standard—2007

Article Published: 30/05/2007

A monologue on AIR

Elio F. Gagliano, MD Article Published: 22/08/2007

The Case Against Smoking Bans by Thomas A. Lambert

University of Missouri-Columbia School of Law

Watch: Newsflash, Heart attacks increase in Scotland.

When it looked as though heart attack rates were dropping in Scotland, the government were quick to claim that this was caused by the smoking ban, but now that we discover that heart attacks are actually increasing, the government and the biased media prefer to sweep this inconvenient truth under the carpet. By Phil Williams, United Kingdom Regional Director, Citizens Freedom Alliance, Inc., The Smoker's Club.

Scotland: Large rise in Acute Coronary Syndrome since the smoking ban. The Scottish smoker ban is responsible for many, many deaths. The ban can be said to have CAUSED hundreds of heart attacks.



Drink Responsibly.
Drive Responsibly.

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Physician, Freedom Lover, says Second-Hand Smoke Science is Junk

I can say with confidence that second hand smoke may irritate some, but it does not kill. Those claiming thousands of deaths from second hand smoke to the Dallas City Council and the public are deceitful for a political goal.

I have been a Texan for 22 years, and a physician specializing in emergency medicine for 36 years. I am familiar with the public health science on second hand smoke.

Public health studies cited by the American Cancer Society and the Surgeon General claim thousands of deaths result from second-hand smoke. These are weak, cherry-picked studies. Their supporters compound the deceit by ignoring studies by the World Health Organization (Buffetta 1998 in the Journal of the National Cancer Institute), Stranges, 2006 in Archives of Internal Medicine, and Enstrom 2003 in The British Medical Journal – all of which show no effect from second-hand smoke.

In science, one study that disproves a scientific theory is more important than a pile of studies that are slightly positive. Anti-smoking advocates and fanatics ignore that basic rule and ignore any study they don't like.

They are propagandists, not scientists.

The crusaders are willing to do and say anything about second hand smoke, including making public statements about thousands of deaths from second hand smoke. Those claims are diverse and duplicitous—they are lies. Second hand smoking, even for the spouse of a smoker is one cigarette or less per day—which has no effect. The second hand smoke scare is a phantom menace conjured up by the High Holy Church of Smoke Haters to support the anti-smoking crusade.

Smoking Bans violate the Texas tradition of minding your own business. If the elected body thinks it has a role in telling people how to live, they should get a Divinity Degree and find a congregation. Folks can easily avoid second hand smoke, and employment in a bar or restaurant is voluntary. Smoking is legal. Avoiding smoke is easy.

John Dale Dunn, MD JD

Policy Advisor American Council on Science and Health, NYC, and the Heartland Institute, Chicago.



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Clearing the Haze? New Evidence on the Economic Impact of Smoking Bans

By Michael R. Pakko

When making decisions about adopting smoke-free laws, advocates often give policymakers a Pollyannaish outlook in which communities can achieve public health benefits with no economic consequences. In particular, the lack of statistically significant economic effects is interpreted as indicating an absence of economic costs. Recent economic research indicates that this is a far too simplistic view of the issue.

A previous article in *The Regional Economist* ("Peering Through the Haze," July 2005) described some early evidence on the economic impact of smoke-free laws and suggested that the findings were far from conclusive.¹

As more communities have adopted smoke-free laws and more data have been gathered, economists have discovered new, significant findings. As an earlier article suggested, economic costs often focus on specific business categories—those that smokers tend to frequent.

Gambling and Smoking

Several papers have examined the cost of smoke-free laws on the gambling business, using data from slot machine revenue at Delaware racetracks ("racinos").² Recent economic research finds conclusive evidence of revenue declines at the racinos after the Delaware Clean Indoor Air Law took effect in December 2002.

In my recent research on the topic, I find statistically significant losses at all three Delaware racinos—ranging from 8.9 percent to 17.8 percent.³ Overall, the statewide revenue decline was 14.9 percent. Using slightly different methods that estimate demand for casino gambling, economists Richard Thalheimer and Mukhtar Ali estimate the total revenue loss at 15.9 percent.

These revenue estimates may significantly understate profit losses. For example, the racino that suffered the smallest loss in revenues—Dover Downs—also was the only one with a luxury hotel on site. Dover Downs management responded to initial revenue losses by offering more discounts on hotel rooms.⁴ Efforts to prop up revenue may have been partly successful, but at a cost to the bottom line.

Evidence on the effect of smoking bans on gaming revenue shows that when analysis can be narrowly focused on data from specific businesses, statistically significant findings emerge. Another approach is to use very large data sets. As smoking bans have spread across the country, the variety and timing of adopting smoke-free laws have generated data that can help identify effects.

Bar and Restaurant Employment

Two papers, one by Ryan Phelps and the other by Scott Adams and Chad Cotti, have used data available from the Bureau of Labor Statistics to examine the employment effects



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of smoking bans. Using nationwide county-level data, these two studies examine the changes in employment at bars and restaurants after communities adopt smoking bans. Neither study finds significant employment changes at restaurants, on average, but both find statistically significant employment declines at bars, with loss estimates ranging from 4 percent to 16 percent.

Adams and Cotti also examine some additional factors. For communities in states with a higher ratio of smokers to nonsmokers than the national average, employment losses at bars were significantly larger, and the employment changes at restaurants went from a small positive effect to a small negative effect (in neither case, statistically significant). Climate also affected restaurant employment.⁵ Restaurants in warm climates fared better than those in cooler climates. The authors suggest that the reason for this might be that restaurants in warmer climates can more easily provide outdoor seating where smoking is not prohibited. (See also the sidebar on Columbia, Mo.) Restaurants that suffered the dual curse of being in regions with colder climates and a high prevalence of smokers suffered statistically significant employment losses, on average.

California Dreamin'

Another recent economic study examines taxable sales receipts of bars and restaurants in California, the home of the smoke-free movement. Because California communities passed some of the nation's first smoke-free laws, much of the early evidence on the subject was based on these data on California taxable sales receipts; as time has passed, those data have accumulated. The experience of California also provides a case in which a statewide smoking ban was superimposed on a patchwork of local smoke-free laws, providing useful variation in the coverage and jurisdiction of smoking bans that can be exploited in empirical analysis.

Economists Robert Fleck and Andrew Hanssen analyzed quarterly restaurant sales data for 267 California cities over 25 years. They find that the measured impact of smoking bans differs between local bans and the statewide ban. In what the authors call their "naïve" specification that treats all smoke-free laws the same, they find a statistically significant 4 percent decline in revenues associated with smoking bans.

When they estimate the effects of the statewide ban and local bans independently, they find that the measured decline in restaurant sales is attributable to the statewide ban on cities without local bans. The measured effect of the statewide ban is nearly 4 percent, and it is statistically significant. The independent effect of local smoking ordinances is estimated to be very small and is not significant. These findings are consistent with the interpretation that locally originated smoking bans have little effect, but smoking bans that are imposed on a community by a higher jurisdiction can have a detrimental economic impact.

Fleck and Hanssen go on to uncover an important specification problem: They find that cities that adopted smoke-free laws were systematically different from those that did not. The authors find that sales growth tends to be a predictor of smoking bans, rather than the other way around. This "reverse causality" calls into question many earlier findings, and it

poses problems for using data from California in drawing inferences about the economic impact of smoking bans elsewhere.

The Role of Economic Research

Economic effects of smoke-free laws may be difficult to identify and interpret, but analysis suggests that at least some businesses do suffer costs. When they consider passing smoking bans, policymakers should study evidence both from public health professionals and from economists.

Sidebar

District Focus: Smoking Ban Singes Columbia, Mo.

Since January 2007, all bars and restaurants in Columbia, Mo., have been required to be smoke-free. Only some sections of outdoor patios are exempt from the requirement.

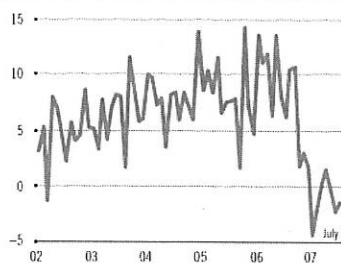
Some local businesses have continued to oppose the Columbia Clean Air Ordinance, circulating petitions to repeal the law by ballot initiative. According to local press reports, owners of at least four establishments have cited the smoking ban as a factor in their decision to close their doors in 2007.

Recent data from the city of Columbia show a distinct decline in sales tax receipts at bars and restaurants. After rising at an average rate of 6.8 percent from 2002 through 2006, tax revenue declined at an annual rate of 1.3 percent over the first seven months of 2007. (See graph.) Although the data are still preliminary, initial analysis suggests a 5 percent decline in overall sales revenue at Columbia dining establishments since the implementation of the smoking ban. This estimate takes into account past trends, seasonal fluctuations in the data and an overall slowdown in sales tax revenue in Columbia.⁶

One interesting feature of the Columbia story is the response of restaurant owners to the patio exemption. According to an article in the Columbia Missourian, owners of at least two bars are building or planning outdoor patio expansions. One owner was quoted as saying, "You have to have a patio to survive."⁷ The expenses associated with these renovations may help buffer the sales revenue of these establishments, but they also represent profit losses that are above and beyond the measured sales declines.

Columbia, Mo., Dining Tax Revenue

YEAR-OVER-YEAR GROWTH



SOURCES: City of Columbia, Mo., and author's calculations



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Michael R. Pakko is an economist at the Federal Reserve Bank of St. Louis. To see more of Pakko's work, go to <http://research.stlouisfed.org/econ/pakko/index.html>.

This article is based on a presentation at the Sixth Annual ERIE Conference on Local Government and Economics, Erie Pa., Aug. 14, 2007.

Endnotes

1. Scollo et al. (2003) provide a review of previous literature, much of which has been published in medical and public health journals.
2. Previous studies of the Delaware racino case study have been published—and disputed—in the public health journal *Tobacco Control*.
3. See Pakko (forthcoming).
4. See Dover Downs (2004).
5. Bar employment was not significantly affected by climate differences.
6. See Pakko (2007).
7. See Solberg (2007).

references

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<http://stlouisfed.org/publications/re/2008/a/pages/smoking-ban.html>



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Included in this document;

Smoking Bans Negative Impact on Bar Revenues Proven for Two States.

Article Published: 27/07/2007

Opposition to Smoking Bans Heats Up V

By Norman E. Kjono, February 27, 2007

Running the Gauntlet Once Again: Secondhand Fat

Article Published: 27/07/2007

**ETS Environmental Tobacco Smoke in Perspective: New ASHRAE 62.1 Standard—
2007**

Article Published: 30/05/2007

A monologue on AIR

Elio F. Gagliano, MD **Article Published:** 22/08/2007

Attached separately as a PDF file

The Case Against Smoking Bans by Thomas A. Lambert
University of Missouri-Columbia School of Law

Smoking Bans Negative Impact on Bar Revenues Proven for Two States.

Norman Kjono

Article Published: 27/07/2007

From the Seattle Times, July 26, 2007...

... "Fat May Be Contagious, Study Finds," by Rob Stein of the *Washington Post*:

July 13, 2007 "Coalition for Equal Rights (CER) in Colorado Smoking Ban Economic Impact"

StopTheBans.com

Chuck Baker Show July 13, 2007 – First Hour

Chuck Baker Show July 13, 2007 – Second Hour

Aurora Sentinel, July 18, 2007, "Where there's Smoke . . . Sales Climb Higher?" by Sara Castellanos
Forces.org, July 20, 2007, "Opposition to Smoking Bans Heats up: Economic Impact," by Norman E. Kjono

July 23 – On July 13, 2007 the first real time study of statewide economic impact imposed by smoking bans in Colorado was posted to Forces.org and StopTheBans.com. Since that original posting of the data an in-depth discussion of the revenue analysis has been presented on the Chuck Baker Show (Radio Colorado Network, KKKK radio, Colorado Springs) and the Aurora Sentinel has published a revealing article on the subject of smoking ban economic impact. In addition, a comprehensive report by Forces columnist Norman E. Kjono that places Colorado smoking ban impact in context of similar results for other states has been posted by Forces.org. Click on the above links to review the smoking ban impact data, listen to local impact reports and a page-by-page discussion of the analysis results, read what the Aurora Sentinel published, and review a report about similar results in other states.

The data reports are based on Colorado Department of Revenue statistics for Liquor Sales Taxes receipts, Restaurant Revenues, and Tavern License holder revenue. It turns out that politicians and anti-tobacco are stealing the economic future from bar owners and taxpayers. Three tobacco control Social Marketing themes are credibly proven to be false by data from the State of Colorado Department of Revenue:

1. Smoking bans are good for hospitality business owners and taxpayers: To the contrary. After the Colorado smoking ban became effective July 1, 2006 previously increasing trends in bar trade revenues abruptly reversed and bar revenues began to decline from preceding highs at an increasing rate. At the same time, the trend for Colorado Liquor Excise Taxes reversed from previous increasing trends. Both tavern license business owners and Colorado taxpayers – smokers and nonsmokers alike – are losing with the smoking ban in bars.

2. Nonsmokers will flock to bars that go "Smoke Free" to make up for lost patrons who smoke: Patently false. In fact, the reversal or bar revenue trends shows *precisely the opposite*. There is a net loss of customers and their revenues to bars under the Colorado smoking ban compared to previous trends. If the effects of smoking bans were positive why did Colorado Restaurant Association members inform legislators they would oppose the ban if bars received an exemption? If the effects of smoking bans were predictably positive as tobacco control claims then restaurant owners would encourage the bar exemption, which would give them a market advantage. *The opposite is true*: smoking bans impose a predictable loss on bar revenues while restaurant revenues rise. The so-called "Level Playing Field" theory of Social Marketing and smoking bans is proven false at tavern license holder's expense.

3. Hospitality trade establishments that lose revenues under smoking bans are "marginal" enterprises. Untrue. That self-serving negative label applied by tobacco control advocates to bars is proven false. First, the anecdotal discussions reveal many circumstances that give a market advantage to some bars while imposing predictable losses on others. Second, the clear pattern of patrons migrating to bars that can accommodate them with outside smoking areas proves the losses to other bars are directly related to the smoking ban and not other market factors. Finally, since the Colorado Department of Revenue data are for the entire bar trade consisting of drinking places the data say that tobacco control negatively labels the entire bar trade segment of the hospitality trade as "marginal" to advance their pharmaceutical mercantile agenda.

Please join in supporting the Colorado Coalition for Equal Rights opposition to smoking bans imposed by out-of-state pharmaceutical special- interests.



Opposition to Smoking Bans Heats Up V

By Norman E. Kiono, February 27, 2007

I provided an example of bar owners who are standing up for themselves and many of their patrons in my last commentary for this series, Opposition to Smoking Bans Heats Up IV. This commentary discusses those small, independent hospitality business owners who do not do so. Some hospitality business owners may believe that a smoking ban is good for business and others would take an opposing view. But both proponents and opponents of bans have a greater long-term interest in preserving their choices as to how they manage their businesses in an open and free competitive market. What seems to be good for the immediate, short-term smoking ban goose may well cook proponents' gander on other special-interest agendas. Looking at these issues from that broader view presents some interesting conclusions. Indeed, those who stand to duty to oppose the bans may have the most valid position and the best approach to preserving competitive opportunities for all small businesses.

From *MSNBC News*, February 23, 2007, "Gun Remark Makes Outdoorsman Outcast," by Blain Harden with *WashingtonPost.com*:

SEATTLE - Modern hunters rarely become more famous than Jim Zumbo. . . . he has spent much of his life writing for prominent outdoors magazines, delivering lectures across the country and starring in cable TV shows about big-game hunting in the West. Zumbo's fame, however, has turned to black-bordered infamy within America's gun culture -- and his multimedia success has come undone. It all happened in the past week, after he publicly criticized the use of military-style assault rifles by hunters, especially those gunning for prairie dogs. . . . The reaction -- from tens of thousands of owners of assault rifles across the country, from media and manufacturers rooted in the gun business, and from the National Rifle Association -- has been swift, severe and unforgiving. Despite a profuse public apology and a vow to go hunting soon with an assault weapon, Zumbo's career appears to be over. . . . Zumbo's fall highlights a fundamental concern of the NRA . . . They do not want American gun owners to make a distinction between assault weapons and traditional hunting guns such as shotguns and rifles. If they did, a rift could emerge between hunters, who tend to have the most money for political contributions to gun rights causes, and assault-weapon owners, who tend to have lots of passion but less cash. The NRA appeared to be saying as much in its statement Thursday, when it emphasized that the Zumbo affair shows there is "no chance" that a "divide and conquer propaganda strategy" could ever succeed." (Underline added.)

How many cities, counties and states would ban guns today if Remington or Smith & Wesson published on its Web site that it supported gun bans, the National Rifle Association (NRA) aggressively worked toward a stated goal to eliminate gun use, and gun owners behaved as hapless, passive victims? I suspect that today there would be few states or counties in this great nation where gun ownership is still legal.

What would the "statistics" about gun use and gun owners be today if Remington or Smith & Wesson stood passive about false statements concerning gun owners killing their co-workers and family members, the NRA stated on its Web site that the views of those who make such claims should be considered in public policy, and gun owners apologized for the risk that they allegedly impose on society? The evidence strongly suggests that news reporters would cavalierly write without critical thought that gun oil is a "known human

carcinogen," even 30 seconds of exposure to gun smoke can cause cardiac arrest, and that millions die each year from causes allegedly related to gun use—including cancer, pulmonary disease and coronary problems.

What would state tax revenues from the sale of guns and manufactured ammunition be today if every gun owner regarded themselves as enduring an addiction to a lethal habit rather than lawfully enjoying use of a legal product, taxes on ammunition were increased by 400 percent-plus, and state governments managed publicity campaigns to negatively label gun owners as killers and to unfavorably stereotype them as irresponsible pariahs who are dangerous to society? Try virtual zero.

What freedom and liberty would Americans enjoy today if the above were scenario were the case? Many believe that absent the right of citizens to bear arms we would have been living in a totalitarian dictatorship for the past 200-plus years. At the least, many would say that it is probable we would have endured more than one civil war in our nation's history.

Philip Morris supports smoking bans and FDA regulation of Tobacco. It negotiated a Master Settlement Agreement (MSA) with state attorneys general in 1998 to buy off its liability with a 45 cents per pack increase in the cost of cigarettes paid by its customers, then piled on 60 cents more in price increases to pump its profits further. A product of that settlement, the American Legacy Foundation, routinely promotes campaigns that convey the message that citizens do not have a right to lawfully consume legal tobacco products. The Robert Wood Johnson Foundation has applied more than \$446 million in special-interest grants to increase the cost of tobacco products, expand prohibitions on the use of tobacco, and to unfavorably stereotype those who lawfully consume legal cigarettes.

If Remington or Smith & Wesson and the National Rifle Association conducted themselves as Philip Morris, the Robert Wood Johnson Foundation, and the Legacy Foundation do citizens would not have a right to purchase and enjoy the use of firearms today.

The preceding illustrate why the current frenzy of tax, increase consumers costs, and ban mandates sweeping through our nation is of compelling importance to all citizens, regardless of whether they choose to smoke. We examine these issues below by taking a look at beer in Oregon. Before doing so it is important to consider a flip side of the opposition coin. We then progress to discussing what approached will work.

The Flipside To An Important Issue

There is a flip side to opposing smoking bans. How does one contend with those who refuse to engage the battle opposition despite the fact that their interests are at stake, too? How do we respond to mainstream media continuing to publish sound bites from tobacco control as if those long-debunked "facts" crafted more than a decade ago still have any credible merit?

Two E-Mails from readers who are also long-standing, credible opponents of smoking bans illustrate the point. I have left these anonymous, however they are verbatim quotes from those I communicate with on a regular basis:

"Have you asked any bar owners why they do not fight for themselves? I feel that we have done what we could for them - we have given them six years of smoking in the businesses that they would not have had if we had not worked against the past three sessions smoking ban bills. I do not understand anyone who would not fight for thier businesses. I don't understand smokers who will spend hours complaining about their lost rights on a bulletin board, but can't be bothered to write a letter, or get a big group of their friends and family to write letters to their elected representatives when these issues come up."

"This is a survival issue for thousands Of people in . . . The tobacco control addicts are spewing their lies all over the place. I believe it's time the media recognized that they have

an obligation to make sure the truth is told. We have the evidence that blows great big hole in the claims that second hand smoke is a health risk I won't go into what it says here but, I think you owe it to the concepts of freedom, liberty and justice to review this evidence and publish it in you papers so people can get the truth. I am in contact with people who have compiled this evidence from the National Cancer Institute, OSHA, DOT, the Cato Institute, District Courts etc, etc and etc. If you believe that truth should prevail over lies and that people have a right to know what is and isn't so. Consider this. It just might get you a Pulitzer. It's time the media stood up to deception and outright lies."

Frustration on the part of those who wrote the above E-Mails is apparent. The above comments are poignant at the present time. Small, independent bar and tavern owners in many states are fighting for their livelihood against well-entrenched and richly-endowed special-interest advocates funded in large part by pharmaceutical nicotine special-interests. Bar owners are standing up in Washington, Colorado, Hawaii and Ohio.

Those few bar owners are standing up for themselves in states where many advocating their demise live on taxpayer funded salaries, are supported by premium health plans at taxpayers expense, and look forward to taxpayer-financed pensions. Add to that \$446 million more in pharmaceutical nicotine grants, such as those from the multi-billion-dollar Robert Wood Johnson Foundation of Princeton, New Jersey, and you transcend a mere David vs. Goliath situation. As a few good people stand to the good fight, mainstream media continues tobacco control dogma unabated, as if OSHA, our federal courts, the *Journal of the National Cancer Institute* and many other authoritative, credible sources that have shown tobacco control claims to be false never wrote a word.

It's not a fair fight. In fact it's really no fight at all. What can a few bar owners realistically do when confronted with legislators determined to ram through legislation that is aggressively supported by the biggest of Big Tobacco, the biggest of Big Drugs, the biggest of Big Health foundations, and a professional Social Marketing infrastructure? After all, there's big business campaign contributions, next year's grants, pumping the health budget, nicotine market share, and professional activist's livelihoods at stake here. How do the legitimate interests of a few local bar owners stack up against those vested-interests in the halls of state legislatures? I suspect that such relatively paltry interests are *not even considered as an afterthought*. But that inconsequential afterthought to Social Marketing advocates is what defines the essence of America: diligent enterprise, a willingness to confront risk in pursuit of the liberty to manage one's interests as they see fit, and enduring commitment to a positive work ethic.

The answers to the questions posed on the first page of this commentary are that *one cannot help those who refuse to help themselves*; those whose paycheck and career prospects are dependent on enacting a pre-programmed special-interest agenda without variation will continue to do so, regardless of facts that emerge; one need not consume valuable time and resources in vain attempt to stop mainstream media from doing what has to date successfully increased pharmaceutical advertising revenues; and that time spent attempting to persuade legislators who have their eye fixated on big business campaign donations would be more productively spent whistling at the moon.

As it turns out, valid hope emerges from what some would say is a lost cause. We have reached the point where the conflicts-of-interest are so transparent, the money trail is so clearly marked, the "scientific" conclusions have escalated to such bizarre claims, and the harm imposed on others so consistently egregious that earnest opposition becomes a compelling mandate for responsible Americans.

Effective opposition by individual groups against the seemingly-overwhelming power of a special-interest throne is also something that we colonists demonstrated a unique aptitude for about 230 years ago. In short, once again the fight has sufficiently matured to become interesting. I suspect that when the dust settles British GlaxoSmithKline—distributor of NicoDerm CQ patches, Nicorette gum, and Commit lozenges—will be sent hauling its butt out of our American affairs just like King George III. We created a new nation by doing that two centuries ago. It seems to me that patriots who value our dignity as a people have an opportunity to perform a much-needed regulatory overhaul on our national interests. That is accomplished by opposing special-interest taxes and ban mandates today.

Politics as Usual

What would the career prospects be for a politician who advocated a statewide ban on the use of guns—including working on them in one's home—because gun oil and gun smoke are “known” to be lethally dangerous carcinogens that seep into adjoining residences? I suspect that any politician foolish enough to support such policy, or who was sufficiently opportunistic to make such claims, would be too busy fighting a voter recall to have time for planning their next campaign.

Politics is a game that rewards those who follow the path of least resistance, is skillfully played by opportunists who believe expedience in legislating an agenda trumps honest facts, and rewards organized groups most accomplished at sucking up to current powers that be.

As played in today's cultural environment, politics as usual is the antithesis of American values. When did we the people begin to believe that sacrificing our neighbor's small business interests on the altar of monopolistic expedience was acceptable? Have we passed the point of no return to where hundreds of shop owners and thousands of their employees in any state are expendable to advance the interests of a few professional activists and their multinational sponsors? Is eliminating small business owners from a free an open market acceptable collateral damage? Are the War on Tobacco and the War on Obesity in truth the merely lowest form of gutter politics that now emerges as a War on the People, the legal products they lawfully choose to consume, plus basic values of fairness and good faith endeavor?

Don't blame “them.” That is the quality of government that the people of any nation earn by their own inaction and lack of commitment to demanding accountability of their elected representatives. The problem is not opportunistic weasels who slink about the halls of power while spewing new taxes and mandates for others as if they were doing something important. The problem is not lobbyists and private foundations who stoke the passions of special-interest zealots and provide political access, grants, or support infrastructure for them to vent their personal-preference spleen. *The bottom line for the current threat to the quality of our government is drawn squarely under we the people who accept such political tomfoolery in the name of business as usual.*

Accordingly, the primary focus of this commentary is on we the people rather than they the advocates. What we the people decide cannot work and will not be tolerated cannot and will not continue. I begin with a few words from the only President of the United States who was elected to four terms in office:



Democrat Franklin Delano Roosevelt

"Democratic President Franklin Roosevelt denounced Prohibition as 'a damnable affliction,' and declared, 'We have...reached the point as a Nation where we must take action to save the Constitution from the Court' of 'Nine Old Men.' Roosevelt, America's most-loved president, said: 'Let me assert my firm belief that the only thing we have to fear is fear itself - - nameless, unreasoning, unjustified terror which paralyzes needed efforts.... Only a foolish optimist can deny the dark realities of the moment.... Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men.... They know only the rules of a generation of self-seekers. They have no vision, and when there is no vision the people perish.... The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic State itself. That, in its essence, is Fascism, ownership of the government by the individual, by a group, or any controlling private power." (Underline added.)

Dare we oh-so-politely observe that a person who smoked cigarettes lead us out of the depression, ended prohibition, and won a world war?

What chance does the current tax, ban and mandate "generation of self-seekers" have against Roosevelt's commitment and ability? What shred of credibility does the current generation of self-serving, grant-funded activists retain when negatively labeling historical figures such as Roosevelt, Churchill and Edward R. Murrow as social pariahs? What value do those grant junkies add to our American culture when they advocate those who put their lives on the line to protect the junkies' liberty today—just like those who landed at Normandy and on Iwo Jima six decades ago—should be banned, shunned and demeaned as citizens of lesser worth than a grant dollar when they return home to the shores of this great land?

A Stellar Example From Oregon

Consider, for example, House Bill 2535, sponsored by Representative Dingfelder and Senator Morrisette, currently before the Oregon legislature. That bill would impose a \$32 "beer cost recovery fee" per 31 gallon barrel of beer. Proponents claim this is not a tax, it is merely a "fee" charged to allegedly help the state recover the costs imposed by alcohol abuse and to protect children as young as 8th graders from abusing alcohol. The "Whereas" statements of the bill are smothered in "statistics" and "conclusions" that support a compelling need to "Save the Children" from alcohol abuse.

\$32 per \$31 barrel of beer is \$1.03 per gallon. There are 8 16 oz. glasses of beer in one gallon. That equals 12.9 cents per draft in new costs that bar owners must pass on to their beer customers to breakeven.

Oregon's HB 2535 is precisely modeled after the 1998 tobacco Master Settlement Agreement (MSA). The alleged purpose of the MSA was for states to recover costs of treating smoking related illness, the alleged purpose of HB 2535 is for the state to recover costs of alcohol abuse. The MSA was supported by a host of studies-on-demand that "proved" the costs of smoking to society, HB 2535 includes reference to many studies and opinions that "prove" the costs of alcohol abuse to the State of Oregon. The focus of the MSA was to "Save the Children" from tobacco use, the focus of HB 2535 is to "Save the Children" from alcohol abuse. And the MSA added 45 cents in costs charged by manufacturers for cigarettes but not cigars—*not a tax*, mind you—to fund payments to states, where HB 2535 imposes a "malt beverage cost recovery fee"—*not a tax*, mind you—of about 13 cents per draft beer but not wine or hard liquor to fund payments to the State of Oregon.

Oregon's HB 2535 is a stellar example of how public policy and legal theory that has been successfully applied to tobacco will predictably expand as to both its scope and its application to other products. As to scope, consider that Oregon's Senate Bill 488 expands Washington's prohibition on smoking of 25 feet from any building entrance to now 75 feet. If that 75 foot distance has bona fide merit are we to believe that nonsmokers in other states with a mere 15 foot prohibition are in mortal danger of instant cardiac arrest from secondhand smoke? Many who sniffed, "I don't care about cigarette costs, I don't smoke" can now suck down the true costs of that thinking as they push an extra 13 cents across the bar for a draft. Those who don't care about the costs of smokes or beer because, after all, they don't smoke or drink should haul their petite buns up on a scale; according to federal Body Mass Index standards one-third of them are obese and another third are seriously overweight. Professional activists financed by the Robert Wood Johnson Foundation in its War on Obesity have a revenue-generating answer for that, too: "Healthy Lifestyle" mandates enforced by increased health insurance costs for the obese.

Never let it be said that once zealous activists have found an axe that grinds well they will not let the sparks fly until it, and everyone to whom it is applied, are ground to dust. The "cost recovery fee" approach is the public tax policy RPG (Rocket Propelled Grenade) of choice employed by special-interest activists in their War on Tobacco—the Robert Wood Johnson Foundation's self-declared "Assault on Smoking." As illustrated by HB 2535, that weapon be employed against all other legal products that professional advocacy groups deem to be appropriate "Targets."

That Oregon beer tax legislation is directly aimed at independent local taverns and bars. What establishments are the largest purchasers of beer in barrels as a group? Moreover, the tax burden of this bill falls most heavily on working class folks who stop by their local tavern for a beer after work. Who does the Oregon beer tax hit the most: a waitperson or construction worker visiting their local tavern or a "young upwardly mobile professional person" who enjoys a martini or glass of wine at their favorite upscale lounge? Based on legislation in Colorado and Washington, the odds are very high that the upscale lounge will exempt from statewide smoking bans as a "Cigar Bar" (cigarettes prohibited in cigar bars due to the dangers of secondhand smoke in Colorado, thank you.) Odds also are that the cigar enjoyed is preferentially taxed; Washington reduce the taxes on Other Tobacco Products in 2005, while increasing taxes on cigarettes, thane added a cap in the tax for cigars. When did we as a people approve of using public policy a political weapon that defines tax exemptions and enjoyable lifestyles for the upwardly mobile, while mandating higher costs and reduced choices for the general public?

Public Policy Implications

The social, public policy and cultural environment implications of Oregon's HB 2535 are huge when coupled with cigar bar exemption and preferential taxation for Other Tobacco Products. By taking a broader view of

that bill through the lens of tobacco control advocacy and the latest trend in cigar bar exemptions we arrive at simple, yet stunning, conclusions.

1. Joe Everyman can just learn to live with paying more for a beer at his local tavern while being required to step outside to smoke a cigarette, but John Jerkwater III, Esq. enjoys a Cognac with his cigar in the comforts of his upscale club lounge, while savoring the special privilege of being immune from sharing the cost burden of recovering alleged state burdens due to alcohol abuse. Perhaps public policy discussed in this commentary comes from fat cats huddling behind closed doors drunk as a loon on hard liquor and the power to exempt themselves from mandates for the common man.

2. Opportunistic politicians play the weeping ballad of "Save the Children" on agenda violins bought with special-interest donations, be the issue anti-tobacco, anti-obesity, or anti-beer. Pretty soon we'll be saving more children than the census bureau reports exist in the USA. Whatever happened to parents saying put the smoke out, Johnny, and while you're at it chill out with Grandma's medicinal elderberry wine then go outside and join the soccer game your friends are playing?

3. Harry's Sports Bar can be encumbered with higher costs for beer, revenue losses due to smoking bans, and soon mandates about what snacks patrons are to be allowed, while upscale patrons of Houte Maison lounge swill lower-taxed martinis and smoke ban-exempt cigars as they divvy up next year's menu for restaurants. Will they next decide in Oregon that any cigarette smoker who has the temerity to come within 75 feet of a cigar smoker is subject a fine *for public health reasons*?

Perversely, if what tobacco control claims about the benefits of smoking bans is true, Pristine Clean *nonsmokers* who allegedly flock to local taverns because their hair will no longer stink once smoking has been banned *will bear the greatest burden of this new tax*. We observe the Agenda-Afflicted sticking it to their own supporters. Which puts the Pristine Clean who aggressively support anti-tobacco among the dumbest of species on planet Earth. Good for them, they've richly earned their dubious distinction. Smokers are intelligent enough to haul it out of places where the tax applies and enjoy a beer at home (for now, until a beer ban applies there, too.) But where does that leave small, independent bar owners?

So much for smoking bans *increasing bar and tavern revenues* as so stridently—and falsely—proclaimed by tobacco control advocates. It's simply amazing how dumb folks can become when they buy into special-interest agendas. That phenomenon creates legions of Pristine Clean who scurry about the state proclaiming "We Won! Now we get to go to places that charge us higher taxes those filthy smokers don't have to pay!"

Revenues that Oregon bar and tavern owners would allegedly gain from a statewide smoking ban they will lose because of lost beer sales due to new taxes. Considering that small, independent bars and taverns consistently lose customers and revenue when smoking bans are passed, and will lose more sales with increased beer taxes, it is apparent that the Oregon legislature has declared a war of attrition on neighborhood bars and taverns. The fact that bars and taverns will lose beer sales due to the tax must be true because the Oregon legislature said so when it wrote into the bill "Whereas alcohol abuse and alcoholism cost each Oregonian an estimated \$683 annually." How is the state to save the costs of alcohol abuse and alcoholism if the sale of products to which this statute applies to—beer—*do not decline*?

Public Response

Several comments about the proposed Oregon beer cost recovery fee legislation were posted to the Web site Bojack.org A few samples are:

"Whereas four out of five Oregonians polled are in favor of increasing an alcohol tax What? Are they serious? When was that poll taken? And where? At a MADD meeting? What a bunch of BS.

Posted by Jon | **February 24, 2007 12:13 AM**

C'mon Jack. We already have a beer tax. And they dont want to be accused of "raising taxes."

Just remember, calling it a "fee" lets the progressives keep saying we are one of the "lowest taxed states".

Posted by Jon | **February 24, 2007 12:18 AM**

Makes me laugh reading all the support for a cigarette tax and whining about a beer tax. I guess it just depends on what you've chosen to indulge in. It couldn't be that so many people think it is ok to tax someone else's vices as long as their own are left alone. Could it? Cut spending! Cut taxes!

Posted by Deb | **February 24, 2007 12:46 AM**

Well now....this cold be trouble. Mess with smokers...yeah OK whatever, there are scum anyway right? Mess with Beer drinkers and we could have a problem. As soon as I read this I had to check and see how many barrels Deshutes sells, which is my favorite. Seems they sell 160,000 a year, a bit over the 125,000 number. Looks like I'll be paying....Their recent Newsletter does a **thorough debunking.**

Posted by THartill | **February 24, 2007 2:03 AM**

Readers posted laudable comments to that Web site. But how many of them took the time to find out who their elected representatives are and send an E-Mail opposing the "recovery fee" tax on beer? How many went to the Oregon legislature Web site, find the beer tax bill, and print out a copy of sponsors for that bill? How many voters who oppose that beer tax will have a clue as to the names of the bill sponsors when they cast their votes in the next election? How many of them will take the time to follow the public hearing schedule for the bill, then go to the hearing to say just four words "I oppose this tax"?

Whining about intrusive or unresponsive government may have its therapeutic value but votes determine the quality of government that we contend with. Those who say "that's what we elect them to do, look out for our interests, why should we do their job, too" have a valid point *as far as it goes*. The response to that position is "Because you are observing what you get when legislators are allowed to play with public policy in the absence of adult voter supervision.

Those who say "Well, I don't it doesn't effect me because I don't drink beer" completely miss the point of Democratic governance. *A Democracy is we the people. When the people create a vacuum through inaction the void is inevitably filled by special-interests.* Those special interests are, by definition, concerned about and paying to support what's in it for them. They are not at all concerned with how their legislation affects others. Indeed, many special-interests such as anti-tobacco and anti-obesity are created for the express and stated purpose of adversely affecting others so they can benefit. Beyond which, we cannot escape the fundamental truth what we allow to be done to others—our neighbors, members of our own communities—inevitable affects everyone because what goes around comes around, energy *always* balances. Measure how you will be treated next year by what you allow to be done to your neighbors today.

Some are even foolish enough to support "Whereas" statements in the Oregon beer tax bill with the trite, childish comment that "It's the truth and it's an outrage!" Well, good for you. Go ahead and be outraged. We're quite impressed, *really*. Now when are you going to get something constructive and meaningful done

about youth alcohol abuse other than lining your own pockets with *adult* beer drinkers' money and decreasing revenue to mom and pop hospitality businesses in your neighborhood? Since when was your personal outrage a legitimate basis for public law that imposes new taxes on millions of your fellow citizens? Why should *they* be required to pay the piper for the intolerance tune that *you* choose to call?

Why Supporting Bar and Tavern Owners Who Oppose Smoking Bans Matters

This section is written for small, independent bars and their patrons, many of whom also choose to use tobacco products while enjoying a drink. It is also written for small, independent taverns and restaurants that serve food. At this point, Pristine Clean with a fixation on hair can stop reading. It will only go downhill from here for them.

The following should be read as response to the question "Why should I support public protest and legislative action against smoking bans?"

1. Because a war of attrition has been declared on you, your business and many of your patrons by out-of-state special-interests who seek to advance their agenda at your expense.

- a.) As cigarette smoking bans expand for bars so do exemptions for cigar bars.
- b.) As beer taxes expand in some states so do exemptions for other alcoholic beverages.
- c.) As the War on Tobacco, the War on Beer, and the War on Food expand, so on the restrictions on small, independent bars, taverns and restaurants.
- d.) By stopping the War on Tobacco today you also stop the same activists, with funding from many of the same sources, from applying the same agenda model in other areas that will hurt your business in the future. You can be assured they will not quit until you are out of business. What are you waiting for to place an equal commitment behind protecting your legitimate small business interests?

2. Because restaurant associations in most states, whose members are by and large chain restaurants with liquor service and bars, have abandoned you.

- a.) Every beer not sold in your bar that allows smoking is a beer that can be sold in a franchise chain's "Smoke Free" lounge.
- b.) Every meal not sold in your tavern that allows smoking is a meal that can be served in a franchise chain's "Smoke Free" dining area.
- c.) Restaurant associations consistently refuse to oppose smoking bans. When are you going to fill that vacuum?

3. Because your legitimate interests are not even on the radar of legislators fixated on campaign donations from Fortune 500 lobbyist groups and the same politicians seek to justify their positions that will hurt you with Social Marketing dogma funded by multi-billion-dollar private foundations.

a.) Many people from small, independent bars, taverns and restaurants who attend public hearings about smoking bans are virtually ignored, often insulted by professional activists.

b.) You may not have the money of a Fortune 500 restaurant chain *but you do have your voice*. Demand that your local interests at the least be equally considered as those represented by lobbyists for large franchise chains.

c.) Demand that legislators present proofs of the Social Marketing sound bites they proclaim. Then present countering evidence and demand that they respond to your information. Vote out of office those who cannot or will not do so.

4. Because those who are standing to duty to oppose the bans merit you support.

a.) By standing up for themselves they are also standing up for you.

b.) Your rights and business interests are best protected by you, not by leaving it to someone else.

c.) The most dangerous German 70 years ago was not the guy with the gun. The most dangerous person then and today is an opportunist who remains silent and seeks self-serving advantage while others stand to duty for everyone.

5. Because the current tax and ban agenda, and the "level playing field" mantra that comes with it are as Un-American as Joe McCarthy's witch hunt.

a.) Any small business owner who believes that a legitimate way to preserve his interests is to limit his fellow trade members opportunity and choices needs to check personal priorities. What prevents another bar or tavern owner from limiting your choices in the future over new mandates about what food can be served, hours of operation, etc.? Opposing sides of this issue may believe they have diverse interests. It must be said, however, that in the longer view both sides have a greater interest in preserving their choices as to how they manage their separate and competitive establishments.

b.) Edward R. Murrow shut down Joe McCarthy, while enjoying a smoke. you can shut down the mandate muggers, too.

c.) McCarthy once claimed to hold up a list of 205 known communists during a radio broadcast. Like McCarthy's list that did not exist and was immediately repudiated by the U.S. State Department, tobacco control's list of health risks of tobacco smoke does not exist as represented and has been repudiated by the U.S. Occupational Health and Safety Administration (OSHA)

d.) Since when was lying about "proofs" and other people the legitimate basis for any American policy?

6. Because you have a civic duty to grow some cahones, to stand up for yourself and those around you by actively participating in this process we call Democracy.

a.) You are part of "we the people," too. What you allow to be done to other people will predictably happen to you.

b.) This great nation was created and built by those who put themselves on the line, often in harms way, to preserve an ideal: that there is a place for everyone and they have the inalienable right to establish their place in our society through free enterprise and unfettered by demands of mandate muggers.

c.) So what do you possibly stand to gain by standing silent when multi-billion-dollar special-interests have already declared a host of wars—tobacco, alcohol, food and obesity, to name a few—on your business?

If you are a small, independent bar or tavern owner who still cannot make up their mind remember that nobody can help anyone who refuses to help themselves. Then remember Franklin Delano Roosevelt. He kicked "Smoke Free" Adolph Hitler's ass, *while enjoying a smoke*. He did so when he couldn't even walk due to polio. How much more than that do you have to work with?

If you are a regular patron of a local bar or tavern who also smokes ask the bartender or waitperson if that establishment is standing to duty for you as their customer. If they do not, ask why. If your local pub does participate in opposition to bans hand an extra buck to the bartender and say thanks for his service. On the way out the door look for the "Stop the Bans" jar on a counter. Drop a \$5 bill in that jar on the way out. When you get home take a few minutes and look up who your state representatives are. Pick a senator and two representatives, then send them an E-Mail that simply says you oppose smoking bans for local neighborhood bars, taverns and restaurants. Perhaps add to your message that the choice is properly that of the business owner and not government or special-interests. As you go about your daily business look for establishments that display a "Stop the Bans" sign. Patronize those small businesses and shun those who do not display the sign. Those simple, one-time efforts on your part are how you also participate in this thing we call Democracy. Such efforts by a few thousand bar patrons in each state can turn the tide. Those who fail to do so earn the same response as bar owners who can't make up their mind: "Nobody can help anyone who refuses to stand up for their own interests."

Finally, don't be concerned about mainstream media repeating Social Marketing sound bites without critical thought. If you have read this you understand the sound bites are not true and that there are alternative sources where you can get up to speed on the facts. See my February 19, 2007 comentary:

February 19, 2007 - Dear Mr. Fancher - The editor at large for The Seattle Times released a cri du coeur lamenting the potential demise of the antique media, including his newspaper. His heartfelt threnody included shrinking newspaper readership and declining profit margins. Less than half of the public regularly reads a newspaper, Mr. Editor laments. Those swept into a paroxysm of grief over the pending annihilation of organs such as The Seattle Times would be well served to examine the record of this paper's embrace of anti-tobacco junk science, strident advocacy for higher and higher tobacco taxes and its relentless demonization of people who choose lawfully to consume a legal product. This paper, as well as most others, have chosen to promote demonstrable lies about tobacco. Why should it be given credence about any other issue before the public? Norman Kjono offers a eulogy for an organization that long ago shirked its responsibilities to inform.

Norman E. Kjono

Running the Gauntlet Once Again: Secondhand Fat

Norman Kjono

Article Published: 27/07/2007

From the Seattle Times, July 26, 2007...

"Fat May Be Contagious, Study Finds," by Rob Stein of the *Washington Post*:

"WASHINGTON — Obesity can spread from one person to another somewhat like the flu or a fad, researchers reported Wednesday in a trailblazing study that helps explain one of the nation's biggest public-health problems. The study, involving more than 12,000 people tracked over 32 years, found that 'social networks' play a surprisingly powerful role in determining an individual's chances of gaining weight, transmitting an increased risk of becoming obese from spouse to spouse, from brother to brother and from friend to friend. The researchers found that when one spouse became obese, the other was 37 percent more likely to do so in the next two to four years, compared with other couples. If a man became obese, his brother's risk rose by 40 percent. The risk rose even more sharply among friends — between 57 percent and 171 percent, depending on whether they considered each other mutual friends. Moreover, the researchers found friends affected friends' risk even when they lived far apart, and the influence cascaded through three degrees of separation before petering out. . . . Rather, the findings suggest that once a person becomes obese, for whatever reason, it may make it more socially acceptable for people close to him or her to gain weight, and that new social norms can proliferate quickly. 'What spreads is an idea. As people around you gain weight, your attitudes about what constitutes an acceptable body size changes, and you might follow suit and emulate that body size,' Christakis said. . . . Other researchers used words such as 'brilliant' and 'groundbreaking' to describe the work and said it is likely to lead to a flurry of new research. . . . The discovery could suggest new tactics for stemming the seemingly inexorable trend of obesity. The findings lend support to treating people in groups or even whole communities, for example. The researchers noted that their study also showed that people who were close to someone who lost weight were more likely to get thinner. 'If these close social environments can promote a disease, they can also promote solutions to disease,' said William Dietz of the Centers for Disease Control and Prevention. 'These same social networks might be used to turn a disease like obesity around.' The proportion of obese Americans has been rising steadily for decades, and more than two-thirds of U.S. adults are now overweight, including one-third who are obese. Obesity boosts the risk for a host of health problems, including diabetes, heart disease and cancer. . . . 'This is not 'birds of a feather flock together.' It's not that obese or non-obese people simply find other similar people to hang out with,' Christakis said. 'Rather, there is a direct causal relationship.' . . . 'We were stunned to find that people who were hundreds of miles away had just as much impact on a person's weight status as friends who are next door,' Fowler said. 'This is not due to people eating or exercising together.' The researchers also found one person's weight gain only increased another's risk if the second person considered the first to be a friend. If not, there was no effect. If both considered the other a friend, the effect was magnified. 'This shows that this is a social process that goes on here,' Christakis said. . . . The researchers cautioned that people should not sever relationships with friends who gained weight, or stigmatize obese people, noting that close friendships have many positive health effects. But the results do support forming relationships with people who have healthy lifestyles." (Underline added.)

