

Comment,  
SMOKING AS A FACTOR IN CHILD  
CUSTODY CASES

### Introduction

Smoking related illnesses kill over 500,000 Americans each year and impose a cost of 75 billion in health care expenses<sup>1</sup>. When adults choose to smoke, they affect not only themselves but those around them as well. When non-smoking adults are confronted with their smoking counterparts, they can choose to leave the room or ask the smoker to quit. Children, however, are left without such options, especially when they are in the presence of a smoking parent.

Fifty percent of all children live in families with at least one smoker<sup>2</sup>. Living with a parent that smokes can have devastating consequences for children - more than 5 million children will die prematurely from smoking related illnesses<sup>3</sup>. Exposure to second hand smoke leads to more than 500,000 pediatric visits for asthma and 1.3 million visits for coughs<sup>4</sup>. It causes children to suffer more than 1500 episodes of pneumonia, 14,000 cases of tonsillitomy, 260,000 cases of bronchitis, 2 million ear infections, and 5200 tympanostomies<sup>5</sup>.

Given the significant health consequences that children must endure when they must live with a smoking parent, courts have begun to consider a parent's smoking habit when custody determinations are being made. To what extent should the court consider the parent's smoking habit? Should it only be a factor to consider when making custody determinations, or should it be the determinative factor? Can courts order parents not to smoke in front of their children, or does such an order violate a parent's

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<sup>1</sup> Campaign For Tobacco Free Kids at [www.tobaccofreekids.org](http://www.tobaccofreekids.org) (Jan. 18, 2003).

<sup>2</sup> Aubrey E. Taylor, *Environmental Tobacco Smoke and Cardiovascular Disease*, 86 CIRCULATION 699, 700 (1992).

<sup>3</sup> *Supra* note 1.

<sup>4</sup> J.R. Difanza & R.A. Lew, *Morbidity & Mortality in Children Associated With Use of Tobacco Products by Other People*, 97 PEDIATRICS 560, 560-68 (Apr. 1997).

<sup>5</sup> *Id.*

right to privacy protected by the Constitution? Do parents have a fundamental right to smoke, or do their children have a fundamental right to breathe clean air? This paper will address these issues and the way courts are responding to them.

## Effects of Second Hand Smoke on Children

Cigarette smoke contains over 3800 compounds<sup>6</sup>. The smoke contains several particles and gases including particles of tar, nicotine, benzene, and benzpyrene and the gases of carbon monoxide, ammonia, hydrogen, cyanide, and formaldehyde<sup>7</sup>. When a cigarette burns, it releases ETS, environmental tobacco smoke, that pollutes the surrounding air. It is this ETS that is the second hand smoke non-smokers breathe<sup>8</sup>. ETS is actually worse than the smoke that smokers inhale<sup>9</sup>. When a smoker inhales, oxygen is drawn through the lit end of the cigarette, which increases the burning temperature of the cigarette. In contrast, the smoke from the idling cigarette results from combustion at a lower temperature. Because hotter fires burn cleaner and produce less air pollution, ETS will contain a higher concentration of the cigarette's toxic compounds than the smoke directly inhaled by the smoker<sup>10</sup>.

Secondary smoke is especially harmful to children since their tissues are still developing and are more sensitive to carcinogens<sup>11</sup>. The EPA has concluded that children exposed to second hand smoke will suffer from new cases of asthma, and will have more severe asthma attacks<sup>12</sup>. These children will also suffer

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<sup>6</sup> Allison D. Schwartz, *Environmental Tobacco Smoke and Its Affects on Children: Controlling Smoking in the Home*, 20 B.C. ENVTL. AFF. L. REV. 135, 141 (1993), *citing* National Research Council, *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* 2 (1986).

<sup>7</sup> *Id.*, *citing* Lynn Mitchell, *GROWING UP IN SMOKE* 1 (1990).

<sup>8</sup> Schwartz, *supra* note 6 at 141, *citing* Public Health Service, U.S. Dep't of Health Edu. & Welfare, *Smoking & Health* 33 (1964).

<sup>9</sup> *Supra* note 6.

<sup>10</sup> *Id.*

<sup>11</sup> Carolyn J. Wheatley, *Should the Ill Effects of Environmental Tobacco Smoke Exposure Affect Child-Custody Decisions?* 32 J. FAM. L. 115 (1993), *citing* Julie G. Scoop, *Smoking Parents Lose Points in Child Custody Case*, 27 TRIAL 82 (1991).

<sup>12</sup> Michael S. Moorby, *Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air?* 12 PACE ENVTL. L. REV.

from more respiratory tract infections, middle ear infections, and will have reduced lung capacity<sup>13</sup>. Children exposed to second hand smoke also endure more episodes of bronchitis, pneumonia, laryngitis, tracheitis, and chronic coughs<sup>14</sup>. Even more seriously, second hand smoke causes six percent of all cancers in children and is responsible for eighteen percent of childhood leukemia<sup>15</sup>.

Second hand smoke also causes prenatal injuries. Mothers who smoke will give birth to babies suffering from a variety of problems, including low birth weight, variations in body length, and congenital malformations<sup>16</sup>. Smoking mothers are also more likely to have still born babies<sup>17</sup>. Young babies are also more likely to die from SIDS, Sudden Infant Death Syndrome, when they are exposed to second hand smoke<sup>18</sup>.

The effects of second hand smoke in general, and on children in particular, have been well documented. The dangers of second hand smoke are well established and are not subject to debate. Given the wealth of medical data and consensus on the subject, courts will be forced to at least address the issue when confronted with a smoking parent seeking custody of a child.

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827, 831 (Spring 1995), *citing* Environmental Protection Agency, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorder* (1992).

<sup>13</sup> *Id.*

<sup>14</sup> Jeffrey L. Hall, *Secondhand Smoke as an Issue in Child Custody/Visitation Disputes*, 97 W. VA. L. REV. 115 (Fall 1994), *citing* