

## **SMOKE-FREE LAWS: REBUTTALS TO SEVEN COMMON CLAIMS BY THE OPPOSITION**

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### **1) Opposition Claim:**

Economic Loss: There are "negative effects of a smoking ban in restaurants, taverns, and night clubs."

### **Rebuttal:**

There is no longer any doubt in the scientific community that smoke-free laws have no negative impact on bars and restaurants. Peer reviewed scientific studies show no economic impact<sup>1,2</sup> and in some cases, a positive impact on bars and restaurants.<sup>3</sup> In order for an economic scientific study to be considered a reliable source of data, the following factors must be accounted for:

- The study measures what actually happened and not just what people feared would happen;
- The study uses hard numbers such as actual revenues or employment statistics collected by an unbiased source;
- The study includes information from a reasonable time before the smoke-free policy went into effect and accounts for underlying trends and random fluctuations in the business cycle;
- The study uses at least one year's data (usually 4 quarters) to assess the effects of the ordinance;
- The source of funding for the study is disclosed;
- The study is published in a peer reviewed journal;
- The study is financed by an agency that has no ties with the tobacco industry.

### *The American Beverage Institute (ABI) Study*

The opposition may cite a 1999 American Beverage Institute (ABI) report, "The Impact of 1998 California Smoking Ban on Bars, Taverns and Night Clubs: A Survey of Owners and Managers," that was released six months after the California statewide smoke-free law was implemented<sup>4</sup> The study was performed by KPMG (an auditing firm) Peat Marwick and appears as a tobacco industry document. The report was not based on sound science, but instead, relied on subjective data. The survey reflects only business owners' opinions about whether business increased or decreased after January 1, 1998, the date the California bar ban went into effect. The report did not account for any other outside economic influences and did not take actual sales receipts into account.

Although ABI states that its mission is to "promote responsible alcohol consumption," ABI is a known ally of the tobacco industry and an avid opponent of smoke-free laws. The organization is run by lobbyist Rick Berman. According to a Phillip Morris presentation from May 2000, ABI and Rick Berman are noted as "hospitality allies who were mobilized to help defeat smoking restrictions in a number of locations around the U.S."<sup>5</sup>

### *New York Smoke-free Ordinance and Economic Effects*

Regarding two news articles that the opposition may cite on New York City's smoke-free ordinance, the one written on May 12, 2003 is solely based on a survey conducted with bars and restaurants. The employees surveyed were asked to

report how they *thought* the smoke-free law affected business, rather than relying on objective data such as tax receipts and employment data. Further, the data collection method used by the *New York Post* (December 9, 2003) is not described. It is impossible to tell if venues were randomly selected, meaning that the data likely do not accurately represent the economic situation in New York after the law took effect. The article provides one bar owner's opinion of the effects of the smoke-free law, serving as a snapshot of one person's viewpoint rather than an entire municipality's economic status. No receipts from the bar are studied and the reporter neglects to cite other social and economic events that may have contributed to the reported economic downturn of this particular business.

A scientific study on the effect of smoke-free legislation on restaurant employment in New York City (an indicator of a business's economic health) found that smoke-free restaurant ordinances do not harm restaurants' employment levels. The study observed trends in the number of restaurants and restaurant employees two years before and two years after the New York City Smoke-Free Air Act took effect in April 1995. The study concluded that during the study period, New York City increased the number of restaurant jobs by 18% new restaurant jobs, suggesting that New York City's smoke-free ordinance did not result in job losses for the city's restaurant industry.<sup>6</sup>

A similar study looking at Lexington-Fayette County concluded that there was no significant difference in employment as result of smoke-free laws, even in considering Lexington's status as an important region for tobacco production.<sup>7</sup>

#### *Michael Pakko's Use of the Economic Loss Argument*

A libertarian activist and economist, Michael Pakko was formerly with the Federal Reserve Bank of St. Louis and is currently at the Institute for Economic Advancement (IEA) University of Arkansas-Little Rock. A list of his works can be found [here](#). His reports are often cited to show a negative economic impact of smoke-free laws.

Pakko's recommendation to require business owners to post signs notifying patrons of their smoking policy is a common strategy used by the tobacco industry to accommodate smokers. This *red light-green light* approach gives patrons the choice of whether or not to enter based on the business owners' decision to allow smoking or not. This "compromise" strategy lulls officials into thinking they have addressed the problem, but does nothing to protect workers who are subjected to the dangers of secondhand smoke on the job.

Pakko's claim that casinos will struggle financially if they go smoke-free is also flawed. A recent [article](#) published with Thomas Garrett failed to account for revenue from gaming machines in bars and restaurants across Indiana. While illegal at the time, these machines were often used as a substitute for casino gambling. The report also did not account for the fact that other states in the report allowed for new casinos to be built during the time of the analysis, while Indiana did not. Lastly, the report does not address the healthcare cost savings that resulted from having smoke-free casinos.

#### *Richard Thalheimer's report on economic impact of Lexington's smoke-free ordinance*

Dr. Richard Thalheimer, an economics professor at University of Louisville, was hired by the Lexington Food and Beverage Association (links to Big Tobacco) to study alcohol revenues before and after Lexington's smoke-free law. Thalheimer reported a 9.8% to 13.3% drop in on-premise wholesale alcohol sales after Lexington's smoke-free law. His report was not published or peer-reviewed. See Attachment A for a fact sheet that identifies flaws in the methods used to evaluate the economic impact of the smoke-free law and funding for the report.

#### *Drunk driving and smoke-free laws*

Adams and Cotti<sup>8</sup> report an increase in drunk driving and DUI fatalities after the implementation of SF laws, arguing that people drive to places so that they can smoke and drink. The study excluded counties with no alcohol related accidents;

it does not account for differences in population growth among the counties; where data are missing the authors use an estimate to fill in the blanks.

### ***Suggested talking points to counter claims of Economic Loss***

- Time after time, study after study, and community after community, the evidence is clear. Smoke-free laws do not harm business.
- Smoke-free is good for people and good for business.
- Smoke-free is a 'win-win-win' for business, smokers, and non-smokers alike.
- Smoke-free means people go out to eat and drink as often,<sup>9</sup> but they smoke less.<sup>10</sup>
- Going smoke-free is cost free (except for those who sell tobacco products).
- Smoke-free creates a healthy bottom line.
  - No decrease in sales
  - Decrease in maintenance costs
  - Decrease in insurance premiums
  - Decrease in labor costs
  - Decrease in legal liability
- Secondhand smoke costs billions of dollars every year in the U.S. (\$10 billion).<sup>11</sup>
- There were 16,500 fewer smokers in Lexington-Fayette County after their smoke-free law, saving \$21 million/year in health care costs.<sup>10</sup>

#### **2) Opposition Claim:**

Not the Government's Role: No "governmental entity should take action."

#### **Rebuttal:**

There is significant legal precedent outlined by the Kentucky Supreme Court that the police powers of Kentucky's local governments include the protection of public health.

*Protecting the public from exposure to environmental tobacco smoke, sometimes known as second-hand smoke, can be the proper object of the police power of local government...This Court has held on several occasions that the protection of public health is uniformly recognized as a most important municipal function.*<sup>12</sup>

With this ruling, The Kentucky Supreme Court notes that it is appropriate for local governments to take action in the protection of public health. Thus local governments can function to protect the health of Kentuckians from secondhand smoke exposure through the implementation of smoke-free laws.

Businesses are all too familiar with government regulations that ensure safe food and clean water. It is not up to business owners to decide whether or not to serve safe food or water. Smoke-free laws ensure clean air; a common sense way to protect the air that workers and patrons breathe.

#### ***Jim Waters and the Bluegrass Institute***

The Bluegrass Institute claims to be a free market 'think tank.' In reality, the Bluegrass Institute is an anti-health advocacy group that claims smoke-free laws are an intrusion of government and they violate property rights. Jim Waters of the Bluegrass Institute claims that workers have a choice of where they are employed. Waters discredits former WKU

professor Richard Wilson who says government should intervene to protect workers and signage ('charters') is simply not enough. In their publication *Perspective*, No. 2005-27, Waters states the following:

*"Wilson discredits this idea, claiming that such charters [posting signs] 'do nothing to protect workers.' If he read the charter, he would see it requires every business to establish a smoking policy for the purposes of informing and protecting its employees. In the professor's world, it appears that workers don't have choices about where they work. But in the competitive restaurant market, workers' opportunities are not limited simply to smoke-filled restaurants"*

The use of signage does not protect workers from secondhand smoke. In these economic times, workers who are employed in smoky environments cannot simply jump from one job to another to avoid working around secondhand smoke. Laws are needed to protect all workers from exposure to secondhand smoke.

Aaron Morris, a fiscal policy analyst for the Bluegrass Institute, further asserts that government is overstepping its boundaries in regulating smoking in restaurants. Morris discredits the argument that regulating smoking in restaurants is similar to regulating food safety. He states,

*"The difference between this type of informative regulation and a prohibitive smoking ban is clear. Customers do not have the pertinent information on the sanitary conditions of kitchens to make informed choices about where to eat. But anyone can tell if there is a smoker at the next table and make their own decisions. No external intervention is necessary"*

Jim Waters goes further by saying that people can smell the smoke in the air and make their own decisions about whether they should remain in an establishment. However, Morris and Waters ignore the science behind secondhand smoke; toxins from secondhand smoke remain in the air long after the smell is gone.

Morris also argues that government funds are being used inappropriately to further smoke-free laws. In his article, "Smoking bans cloud market's ability to thrive," printed in *Policy Point*, he suggests that that health officials use government money to lead the smoke-free charge:

*"Health officials on a government payroll at some level frequently lead the effort to convince politicians to enact smoking bans in privately owned establishments."*

This same argument has been echoed regarding Dr. Ellen Hahn at the University of Kentucky and UK's receipt of federal stimulus dollars. In a February 19, 2010 issue of the "[Bluegrass Beacon](#)", Jim Waters asserts:

*"Hahn snared \$296,664 of 2009 stimulus money to fund her efforts to assault the private property rights of small business owners and our individual liberty. The grant states: 'Print media clippings from all 51 daily and non-daily newspapers in study counties will be evaluated for pro-con slant related to smoke-free environments.'"*

Waters overgeneralizes the amount of money that was actually received as stimulus money for the analysis of press clippings, distorting the amount of stimulus funding spent on this part of the project. Distorting facts and cherry picking information are a common tactics used by the opposition to play on the emotions of elected officials and the public.

## *Northern Kentucky Choice*

Associated with the Bluegrass Institute, Northern Kentucky Choice is an example of a local group that opposes smoke-free laws, arguing that they violate business and individual rights. Following is the Northern Kentucky Choice “logic”:

- The “red light, green light” approach promotes individual choice (a well-known tobacco industry/anti-health tactic).
- Workers have a choice of where to work just like patrons have a choice of where to eat, drink, etc.
- The majority of workers do not want the law and the free market is taking care of the problem on its own without the government’s help.

The response to these statements is similar to those above in the section on the Bluegrass Institute. The use of signage does not protect workers from secondhand smoke. In these economic times, workers who are employed in smoky environments cannot simply move from one job to another to avoid working around secondhand smoke. Laws are needed to protect all workers from exposure to secondhand smoke.

### ***Suggested talking points to counter claims of government intrusion or property rights***

- Smoke-free is not a partisan or property issue (‘property’ is the most frequently used word by the opposition). It is about our mothers, fathers, sisters and brothers, being exposed every day to a toxic brew of dangerous poisons when they go to work.
- There is no constitutional right to smoke. Smokers do not have the right to harm others with their smoke.
- Is it right to ask people to go to another restaurant if they don’t like mouse droppings in their food? Is it not the government’s role to make sure our food is safe to eat? Shouldn’t we do the same about providing safe air?
- The minute private businesses open their doors to the public, they have many rules and regulations to follow. That includes a long list of steps to protect customers and employees, from storing food at safe temperatures to making sure that young employees do not operate hazardous machinery.
- Private property rights are not a license to endanger the public. Just because it’s your building doesn’t mean you can allow a dangerous substance like asbestos or radon to foul the air. And smoke doesn’t stay in one place.
- It is the government’s role to protect our most vulnerable workers from a known health hazard.

See Attachment B for a list of additional talking points to counter the property rights argument.

### **3) Opposition Claim:**

Requires Planning Commission Approval: “A smoking ban is a restriction on property use requiring submission and approval by a planning commission instead of a local governmental entity.”

### **Rebuttal:**

The 2008 decision by the Kentucky Court of Appeals to hear the oral arguments in the case of Dickie Todd v The City of Paducah claims that the Paducah smoke-free ordinance restricts property use. In the case, Dickie Todd, a business owner, asserts that Paducah’s smoke-free ordinance is a zoning ordinance restricting the use of property and requires the approval of the Paducah Planning Commission.

The precedent is clear – the regulation of secondhand smoke exposure is a matter of public health, not an issue related to property rights. Again, the Kentucky Supreme Court speaks:

*The real issue is whether the public health regulation is reasonable. In this case, we must conclude that it is. Both federal and state courts have determined numerous times that where public*

*interest is involved it is to be preferred over property interests even to the extent of destruction if necessary.... The smoking ordinance is not an improper infringement upon property rights.<sup>12</sup>*

The Kentucky Supreme Court has ruled that smoke-free laws are the jurisdiction of local government and are not an issue of property rights.

#### **4) Opposition Claim:**

Employees Can Decide: "Employees have the choice to decide where they work."

#### **Rebuttal:**

There are many conditions that can limit a worker's ability to change jobs or positions. These factors include tightening job markets for hospitality workers, dependent family members reliant on steady income, and limited time to find new employment. Finding other job opportunities may be less lucrative given a worker's skill level, as is frequently the case in service industry positions.

Hospitality workers are disproportionately affected by secondhand smoke compared to other positions in the workforce. Nationally only 28% of waiters and 13% of bartenders are protected by smoke-free policies, compared to over 75% of white-collar workers.<sup>13</sup> As a consequence, nonsmokers who work in restaurants are 50% more likely to develop lung cancer and 20-30% more likely to contract heart disease than nonsmokers in the general public.<sup>14</sup>

All workers deserve to breathe clean air at work. Among other worker protections, providing clean air ensures that all workers can be safe from toxic exposure to secondhand smoke while on the job.

#### **5) Opposition Claim:**

Smoking Tobacco is Legal: "Government does not have the power to prohibit the use of a legal substance."

#### **Rebuttal:**

- Alcohol is a legal substance, and there are drunk driving and other alcohol laws to minimize the harm caused by alcohol.
- Smoke-free laws are meant to minimize the harm caused by exposure to secondhand smoke.
- Smoke-free laws still allow for the use of tobacco on 99% of a localities' property, including outside, in one's home, or in a car. Smoke-free laws do not ask smokers to quit smoking, but rather, to smoke outside businesses and workplaces.

#### **6) Opposition Claim:**

Smoking Laws Divert Attention: "Enforcing a smoking ban would divert law enforcement personnel from more critical situations, putting community safety at risk."

#### **Rebuttal:**

- Smoke-free laws are generally self-enforcing, especially if they are comprehensive.
- With public and business owner education prior to and during implementation of smoke-free laws, compliance is high.
- The more comprehensive the ordinance (few to no exemptions), the easier it is to enforce.

## 7) Opposition Claim:

Junk Science: “The dangers of secondhand smoke are overblown and based on junk science.”

### Rebuttal:

Michael McFadden, author of Dissecting Antismokers’ Brains, and member of the Pennsylvania Smokers Action Network, debunks the science of SHS exposure as evidenced by excerpts on the website <http://www.antibrains.com/>:

*“To refer back to our earlier example of arsenic, a nonsmoker would have to work with a smoker 8 hours a day, 5 days a week, 50 weeks a year, for well over a hundred years to be exposed to a quantity of arsenic equal to one grain of salt. While a lot of waitresses and bartenders may feel as if they’ve worked a hundred years at their jobs, there really aren’t too many who actually have.”*

McFadden’s comments are misguided since we know that even brief exposure to secondhand smoke can trigger a heart attack.<sup>15, 16</sup> Five minutes in a smoky environment stiffens the aorta, the main valve in the heart, as much as smoking a cigarette. Secondhand smoke exposure can trigger irregular heartbeats, heart attacks, and asthma. Long terms exposure to secondhand smoke is a cause of breast cancer in young premenopausal women.

### ***Suggested talking points to counter the junk science argument***

- Working 8 hours in a smoky bar or restaurant is like smoking a pack of cigarettes.<sup>17</sup>
- No one should have to breathe secondhand smoke to hold a job.
- Everyone deserves to breathe clean air.
- Smoke-free saves lives and money.
- The debate is over.<sup>14</sup> The science is clear. SHS is really secondhand death. Every health and medical authority knows SHS is dangerous.
- SHS has 4,000 toxic materials and 60 known to cause cancer in humans.
- A smoke-free policy is like a vaccine for heart attacks, lung cancer, other cancers, and asthma attacks.
- A smoke-free law is common courtesy approach to protecting worker safety and general public health.

For more information, contact the Kentucky Center for Smoke-free Policy, University of Kentucky College of Nursing, 859-323-4587 or [www.kcsp.uky.edu](http://www.kcsp.uky.edu).

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## Smoke and Mirrors: Exposing the Thalheimer Report

On June 7, 2005, the Lexington Food and Beverage Association (LFBA) released a report, “An Analysis of the Economic Effects of the Lexington-Fayette County, Kentucky Smoking Ban of 2004,” by Richard Thalheimer, PhD of Thalheimer Research Associates, Lexington, Kentucky. The purpose of the report was to examine the effect of Lexington’s smoke-free law on demand for alcohol. Thalheimer analyzed only on-premise wholesale sales of alcohol, and claimed there had been a 9.8% to 13.3% drop in on-premise alcohol sales after implementation of the smoke-free ordinance.

### Flawed Scientific Methods

- Of the nine alcohol distributors in Lexington, Thalheimer analyzes data from only three of them, representing only one-third of all the distributors in Fayette County. Furthermore, Thalheimer finds a significant effect of the law in *only two* of the three distributors.
- The report provides no information on how much market share is represented by the three distributors, or how many firms they serve. Some distributors in the report may have lost business to those who were not included in the sample.
- The report does not provide information on the types of alcoholic beverages (beer, wine, distilled spirits) sold by the selected distributors in this report. It is possible that alcohol sales differed by type of beverage.
- The report does not analyze food sales in these establishments. Alcohol sales could be down, but food sales could be up, resulting in no overall effect on sales.
- Changes in alcohol sales in other communities are not taken into account. The report should have analyzed regional, state, and national trends in alcohol sales over time, but did not.
- The report does not take into account the change in the price of alcohol over time.
- The report uses a proprietary data base that is not available to the public and is not reproducible. The findings of this report cannot be checked by other researchers. There was no audit to ensure accuracy of the data provided by the alcohol distributors, who have traditionally worked closely with the tobacco industry.

### Report Not Peer-reviewed or Independently Evaluated

- The report methods are similar to tobacco-industry supported economic reports.
- There are no peer-reviewed, scientific studies that show a negative economic impact from smoke-free laws; the only reports showing a negative impact are funded by the tobacco industry.
- Thalheimer has ties to the American Gaming Association which has a formal relationship with the tobacco industry.
- The LFBA hired Thalheimer as a contractor to produce this report. The LFBA delayed the implementation of Lexington’s smoke-free ordinance by launching a 7-month legal challenge funded in part by Brown and Williamson Tobacco Company.
- Although Dr. Thalheimer is a Professor at the University of Louisville, he ran this study through his company, Thalheimer and Associates. The study was not peer-reviewed or independently evaluated.

Prepared by the Kentucky Center for Smoke-free Policy, University of Kentucky College of Nursing, 859-323-1720, [kscp00@lsv.uky.edu](mailto:kscp00@lsv.uky.edu), [www.kcsp.uky.edu](http://www.kcsp.uky.edu).



***Property and Personal Rights Arguments: Talking Points for Advocates***

- Smoke-free policies are a public health issue, not a rights issue. The science is clear. There is no longer any debate that secondhand smoke is known to cause cancer, heart disease, emphysema, and stroke.
- The April 2004 Kentucky Supreme Court ruled local governments have the power to promote and safeguard public health. The Supreme Court ruled that the “protection of public health...is not only a right but a *manifest duty*.”
- There are already many laws and regulations by which business owners must abide. Laws regulate many aspects of business designed to protect public health, from occupancy permits for fire safety, food preparation, fall protection, and sneeze guards on buffet lines. Ensuring clean air is another public health measure that requires governmental protection.
- Business owners may privately own their business, but by inviting the public in, they are responsible for providing a safe environment.
- A free market approach does not protect all workers. In the best case scenario, less than 50% of workers can be covered by voluntary smoke-free policies. Business owners like the government to level the playing field so all have the same smoking rules.
- Not all workers have access to smoke-free employment options. Many people in rural areas have limited job opportunities and not all workers have transportation to neighboring communities to find a smoke-free workplace. Smoke-free laws protect *all* workers’ right to breathe clean air.
- Smoke-free laws do not take away anyone’s right to smoke. With a smoke-free ordinance, smokers can still smoke in nearly all parts of the community. Smoking is typically only restricted inside workplaces and buildings open to the public where it is harmful to others. Smoke-free laws and regulations simply ensure that the right to breathe clean air while at work is protected.
- Smoke-free laws and regulations protect the constitutional rights of all people by preserving: (a) ***life*** by reducing secondhand smoke related death and disease; (b) ***liberty*** by promoting the freedom to work and visit any public place without getting sick; and (c) ***the pursuit of happiness*** by ensuring the right to breathe clean air.

Prepared by University of Kentucky Clean Indoor Air Partnership, [www.kcsp.uky.edu](http://www.kcsp.uky.edu), 859-323-4572.

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