A news article that focuses on why overweight people should be shunned cautions that people "should not sever relationships with friends who gained weight, or stigmatize obese people" and then reports that study results "do support forming relationships with people who have healthy lifestyles."

Presumably, those who realign their relationships to conform to supporting healthy lifestyles will reduce their risk of experiencing diabetes, heart disease and cancer. After all, the studies show that those who have obese friends experience a 57 percent elevation in risk of becoming obese and when a relationship as friends is considered to be mutual the risk skyrockets to 171 percent. Try convincing a high school cheerleader that she should maintain a friendly relationship with an overweight classmate. The response a parent will predictably receive will be something akin to "No fat kids can be in our group. *We're* not going to get cancer just because *she* wants to have friends."

Health activists know that folks bought that line of reasoning in the War on Tobacco, to shun persons who smoke. Why not apply it with equal success to the War on Obesity?

From *USA Today*, July 9, 2007, "**Does Food 'Addiction' Explain Explosion of Obesity?**" by Nanci Hellmich:

"Obesity has long been blamed on weak willpower, overeating, genetics and lack of exercise. Now scientists increasingly are seeing signs that suggest there may be an additional contributor: food addiction. Monday night and again today, dozens of the nation's leading researchers in obesity, nutrition and addiction planned to discuss whether food has addictive properties for some people. They're gathering in New Haven, Conn., at a meeting sponsored by Yale University's Rudd Center for Food Policy and Obesity. 'We believe that there is sufficient science to suggest there is something to this, so we are bringing the leading authorities together to decide whether food addiction is real and what the underlying psychology and biology might be,' says Kelly Brownell, director of the Rudd Center. It's surprising that our field has overlooked this concept for so long," he says. 'Society blames obesity only on the people who have it and has been close-minded to other explanations.' Support for the idea of food addiction comes from animal and human studies, including brain imaging research on humans, says Mark Gold, chief of addiction medicine at the McKnight Brain Institute at the University of Florida, who is a co-chair for the meeting."

Try Pfizer's Champix. What works to block brain function for nicotine is also being examined to block similar brain functions from enjoying food. But addiction must first be taught. As people believe themselves to be so they are. Those who firmly believe they are addicted to nicotine will be addicted. Those who accept the notion they are addicted to food will behave as if they are. Both require medication to contend with the beliefs they have been taught and adopted.

From *Forbes*, January 11, 2006 "**The Fat Tax: A Controversial Tool in the War Against Obesity**"

"(HealthDay News) -- In America's ongoing battle of the bulge, one strategy to combat the nation's obesity epidemic has generated more than a decade's worth of attention and controversy. Popularly known as the "fat tax" or the "Twinkie tax," the concept first gained widespread attention in 1994 when Yale University psychology professor Kelly D. Brownell outlined the idea in an op-ed piece in *The New York Times*. Addressing what he called a "dire set of circumstances," Brownell proposed two food-tax options: A big tax, in the range of 7 percent to 10 percent, to discourage the purchase of unhealthy processed foods while subsidizing healthier choices; or a much smaller tax to fund long-term public health nutrition programs. "The American food system is set up as if maximizing obesity were the aim," Brownell told *HealthDay*. "So the idea was to tax either certain classes of foods -- like soft drinks or fat foods -- or to just tax specific foods high in calories or low in nutrition. Then you use the income from such a tax to subsidize the sale of healthy foods in order to reverse what is the unfortunate reality now: that it costs more to eat a healthier diet." The tax, said Brownell, would be a pro-active response to a food industry and consumer culture that increasingly promotes high-fat/low-nutrition products as the cheapest, tastiest, most convenient and most available dietary options. Brownell emphasized that, if properly implemented, fat taxes could yield major benefits. For example, slapping a single penny tax onto the cost of soft drinks across the country would generate almost \$1.5 billion annually - a figure that far exceeds the budgets of current government-sponsored nutrition programs, he said. The non-profit Washington, D.C.-based Institute of Medicine (IOM) reports that, in recent years, levies of this kind have, in fact, been imposed -- with states such as Arkansas, Tennessee, Virginia and Washington creating "fat taxes" on soft drinks sold within their borders. Other states such as California, Maine and Maryland have also experimented with hefty "fat-tax" legislation, Brownell said. However, all the levies were ultimately repealed, highlighting several practical problems with the fat-tax concept identified by both Brownell and the IOM. One big problem is that money collected through fat taxes has typically not been earmarked for obesity-prevention programs or healthy food subsidies; instead they were often used to cover budget deficits. Concerns have also been raised that such a tax is inherently regressive, meaning it punishes poorer people who must spend much of their limited income on food." (Underline added.)

How will increased taxes on food reduce consumption by those who firmly believe they are addicted? Predictably, higher taxes will not change consumption to feed an addiction. Beliefs in addiction are necessary to assure optimum tax revenue yield to fund anti-obesity advocates.

From Reuters, July 12, 2007, "'Fat Tax' Could Save 3,200 Lives Each Year," by Peter Griffiths:

"LONDON (Reuters) - A "fat tax" on salty, sugary and fatty foods could save thousands of lives each year, according to a study published on Thursday. Researchers at Oxford University say that charging Value Added Tax (VAT) at 17.5 percent on foods deemed to be unhealthy would cut consumer demand and reduce the number of heart attacks and strokes. The purchase tax is already levied on a small number of products such as potato crisps, ice cream, confectionery and chocolate biscuits, but most food is exempt. The move could save an estimated 3,200 lives in Britain each year, according to the study in the Journal of Epidemiology and Community Health. "A well-designed and carefully-targeted fat tax could be a useful tool for reducing the burden of food-related disease," the study concluded. The team from Oxford's Department of Public Health said higher taxes have already been imposed on cigarettes and alcohol to encourage healthy living. They used a mathematical formula to estimate the effect of higher prices on the demand for foods such as pastries, cakes, cheese and butter." (Underline, Italic added.)

*The 1988 report of U.S. Surgeon General Dr. C. Everett Koop that declared nicotine to be as addictive as heroin or cocaine also reported that 300,000 Americans died from tobacco use each year. The current figure for tobacco related deaths touted by tobacco control advocates is about 430,000. After tobacco control began its tax and ban interventions in U.S. Public Policy in 1993 previous declines in **adult current smokers** leveled off and preceding increases in adults who quit smoking reversed. During that same period **youth smoking prevalence** skyrocketed 43 percent. Alleged tobacco related deaths today are 143 percent higher than those reported by tobacco control nearly twenty years ago, despite a more than 400 percent increase in federal and state excise taxes on cigarettes. What leads one to believe that a fat tax can "save" thousands of lives when cigarette taxes failed to do so?*

From Skynews, July 12, 2007, "**Calls for Fat Tax on Unhealthy Food:**"

"Experts are putting pressure on the Government to introduce a "fat tax" on unhealthy foods, saying it could save thousands of lives.

A study from the Queen's Medical Centre in Nottingham claims that taxing food containing lots of fat, salt and sugar would prevent more than 3,000 deaths a year from heart attacks and strokes. However, while it would save the NHS £6bn a year, it would put an extra 67p a week on food bills, which would total some £2bn annually across the UK. The author of the report, Dr Mike Rayner, told Sky News: 'There's an overabundance of cheap, bad food in this country and we need to tax it, to make it more expensive, to make people switch to healthy foods. 'If we do have a tax on unhealthy food it will raise money for the Inland Revenue and a good way of spending that would be to subsidise healthy food.'" (Underline added.)

If there is proposal for new taxes there will predictably be a study supporting that policy. The studies will proclaim lives and money to be "saved." Lost in the fray over policy debate is the now-transparent fact that the alleged death toll must keep rising to support the "compelling need" for more programs. What food gets subsidized and what food gets taxed? Who enjoys mercantile advantage from the policy and who is guaranteed loss of their business?

From the *Seattle Times*, July 26, 2007, "**Some Would Like to Play Taps for Bottled Water,**" by Stevenson Swanson of the *Chicago Tribune*:

"Rather than spend money on costly plastic containers of water, consumers should boot the bottle and turn on their taps, according to such officials as San Francisco Mayor Gavin Newsom, Salt Lake City Mayor Ross "Rocky" Anderson and Minneapolis Mayor R.T. Rybak. Those three sponsored a resolution at last month's meeting of the U.S. Conference of Mayors calling for a study to examine the environmental impact that millions of empty plastic water bottles have on municipal garbage operations. . . . "For a long time, I've viewed [bottled water] as a huge marketing scam," Anderson said recently, explaining why he has called for Salt Lake City employees to drink tap water and use refillable water bottles. . . . The bottled-water business calls the attacks unfair. The head of the industry's leading trade group says bottled water's competition is not the kitchen faucet but the soft drinks, sports drinks, iced teas and other beverages that fill grocery shelves. "I think it's unfortunate there is now this tap-water-versus-bottled-water controversy," said Joseph Doss, president of the International Bottled Water Association, which represents 450 bottlers, distributors and suppliers. "We don't see it that way. I don't think consumers are replacing tap water with bottled water. We make a food product. We see other food products as our competitors." Only soft drinks outsell bottled water, and their market share has been declining."

If the Agenda-Afflicted advocacy process works for War on Obesity plus the War on Tobacco why not apply it to the War on Bottled Water, too?

We confront the true issue: it's not the current crisis or the Agenda-Afflicted program that will allegedly save us from it this time. It is, quite simply, what we choose to believe and make our reality today.

Flow

Where energy flows, life surly goes.

As we believe things come to be.

We define what's real, our lives our way,

by what we think and believe each day.

Perhaps we should consider a much simpler approach. Rather than pointing at *them* and what *they* do that must be taxed and banned *this time* it might be a good idea to examine what each of use chooses to believe each day.

ETS Environmental Tobacco Smoke in Perspective: New ASHRAE 62.1 Standard—2007

Norman Kjono

Article Published: 30/05/2007

On May 28, 2007 Forces.org published my commentary that addressed the American Society of Heating, Refrigeration, and Air-Conditioning Engineers (ASHRAE) 62.1 Standard—2004:

May 28 [12:30 GMT] – Environmental Tobacco Smoke (ETS) in perspective: material risk, regulatory standards, and study results - In 2004 the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) published its new minimum ventilation 62.1 Standard. The new standards dramatically reduce minimum ventilation airflows and intake of outside air for food and beverage establishments. Coincident with the reduction in Indoor Air Quality that accompanies reductions in ventilation tobacco control began its latest push to extend smoking bans to bars, taverns, restaurants and other hospitality trade venues. Which came first the smoking ban chicken or the reduced ventilation egg? The fact that two highly influential Robert Wood Johnson Foundation grantees sit on the committee that published ASHRAE's position document on Environmental Tobacco Smoke (ETS) it appears that both the chicken and the egg are part of a hybrid species of fowls. Forces columnist Norman Kjono explores highly relevant subjects regarding deeper issues behind tobacco control's claim to be about public health.

As that work was written ASHRAE announced its new Standard 62.1—2007 on May 22, 2007 (see "**ASHRAE Publishes New Standard 62.1**"). The standards were open for comment until April 30. The ASHRAE press release concerning revised ventilation standards includes the following statement:

"Standard 62.1 has served the building industry and the public as the most prominent standard on ventilation for indoor air quality,' Dennis Stanke, committee chair, said. 'Changes in the 2007 standard build on the improvements published in the 2004 version, providing additional guidance for designers of building ventilation systems.'

"The new standard includes requirements for the separation of areas with environmental tobacco smoke (ETS) from areas without ETS in the same building. Although some local building and health codes prohibit smoking indoors in many buildings and locations, other codes allow smoking in designated areas. In buildings that allow smoking in designated areas, effective separation of ETS areas ensures 'ETS-free' areas contain little or no ETS-related contaminants. The new separation requirements help designers ensure effective separation, according to Stanke." (Underline added.)

An Interesting and Laudable Role Reversal

HPAC Engineering magazine has published "**Codes and Standards**" in its April 2007 edition. That work includes the following statement:

"Addendum i, which requires that zones with environmental tobacco smoke (ETS) be supplied with more outdoor air than ETS-free areas of the same occupancy category. Outdoor airflow rate would be determined using 'engineered methods with the approval of the authority having jurisdiction.'" (Underline added.)

Persons who smoke will love it! They can enjoy sitting in rooms built just for them that have superior ventilation compared to where nonsmokers sit. All this, just to protect nonsmokers from the alleged risks of ETS that do not exist as represented by tobacco control. Good for them! It's about time smokers enjoyed an advantage that nonsmokers have voted to exclude themselves from by supporting tobacco control smoking bans. The last thing anyone who smokes would be concerned about is the alleged risks of secondhand smoke – that is a mind-bending worry reserved exclusively for nonsmokers who push the ban button in polling booths.

It also appears that smokers can relax and enjoy a smoke with their beer, comfortable in the knowledge that the increased intake of outdoor air in designated smoking areas also reduces documented risk from Indoor Air Quality constituents not related to tobacco smoke. Carcinogens from cooking with oils and solid fuels like wood that many credible studies show have OR risk factors many times greater than the 1.19 OR at 90 percent confidence Level published by the U.S. Environmental Protection Agency in 1992 come to mind. An added advantage is that walls built to special areas for smokers – thereby creating “Smoke Free” environments for the Pristine Clean – will muffle the whines about a bad hair night previously heard from those who complain they must dash home and shampoo their hair whenever they *voluntarily choose* to enter a hospitality establishment that permits smoking.

Those with a penchant for stock market investing may want to short shampoo stocks – the profits could be stunning once stock price declines begin to reflect the massive reduction in demand for shampoo by nonsmoker zealots. According to anti-tobacco activists, at the present time there are gazillions and billions of nonsmokers manically applying shampoo after enjoying a night out on the town. Given that reduction in demand because of ASHRAE's smoking rooms, shampoo prices should plummet. Rumor has it that the antis are dreaming up an “Anticipated Shampoo Need” index to sustain the market. Pristine Clean will be required to buy their “fair share” of shampoo just in case anyone *even thinks about smoking* in public. A little yellow bird has been circulating the rumor that a bill has been introduced in Congress to mandate tax free status for shampoo, just to stimulate demand. That should keep a few thousand anti-tobacco lobbyists busy for the next several years. Hy, its all good. “Billable hours is billable hours,” as they say, regardless of the fruitcake cause to which they are logged.

Smokers, score one for your side! Light up and enjoy the new superior facilities built just for you.

Nonsmokers Still at Risk

Meanwhile, back at the nonsmoking ranch, the Pristine Clean will be sitting in reduced ventilation, inferior, Indoor Air Quality environments. Good for them, too! They have justly earned and richly deserve what they have aggressively pushed for during the past decade. You voted for, now enjoy what you have.

“Secondhand Smoke Consultant” James Repace confirmed inferior Indoor Air Quality in “Smoke Free” environments with his recent 2006 study, “Can Displacement Ventilation Control Secondhand ETS?”

published by *ASHRAE Applications*. That work concerned “scientific” measurements of indoor air constituents before and after a smoking ban. On page 4 of that report Repace lists CO₂ pre and post smoking ban levels in Table 1. for the Black Dog Pub. CO₂ levels in the Black Dog's “Smoke Free” dining room increased from pre-ban levels of 760 Parts Per Million (PPM) to 1,518 – doubling after a smoking ban.

Repace omits CO2 measurements for the "Smoke Free" bar after the ban. In the text on page 3 of that 2006 study Repace comments about ventilation air flows at the Black Dog *after* the ban:

"CO2 levels showed a decline in outdoor air supply to L/s per occupant, in compliance with the Standard 62.1—2004 recommendation for nonsmoking bars. However, *the air quality felt stuffy.*" (Italic, added.)

Repace oughta know. He holds himself out as an expert on secondhand smoke and reports that he is a member of ASHRAE. So there you have it, direct from the horse's . . ."

Of equal or greater importance is Repace's measurement of carcinogenic Respirable Suspended Particles (RSP) and Polycyclic Aromatic Hydrocarbons (PAH). While the post ban measurement did show material declines, what Repace describes as carcinogenic substances remained. The data are uncertain due to methods used to measure and conduct estimates. The material point is that carcinogenic substances remained in nonsmoking areas, despite a ban on smoking.

One section of my previous commentary about ASHRAE ventilation standards as published by Forces.org merits repetition:

"Observations concerning the association between cooking with oil and lung cancers in nonsmokers were confirmed by a study published May 1, 2006 in the journal *Cancer Research* (66, 4961-4967). See "Dose-Response Relationship between Cooking Fumes Exposures and Lung Cancer among Chinese Nonsmoking Women:"

"The high incidence of lung cancer among Chinese females, despite a low smoking prevalence, remains poorly explained. Cooking fume exposure during frying could be an important risk factor. . . . Multiple unconditional logistic regression was used to estimate the odds ratios (OR) for different levels of exposure after adjusting for various potential confounding factors. . . . The ORs of lung cancer across increasing levels of cooking dish-years were 1, 1.17, 1.92, 2.26, and 6.15. After adjusting for age and other potential confounding factors, the increasing trend of ORs with increasing exposure categories became clearer, being 1, 1.31, 4.12, 4.68, and 34. The OR of lung cancer was highest for deep-frying (2.56 per 10 dish-years) followed by that of frying (1.47), and stir-frying had the lowest OR (1.12) among the three methods. Cumulative exposure to cooking by means of any form of frying could increase the risk of lung cancer in Hong Kong nonsmoking women. Practical means to reduce exposures to cooking fumes should be given top priority in future research." (Underline, italic added.)

It is noteworthy that the OR risk factor for lung cancer among nonsmokers allegedly caused by exposure to Environmental Tobacco Smoke published by EPA in 1992 was 1.19 at a 90 percent Confidence Level. In contrast, the above ORs for lung cancer due to fumes caused by cooking with oils increase to 6.15 and 34.0 over time, presumably at a 95 percent Confidence Level. ASHRAE 62.1 Standard permits the greatest decreases in ventilation airflow and reductions for intake of fresh outside air (reportedly ranging from fifty to sixty-nine percent) in the food and beverage service category. In addition, ASHRAE has stated that the only way to eliminate the risks of exposure to ETS is to prohibit smoking activity.

It therefore becomes evident that ASHRAE standards effectively prohibit a lawful activity, smoking tobacco products, that has a risk factor so low it is subject to chance (1.19 at 90 percent CL) but permits continued exposures to substances with OR's so high over time (6.15

to 34.0 at 95 percent CL) that the causal association with lung cancer is virtually conclusive. Is selective prohibition based on political and mercantile agendas being imposed in defiance of established federal regulatory authority that supports genuine public health measures? The issue raised is not whether persons who lawfully consume legal tobacco products have a constitutionally protected right to do so; the important issue raised is that activities for which causal associations with lung cancer among nonsmokers is virtually nonexistent are prohibited, while cooking activities that present apparently certain causal associations continue to be permitted. The final question that the above information presents is compelling: how can such conflicting and contradictory standards possibly support a legitimate state interest?"

Nonsmokers can be profoundly grateful to tobacco control advocates for their current state of Indoor Air Quality. Politicians who support tobacco control agendas also deserve their fair share of credit. Who but an opportunist zealot or a catatonic public servant would have the chutzpah to promote and aggressively push for adoption standards that *reduce overall Indoor Air Quality* for nonsmokers *in the name of "clean Indoor Air?"* Whatever happened to tobacco control's strident proclamations that "Everyone has a right to breathe clean indoor air?" Perhaps tobacco control and genuine Indoor Air Quality merely prove for politicians and air quality standards board folks the long standing adage, "Play with snakes and you eventually get bit, *every time.*"

One profoundly hopes that we will soon see the day when politicians wake up and smell the carcinogens not related to Environmental Tobacco Smoke (ETS). When they do so perhaps we will see responsible Indoor Air Quality measures that work for everyone. In the meantime, citizens and small business owners continue to endure adverse consequences of tobacco control's self-serving smoking ban mandates.

Current Hospitality Trade Issues

Bar owners should be pleased with the new ASHRAE 62.1 Standard. First, it provides a way to accommodate patrons who smoke, albeit at considerable expense to construct special rooms. Second, that cost of construction for smoking rooms adds to economic damage calculations imposed by smoking bans. Hospitality trade business owners should consider a few important questions:

1. Why are federal regulatory Permissible Exposure Limits (PELS) considered for carcinogenic compounds such as those related to cooking with oils that have vastly greater risk factors than tobacco smoke considered as to material risk, but the same federal standards are not considered for ETS? Why is "Zero Tolerance" *policy* applied to ETS, but federal material risk *standards* applied other carcinogens.

2. Why are federal regulatory conclusions by worker safety agencies such as OSHA concerning other carcinogens regarded as definitive, but OSHA's conclusions concerning ETS utterly disregarded? Who authorized the *substitution* of private *opinion* for federal material risk *conclusions*?

3. Why are hospitality trade small business owners afforded the *protections of the federal rulemaking process* concerning all other alleged carcinogens, but those same protections not applied – indeed, disregarded – when mandating public policy for ETS?

Answer those questions and you will go to heart of tobacco control advocacy. The short form answer is because tobacco control cannot advance its special-interest, mercantile agenda to peddle “Smoke Free” nicotine delivery devices if due and proper regard is given federal regulatory authority of OSHA. Therein may found the path for hospitality small business owners to recover economic damages advocated by tobacco control.

That short form answer raises a compelling final question:

Why is it that hospitality trade small business owners are required to in effect subsidize the Robert Wood Johnson Foundation’s “Smoke Free” nicotine delivery device sales agenda through declines in smoking patron revenues?

Is suspect that the preceding questions will become an increasing part of legal issues concerning equal protection of the laws and due process as applied to smoking bans.

Closing Remarks

We will follow the professional commentary about ASHRAE's Standard 62.1—2007. As the new standard was announced just a week ago the published works on the new standard are relatively scarce at the moment. For the present time it appears that ASHRAE may be vainly attempting to wiggle out of the ever-tighter corner that their collaboration with tobacco control painted them into in 2004.

In the meantime, I restate my closing to the previous commentary that addressed ASHRAE 62.1 Standard—2004”

The above information presents an important new perspective concerning tobacco control advocacy and smoking bans. Hospitality patrons should consider their personal safety and well-being when entering a establishment that aggressively advertises itself as ‘Smoke Free.’ The restaurant may well be ‘Smoke Free,’ but is it ‘Safe’? ASHRAE’s reduced ventilation standards and emerging science about other airborne carcinogens not related to ETS raise a potential question: ‘Is it ASHRAE Standard 62.1 Free?’”

Genuine Indoor Air Quality for everyone hangs in the balance.

Norman E. Kjono

A monologue

Elio F. Gagliano, MD

Article Published: 22/08/2007

I am a physician but I would like to address the following monologue to the man of the street, even though I do not mean to exclude the colleague (or any scientist, for that matter) whose work is, one way or another, connected with the quality of the air and/or tobacco smoke, as long as he puts aside the currently popular dogmas about passive smoke, following my thoughts with a virgin mind.

In a local Italian newspaper, in a page dedicated to Medicine and Health, I read two articles dedicated to respiratory problems.

The first of them, titled: **IN SEARCH OF CLEAN AIR TO BREATHE.**

The writer was stating that there is a progressive reduction of respiratory functionality and that, within a few years, it will be the third cause of death. There was a listing of symptoms, the therapy, and an appeal to legislative participation as the only way to curb this escalation. So far so good.

Then he passed to analyze the causes of respiratory illnesses and embroiled himself with the silly tale (nowadays highly fashionable and politically correct) according to which the first cause was the cigarette's active and passive smoke, followed by the air pollution. That was not an alphabetical order (ex.: cigarette-smog), no. The author clearly stated that the cigarette is the main source of respiratory distress.

Such a resolute statement impressed me and made me ponder.

Here are my thoughts:

The air is present wherever there is any form of life. It is what we breathe. It is present in the road, in the living room as well as in the basement of the house, in the car as well as in the bus, in the office just as in the workshop; it wraps around the flowers, the salads, the cauliflowers, the fruit trees and each and everything nature offers us. In unanimated and in scarcely populated areas of the world, the air is mainly composed of 78% nitrogen (N₂) and 21% oxygen (O₂).

What is it made of in the cities with high traffic and industrialization? Of course there are still N₂ and O₂ but, in addition, there are loads of noxious substances, among which: Carbon monoxide (CO), Sulfur dioxide (SO₂), Lead (Pb), Particulate Matter (PM), Metals, Polycyclic Aromatic Hydrocarbons (PAHs)*, Volatile Organic Compounds (VOCs)**, Ozone. These substances travel into our lungs, from there into the blood stream, which nourishes each and every organ and tissue of the body.

So much for the air in urban areas.

What about the cigarette's smoke?

There too there are many noxious substances, which go into the air polluting it. No questions about that, but let's make two considerations:

1. Stand in front of a working factory and look at the smoke that comes out from the chimney. Then light a cigarette and watch the smoke that comes from it: how many hundreds (perhaps thousands) of cigarettes are necessary to produce the same amount of smoke?
2. Daily in the freeway Milano-Brescia travel between 100,000/140,000 vehicles (1/3 of which trucks – all diesel vehicles). Try to imagine how many there can be in the Los Angeles, New York, Chicago, London, Hong Kong freeways!... How many millions (billions?) of cigarettes are necessary in a day to produce the equivalent smoke of all these motor vehicles?

After these remarks, common sense would seem to show no valid comparison.

If the bad air is the main cause of lung illnesses, how, for heaven's sake, can any right-minded person state that the primary cause of air pollution is the cigarette smoke?

The second article's title was: **SMOKE, LETHAL FOR 3 MILLIONS NON-SMOKERS.**

I have the doubt (in truth, I'm sure) that who wrote that title had in mind a previous article published by an Italian national newspaper:

"Smog, the alarm is world-wide: 3 millions die every year", which, by the way, was taken from a WHO's report stating: "Almost 3 million die every year from the effects of pollution".

Neither one mentioned the smoke!

I do not intend to infer on the author of the piece, but I cannot help thinking that the article was written under the influence of a ruthless propaganda and intolerance for people who have views different from those of the writer. Of course, one could suspect that the guiding light of both articles was a political/financial interest in the antismoke campaign. I don't think so: there are too many

writings on the deleterious effects of passive smoke to believe that every author is taking sides for personal interests. I rather suppose that both the authors were victims of a guided misinformation deceiving people, be they farmers or students, factory workers or white collars, housewives or managers. The media, piloted by tycoons, forge our minds. There is no doubt about that.

That is the reason why the media are called the "Fourth Power" (after the Legislative, Executive and Judicial)! I believe that both articles were written by two who did not trouble themselves to give a reason, either because of the strength of their convictions or because of their contempt for those whom they address.

Upon closing, it is far from my mind to make the panegyric of tobacco smoking. As I earlier alleged, in the cigarette smoke there are many noxious substances, which go into the air polluting it.

This, however, is not a reason for stigmatizing the passive smoke as a cause of lung troubles, unless it is listed along with the indoor concentration of the several health-damaging pollutants we live with in our own home. In fact, the air inside our home is already polluted since it comes from the already contaminated outside air but, as we dwell it, it gets much worse than the one outside. That is because of the addition of the VOCs(*) and the PAHs(**) produced by the commodities that make our lives at ease: gas appliances, fireplaces, wood and coal stoves, heaters, air conditioners, clothing dryers, plywood panelling, carpet backing, upholstery, drapery fabrics, paints, household cleaning agents, aerosol spray products, including health, beauty, and cleaning goods, disinfectants, pesticides, insecticides, moth repellents, paints, solvents, adhesives, spot removers, oven cleaners, furniture and floor polishes, air fresheners and deodorants, glues, markers, animal dander, cockroaches, dust mites, mildew, molds, plants, bacteria, viruses, permanent press clothes, blue jeans...

The list is nearly with no end but, before concluding it has to be added: > > > >

... and the "silent killer" RADON, a colourless, smokeless, tasteless gas that from the earth crust infiltrates the houses, where it enters through any openings or cracks in the foundation floors, walls, drains, or joints.

With all the above, I wonder: does it make any sense the campaign about environmental tobacco smoke?

ADDENDUM (*) VOCs: (Volatile Organic Compounds) are chemicals that evaporate into potentially-harmful gases at room temperature. emitted by a wide array of products, as listed above.

(**) PAHs: (Polycyclic Aromatic Hydrocarbons) are chemical compounds formed by incomplete combustion of coal, oil and gas, garbage, or other organic substances like tobacco or charbroiled meat. red or white, fish included.

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**Legal Studies Research Paper Series
Research Paper No. 2006-11**

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Missouri Environmental Law and Policy Review, Vol. 13, 2006

This paper can be downloaded without charge from the Social Sciences
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THE CASE AGAINST SMOKING BANS

Thomas A. Lambert[†]

In recent months, dozens of localities and a number of states have enacted laws banning smoking in public places.¹ Proponents of these sweeping bans insist that they are necessary to reduce risks to public health and welfare and to protect the rights of non-smoking patrons and employees of the regulated establishments.² This essay argues that government-imposed smoking bans represent unwise policy. Unlike regulation of the outdoor environment, smoking bans cannot be justified on market failure grounds. Nor are they justified as means of shaping preferences or on risk-reduction grounds. In fact, smoking bans ultimately reduce public welfare by preventing an optimal allocation of non-smoking and smoking-permitted public places. Such bans are therefore both unnecessary and, on the whole, welfare-reducing.

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¹ Prominent localities that have adopted such bans include New York City, Chicago, and Washington, D.C. See Michael Cooper, *Mayor Signs Law to Ban Smoking Soon at Most Bars*, N.Y. TIMES, Dec. 31, 2002, at B3; Fran Spielman, *City Council Snuffs Out Cigarettes: Smoking Ban Starts on Jan. 16 for Most*, CHI. SUN-TIMES, Dec. 8, 2005, at 8; *Capital Passes a Smoking Ban*, WALL ST. J., Jan. 5, 2006, at D5. States that have enacted bans include California, Georgia, Massachusetts, Connecticut, Maine, Delaware, Idaho, Florida, Montana, New Jersey, and Rhode Island. See Patricia Guthrie, *Restaurant Smoking Ban Leaves Some Folks Fuming*, ATLANTA J. CONST., July, 2, 2005, at E2; Bob Anez, *Marlboro Country Imposing Sweeping Indoor Smoking Ban*, CHI. SUN-TIMES, Apr. 8, 2005, at 38; Richard L. Jones & Josh Benson, *Legislators Pass Smoking Ban in New Jersey*, N.Y. TIMES, Jan. 10, 2006, at B1; *National Briefing New England: Rhode Island: Public Smoking Ban*, N.Y. TIMES, Mar. 2, 2005, at A14. For examples of the statutes and ordinances that were enacted, see CAL. LAB. CODE § 6404.5 (West 2006); GA. CODE ANN. § 31-12A-4 (West 2005); MONT. CODE ANN. § 50-40-104 (2005).

² See Paul McIntyre, *Restaurant, Bar Workers Need Protection from Smoke; Eliminating Tobacco Smoke in the Workplace is the Duty of Every Responsible Employer in Chicago*, CHI. SUN-TIMES, July 11, 2005, at 49; Walter Tsou, *Phila.'s Smoking Ban Long Overdue*, PHILA. INQUIRER, Sept. 14, 2005, at B02; Joseph R. Perone, *A Smoldering Issue: Smoking Ban Would be a Drag for Some, but a Pleasure for Others*, STAR-LEDGER, Mar. 17, 2005, at 15; Editorial, *Let the Smoke Clear: Statewide Ban is a Step in the Right Direction, but Exemptions Keep it from Going Far Enough*, ATLANTA J.-CONST., Mar. 16, 2005, at A20; Editorial, *Pass the Smoking Ban*, STAR-LEDGER, Sept. 26, 2005, at 14 (“Bans on smoking in public places can save lives . . .”); Editorial, *Time has Come for a State Smoking Ban*, DENVER POST, Jan. 23, 2006, at B7 (“It’s a matter of health and comfort.”).

This essay consists of two parts. Part I rebuts the most commonly asserted arguments in favor of government-imposed smoking bans. Part II sets forth an affirmative argument for a laissez-faire approach to the issue of public smoking.

I. REBUTTING JUSTIFICATIONS FOR BANS

Advocates for sweeping smoking bans in “public places”³ have generally offered three justifications for the bans. First, they claim that such bans are warranted because indoor smoking involves a negative externality – the market failure normally invoked to justify regulation of the ambient environment.⁴ In addition, ban advocates assert that smoking bans shape individual preferences against smoking, thereby reducing the number of smokers in society.⁵ Finally, they argue that smoking bans are justified, regardless of whether any market failure is present, simply because of the health risks associated with inhalation of environmental tobacco smoke (“ETS,” commonly referred to as “second-hand smoke”).⁶ The following subsections rebut these three arguments, which I have labeled (respectively) the externality argument, the preference-shaping argument, and the risk argument.

A. *The Externality Argument*

The conventional justification for regulation of the ambient environment (*i.e.*, outdoor air and water) is that it is necessary to combat the inefficiencies created by negative externalities.⁷ Negative externalities are costs that are not borne by the party in charge of the process that

³ Referring to the establishments in which smoking is prohibited under most smoking bans as “public places” is somewhat misleading, for, unless they are in government-owned buildings, such places are actually *privately* owned places to which members of the public are invited. Despite the technical inaccuracy, this essay uses the term “public places” to refer to privately owned places to which the members of the public are invited.

⁴ See *infra* notes 7-12 and accompanying text.

⁵ See *infra* notes 29-36 and accompanying text.

⁶ See *infra* notes 44-58 and accompanying text.

⁷ See, *e.g.*, TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 51-59 (3d ed. 1992).

creates the costs.⁸ For example, the owner of a smoke-spewing factory does not fully bear the costs associated with the smoke, stench, and health-risks his factory produces; many of those costs are foisted onto the factory's neighbors. When conduct involves negative externalities, participants will tend to engage in that conduct to an excessive degree, for they bear the full benefits, but not the full costs, of their activities.⁹ Quite often, then, government intervention (*e.g.*, taxing the cost-creating behavior or limiting the amount permitted) may be necessary to ensure that the cost-creator does not engage in the conduct at issue to an excessive degree.¹⁰

Advocates of smoking bans insist that indoor smoking involves negative externalities. First, ban advocates argue that non-smoking patrons and employees of establishments that allow smoking are forced to bear costs over which they have no control.¹¹ In addition, smokers impose negative externalities in the form of increased health-care costs, a portion of which is paid by the public fisc.¹² Thus, taxpayers are required to foot the bill for some of the costs associated with smoking in general. Examined closely each of these externality-based arguments for smoking bans fails.

⁸ *Id.*

⁹ See A.C. PIGOU, *THE ECONOMICS OF WELFARE 183-94* (1920). The factory owner, for example, captures all the benefits of his operations but bears only a fraction of the costs. He will run his factory to the point at which his incremental benefits from production, which tend to fall as the level of production increases, equal his incremental costs from production, which tend to rise as the level of production increases. Since he is capturing *all* the benefits of production but only a portion of the costs, producing to the point at which his incremental costs and benefits equal each other will result in a net social loss – *i.e.*, more costs (the factory owner's *plus* those imposed on others) than benefits (only the factory owner's).

¹⁰ See PIGOU, *supra* note 9, at 183-94. *But see* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (explaining that, when property rights are clearly defined and transferable and bargaining costs are not excessive, negative externalities will not lead to inefficiencies because parties will privately bargain to minimize costs).

¹¹ See, *e.g.*, Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1241 (2005) ("For cigarettes, an obvious external cost is the harm caused by environmental tobacco smoke ('ETS'), often known as 'second-hand smoke.' In this case, the smoker's consumption adversely impacts health outcomes for other people, and absent government intervention, the smoker may not take these costs into account.").

¹² See, *e.g.*, Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Compensation*, 107 YALE L. J. 1163, 1224 (1998) (arguing that smoking creates externalities because many of the health-care costs associated with smoking are paid under first-party insurance policies, including those provided by public health-care systems).

1. *Inconveniences and Risks to Patrons and Employees*

As noted, outdoor air pollution involves the sort of negative externality likely to result in both an inoptimal (*i.e.*, excessive) amount of the polluting activity and a violation of pollution victims' "rights."¹³ When it comes to indoor air pollution, by contrast, there is no such externality. That is because the individual charged with determining how much, if any, smoking is permitted in an indoor space ultimately bears the full costs of his or her decision and is thus likely to select the optimal level of air cleanliness. Moreover, non-smokers' "rights" are not violated, for they are compensated for the inconveniences and risks they suffer.

One might wonder how this could be. Don't smokers in a public space impose costs on non-smoking patrons, who can't order them to stop? And if that's the case, won't indoor smoking entail both the inefficiency (an excessive level of pollution, since the polluters don't bear all the costs of their activity) and the injustice (an infringement of non-polluters' rights to enjoy clean air) associated with outdoor air pollution? The answer to the latter question is no. There is a crucial difference between outdoor and indoor air, and that difference alleviates the inefficiencies and injustices normally associated with air pollution.

The crucial difference is property rights. Whereas outdoor air is common property (and thus subject to the famous "Tragedy of the Commons"),¹⁴ the air inside a building is, in essence, "owned" by the building owner. That means that the building owner, who is in a position to control the amount of smoking (if any) that is permitted in the building, has an incentive to permit the "right" amount of smoking – that is, the amount that maximizes the welfare of individuals within the building. Depending on the highest and best use of the space and the types of people who patronize the building, the optimal level of smoking may be zero (as in an art museum), or "as much as patrons desire" (as in a tobacco lounge), or something in-between (as in most restaurants, which have smoking and non-smoking sections). Because patrons select establishments based on the benefits and costs of patronage, they will avoid establishments with air policies they do not like or will, at a minimum, reduce the amount they are

¹³ See *supra* notes 7-10 and accompanying text.

¹⁴ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

willing to pay for goods and services at such places. Owners of public places thus bear the full costs and benefits of their decisions regarding air quality and can be expected to select the optimal level of air cleanliness. Moreover, customers who do not like the air policy a space-owner has selected will patronize the space only if they are being otherwise compensated by some other positive attribute of the space at issue – say, cheap drinks or a particularly attractive clientele. They are, in other words, compensated for any “rights” violation. The de facto property rights that exist in indoor air, then, prevent the inefficiencies and injustices that accompany outdoor air pollution.

But what about *workers* at businesses that permit smoking?¹⁵ Isn't there an externality in that they are forced to bear costs (and assume risks) over which they have no control? Again, the answer is no. Workers exercise control by demanding higher pay to compensate them for the risks and unpleasanties they experience because of the smoke in their workplaces. Adam Smith theorized about such “risk premiums” when he wrote that “[t]he whole of the advantages and disadvantages of the different employments of labor and stock must, in the same neighborhood, be either perfectly equal or tending to equality [T]he wages of labor vary with the ease or hardship, the honorableness or dishonorableness of employment.”¹⁶ He was right. A vast body of empirical evidence demonstrates that employers do in fact pay a premium for exposing their workers to risks and unpleasanties.¹⁷ Such risk/unpleasantie premiums

¹⁵ See, e.g., McIntyre, *supra* note 2 (“Workers exposed to secondhand tobacco smoke face . . . dire consequences.”); *Get Serious: Protect All Workers from Smoke*, STAR TRIB., Feb. 2, 2005, at 10A (“Bartenders are no less deserving of protection from smoke than they are of protection from asbestos or benzene.”).

¹⁶ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 99-100 (1776, reprinted 1937); see also W. KIP VISCUSI, RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE 37 (1983). Professor Viscusi explains Adam Smith's insight as follows:

If a worker takes a job he knows is risky, there must be some other aspect to compensate for the risk. If the other nonmonetary aspects of the job are equivalent to those for less risky jobs, this compensation will take the form of a higher wage rate. The need to pay higher wages in turn provides a financial incentive for the employer to reduce the risk.

Id.

¹⁷ See, e.g., Richard Thaler & Sherwin Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, HOUSEHOLD PRODUCTION AND CONSUMPTION 265-98, (Nestor Terleckyj ed. 1976); W. KIP VISCUSI, EMPLOYMENT HAZARDS: AN INVESTIGATION OF MARKET PERFORMANCE (1979)

motivate employers to select the optimal amount of smoke in their restaurants. They also alleviate any injustices occasioned by what might otherwise appear to be a violation of employees' rights. Thus, smoking in public establishments does not, in any meaningful sense, impose genuine negative externalities in the form of risks and unpleasantities to the patrons and employees of such establishments.¹⁸

(finding that workers on jobs perceived as dangerous receive an earnings premium of 5.5%); Charles Brown, *Equalizing Differences in the Labor Market*, 94 QUARTERLY J. ECON. 113 (1980) (reviewing studies and providing fresh empirical data); W. Kip Viscusi, *Occupational Safety and Health Regulation: Its Impact and Policy Alternatives*, in RESEARCH IN PUBLIC POLICY ANALYSIS AND MANAGEMENT 281, 281-89 (John P. Crecine ed. 1981); Richard J. Arnould & Len M. Nichols, *Wage Risk Premiums and Workers' Compensation: A Refinement of Estimates of Compensating Wage Differential*, 91 J. POL. ECON. 332 (1983); Stuart Dorsey & Norman Walzer, *Workers' Compensation, Job Hazards, and Wages*, 36 INDUS. & LAB. REL. REV. 642 (1983); Greg J. Duncan & Bertil Holmlund, *Was Adam Smith Right After All? Another Test of the Theory of Compensating Wage Differentials*, 1 J. LAB. ECON. 366, 374 (1983) (finding that "[d]angerous work yields positive wage premiums of around 2%"); Shelby Gerking et al., *The Marginal Value of Job Safety: A Contingent Valuation Study*, 1 J. RISK & UNCERTAINTY 185 (1988); Henry W. Herzog, Jr. & Alan M. Schlottmann, *Valuing Risk in the Workplace: Market Price, Willingness to Pay, and the Optimal Provision of Safety*, 72 REV. OF ECON. & STATS 463 (1990) (listing, at 463, American, British, and Swedish studies documenting the existence of compensating differentials and providing, at 468, new evidence indicating that compensating differentials comprised 1.9% to 2.5% of manufacturing employees' weekly earnings); Felice Martinello & Ronald Meng, *Workplace Risks and the Value of Hazard Avoidance*, 25 CANADIAN J. ECON. 333, 343 (1992) (concluding that "workers are compensated for higher fatality risks" and "also receive additional wage premiums for higher risks of total injuries and severe injuries"); Michael J. Moore & W. Kip Viscusi, *Doubling the Estimated Value of Life: Results Using New Occupational Fatality Data*, 7 J. POL'Y ANALYSIS & MGT. 476 (1988) (using then-new National Institute for Occupational Safety and Health data to recalculate the implicit value of life revealed by compensating differentials for fatality risks); MICHAEL MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY 46-52 (1990) (estimating risk premiums and the extent to which those premiums are lowered by the presence of workers' compensation). *But see* Peter Dorman & Paul Hagstrom, *Wage Compensation for Dangerous Work Revisited*, 52 INDUS. & LAB. REL. REV. 116 (1998) (disputing existence of compensating differentials).

¹⁸ While indoor smoking may technically impose some costs on non-smoking patrons and employees within an establishment, the externality at issue is only a "pecuniary" externality – *i.e.*, a third-party effect that is mitigated by the price mechanism. The mitigation here occurs because a patron (employee) adversely affected by indoor smoking will take her business (provide her services) elsewhere unless compensated by the facility owner with lower prices (higher wages). Pecuniary externalities, unlike "technological" externalities (*i.e.*, third-party effects not mitigated by a change in relative prices) do not raise efficiency concerns. As Professors Haddock et al. explained:

"Externality" is a slippery concept, one less often used to elucidate a supposed "problem" than to justify government intervention to "solve" it. The efficiency issue is not whether any third-party impact takes place—that is inevitable—but whether the appropriate marginal conditions still hold. Many externalities are

2. Costs to the Public Health-Care System

Ban advocates also seek to justify prohibitions by pointing to externalities in the form of public health-care expenditures.¹⁹ The argument here proceeds as follows: (1) smokers face disproportionately high health-care costs; (2) a portion of such costs is borne not by smokers themselves but by the public at large; (3) smokers thereby externalize some of the costs of their behavior and thus will tend to engage in “too much” smoking; and (4) smoking bans are therefore justified as an effort to cut back on the level of smoking that would otherwise exist.

This argument suffers from several weaknesses. First and most importantly, the initial premise is unsound. According to a comprehensive study in the *New England Journal of Medicine*,²⁰ smoking probably has the effect of *reducing* overall health-care costs, for smokers die earlier than non-smokers.²¹ The authors of *The Health Care Costs of Smoking* summarize their results as follows:

Health care costs for smokers at a given age are as much as 40 percent higher than those for nonsmokers, but in a population in which no one smoked the costs would be 7 percent higher among men and 4 percent higher among women than the costs in the current mixed population of smokers and nonsmokers. If all smokers quit, health care costs would be lower at first, but after 15 years they would

solely pecuniary; they change prices but do not raise efficiency concerns as long as prices still equal marginal cost. A problem arises only when prices and costs diverge, creating a non-pecuniary (or “technological”) externality.

David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 723 (1987).

¹⁹ Hanson & Logue, *supra* note 12, at 1224 (“The presence of first-party insurance can cause many of the costs of smoking to be externalized by smokers to nonsmokers or by heavy smokers to light smokers, if the insurers fail to make premium or coverage adjustments based on the insureds’ smoking choices. Any of the costs caused by cigarettes for which first-party insurance coverage exists can be externalized in this way. Those costs include increased health care expenses because of smoking-related illnesses . . .”).

²⁰ Jan J. Barendregt et al., *The Health Care Costs of Smoking*, 337 NEW ENG. J. MED. 1052 (1997).

²¹ See also J.B. Shoven, J.O. Sundberg & J.P. Bunker, *The Social Security Cost of Smoking*, in *THE ECONOMICS OF AGING* (D.A. Wise ed., 1989) (arguing that smoking may create positive externalities in the form of decreased public health-care costs, for smokers die earlier than non-smokers); W. Kip. Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J. L. & ECON. 575 (1999).

become higher than at present. In the long term, complete smoking cessation would produce a net increase in health care costs, but it could still be seen as economically favorable under reasonable assumptions of discount rate and evaluation period.²²

Moreover, even if smoking were shown to increase public health-care expenditures, the argument here would seem to prove too much. If increased health-care costs could justify government imposition of a smoking ban in privately owned places, could they not similarly justify governmental regulation of menus at fast-food restaurants or mandatory exercise regimens? Serious liberty interests would be at stake if a government were to make its citizens be healthy so as not to impose health-care costs on others.

Finally, the assumption that public smoking bans reduce the incidence of smoking (point four above) seems suspect. As discussed below, widespread smoking bans may actually increase the incidence of smoking among young people.²³ Externalities in the form of increased public health-care costs, then, likely cannot justify widespread bans on smoking in public spaces.

B. The Preference-Shaping Argument

I argued above that smoking bans are unnecessary because market processes will ensure either that patrons' and employees' preferences regarding smoking are honored or that those individuals are compensated for not receiving their preferences.²⁴ That argument assumes that individuals' preferences are unaffected by the legal rule itself.²⁵ A number of scholars have disputed the notion of "exogenous preferences."²⁶

²² Barendregt et al., *supra* note 20, at 1052.

²³ See *infra* notes 33-36 and accompanying text.

²⁴ See *supra* notes 14-18 and accompanying text, and *infra* notes 58-62 and accompanying text.

²⁵ Cf. A MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 10 (1983) ("For example, an individual's evaluation of the desirability of cleaner air is assumed not to depend on whether the legal system establishes a right to clean air. This is known as the assumption of exogenous preferences.").

²⁶ See, e.g., Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1172 (1986) (noting that "the various categories of malfunctions in a system based on private preferences justify the general conclusion that neither private nor public law should treat such

Instead, they claim that individuals' preferences regarding activities like smoking are influenced by the background legal rules themselves.²⁷ Some theorists have therefore sought to justify smoking bans on grounds that they make smokers less likely to want to smoke and/or make non-smokers more likely to appreciate smoke-free environments and thus more willing to pay a premium for such environments. In the end, neither preference-shaping argument can justify widespread bans on public smoking.

1. *Shaping Attitudes Toward Smoking*

In recent years, legal scholars have produced voluminous literature on the role of law in indirectly controlling conduct by shaping social norms and individual preferences.²⁸ Smoking bans provide one of the favorite "success stories" of those who laud the use of legal rules to change norms and preferences.²⁹ According to these scholars, smoking bans affect behavior, despite their lax enforcement, because they change the social norm regarding smoking in public.³⁰ With the advent of smoking bans, non-smokers who previously felt embarrassed about publicly expressing their distaste for ETS are speaking up. By providing a de facto community statement that public smoking is unacceptable, the bans embolden non-smokers to confront smokers who are inconveniencing them.³¹ Facing heightened public hostility toward their habits, smokers

preferences as exogenous variables . . .").

²⁷ See, e.g., Cass R. Sunstein, *How Law Constructs Preferences*, 86 GEO. L. J. 2637 (1998); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1 (1990).

²⁸ The literature is too voluminous to cite exhaustively. For scholarship reviewing the extensive literature, see STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 598-646 (2004); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 339-54 (1997); Eric A. Posner, *Efficient Norms*, in 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 19-23 (Peter Newman ed., 1998); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 904-47 (1996).

²⁹ See, e.g., Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 625-28 (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1025-34 (1995).

³⁰ See, e.g., Kahan, *supra* note 29, at 625-28.

³¹ As Professor Kahan explained:

Before the 1970s, many individuals no doubt experienced second hand smoke

are likely to revise their preferences regarding smoking. Thus, by making smoking more socially costly, the theory goes, bans reduce the number of smokers.

Of course, this is a good thing only if actual social utility is increased by reducing the incidence of smoking. Ban advocates assume that reducing smoking is welfare-enhancing for the obvious reason that smoking carries serious health risks. But ban advocates generally are not in a position to judge the cost side of reducing smoking, for they do not know the degree of utility smokers experience by smoking.³² Smokers themselves, who these days are aware of the risks of smoking, appear to believe that the benefits they experience from the activity outweigh the costs.³³ It is thus not at all clear that eliminating smoking will enhance social welfare.

But even if it were clear that society would be better off with less smoking, attempting to use smoking bans to influence social norms may not represent wise policy. Sweeping smoking bans may actually increase

as unpleasant. But because there were neither laws nor norms against smoking in public at that time, there was little these individuals could do other than silently forbear their irritation. Once even mild antismoking regulations were in place, however, it became clear that nonsmokers were entitled to be free of smoke and that smokers were the parties obliged to forbear. Consequently, irritated nonsmokers were much more likely to express their disapproval.

Kahan, *supra* note 29, at 627-28.

³² Cf. Jason Scott Johnston, *Paradoxes of the Safe Society: A Rational Actor Approach to the Reconceptualization of Risk and the Reformation of Risk Regulation*, 151 U. PA. L. REV. 747, 759 (2003) ("Smoking, overeating, hang gliding, and other risky behaviors are chosen by individuals. They are objects of consumption. Individual choice reveals that individual utility functions are such that the individuals who choose to engage in these behaviors get positive utility from so doing.").

³³ Professor Larry Lessig has rejected this deferential stance toward informed smokers' revealed preferences on grounds that smoking is addictive. He explains,

[I]f a commodity is addictive, then an individual, knowing all the relevant facts, may actually consume more of a commodity than is utility maximizing. Simply stated, because cigarettes are addictive, individuals may consume more than they actually want. Thus there may be reasons to take steps to reduce consumption below the level demanded when all facts are known—and therefore a public justification for efforts to reduce cigarette smoking below the "invisible hand of demand."

Lessig, *supra* note 29, at 1028-29 (1995). *But see* Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675, 694-95 (1988) (explaining how unhealthy behaviors, such as smoking and other addictive habits, can be utility maximizing within an intertemporal utility function and thus consistent with the rational actor model).

the incidence of smoking. A large percentage of smokers acquire the habit at a young age,³⁴ and they frequently do so because smoking is “cool.” Smoking is cool, of course, because it is rebellious. The harder anti-smoking forces work to coerce people into quitting smoking, and the more they engage the government and other establishment institutions in their efforts, the more rebellious – and thus the “cooler” – smoking becomes. Even advocates of the use of smoking regulation to alter social norms acknowledge that overly intrusive regulations may result in this sort of “norm backlash.”³⁵ As an empirical matter, then, it is not clear whether sweeping smoking bans – highly intrusive regulatory interventions – actually reduce the incidence of smoking in the long run.³⁶

2. *Influencing Willingness-to-Pay for Non-Smoking Environments*

The preference-shaping argument analyzed above focuses on the potential for smoking bans to shape the preferences of smokers (and potential smokers) by manipulating social norms. Insights from cognitive psychology suggest that smoking bans might similarly influence the preferences of non-smokers, making them more willing to pay a premium for smoke-free environments and thereby encouraging more business owners to adopt no-smoking policies.

Advocates of a laissez-faire approach to the issue of indoor

³⁴ PRABHAT JHA & FRANK J. CHALOUKKA, *CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL* (1999) (World Bank Study) (finding eight out of ten smokers in high-income countries start as teenagers while most smokers in low to middle-income countries start smoking in their early twenties).

³⁵ See, e.g., Lessig, *supra* note 29, at 1030 (“What is required for the inducements not to backfire is that punishments be proportional and that there be alternatives or accommodations for smokers.”); Sarah E. Waldeck, *Using Male Circumcision to Understand Social Norms as Multipliers*, 72 U. CIN. L. REV. 455, 501 (2003) (“If a law condemns behavior more than the average individual does, it is likely to engender backlash and resistance.”); Kahan, *supra* note 29, at 632-33 (discussing backlash occasioned by (alcohol) Prohibition).

³⁶ While it is admittedly anecdotal evidence, the history of the anti-tobacco movement in Germany in 1933-45 is consistent with the notion that overly stringent efforts to regulate smoking may encourage the behavior as a signal of resistance or rebellion. See Robert N. Proctor, *The Anti-Tobacco Campaign of the Nazis: A Little Known Aspect of Public Health in Germany, 1933-45*, 313 *BMJ* 1450 (1996) (observing that while “Germany had the world’s strongest antismoking movement in the 1930s and early 1940s, . . . German smoking rates rose dramatically in the first six years of Nazi rule, suggesting that the propaganda campaign launched during those early years was largely ineffective.”).

smoking maintain that an unregulated market will produce an optimal number of smoking and smoke-free establishments as business owners respond to the demands of patrons and employees.³⁷ If patrons and employees are willing to pay more for a smoke-free environment (via, respectively, higher prices for the business's goods and services or lower wages) than smokers are willing to pay for the right to smoke, then business owners will be motivated to ban smoking. Otherwise, they won't. Thus, there's no need for the government to force establishments to go non-smoking; the market will provide an optimal number of non-smoking facilities.

This argument assumes, though, that non-smokers' willingness to pay for smoke-free environments is unaffected by the smoking laws themselves. If the laissez-faire approach depresses the amount non-smokers are willing to pay for a smoke-free environment, then intervention in the market in the form of smoking bans may be justified.

So why might the background rules on when and where smoking is permitted affect non-smokers' willingness to pay for smoke-free environments? In recent decades, cognitive psychologists have conducted a number of experiments purporting to demonstrate an "endowment effect," whereby an individual's valuation of an asset is determined, in part, by whether or not she owns that asset.³⁸ The general finding is that people attach a greater value to things they own than they would attach to those things if they did not own them and had to purchase them.³⁹ In other words, ownership enhances subjective value.

With regard to smoking bans, ban advocates may argue that legal prohibitions effectively endow non-smokers with the right to smoke-free air, causing them to value it more than they would if they had to "buy" it.⁴⁰ If that is indeed the case, then the laissez-faire approach to indoor

³⁷ See *supra* notes 14-18 and accompanying text, and *infra* notes 58-62 and accompanying text.

³⁸ See Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L. Q. 59, 66-85 (1993) (summarizing studies purporting to provide empirical evidence of endowment effect).

³⁹ See *id.* at 68-69 (concluding that weight of experimental evidence establishes that "willingness to accept" – *i.e.*, the minimum amount one would require to give up an asset she owns – tends to exceed "willingness to pay" – *i.e.*, the maximum amount one would pay to acquire the same asset in the first instance).

⁴⁰ Cf. Robert D. Rowe et al., *An Experiment on the Economic Value of Visibility*, 7 J. ENVTL. ECON. & MGMT. 1 (1980) (purporting to demonstrate existence of endowment effect with regard to

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smoking appears troubling, for it is not, as its advocates maintain, merely a neutral policy that facilitates satisfaction of existing preferences. Rather than providing a level playing field on which privately adopted non-smoking and smoking-permitted policies can compete, it biases the outcome of competition in favor of smoking-permitted policies. Since a truly neutral market solution is really impossible, ban advocates may call for the government to weigh in on the side of public health and force the no-smoking policies that will be under-produced by the inherently biased free market.⁴¹

There are several problems with this analysis. First, there is a great deal of debate over the extent to which the endowment effect really exists and the extent to which it applies to ownership of intangible rights (e.g., the right to smoke-free air) as well as to ownership of tangible property.⁴² In addition, given the number of public establishments that have already gone smoke-free, thereby “endowing” their patrons with the right to smoke-free air, the argument is a little late in time. Non-smokers have now been exposed to enough facilities in which they have been endowed with the “right” to smoke-free air that they likely have adjusted upward their subjective valuation of that commodity (assuming endowment would, in fact, occasion an upward adjustment). Finally, the endowment effect argument would support, at most, temporary smoking bans – i.e.,

right to clean air).

⁴¹ While I am not aware of any scholar besides Ms. Peerson who has expressly articulated this argument, the argument would seem to be a logical application of the broader view that the law should interfere with private preferences where they appear to be inherently biased in one direction by the allocation of legal entitlements. See generally Sunstein, *supra* note 26, at 1172 (noting that “the various categories of malfunctions in a system based on private preferences justify the general conclusion that neither private nor public law should treat such preferences as exogenous variables [T]he nature and extent of these malfunctions will support considerable legislative and judicial intrusion into private preference structures.”); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106, 132 (2002) (arguing that, because law will inevitably shape preferences, largely because of endowment effect, law should aim to push preferences in desirable directions); Hoffman & Spitzer, *supra* note 38, at 112-13 (discussing, in general terms, how endowment effect calls for increased paternalism in allocating endowments so as to shape preferences in desirable directions).

⁴² Cf. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L. J. 2419, 2468 (2001) (noting experimental conclusion “that the endowment effect is stronger when the asset is a physical thing than when it is a financial asset”). But see Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1261 (2003) (observing that “an endowment effect has been shown to exist for [intangible] financial assets as long as they have an uncertain value”).

bans that persisted long enough to move the amount non-smokers would be willing to pay to avoid smoke from a “willingness to pay” measure to a “willingness to accept” measure.⁴³ If the justification for the bans is a need to enhance non-smokers’ valuation of smoke-free spaces so as to encourage market creation of such spaces, then the bans need not be permanent.

C. *The Risk Argument*

The first two arguments for smoking bans focus, to some degree, on citizens’ preferences: the externality argument focuses on a purported market failure that allegedly prevents the satisfaction of preferences regarding smoking, and the preference-shaping argument focuses on the law’s inevitable role in shaping those preferences. By contrast, the third common argument for smoking bans ignores citizens’ smoking preferences altogether. That argument asserts that smoking should be banned in public places, regardless of individuals’ smoking preferences, because the health risks it presents are simply too great. In other words, smoking bans are justified on risk-based grounds even if there’s no need to remedy a market failure or to correct a preference-shaping bias in the law.

Policy-makers frequently invoke excessive risk as a sufficient ground for regulating an activity, even when that activity does not involve a market failure or reflect preferences that have been skewed by the background legal rules.⁴⁴ Consider, for example, mandatory seat belt laws. There’s not much of an externality involved in the failure to wear a seat belt (the costs of the conduct are borne by the person deciding to engage in it). While mandatory seat belt laws may have the effect of altering preferences, there’s no reason to think that the background legal rule had previously biased preferences against wearing seat belts, and risk-

⁴³ Experimental evidence indicates that “the disparity between [willingness-to-accept] and [willingness-to-pay] arises very quickly,” which suggests that “preferences might change rather quickly as a result of policy changes.” Hoffman & Spitzer, *supra* note 38, at 112-13.

⁴⁴ Shi-Ling Hsu, *On the Role of Cost-Benefit Analysis in Environmental Law: A Book Review of Frank Ackerman and Lisa Heinzerling’s Priceless: On Knowing the Price of Everything and the Value of Nothing*, 35 ENVTL. L. 135, 158 (2005) (“Governmental policy also takes this approach, or should. Certain activities and substances pose a risk to human health and the environment, and if the risk is great enough, we consider regulation or a ban.”).

avoidance is the sole reason for altering citizen preferences in the first place. Thus, the predominant justification for mandatory seat belt laws, which have been enacted in every state except (“Live Free or Die”) New Hampshire,⁴⁵ is risk-reduction – not externalities or a need to shape preferences for some end other than risk-reduction. Similarly, ban advocates argue, public smoking bans may be justified solely on grounds of risk-avoidance.⁴⁶

But a purely risk-based argument likely cannot justify a sweeping smoking ban. While risk, standing alone, is sometimes deemed sufficient to justify government prohibition of private conduct, such prohibition seems appropriate only when the harm avoided is relatively great and the regulation’s intrusion on personal liberty is relatively small. Again, consider mandatory seat belt laws. The risk associated with not wearing a seat belt is huge, and the regulation’s intrusion on personal liberty is minor – no more than a slight inconvenience. Hence, the laws may be justifiable on risk-reduction grounds. Consider, by comparison, whether the government could invoke risk as a legitimate basis for banning driving after 1:00 A.M. Such behavior certainly presents a heightened risk (late-night drivers are far more likely to fall asleep at the wheel), but the magnitude of risk presented does not justify the degree of liberty intrusion occasioned by the regulation. Smoking bans look more like late-night driving bans than mandatory seat belt laws and thus likely cannot be justified solely with reference to risk.

To see why this is so, we must first isolate the relevant risk. Because public smoking bans do not prohibit smoking altogether⁴⁷ and may not even reduce its incidence,⁴⁸ the risk the bans aim to avert is not the risk to smokers themselves. It is instead the risk to non-smokers – *i.e.*, the risks associated with inhalation of ETS. The key question, then, is whether these risks are of sufficient magnitude to justify a significant intrusion on the personal liberty of private business owners.

⁴⁵ See David A. Mobley, *Revisiting Alabama’s Seat Belt Defense: Is the Failure to Buckle Up a Defense in AEMLD?*, 53 ALA. L. REV. 963, 969 (2002).

⁴⁶ See, e.g., Jody Hodgdon, Comment, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49, 53 (2004) (“Due to these health concerns, the state . . . should focus on ways to eliminate environmental tobacco smoke from all restaurants . . .”).

⁴⁷ Smokers are still free to smoke outdoors and in private places.

⁴⁸ See *supra* notes 34-36 and accompanying text.

The latest science on ETS suggests that the risks it poses cannot justify this degree of liberty intrusion. The contrary view (*i.e.*, that ETS poses major health risks) is deeply ingrained in public discourse, thanks largely to a 1993 EPA study purporting to show that inhalation of ETS causes 3,000 lung cancer deaths per year.⁴⁹ The findings of that study, however, have been severely undermined since its publication. A congressional inquiry into the methods the EPA used in the study, which concluded that ETS is a Class A (known human) carcinogen, found that

The process at every turn [was] characterized by both scientific and procedural irregularities. . . . [T]hose irregularities include[d] conflicts of interest by both Agency staff involved in the preparation of the risk assessment and members of the Science Advisory Board panel selected to provide a supposedly independent evaluation of the document.⁵⁰

The congressional inquiry further concluded that “the Agency ha[d] deliberately abused and manipulated the scientific data in order to reach a predetermined, politically motivated result.”⁵¹

The findings of the EPA’s 1993 study have also been undermined by court opinion. Charged with evaluating the Agency’s risk assessment in determining that ETS constitutes a Class A carcinogen, a federal district judge criticized the Agency’s analysis in terms that can best be described as scathing. The court concluded that the EPA

[P]ublicly committed to a conclusion before research had begun; . . . adjusted established procedure and scientific norms to validate the Agency’s public conclusion, and aggressively utilized the [Radon] Act’s authority to disseminate findings to establish a *de facto* regulatory scheme intended to restrict Plaintiffs’ products and to influence public opinion[;] . . . disregarded information and

⁴⁹ U.S. EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (1992). This study is available for download at <http://cfpub2.epa.gov/ncea/cfm/recorddisplay.cfm?deid=2835>.

⁵⁰ STATEMENT OF HON. THOMAS J. BLILEY, JR. BEFORE THE HEALTH AND ENVIRONMENT SUBCOMMITTEE OF THE COMMITTEE ON ENERGY AND COMMERCE, U.S. HOUSE OF REPRESENTATIVES (July 21, 1993), *available at* <http://ftp.demon.nl/doc/liberty/FORREST/bliley.txt>.

⁵¹ *Id.*

made findings on selective information; did not disseminate significant epidemiologic information; deviated from its Risk Assessment Guidelines; failed to disclose important findings and reasoning; and left significant questions without answers.⁵²

Thus, the EPA's finding that ETS poses a serious cancer risk, a finding that has been extremely influential in motivating state and local smoking bans throughout the United States, is simply incredible.

So how great are the health risks associated with inhalation of ETS? According to the latest and most complete scientific studies on the matter, not very. In 1998, the World Health Organization's International Agency on Research on Cancer ("IARC") published the results of a ten-year study covering so-called "second-hand smokers" in seven European countries. It found no statistically significant lung cancer risk for non-smokers who either lived with or worked with smokers.⁵³ In fact, the study's only statistically significant finding was that children of smokers demonstrated a slightly *decreased* risk of lung cancer in later life.⁵⁴

The general findings of the IARC study have recently been confirmed by research from the American Cancer Society. In its Cancer Prevention Study ("CPS1"), published in 2003, the Cancer Society followed more than 35,000 never-smoking Californians who were married to smokers. Researchers collected data on the never-smokers for thirty-nine years (from 1959 to 1998). The tabular data revealed no heightened lung cancer risk among study subjects and, in fact, showed a slightly decreased risk of lung cancer compared to the general population of never-smokers.⁵⁵ Thus, even the research from

⁵² *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. EPA*, 4 F. Supp.2d 435, 465-66 (M.D.N.C. 1998), vacated on other grounds, 313 F.3d 852 (4th Cir. 2002).

⁵³ Paolo Bofetta et al., *Multicenter Case-Control Study of Exposure to Environmental Tobacco Smoke and Lung Cancer in Europe*, 90 J. OF THE NAT'L CANCER INST. 1440, 1443-44 (1998), available at <http://jncicancerspectrum.oxfordjournals.org/cgi/reprint/jnci;90/19/1440.pdf>.

⁵⁴ *Id.* at 1445.

⁵⁵ James E. Enstrom & Geoffrey C. Kabat, *Environmental Tobacco Smoke and Tobacco-Related Mortality in a Prospective Study of Californians, 1960-98*, 326 BMJ 1057 (2003), available at <http://bmj.bmjournals.com/cgi/content/full/326/7398/1057>.

organizations likely to support widespread smoking bans concludes that ETS does not create a significant risk of cancer.

Advocates of smoking bans must therefore base their risk arguments on non-cancer risks. Some have acknowledged that the purported link between ETS and cancer is trumped up but have nonetheless maintained that other health risks justify sweeping bans. For example, Dr. Elizabeth Whelan of the pro-ban American Council on Science and Health chastised her fellow ban advocates for “threaten[ing]” their cause with “hyperbole about the likely effects of ETS” – *i.e.*, claims that ETS causes cancer.⁵⁶ Maintaining that the advocates should have “simply stated that ETS caused irritation of the eyes, nose and respiratory tract and aggravated preexisting asthma,” she insisted that “[s]urely that is enough of a reason to justify the protection of all workers” via a sweeping smoking ban.⁵⁷

Surely it’s not. As noted above, paternalistic regulations aimed solely at reducing risks, not at correcting a legitimate market failure, are justifiable only when the risk is relatively serious and the liberty intrusion occasioned by the regulation is relatively minor. Here, the potential harms at issue (a greater number of watery eyes and runny noses, and aggravation of complications among asthmatics who voluntarily patronize establishments where smoking is permitted) do not seem great enough to justify a governmental command that private business owners force their invitees to refrain from an activity that affects only other invitees. Hence, widespread smoking bans are not justifiable solely on risk-based grounds.

II. WHY A LAISSEZ-FAIRE APPROACH IS SUPERIOR

Part I of this essay attempted to rebut the arguments in favor of smoking bans. This part sets forth an affirmative argument in favor of a laissez-faire approach to the issue of smoking in public spaces.⁵⁸ For

⁵⁶ Elizabeth M. Whelan, Editorial, *Warning: Overstating the Case Against Secondhand Smoke Is Unnecessary—and Harmful to Public Health Policy*, AM. COUNCIL ON SCI. AND HEALTH (Aug. 1, 2000), available at http://www.acsh.org/healthissues/newsID.248/healthissue_detail.asp.

⁵⁷ *Id.*

⁵⁸ Recall that “public places,” as used herein, actually refers to privately owned spaces to which members of the public are invited. See *supra* note 3.

reasons explained below, such an approach maximizes social welfare (e.g., the aggregate happiness of citizens) by providing the optimal allocation of smoking and smoke-free establishments.

Controversies over smoking in public places are ultimately controversies over property rights: does a smoker have the right to fill the air with his or her smoke, or do non-smoking patrons have the right to insist upon clean air? In other words, who “owns” the air? A smoking ban effectively gives non-smoking patrons the right to the air. By contrast, the laissez-faire approach effectively permits the owner of the establishment to determine the proper allocation of air rights within his or her space. The owner may choose to give the rights to smoking patrons (by permitting smoking), to give them to non-smokers (by banning smoking); or to “split the baby” (by designating some parts of the establishment non-smoking but permitting smoking elsewhere within the space).

However owners allocate the right to air among smokers and non-smokers, there will be some “winners,” whose preferred policy is adopted and whose happiness is therefore increased, and some “losers,” whose preferred policy is rejected and whose happiness is therefore diminished. There is, in other words, an unavoidable, reciprocal harm inherent in any allocation of the right to the indoor air at issue.⁵⁹ Adoption of a smoking-permitted policy victimizes non-smokers, but adoption of a no-smoking policy victimizes smokers.⁶⁰

In light of this reciprocal harm, social welfare would be maximized if smoking policies were set to favor the group whose total happiness would be most enhanced by implementation of its favored policy.⁶¹ So, if smoking customers value the right to smoke in a particular place more than non-smoking customers value the right to be free from such smoke, that place should allow smoking. Conversely, if non-smoking patrons

⁵⁹ See Coase, *supra* note 10 (discussing the reciprocal harm involved in any dispute over legal entitlements).

⁶⁰ For a contemporary example of how a smoking ban injures smokers, see Monica Davey, *As Smoke Clears, Tobacco Maker Opens Lounge*, N.Y. TIMES, Jan. 19, 2006, at A1 (discussing effort of smoking ban advocates to shut down recently opened tobacco lounge in Chicago).

⁶¹ Professor Coase recognized this point. See Coase, *supra* note 10, at 2 (noting that the central issue is “should A be allowed to harm B or should B be allowed to harm A?” and the ultimate goal should be “to avoid the more serious harm”).

value an establishment's clean air more than smoking patrons value the right to light up, the establishment should ban smoking.

It should thus be clear why a laissez-faire approach of permitting establishment owners to set their own smoking policies will create more welfare than a ban on smoking in public places. Under the laissez-faire approach, a business owner, seeking to maximize his or her profits, will set the establishment's smoking policy to accommodate the patrons who most value their preferred policy (and thus are most willing to pay a premium to be in the proprietor's space). This will result in a variety of smoking policies at different establishments, as business owners respond to the preferences of their customers. Under a smoking ban, by contrast, business owners are not permitted to cater to smoking patrons' demands *even when* those patrons value the right to smoke more than non-smoking patrons (and employees) value the right to be free from smoke. A smoking ban, then, is less likely to maximize social welfare than a laissez-faire approach, which ensures that the right to any particular public place's air is allocated to the group who values it most.

III. CONCLUSION

Government imposed smoking bans are unwise. Considered closely, the arguments ban advocates offer to justify such bans falter. The externality argument fails because indoor smoking creates, at worst, a pecuniary externality that will be mitigated by the price mechanism. Preference-shaping arguments are weak because heavy-handed government restrictions create a substantial risk of "norm backlash." Risk-based arguments are insufficient, for the slight risks associated with ETS cannot justify the substantial privacy intrusion occasioned by sweeping smoking bans. In the end, a laissez-faire policy that would permit private business owners to tailor their own smoking policies according to the demands of their patrons is most likely to maximize social welfare by providing an optimal allocation of both smoking and smoke-free establishments.

Chairman and Members of the Committee:

I thank you for allowing me to testify on behalf of Armour Amusement in opposition to a Statewide smoking ban in Kansas. My name is Jeff Martin and I have been the Operations Manager for nearly 14 years. Armour Amusement is a vending company in Kansas City, Kansas that has already seen the negative effects a smoking ban has had. We have already lost 50% of our business from Lawrence due to their smoking ordinance.

If this bill were to pass statewide, I would see further declines in my business. I supply my clients with cigarette vending equipment and if they are forced to eliminate smoking, my equipment is no longer needed in their establishments. Not only would we lose business but we would have no other choice but to lay off more employees as well. We would see a 20-30% loss in employment, if we are even able to survive at all.

This ban would bring with it a negative impact on the entire hospitality industry in Kansas. This would cost a number of businesses a loss in customers, resulting in lost jobs and revenue. I am in strong opposition to a smoking ban for obvious reasons and I encourage you to oppose it as well.

Thank you for your time.

Jeff Martin
Armour Amusement
2500 S. Mill St
Kansas City, Kansas 66103



SUBMITTED TESTIMONY

TO: The Honorable Jim Barnett, Chair
And Members of the Senate Committee on Public Health and Welfare

FROM: Whitney Damron
On behalf of:

- Flint Oak, LLC
- Flint Hills National Golf Course

RE: SB 25 – An Act concerning crimes and punishment; relating to smoking.

DATE: January 29, 2009

Good afternoon Chairman Barnett and Members of the Senate Committee on Public Health and Welfare. I am Whitney Damron and I respectfully submit these comments to you today on behalf of Flint Oak, LLC, which are also supported by Flint Hills National Golf Course (which is owned by Mr. Tom Devlin, who is a partner in Flint Oak).

Flint Oak is a world-class hunting, fishing and shooting sports recreational facility located in Elk County, approximately 80 miles east of Wichita. Flint Oak was founded and developed by Ray and Winona Walton in 1980 and since that time, has grown to become one of the premier facilities of its kind in the United States with an international clientele. In January of 2007, a group of six investors from Wichita purchased Flint Oak and have continued to reinvest into its infrastructure and expand its operations.

The facility includes thousands of acres of hunting land, a signature fishing lake, a championship sporting clays course, lodging for more than 80 guests, corporate meeting rooms, a large dining area and a bar where smoking is allowed.

Flint Oak is a semi-private club for its members and their guests, who are from Kansas and throughout the United States. Flint Oak hosts a wide range of charitable events throughout the year and also allows non-members to utilize the non-hunting aspects of the property from April 1 through August 31 (i.e., sporting clays, fine dining, lodging, etc.).

Flint Hills National Golf Course, owned by Tom Devlin, is considered one of the finest golf courses in the United States with members like Flint Oak, from Kansas and throughout the U.S.

Public Health and Welfare

Date:

01/29/09

Attachment:

14

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Specifically, as it relates to SB 25, the ownership group of Flint Oak and Flint Hills National Golf Course would respectfully suggest that smoking ordinances are best left to local units of government so that accommodations can be made for certain exemptions when deemed appropriate by locally elected officials and/or the voters of a city or county. SB 25 recognizes the appropriateness for certain exemptions to a statewide ban on smoking, but the bills does not take into consideration all of the possible exemptions that a local community might be willing to consider or accommodate.

Such exemptions might appropriately include private and semi-private clubs, Class A liquor licensees, bars, restaurants and clubs after a certain time of day (i.e., 4:00 p.m.), small businesses or as approved or allowed through local ordinances.

Flint Oak attracts a clientele from throughout the United States who appreciate a quality hunting and fishing experience, along with superior amenities, fine dining and the opportunity to enjoy a fine cigar or other tobacco products at the bar following activities in the field, on the fishing lake, on the sporting clays course or simply after a fine meal. Flint Oak constantly seeks input from their customers and the ability to enjoy cigars in the bar is something they do not want to see abrogated by a state ban on smoking.

Members of properties such as Flint Oak and Flint Hills National pay significant annual membership fees and much more for use of the facilities. In short, they choose to belong and be a member – they know what they are buying into before they write the check, so to speak. Accordingly, as a semi-private club, the owners of Flint Oak and Flint Hills National respectfully suggest it is appropriate to exempt them and similar facilities from imposition of a statewide ban on smoking or provide discretion to local units of government for consideration of such exemptions, as not to do so will have a detrimental impact upon their membership and ultimately their revenues.

Included with my testimony is a listing of all jurisdictions in Kansas who have adopted some form of a smoking ban or restriction. This list was obtained from *Wikipedia*, the online encyclopedia, so it not necessarily a scholarly document. However, it is illustrative of the wide variety of smoking ordinances that have been established to date and the acceptance of certain exemptions in many of those communities.

Thank you for consideration of my comments.

WBD

www.flintoak.com

www.flinthillsnational.com

Attachment

List of smoking bans in the United States

From Wikipedia, the free encyclopedia

www.wikipedia.org

http://en.wikipedia.org/wiki/List_of_smoking_bans_in_the_United_States#.C2.A0Kansas

Kansas

- **No statewide smoking ban.** The Kansas Legislature twice has **rejected** a statewide smoking ban, once in January 2007 and again in August 2007.^[27] A third attempt **failed** when it was not passed by the end of the legislative year in May 2008.^[28] In 2007, upon a bar owner's challenge to Lawrence's smoking ban, the Kansas Supreme Court ruled that cities and counties may enact smoking bans which are more stringent than state law.^[29]
- Abilene, August 29, 2005, banned in all workplaces, except bars and bowling alleys.
- Derby, January 1, 2009, banned in all workplaces; exempts restaurants and bars unless Wichita passes a smoking ban affecting such establishments.
- Emporia, March 4, 2009, banned in all workplaces, including restaurants and bars
- Fairway, January 1, 2006, banned in all public places.
- Garden City, January 8, 2007, banned in all restaurants and bars, and private clubs. Exempts private offices.
- Harvey County, January 1, 2008, banned in all workplaces, including restaurants and bars in unincorporated areas of Harvey County, and within 20 feet (6.1 m) of the entrances to those places.^[30]
- Hutchinson, December 16, 2008, City Council **rejected** a ban on smoking in all workplaces, including bars and restaurants.^[31]
- Unincorporated areas of Johnson County, April 1, 2007, banned in all enclosed workplaces^[32]
- Lawrence, July 1, 2004, began a ban on smoking in "all enclosed public places" within the city.
- Leawood, January 2, 2008, was the 2nd Kansas City area municipality to agree to the KRHA model smoking ban ordinance, similar to the ban passed in Overland Park. It bans smoking in all places, except for outdoor patio areas of restaurants.
- Manhattan, January 3, 2009, banned in all enclosed workplaces.
- Mission, September 1, 2008, banned in all enclosed workplaces, including bars and restaurants; also banned within 20 feet of entrances and windows of such facilities^[33]
- Mission Hills, May 2007, **rejected** smoking ban^[34]
- Newton, January 1, 2008, banned in the indoor areas of all public workplaces, including restaurants and bars, and within 20 feet (6.1 m) of the entrances to those places^[35]

- North Newton, January 1, 2008, banned in the indoor areas of all public workplaces, including restaurants and bars, and within 20 feet (6.1 m) of the entrances to those places^[36]
- Olathe, November 16, 2006 banned in all public places, including restaurants, bars, and workplaces. Private clubs and fraternal clubs exempt.
- Ottawa, June 1, 2008 scheduled to be banned in restaurants. Bars, fraternal and private clubs exempt. Presented to Ottawa City Commission by Youth in Government in July 2007.
- Overland Park, January 2, 2008, banned in all workplaces, including restaurants and bars, private clubs, and bowling alleys. Exempts outdoor patio areas of restaurants.^[37]
- Prairie Village, January 2, 2008, banned in all workplaces; exempts bars and restaurants are unless all neighboring cities pass bans (not currently met, because Kansas City, Missouri, Mission and Mission Hills do not have bans affecting restaurants and bars in effect).
- Roeland Park, May 17, 2006, banned in all workplaces, including bars and restaurants.
- Salina, 2002, banned in all restaurants between 5am and 9pm. Ban only applies to restaurants.
- Sedgwick, November 20, 2007, **rejected** ban on smoking in bars and restaurants by unanimous decision of the city council^[38]
- Scott City, January 2004, **rejected** ban on smoking in bars and restaurants^[39]
- Shawnee, January 2, 2008, banned in all workplaces including restaurants and private clubs, but exempting 25% of hotel rooms and any bars which derive less than 33% of their gross annual revenues from food sales.
- Westwood, February 1, 2008, banned in the indoor areas of all public workplaces, including restaurants and bars, and within 25 feet (7.6 m) of the entrances to those places.^[40]
- Wichita, September 4, 2008, prohibited in places of business where minors under 18 are allowed. Includes restaurants, retail stores, office buildings, medical facilities, daycares, theaters, banks, bars, manufacturing plants, vehicle repair shops, public areas of hotels and motels, wholesale business services, warehouses and home-based businesses. Businesses may allow smoking if they have smoking rooms enclosed on all sides by solid, impermeable walls or windows extending from the floor to ceiling and must have self-closing doors and maintain a negative air pressure (meaning more air is exhausted from the room than is directly supplied by the heating, ventilation and air conditioning (HVAC) system) and cannot be returned to the HVAC system. No one under 18 can be allowed in such smoking rooms.^[41]
- Winfield, January 2, 2008, banned in all enclosed workplaces.
- Wyandotte County (containing Kansas City, Kansas), February 16, 2009, banned in all enclosed workplaces, including bars and restaurants; exempts private clubs, retail tobacco shops, casinos, racetracks, and any business which pays \$250 per year to obtain a license to allow smoking^[42]

TESTIMONY

TO: The Honorable Jim Barnett, Chair
And Members of the Senate Committee on Public Health and Welfare

FROM: Kurt Van Keppel
President, XIKAR, Inc., a Kansas Corporation

RE: SB 25 – An Act concerning crimes and punishment; relating to smoking.

DATE: January 28, 2009

Chairman Barnett and Members of the Senate Committee on Public Health and Welfare: I am Kurt Van Keppel, President, founder and co-owner of XIKAR, Inc., the United States' largest cigar accessory brand, a company which Scott Almsberger and I started in 1996, with a \$5000.00 investment out of our garages in Shawnee, Kansas.

XIKAR is considered “the” accessory brand of the cigar trade; we are known as the experts in cutting, lighting, humidifying, storing and transporting cigars. We employ 22 people at our corporate offices, twelve additional sales reps across the USA and two others overseas. XIKAR exports 20% of our sales to more than 20 nations. And, I am proud to say that in just over 10 years, we have built this business from a startup with no revenues to a company with revenues in excess of \$6 million, adding payroll and significant tax revenue to the local economy.

XIKAR holds a warranty registration database of more than 30,000 consumers. More than 600 of these cigar smokers, who own a XIKAR product AND who registered their warranty, live in the State of Kansas.

Cigar smoking's history began on this continent, and was integral to our nation's formation, economic development and settlement. Cigar smoking is more than a pleasure. It is known and enjoyed as a celebration, a respite, a “one hour vacation”. Above all, it is a legal, pleasurable and non-narcotic way to relax, facilitate camaraderie, where a “plumber and a president can be friends”.

Regarding SB 25, we implore you to permit smoking ordinances to stay in the hands of local government, who understand the needs of their communities. Only local government can balance the needs the community at large, in this case the majority, with the rights of smokers, a minority enjoying a legal product.

A statewide ban on smoking will usurp the legal rights of more than 600 known *cigar* smokers, and will damage the good business of XIKAR, Inc. and our four retail customers in Kansas. A statewide ban will abrogate the right of Kansans to congregate, communicate and enjoy each other's company while enjoying the consumption of a legal product that facilitates that very gathering.

Thank you for your kind attention. We sincerely hope you will return this bill to the local communities.

Sincerely yours, Kurt Van Keppel

Public Health and Welfare
Date:
Attachment:

01/29/09

Thomas Devlin Testimony
Flint Hills National Golf Club
Senate Public Health and Welfare Committee
January 29, 2009

My name is Thomas Devlin and I am the owner of Flint Hills National Golf Club.

I appreciate the opportunity to talk with you today and express my strong opposition to legislation which would ban smoking in most public places including bars, taverns, clubs and other adult venues. This would include, of course, the bar facility at our golf club.

As you may or may not know, the profits from our bar business are extensive as compared to other operations at the course. At this particular time of recession and reduced profits overall, forcing a smoking ban on so many of our regular customers would basically lead to even more financial stress on our club which is an important tourist attraction as well as gathering place for local golfers.

For the record, I hope that all legislators will fully understand the importance of my customers who smoke to my overall business. On any given afternoon and into the evening, smokers can account for up to 40 per cent all patrons. They are following a long tradition among golfers, who come into the bar following a round of golf to talk over their scores or play cards.

What I have learned through the years is that my customers who smoke buy more food and drinks. This is simply because patrons who smoke stay around longer and usually purchase more than nonsmokers. So, if a smoking ban is imposed by the state legislature, it would place me in the terrible situation of having my best customers automatically spending less.

I will guarantee that a smoking ban will cut down on my customers who stay at the bar. But also there are other members who don't happen to play golf on that particular day that often come in after work for drinks and a card game. Losing a big portion of them to a state imposed smoking ban would be just another financial hurdle to overcome.

As a club manager, I believe that imposing a smoking ban is an infringement of private property rights which we have always enjoyed in Kansas. If a patron does not wish to be in a smoking area, there are plenty of tables in our other facilities which are smoke free and where drinks are available.

I urge members of this committee and all legislators as well to vote against an all-encompassing statewide smoking ban.

January 29th, 2009

Dear Senate Committee Members,

On behalf of Freestate Business Rights Coalition I wish to voice my objection to Senate bill #25. Freestate Business Rights coalition is a group of over 70 small business owners that own and operate bars, taverns and casinos. They are all privately owned and operated.

We would like for you to consider looking at the Wichita ban which is very considerate of privately held business and the citizens as a whole. Together with several other organization we have proposed a compromise bill SB #81. We hope that you will consider the small businesses in your deliberations. In these tough economic times please don't make it any harder on the small guys.

Respectfully Submitted,

Cathy Nugent
Free State Business Rights Coalition

January 29, 2009

Mr. Chairman and Members of the Senate Judiciary Committee:

My name is Kim Moffitt and I am a taxpaying resident of the great state of Kansas. Today I respectfully ask that you oppose Senate Bill 25. A smoking ban sounds like a great idea for sound bites, but the negative economic impact it will have on our fellow citizens of Kansas will be astronomical.

I own a bar on the Missouri/Kansas border called Twin City Tavern. Although my bar is in Missouri, we will be negatively impacted by a statewide ban in Kansas, my largest pool of customers is from KU Medical Center which is across the street.

Like me, many of my employees live in Kansas and work in Missouri. Since the smoking ban has taken effect in Kansas City my business has declined over 45% indoors. But my business under my tent on my deck has increased substantially. There are times when my bar has 2 or 3 people in it and I have 40 people shoved under the tent watching a game on the patio. While you may think this is not a problem and has not impacted the business you are wrong. I have witnessed several of my regular patrons experience severe colds suffer through miserable flu attacks and have been sicker this winter than ever before.

So when the proponents claim it cuts down on the health care bills they are completely wrong, forcing clientele to stand in zero degree weather to smoke has created another problem that is very measurable. Please consider this hypocrisy when you are deciding on sending elderly, health compromised individuals out into the zero degree weather in order to enjoy their favorite nightspot.

Please oppose Senate Bill 25. Thank you for your time and consideration on this very important matter.

Kim Moffitt
4728 W. 61st St.
Mission, Kansas 66205

January 29, 2009
Testimony on SB 25
Senate Public Health and Welfare Committee

My name is Tom Conroy and I own Conroy's Pub in Lawrence. Conroy's Pub has a capacity of 214 and can be described as a family friendly restaurant with a full menu of homemade food, kid-friendly amusement machines, and we have a side room which many families and local businesses use for banquets and meetings. I have never smoked in my life, so I am not a partisan on the issue.

The smoking ban issued in Lawrence has been devastating to my business, and ended a soon to be record year. It has resulted in a drop in sales of 30%-50% on most days. My total number of employees has dropped from 27 to a current number of 13, thus eliminating 14 Lawrence jobs in my place alone. My wife and I work most of those shifts in order to make ends meet, and we do very little hiring.

I resent very much the small group of people who convinced three people on our commission to deny citizens and business owners the freedom of choice. I also resent this small group of people (in my case, a group called "Clean Air Lawrence") telling city officials and the media how smoking bans actually increase business. I know of no owner/manager in my profession in Lawrence that has experienced an increase in sales since the ban, and I resent these people lying to government officials saying the opposite. They seem more interested in their own personal legacies than in the facts. All one has to do is check their website. The list of current members contains none from the food and beverage industry. Many others and I would gladly join their organization and be proud spokespeople if their cause was good for business. It is not, and two years later, it has not recovered.

There is so much more to say, but I will end by telling you I'm tired of these groups who distort facts with religious fervor in an effort to save the world, save people from themselves, and deny other people's freedoms as they see fit. I am not political on this issue. Whatever is good for business and gives people the freedom to choose is good with me. A smoking ban, in my experience, is bad for business.

Tom Conroy
Conroy's Pub
3115 W.6th St. Suite D
Lawrence, Ks 66049
785 856 3663



January 28, 2009
Regarding SB 25

My name is Chuck Magerl, and I have a curious experience with the questions of smoking accommodation, since one of my restaurants in Lawrence, WheatFields bakery, was non smoking, and one of them, Free State Brewery was open accommodation. My academic training was as a scholarship student in pre-med biology, as well as civil engineering and water resources. Those studies confirmed for me the need to search for connections in science and public health and safety issues. As a disclaimer, I have smoked perhaps a dozen cigarettes in my life, and have neither paid money to, nor received money from any tobacco company. I've never allowed the sale of tobacco at any of the businesses I have operated in Lawrence for the past 30 years. I have made sure that my retirement funds are not invested in tobacco companies. I am not just a nonsmoker, but also anti-smoking, though certainly not anti-smoker. With this background I was selected as one of 7 members on the Lawrence Task Force on Smoking. As you may guess, it was a massive undertaking.

My personal belief is that smoking stinks, it burns your eyes, irritates your nasal passages and fouls your hair and clothes, and for smokers, it cuts your life expectancy by 7 to 10 percent. If smokers quit, the health of Lawrence will improve, but it most likely won't have much of any impact on the mortality of us nonsmokers, and therein rests my opposition to this bill.

The reality behind the Lawrence smoking ban is that it is designed to abate the nuisance for us nonsmokers, and hopefully entice a few smokers to quit, so they can reap the health benefits of a nonsmoking lifestyle. Government has no role in accommodating personal preferences at the expense of private businesses, especially when a person has many options to enjoy a smoke free environment if that is important to him.

I'm the father of two girls, who have spent many hours over the years at my restaurants, healthy, intelligent kids, the oldest has been on the principal's honor roll through junior high and high school, every semester, and her younger sister is matching her pace. To suggest that I would risk their health, my wife's health, my health or the health of the 110 employees I care for, is simply wrong.

I appreciate Sen. Barnett providing a forum for the second hand smoke issue facing our state. This consideration is an example of one of the wonderful features of Kansas: true, broad based care for the future of our state. Sometimes wise and principled individuals may find themselves in disagreement on plans of action, and the smoking ban issue is a grand example. I believe that our democracy is posited on a Socratic "educated masses", not a deferral to a Platonic "enlightened ruler".

My assumption is that members of this committee and myself both want the same thing, responsible hospitality and healthy lifestyles. We want moderation, we want healthy citizens. My commitment is to life, liberty and the pursuit of happiness, and the individual's right to make personal choices based on informed decisions.

I am not a tobacco user, and as a member of the Mayor's Task Force, I've had quite a bit of exposure to the implications and problems associated with tobacco use. I also am an advocate of programs promoting

Public Health and Welfare

Date:

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abstinence from tobacco products as a healthy and better choice for members of our society, especially youth. I have instructed my smoking employees on the real dangers of a smoking lifestyle.

The two thoughts that seem to encapsulate this discussion most completely come from some highly esteemed gentlemen. The first came on a wonderful Public Radio broadcast with the noted surgeon Dr. Michael DeBakey. The summation of his lengthy interview was the thought, "I hope we realize that our health and our freedom are the two most valuable things we have." The other item that resonates with this discussion is the often quoted English Prime Minister Benjamin Disraeli's quip, "there are three kind of lies: lies, damned lies and statistics."

As I reviewed these statistics and reports for the Task Force, several perplexing questions arose about the threat level of second hand smoke. The first thing I noted is the fact that of the 18 developed nations with a greater life expectancy than the US, 15 have greater rates of smoking, and by extension, greater exposures of secondhand smoke (sometimes much greater, e.g. Japan). Something else may be a factor in the US life expectancy than secondhand smoke?

Additionally, there was the troubling report of a huge drop in heart attacks in Helena, Montana during a brief smoking ban. It was initially reported that heart attacks dropped 60 percent (later changed to 40 percent). According to the U.S. Centers for Disease Control and Prevention, smoking accounts for about one-fifth of heart disease deaths. So even if every smoker in Helena quit (which no one claims happened), you would not get anything like the drop that was attributed to the ban.

If smoking bans cut heart attacks in half, it's odd that no one had noticed it before, especially in big cities such as Los Angeles and San Francisco, where an effect of such magnitude should have been obvious. Indeed, why didn't the authors study hospital data in places within the State of California where the samples would have been much bigger and the results more meaningful, instead of focusing on what one author calls "a tiny little community in the middle of nowhere"?

California's ban on smoking in workplaces took effect in 1995; it was extended to bars in 1998. Yet according to CDC data, the number of heart disease deaths in California did not drop substantially in either year compared with national trends. If smoking bans cut heart attacks in half, surely the effect would have shown up in these numbers.

The oddity of the report from Helena is further called into question by the results from the Western New York health study, published recently. This was an extensive study over 5 years, with a team of researchers under the auspices of the Department of Social and Preventive Medicine, School of Public Health and Health Professions, of the University at Buffalo,

They reported their results: "After adjustment for covariates, exposure to SHS (second hand smoke) was not significantly associated with an increased risk of MI (myocardial infarction). In the absence of high levels of recent exposure to SHS, cumulative lifetime exposure to SHS may not be as important a risk factor for MI as previously thought."

In my own community of Lawrence, when I extrapolated the often repeated number of 50-60,000 deaths each year from ETS, it suggests that in my 35 years in Lawrence there were 500-600 people who died from second hand smoke. I've known people who have been murdered, people who have drowned, people who have been killed in car accidents, but not one who died from second hand smoke. My doctor, who has practiced in Lawrence longer than 30 years, could not cite any cases either.

I believe government has a legitimate role in health and safety issues. I accept that appropriate government intervention must be considered in regards to worker health and secondhand smoke. In fact, a specific government agency is responsible for all these concerns, and is mandated to seek action to remedy safety and

health problems. That agency, however, is not our hard working citizen legislators of the Kansas Senate, but rather the expert staff of the Occupational Safety and Health Administration of the Federal government.

For five years OSHA reviewed studies and testimony on the workplace impact of secondhand smoke. They factored the components of smoke exposure based on their tabulated data for air contaminant substances, and the established Permissible Exposure Levels. Their conclusion? "Field studies of environmental tobacco smoke indicate that under normal conditions, the components in tobacco smoke are diluted below existing Permissible Exposure Levels. It would be VERY RARE to find a workplace with so much smoking that ANY individual PEL would be exceeded."

As continued calls came to OSHA from state and local governments seeking information on the workplace threat of secondhand smoke, OSHA reiterated their findings in 2003. "Although OSHA has no regulation that addresses tobacco smoke as a whole, 29 CFR 1910.1000 limits employee exposure to several of the main chemical components found in tobacco smoke. In normal situations, exposures would not exceed these PELs." It's within the scope of this legislative body to act as you wish, but you should know that some well informed experts disagree with the ban approach.

As a responsible and caring business owner, I am concerned about the employees, guests and my family, who frequent my businesses. Using the best data from KDHE, CDC and the American Cancer Society, the statistics suggest the possibility of a case of lung cancer with a non-smoking employee for every 949 years we are in business. I know some people would suggest that any risk is too much. That's the basis for the famous quip of a former Surgeon General of "no safe level of secondhand smoke." As an individual facing risks, the only sane response is to analyze the risk factors and make your own decisions based on the concerns you value.

That what we have to do in our businesses every day as well. The bar and restaurant business is fiercely competitive, and the people running venues are smart enough to do everything they can to increase their bottom line. If banning smoking really were good for their business, wouldn't they have discovered it by now, and wouldn't that make laws mandating bans unnecessary?

Could we have done a better job of abating the smoke nuisance at Free State Brewery? Absolutely. One of the most positive aspects of my year of research with the Task Force has been my understanding of the advancements in ventilation and filtration technology that would greatly enhance the comfort level of our guests and staff. I was prepared to invest \$30-40,000 in updated heat recovery ventilation systems to make the Brewery a more hospitable and relaxing environment for people to enjoy our food and beer. And that would benefit us all, since we know moderate alcohol consumption decreases heart disease by 40 percent.

For some very legitimate reasons, some activists have declared war on tobacco companies. Unfortunately, frustrated with losing the direct confrontations, they have taken a different attack. This bill would conscript hundreds of small, independent Kansas businesses in a proxy war against the tobacco companies. And that's too bad. It's not really our war.

If you wish to ban smoking outdoors, please realize you may be leaving science behind in your rationale. A newspaper article from California reported on the debate there about outdoor bans. One insight came from Dr. Michael Siegel:

"Today's anti-smoking crusaders, he says, have lost their moorings in science by advocating smoking bans in the last refuge for smokers — the great outdoors. 'I've been working in this field for 21 years,' said Siegel, who earned an M.D. from Yale University and a master's degree in public health from UC Berkeley. I never understood that the goal was to get rid of smoking so that no one even gets a whiff of smoke.' 'It's a grass-roots social movement that's been so successful that it doesn't know where to stop,' Siegel continued. 'It's getting to the point where we're trying to protect people from something that's not a public health hazard.' At risk, he and other like-minded tobacco control advocates assert, is not only the credibility of public health officials, but the undermining of a freedom prized in democracies — do as you wish so long as you don't harm others."

Dr. Siegel went on to comment that he believes there is not sufficient scientific evidence to conclude that there is any substantial public health risk posed by allowing smoking in most open outdoor environments where people can move freely about.

If this committee believes that smoking is devastating to the health of smokers, and that tobacco smoke is devastating to the health of non-smokers, then I urge you to have the courage to ban the sale of tobacco in Kansas. Banning smoking in businesses will not address the greatest venue for second hand smoke exposure, private homes and automobiles. Why take timid, half way measures? This is not a new idea for Kansas, we banned tobacco for several decades in the Carry Nation years, we could do it again. Take the stance of forsaking the \$190 million in revenue that Kansas gathers from tobacco sales. If you can't take the step of banning the product, then please have the respect and decency to allow Kansas businesses and Kansas citizens the personal intelligence to decide how to balance the use of a legal product on private property. The innovations of Kansas businesses should not be underestimated.

My regard for cigarette smoking in restaurants is highlighted in the swimming pool analogy. Having a non-smoking area in a restaurant is like having a non-peeing area in a swimming pool or lake. It may be obnoxious, it may be gross, but it's something we have all been exposed to, and the health risk is virtually non-existent. Filtration and dilution is a wonderful thing. Like they taught us in pre-med biology, the poison is in the dose.

Thanks for taking the time to consider my thoughts. I truly do not envy the task ahead of you, and I wish you extraordinary wisdom and courage in the weeks to come.

Chuck Magerl
(785)843-4555
cm@freestatebrewing.com

To help clarify some of the comments that have been advanced in this discussion of smoking bans, and aspects of health and economics, I've provided these brief comments.

The health inspection analogy is often cited as a comparable to the imposition of smoking restrictions. For the most part, health inspections are intended to go "behind the scenes" at food service operations to determine risks that patrons would not be generally able to see on their own. If there are problems with flies or rodents in the dining area, the guests can make their decision to stay or go based on what they can see. The health inspectors study the conditions in the prep and kitchen areas to assure guests that official eyes are able to access areas that the public may not be free to peruse. With smoking, the guests are able to recognize and monitor what they feel comfortable with in a dining room setting, it's detectable to the guests if it's something they are concerned about.

The often cited statistic of 50,000 deaths per year as a result of second hand smoke exposure is the same as the citation of deaths as a result of air pollution from coal burning power plants. So, the theoretical risk of breathing second hand smoke in a building is the same as the theoretical risk of breathing air outdoors. I personally cleaned the windows at my restaurant, and invariably prior to our smoking ban, the windows were dirtier on the outside than the inside. I've always figured that's the way it is in Kansas.

On the topic of asthma, often mentioned in second hand smoke discussions, the data from California offers some curious questions. Cotinine is a metabolite of nicotine, which is often used as a detection marker to assess smoking exposure, most particularly in the life insurance industry to determine if a professed non-smoker is truly what they say. As a result of the California smoking ban, the cotinine detection results reported in the general population decreased 75 percent. Over the same period, asthma cases went up 60 percent. There could be some time delayed factor in asthma development, but even prior to the all out ban, smoking levels in the state had been declining. A more likely possibility is that the asthma trigger is not strictly associated with tobacco smoke.

You have probably heard the comment that there is no safe level of second hand smoke. This is a stunning emotional comment, but not a credible scientific statement. The comment is based on the possibility that a small amount of exposure could potentially damage a single cell.

By this reasoning, any exposure to any carcinogen could be said to increase the risk of cancer. By this reasoning, the CDC should also be warning the public that:

- A single chest X-ray causes cancer.
- Being in the sun for thirty seconds causes cancer.
- Breathing in diesel fumes for ten seconds causes cancer.
- Eating peanut butter causes cancer.
- Eating a single char-broiled burger causes cancer.
- Drinking a sip of chlorinated water causes cancer.

In fact, just the process of living every day could be said to cause cancer, since there is always damage being done to our cells that could potentially trigger cancer. The body has defense mechanisms that repair this damage constantly. This is the reason why it takes more than a single exposure to cause cancer. The exposure has to overwhelm the body's ability to repair the damage.

Dr. Micahel Siegel has written that the Surgeon General in his press conference misrepresented the findings of his own report, since the report mentioned nothing about brief secondhand smoke exposure causing heart disease and lung cancer.

Simon Chapman, editor of the influential journal of the anti-smoking movement, Tobacco Control, wrote a scathing opinion piece in the journal called, "Banning Smoking Outside is Seldom Ethically Justifiable."

Prohibitions on outdoor smoking "push the envelope of tobacco control into areas where questions need to be asked to ensure tobacco control policies are firmly anchored to scientific evidence," Chapman wrote, "and especially concern those who value the freedom of individuals to do what they please to the extent that this does not harm others."

Overall, tobacco smoke is such a miniscule fraction of air pollutants that it's usually disregarded in air contaminant inventories, said C. Arden Pope, an air pollution expert with Brigham Young University in Utah.

"Most of the time, it's so small we don't even bother trying to measure it," Pope said. Furthermore, he added, smoke from other sources, such as wood fires, barbecues and burning leaf litter, waft for waft is as hazardous to health as secondhand smoke.

To ban smoking outdoors, as this bill proposes, becomes a game of irrational increments. What is the difference between smoking 10 feet beyond a door or window, smoking 8 feet beyond, or 25 feet beyond?

As a non smoker, I'm rather grateful for smokers. In spite of the conventional wisdom, smokers are helping me out by dying earlier, reducing the draw on Social Security and Medicare. And lung cancer is not really a very expensive medical proposition. It's not too drawn out, and the intervention costs are rather limited. When people cite the cost that smoking places on society, the bulk of the cost is listed as loss of productivity and earning power. Those numbers are based on the idea that the smokers are earning wages of \$85,000 a year and lose that money that they would have earned between dying at age 74 rather than age 83. I guess I'm traveling in the wrong circles, since I don't know all that many 80 year olds still in the work force and earning \$85,000 per year. (I'm not a university type.) Really, I don't see how we could even count that as a loss of productivity, since if the job was worthwhile, I assume the old dead guy would be replaced by a younger person at a lower pay rate, resulting in better productivity numbers for the economic reporters.

There are some wise and scientifically credible ways to address air quality concerns within private businesses in Kansas. It would be wonderful to advance that science with a better vehicle than SB 25. Thank you for your time and consideration.

Chuck Magerl
Free State Brewing Company
WheatFields Bakery
785-843-4555
cm@freestatebrewing.com

Name: Michael Siegel

Location: Boston, Massachusetts

I am a physician who specialized in preventive medicine and public health. I am now a professor in the Social and Behavioral Sciences Department, Boston University School of Public Health. I have 20 years of experience in tobacco control, primarily as a researcher. My areas of research interest include the health effects of secondhand smoke, policy aspects of regulating smoking in public places, effects of cigarette marketing on youth smoking behavior, and the evaluation of tobacco control program and policy interventions.

December 13, 2006,

The only aspect of my previous commentaries which I am having some trouble with is my belief that the deception of the public may be inadvertent, due to simple, innocent mistakes. I no longer feel that is a viable explanation for what is going on. My opinion now is that this is basically a deliberate attempt to mislead the public into thinking that secondhand smoke is far more dangerous, on an acute level, than it actually is.

While I share the concern about educating people about the hazards of secondhand smoke and promoting policies to protect them from these hazards, I do not share the conviction that the ends justify the means and that misleading people is acceptable as long as the ultimate goal is a noble one. Deceiving people, with the intention of promoting a favored policy, is wrong. What we are observing is unethical behavior within the anti-smoking movement.

For the details, view - www.tobaccoanalysis.blogspot.com

Ban the bans

By JAY AMBROSE
Scripps Howard News Service
21-MAR-06

Colorado is joining 12 other states in banning smoking in restaurants and bars, as if customers and workers couldn't decide for themselves if they wanted to spend time where tobacco fumes reside, and as if the owners of these establishments were something less than American citizens whose freedoms should be respected.

The legislators cannot be bothered by such trivialities _ self-accountability, ha! _ because they are too busy pretending they are on a noble life-saving mission. It doesn't dampen their enthusiasm to find they are widely applauded by a majority of their constituents who are non-smokers with easily offended nostrils and who are probably mostly ignorant of the most exhaustive research project ever completed on secondhand smoke.

The study involved 118,000 Californians. It followed their health history for four decades, and was conducted by highly respected scientists and published in the highly respected British Medical Journal. Here is what it said: There is no evidence of a "causal relationship" between "exposure" to tobacco smoke in the air around you and death. A "small effect" cannot be ruled out, the scientists reported, but that's it. Period.

On the other side is a once-ballyhooed 1993 "meta-analysis" _ a study of a number of studies _ by the Environmental Protection Agency. It didn't bother to protect the truth.

Careful commentators and even a court of law concurred that the study violated widely accepted statistical methods to arrive at conclusions the EPA had decided beforehand were in the public's best interests. It did not finally demonstrate that passive smoke causes cancer anymore than some more recent studies have shown that smoking bans in Helena, Mont., and Pueblo, Colo., dramatically decreased heart attacks.

The Helena study has been pretty thoroughly debunked by now. Its sample was tiny, the research effort was anorexic and the study didn't account for a similar decrease in a year prior to the ban. On the face of it, quick and substantial declines in heart attacks after a ban such as the one in Pueblo are much less likely to have a connection with the ban than to be a reflection of normal statistical ups and downs. This probability is brought home by a study of the heart-attack drops after smoking bans in states with a combined population of tens of millions, not in one community of tens of thousands. The finding? There was no overall drop.

Secondhand smoke almost certainly can have deleterious health consequences, but what both common sense and science tell us is that the extent of the threat depends on how concentrated the smoke is and whether you are sucking it in day after day, year after year. On the basis of testing, the Occupational Safety and Health Administration says it is rare to find a nook or

cranny in any workplace with concentrations thick enough to be deemed dangerous.

None of the above is difficult to discover for anyone with access to the Internet and an inclination to get at the facts, raising the question of what might be going on with all these state and community bans, some of which even deny people the chance to light up outside.

It's politics in part _ as legislators know, non-smoking voters love smoke-free zones _ but it is also zealotry and a new Puritanism. Many anti-tobacco crusaders want so badly to waste this weed that they close their eyes to any argument that might get in the way, and great bunches of morally indignant modernists are intent on imposing their sophisticated values on everyone else, one of them being thou shalt not smoke.

People shouldn't, of course, not if they care for their physical well-being and longevity. But while it is fine and good to scorn smoking and to remind people of its cruelties, it is not so good for governments to engage in sledgehammer coerciveness with little or no regard for individual self-determination, and certainly none for what science tells us.

Telling the truth about smoking has caused millions to quit the habit and any number of private concerns to enforce their own restrictions. We don't need political pretense or blind fervor to keep us marching in the direction of a healthier, happier America. Truth will do fine.

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CDC: Pueblo Smoking Ban Reduced Heart Attacks by 41%, Due Mostly to Decreased Secondhand Smoke Exposure; *But Conclusions are Biased and Invalid*

In a new study published in the current issue of *MMWR (Morbidity and Mortality Weekly Reports)*, researchers from Colorado and from the Centers for Disease Control and Prevention (CDC) have concluded that the smoking ban in Pueblo, Colorado caused a 41% reduction in heart attacks during the three years following its implementation, primarily due to a reduction in secondhand smoke exposure associated with the ban (see: Alsever RN, et al. Reduced Hospitalizations for Acute Myocardial Infarction After Implementation of a Smoke-Free Ordinance --- City of Pueblo, Colorado, 2002--2006. *MMWR* 2009; 57(51);1373-1377).

The study compared the rate of hospitalizations for acute myocardial infarction (heart attacks) in the city of Pueblo with similar rates in Pueblo county (outside of Pueblo) and El Paso county (which includes Colorado Springs) for the 18-month period prior to the implementation of Pueblo's smoking ban and for the two 18-month periods following the smoking ban, which was implemented in July 2003. While there was no significant reduction in heart attack admissions for Pueblo or El Paso counties, there was a reduction in the heart attack rate of 19% and 41% from pre-implementation to the first and second post-implementation periods, respectively, in the city of Pueblo.

The study concludes: "These findings suggest that smoke-free policies can result in reductions in AMI [acute myocardial infarction] hospitalizations that are sustained over a 3-year period and that these policies are important in preventing morbidity and mortality associated with heart disease. This effect likely is mediated through reduced SHS [secondhand smoke] exposure among nonsmokers and reduced smoking, with the former making the larger contribution."

The Rest of the Story

Before you jump to any conclusions here (something the study did prematurely), consider this: let's accept the study's conclusion as correct - that smoking bans do lead to a dramatic, immediate reduction in heart attacks, in part because of a large reduction in smoking prevalence. Let's suppose that you want to demonstrate this "fact" by showing that compared to a similar city, heart attack rates in the city with the smoking ban fell substantially more after the ban was implemented.

Now you have to choose a comparison city. You have two choices, with the following information available about the smoking prevalence changes in those cities from pre-implementation to post-implementation:

City A - The smoking prevalence increased from 19% to 24%.

City B - The smoking prevalence remained relatively unchanged, dropping only from 24% to 23%.

Which city would you choose as the comparison city?

If you choose city B, you would be justified. There was little change in smoking prevalence, which mirrored the changes nationally during that time period, so one could argue that this is a reasonable comparison group.

If you choose city A, where there was a large increase in smoking prevalence, you are going to expect to see an increase in heart attacks due to the rise in smoking alone. This is going to artificially reduce any secular decline in heart attacks occurring in the comparison city and bias your results towards finding a larger decline in heart attacks in the city with the smoking ban.

A researcher who chose city A as the comparison city would certainly be suspected of having intentionally biased the results towards finding an effect of the smoking ban on heart attacks.

The last thing in the world that you want for a comparison city is one in which there was actually an **increase** in smoking prevalence, defying all odds about what the national trends in smoking are throughout the nation.

Unfortunately, this is exactly what this study does: it knowingly uses a comparison county in which it has been documented that the smoking prevalence over the study period has **increased** from 17.4% to 22.3%.

The study doesn't try to hide this fact. It openly acknowledges that the reported smoking prevalence in El Paso County (the comparison group) increased from 17.4% in 2002-2003 to 22.3% in 2004-2005.

Given this finding, El Paso County simply **cannot** be used as a comparison population. You can't take a population in which you know that smoking prevalence increased substantially and "pretend" that it represents a reasonable area in which to evaluate the baseline secular trends in heart attack admission rates that would have occurred in the smoking ban city in the absence of the smoking ban.

Of course you are going to find that the rate of heart attacks in El Paso County did not decline all that much, given the increase in smoking. El Paso County is clearly not going to give you a good, representative picture of what the actual secular trend in heart attack admissions is.

Now if smoking rates throughout the country had increased substantially during the same time period, one could argue that El Paso county is representative of the nation as a whole, or of Colorado as a whole. But clearly, the trends in smoking reported in El Paso are an anomaly - they are very different from the rest of the nation and from Colorado, where we know that smoking has continued to decline during the study period.

While I am not arguing here that the study intentionally used El Paso county in order to try to create the finding of a smoking ban effect on heart attacks, the fact that the study failed to even consider this problem suggests to me that there is a great deal of bias inherent in the paper. Yes, I do think that the study wanted to find an effect of the smoking ban and that it lost its neutrality somewhere in the process. It's natural to want to see the positive effects of a public health policy. But you have to separate your desires from the science itself. More about that later.

Another important problem is the other comparison group that was used: the rest of Pueblo county. Since this area is directly adjacent to Pueblo, which is the one city in this area, it would be expected that many residents of Pueblo county work in, and/or spend time in Pueblo, including eating in restaurants in the city. Thus, one would expect that if the smoking ban reduced heart attack rates, it would reduce rates among Pueblo county residents as well. It's not like those residents were somehow shielded from the intervention.

For this reason, the study should have combined the heart attack admissions from Pueblo and Pueblo county. Doing this, the reduction in the heart attack rate from pre-implementation to the second post-implementation period is 33%, rather than 41%.

Two logical comparison groups that one would want to consider are the state of Colorado as a whole and the nation as a whole. Heart attack admission rates for Colorado during the approximate period of the study (2002-2005) dropped by 18.4%. For the United States as a whole, the heart attack admission rate dropped by 17.2% during this period.

It is quite a different situation to claim that the smoking ban in Pueblo reduced heart attacks by 41% (because there was no significant decline in the inappropriate comparison county of El Paso) than it is to view the whole picture, and see that a 33% decline in heart attacks in Pueblo must be compared with about an 18% drop throughout the state of Colorado and a 17% decline nationally during the same time period.

The fact that these comparisons were not made is problematic, since the data are readily available (it took me about half hour to access and run the numbers). Why wouldn't the study want to look at the statewide trends in Colorado, rather than simply rely on the biased control group of El Paso

county? In 30 minutes, the study could have determined that there was an impressive 18% decline in heart attacks in the whole state during the study period, thus making it clear that the present conclusion of the study is inaccurate.

The bottom line is that the study fails to appropriately determine the baseline secular trends in heart attacks in order to be able to judge the differences observed in Pueblo from the trends that would have been expected in the absence of the smoking ban. For this reason, the study cannot conclude that the observed changes in heart attacks are due to the smoking ban, rather than to other changes that took place over time, including changes in medications being used to treat heart disease, better diagnosis and more aggressive treatment of heart disease, and a substantial decline in smoking prevalence in Pueblo county during the study period, which may or may not be due to the smoking ban itself.

More troubling to me than the fact that the study draws a conclusion that is premature and inadequately supported by the data is the appearance of bias in the study. Not only in the choice of a comparison community where smoking prevalence dramatically increased during the study period, but also in the conclusion itself.

Even if we stipulate that the smoking ban did cause the decline in heart attacks, how can the study possibly conclude that the effect was due primarily to reduced secondhand smoke exposure? The study made no attempt to determine the smoking status of the heart attack victims, so there is no evidence that the reduction in heart attacks occurred primarily among nonsmokers. Neither did the study measure changes in population-based exposure to secondhand smoke.

Moreover, the study itself documents that there **was** a substantial decline in smoking prevalence in Pueblo county during the study period, from 25.9% to 20.6%. Wouldn't this documented decline in active smoking prevalence be the presumed major reason for the observed decline in heart attacks, as opposed to reductions in secondhand smoke exposure? At very least, wouldn't a study simply remark that both mechanisms may be operating, but that it can't be determined to what extent each is contributing?

The fact that the study concludes that it must primarily be the secondhand smoke reduction is curious. The fact that the editorial note of the study begins by claiming that evidence shows that brief secondhand smoke exposure can trigger a heart attack is revealing. If you look at the report to which that claim refers (the 2006 Surgeon General's report), you will not find any conclusion that brief secondhand smoke exposure triggers heart attacks. And you certainly won't find any evidence in that report that if we reduce secondhand smoke exposure, we can reduce heart attacks triggered by secondhand smoke exposure.

You may remember that I have previously called attention to the poor science by CDC and the Department of Health and Human Services in their communications regarding the acute cardiovascular effects of secondhand smoke, when they went out on a limb, against the advice of respected and expert scientists in the tobacco control field, and told the public that brief secondhand smoke exposure is enough to trigger heart attacks, cause heart disease, and cause lung cancer.

It seems odd that even if we stipulate that the overall conclusion of the study is valid (that the smoking ban caused a dramatic reduction in heart attacks in Pueblo), the study would emphasize that the effect must be primarily due to the reduction in secondhand smoke and thus a reduction in heart attacks among nonsmokers that would have otherwise been triggered by brief secondhand smoke exposures in restaurants or other public places.

Even if I were writing this editorial as a highly biased advocate, I would have simply concluded that the effect is likely due to the combination of a reduction in smoking prevalence and a reduction in secondhand smoke, but that the study provides no way of teasing out the degree to which these two phenomena are operating.

In fact, given the large decline in smoking prevalence reported in Pueblo county, even the above conclusion seems biased, since it is clear that if the effect were real, the smoking prevalence reduction would likely have been a major reason.

The study goes overboard not only in its overall conclusion, but in its attempt to paint these data as somehow proving that eating in a smoky restaurant for a half hour is causing lots of people to keel over from heart attacks. The study does nothing of the sort.

Let me finish by emphasizing that I would like nothing more than to have strong evidence presented that smoking bans are resulting in immediate and dramatic reductions in heart attacks. As I have devoted much of my life's work to promoting smoking bans, especially in bars and restaurants, it would bring a great sense of fulfillment to now that these policies are immediately saving lives and that we can document these acute effects.

However, I am first a scientist and I believe that in public health, our conclusions must be based on solid science, not just on conjecture or our deeply felt desire to see the success of our policies.

Name: Michael Siegel

I am a physician who specialized in preventive medicine and public health. I am now a professor in the Social and Behavioral Sciences Department, Boston University School of Public Health. I have 20 years of experience in tobacco control, primarily as a researcher. My areas of research interest include the health effects of secondhand smoke, policy aspects of regulating smoking in public places, effects of cigarette marketing on youth smoking behavior, and the evaluation of tobacco control program and policy interventions.

The “science” behind the surgeon general’s latest report on secondhand smoke does not support officials’ claims.

Stoking the Rigged Terror of Secondhand Smoke

BY GIO BATTÀ GORI

Health Policy Center

While there is agreement that smoking cigarettes, like most pleasures, is risky, the zealous people who wish to abolish smoking could not have mounted the current antismoking crusade without playing up the risks of so-called “secondhand smoke” — or, what the scientific literature calls environmental tobacco smoke (ETS). Under the flag that the end justifies the means, the purported risks posed by ETS have been used to justify draconian regulations that criminalize and marginalize lawful citizens, pitting children against parents, spouses against spouses, and people against people to the point of raising homicidal animosities against smokers.

Last July, the U.S. surgeon general released its latest report on ETS, *The Health Consequences of Involuntary Exposure to Tobacco Smoke*. As usual, it is not a primary study but a summary of selected previous studies. The report shows once again the antismoking crusaders’ successful seizure of the surgeon general’s authority, much as it happened for previous ETS reports issued by the U.S. National Academy of Sciences, the Environmental Protection Agency, the World Health Organization, the UK Royal College of Physicians, and other authorities.

At the press conference introducing the report, then-surgeon general Richard Carmona personally ventured the absurd assertions that “there is no risk-free level of secondhand smoke

exposure,” that “breathing secondhand smoke for even a short time can damage cells and set the cancer process in motion,” and that, for children exposed to secondhand smoke, “eventually, they’ll develop cardiovascular disease and cancers over time.”

Of course, without the time to analyze the studies themselves, the surgeon general has to trust what words others put in his report. Yet, on careful reading, those horrific claims are not supported by the studies reviewed in the report, even on assuming that the studies might be trustworthy.

FATAL FLAWS

Claimed ETS risks are reported with a precision of two decimal points — 1.21 for lung cancer, according to the latest surgeon general’s report. Such a precise assessments of risk, or of anything else for the matter, must fulfill some careful, analytical requirements. First, care must be taken to ensure that what is measured is, indeed, what is claimed to be measured. Second, measurements must be accurate within an explicit margin of error. Third, the results cannot be explained by alternatives. And finally, repeated studies should yield consistent, reproducible results. Such are not only the requirements of scientific observations, but of commonsense evidence as well.

In assessing ETS risk, studies would have to compare groups of nonsmokers that had been either exposed or not exposed to ETS. Yet, persons with no prior exposure to ETS are virtually impossible to find, and it is only possible to utilize nonsmokers who have been more or less exposed.

Simply having been exposed to ETS could not be the basis of risk estimates, however. Risk could only be deter-

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mined in relation to the biologically effective doses that people internalize, as the surgeon general report confirms. Such doses cannot be derived from exposure data without knowing the simultaneous rates of individual inhalation and metabolic transformations.

Effectively, those rates cannot be measured and cannot be known because they vary continuously and independently from location to location, moment to moment, day to day, year to year. The changes are rapid and chaotic, and make it impossible to obtain cumulative measures over time. The recent surgeon general's report avoids any discussion of this issue, with the tacit admission that the absolutely crucial measurements of biologically effective doses are impossible — an admission that is alone sufficient to disqualify any representation of the small risks claimed.

Indifferent to this capital impediment, the surgeon general's report keeps insisting on exposure as a determinant of risk, despite describing in some detail the many insurmountable obstacles to its assessment. The report even admits that studies directed at validating exposure "showed a high degree of

repeatability for questions concerning whether a spouse had smoked, but a lower reliability for responses concerning the quantitative aspects of an exposure."

NON-EXISTENT MEASUREMENTS There is more. Besides issues of dose and exposure, over two dozen widespread lung cancer risks other than smoking have been reported. Thus, risk assessment studies must also determine whether the lung cancers observed are caused by those other risks, rather than ETS. How have epidemiologic studies of ETS and lung cancer coped with such fundamental problems?

Lung cancer develops slowly and generally manifests at advanced ages after cumulative lifetime experiences. Even if ETS exposure, alone, could measure risk — and it cannot — it should be measured as the sum-total of instant exposure episodes over the lifetime of individual nonsmokers. Yet, as we have noted, the myriad momentary changes of exposure over lifetimes would be impossible to track, and therefore cumulative assessments of individual exposures are materially impossible.

Still, this is what ETS studies disingenuously claim to have done. Yet how could they have generated continuous measures of exposures, starting from any person's birth through the 60–70 years needed for lung cancer to develop, as the studies claim? So impossible are those assessments that no epidemiologic study has ever measured the ETS exposures of the people observed.

Typically, instead, the studies asked 60–70 year-old self-declared nonsmokers to recall how many cigarettes, cigars, or pipes might have been smoked in their presence during lifetime since early childhood, how thick the smoke might have been in the rooms, were the windows open, and similar vagaries. The resulting answers — usually elicited in a few minutes as part of an interview, a phone survey, or by proxy recalls provided by relatives of deceased persons — are then recorded as precise numerical measures of lifetime exposures, as if the digits recorded were error- and bias-free.

In reality, it is well known how difficult it is to remember what one ate a week ago, never mind 20 years ago or during childhood. It is transparently impossible to summarize from a few momentary and vague recalls, and with an absurd expectation of precision, the total exposure to smoke over the 50–60 years of a prior lifetime. The plain truth is that no credible measure of ETS exposure has ever been possible. Therefore, epidemiologic studies of ETS have produced statistical estimates of risk based not only on improper exposure data, but also on exposure data that are illusory.

UNCONTROLLED VARIABLES Even assuming that ETS exposures could be measured and could be used to assess risk, the 20 percent lung cancer risk elevation claimed by the surgeon general and others is still not credible because the studies have not accounted for the likely interference of a whole series of known lung cancer risks, and for prejudices and biases that are inevitably present.

For instance, people with lung cancer are more prone to amplify their recall of ETS exposure than those who are disease-free. Other respondents will fib about being nonsmokers and thus will contaminate the results. More than two dozen independent risk factors for lung cancer are reported in the professional literature, and over 200 for cardiovascular diseases, yet the studies fail to control credibly for those risk factors in studies of ETS.

There is also reason to suspect publication bias. Studies reporting an elevation of risk from ETS likely are preferentially published, while studies reporting no risk or risk reduction are disregarded. Thus, the claimed small risks for lung cancer and other diseases are doubly illusory because of alternative explanations that were not, and could not be, calculated and corrected.

ABSURD METHODOLOGY It is no surprise, therefore, that different studies have produced contrasting results. Of the 75 published studies of ETS and lung cancer, some 70 percent did not report statistically significant differences of risk and are moot. Roughly 17 percent claim an increased risk, and 13 percent imply a reduction of risk. Thus, reported studies do not offer consistent results, and overall cannot be interpreted for or against risk.

The overwhelming majority of ETS studies do not claim risk on the basis of higher or lower frequency of lung cancer in relation to higher or lower exposures to ETS. Rather, groups of self-declared nonsmokers, all with lung cancer and exposed to ETS, have been compared to groups of self-declared nonsmokers without lung cancer, and also exposed to ETS. As a generic example, some studies may have found that nonsmokers without lung cancer recalled ETS exposure at a standardized rate of 100, while nonsmokers with lung cancer recalled exposure at a standardized rate of 120. Without discernible logic or rhyme, the studies and the surgeon general's report assume that a report of 20 percent more exposure represents a 20 percent increase in risk. The mirror implausible implication is that a 20 percent difference in exposure recall — which is impossible to verify or measure in the first place — is responsible for all the lung cancer of the nonsmokers with the disease, while nonsmokers who remember only slightly less exposure remain incredibly and totally immune from that cancer.

Several studies also reported the reverse, namely that nonsmokers with lung cancer recalled less ETS exposure than nonsmokers without the disease. Should such reports carry the equally absurd implication that ETS exposure protects from lung cancer?

SOME REFRESHING HONESTY

No epidemiologic study has ever measured actual lifetime doses of ETS, nor lifetime exposures to ETS. No study has determined

the recall bias of people with lung cancer. No study could guarantee that some self-declared nonsmokers were, or had been, smokers. No study could exclude that the lung cancers observed might have been caused by many known risks and thus not by ETS. Most studies did not report differences of risk, and some implied a reduction of risk. Thus, the statistical analyses and the claimed lung cancer risks of ETS are illusory.

The abiding mystery is why so many have acquiesced for so many years, when it must have been plainly obvious that the story of ETS risks is without any testable support. The barely whispered justification is that all is for the higher goal of abolishing cigarettes and tobacco.

The antismoking crusade has studiously avoided or squelched any confrontation that could have forced the truth of ETS to emerge. That is, until the spring of 2006, when the highly competent Oxford epidemiologist Sir Richard Peto — a leading intellect of the campaign against ETS — was called to testify before the UK House of Lords Select Committee on Economic Affairs, which was inquiring with a critical eye about government policy on the management of risk, including the claimed risks of ETS.

Asked to quantify the hazards of ETS, Sir Richard replied:

I am sorry, I know that is what you would like to be given, but the point is that these risks are small and difficult to measure directly.... I am sorry not to be more helpful; you want numbers and I could give you numbers..., but what does one make of them? ...These hazards cannot be directly measured.

He declined any quantification of ETS risks, with the clear implication that quantification is impossible.

He then increased his distance by saying, "I do not want to be cast in the role of advocating banning smoking in public places or in private places." Pressed further, Sir Richard offered his personal belief that "I think there has got to be some risk," for which he admitted not having any testable evidence. Asked whether ETS regulation could be used to dissuade smokers from smoking, the telling answer was, "I do not want to argue for or against any rule, but there does seem to be a consensus that it would affect the number of people who choose to smoke."

Later, commenting on the UK government's irritation with the select committee's findings, the committee's chair, Lord Wakeham, had this to say:

Nothing in our report can be interpreted to mean that we do not think that smoking is harmful or that policies to restrict it are not a good thing. It simply means that a policy to eliminate smoking in public places cannot rely, as the Government tried to, on the argument that passive smoking poses a major health risk to the public.

In their response, the Government rejects our analysis of passive smoking and attempt to undermine our conclusions by challenging the evidence in different ways. "The scientific and medical evidence of the health risk presented by second hand smoke is now well established and clear," [claims the Government]. It highlights comments in our report that "the main harm, if there is one, concerns children who are exposed to passive smoking in the home, which is something the bill is not designed to address." It highlights, too, the fact that we received evidence

from Imperial Tobacco and the Tobacco Manufacturers' Association, presumably with the intention of suggesting that we may have received biased evidence. The Government's response also quotes Sir Richard Peto's evidence to us that "the definite statement is that some people are killed by breathing other people's smoke." They fail to mention, however, that he also told us that "these risks are small and difficult to measure directly."

I stress that our objective in raising the issue of passive smoking was not to defend any kind of smoking, whether active or passive, or to say that legislation is not needed to limit smoking in public places. Our primary purpose was to emphasize a more general point: risk assessment procedures and policy formulation should always be based on a clear statement of objectives, an unbiased assessment of available evidence, and a proper regard for the impact of legislation on personal freedom and choice. Our view was that the legislation relating to passive smoking failed to consider these matters properly and that the Government should learn the appropriate lessons from their mistakes to ensure that future policy responses are transparent, evidence-based and proportionate. Judging from the tone of the Government's response to our comments on passive smoking, this lesson has still to be learnt.

CONCLUSION

Should it be permissible — in an avowedly enlightened and rational society — to legislate draconian regulation solely because some high priesthood of epidemiology thinks there might be some ephemeral risk, without any testable clue to its quantification or probability? Indeed, who stands to gain from such a distortion? To paraphrase the French crime novel's cliché: *cherchez l'argent!* The money is good, and many in the science and advocacy of public health have been persuaded to follow the current, aware or not. It is the co-opted public money and the enormous amount of funds from nonprofits linked to industrial interest, keen to the medicinal opportunities opened by a reduced demand for cigarettes. Marketing with tax-exempt money under the guise of philanthropy — brilliant!

By any sensible account, the anachronism of the tobacco culture should be slated for extinction in an advancing civilization. Why must it happen under the tyranny of deception, when intelligent and transparent ways are available? The mild and pleasurable addictivity of nicotine and a lurking black market have continued to frustrate the abolitionist crusade, and abolition will not work in the long run.

Instead, a humane and enlightened policy would first seek to reduce the risk of smokers who cannot quit. A recipe for this policy was given almost 40 years ago by the Smoking and Health Program of the National Cancer Institute, but was quickly suppressed by abolitionist intransigence. Over four decades, this

relentless and uncaring obstruction has been responsible for untold millions of premature deaths that could have been spared worldwide. In fact, the original recipe of the National Cancer Institute was revived by a 2001 report by the National Academy of Sciences' Institute of Medicine, which also has been studiously smothered. Still, the recipe for less hazardous cigarettes is simple: in the words of the Institute of Medicine it means, "Retaining nicotine at pleasurable or addictive levels while reducing the more toxic components of tobacco." With current technology, this policy would make it feasible to reduce the risk of cigarettes by at least 50 percent in less than two years. The move would not cave in to the perpetuation of cigarettes, for it would also advertise and require a gradual reduction of the nicotine and smoke yields of cigarettes over many years, until smokers are weaned of a habit that most would like to abandon anyhow. It would be a policy of transparent advice and consent, with solid scientific and behavioral justification.

The world must protest the ongoing deceit and the squandering of public monies for rigged and incompetent ETS studies. And people should feel offended by the complicity and sham paternalism of health authorities and of profitable tax-exempt charities. Such an officially imposed tyranny has no place in countries that claim and presume to be free, enlightened, and just. We are not children, nor bumbling simpletons who need to be deceived for our own good — a deceit that is doubly grating when the wilfully flawed surgeon general's report on ETS runs against statutory requirements of "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by a government agency."

If this fraudulent nonsense is not halted, an Orwellian world may not be far away. A redemption of ETS from its bête noire image now engrained in false public perceptions might appear quixotic and unnecessary. Yet, is it ever too late for pointing out that the emperor has no clothes? **R**

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January 29, 2009
Testimony on SB 25, Senate Public Health and Welfare Committee

Mr. Chairman, and Senators of the Committee,

I am Philip Bradley representing the Kansas Licensed Beverage Assn., the men and women, in the hospitality industry, who own, manage and work in Kansas bars, breweries, clubs, caterers, hotels and restaurants where beverage alcohol is served. These are the over 3000 places you frequent, enjoy and the tens of thousands of employees that are glad to serve you. Thank you for the opportunity to speak today.

First the good news! In 2007, the Kansas Supreme Court's decision to not overturn, the case against locally imposed bans, means that the system is currently working. Voluntary and mandatory smoke free areas and establishments are increasing. Smoking rates are down. And by these measures, health considerations are improving. It is for these reasons the 07 Interim Committee took the position that the local options were working, local governments were acting and reponding.

Now to the crux of the matter. Since local options are working and the options of local elections exist already, why would the State and this committee feel it necessary to act? We believe that the only reason is to create a statewide standard. It would seem that if there is to be an amended statute, it must be uniform **and include preemption** in order to achieve the goal of an equal opportunity and level playing field. Without such this is a just a action for appearances. Yesterday you heard from the proponents that an essential reason for this measure is to, pardon the paraphrase, prevent a "patchwork" which is unacceptable. A bill without preemption, allowing local elections and allowing local ordinances guarentees just such a patchwork. And you heard much about a "level playing field". That is an argument about economic impact. ***If there is no economic impact then there is no need for a "level playing field"***. It would not matter.

We oppose smoking ban proposals previously introduced, and we oppose SB 25 and efforts to limit the choices of adults and businesses about a legal product. Please consider these points.

If this is an air quality issue, why are we not addressing air quality. There are many more air contaminates than environmental smoke and if it is the desire of this body to protect all citizens from them then an air quality standard bill would be in order. This would set the desired "level playing field" and allow all businesses to meet this standard for all the air particulates and gasses. This is the fair and most effective way to address the issue and removes the emotional element. This would allow for the advancement of science and the creative capabilities of industry to work and continually improve lives and living conditions. If however the real goal is to get rid of all smoking then the legislature should propose the prohibition of smoking and vote on that issue and the subsequent loss to the general fund revenue. ***Please do not make the hospitality establishments the unwitting victims in a battle between the anti-tobacco activists and the smoking public!***



**Drink Responsibly.
Drive Responsibly.**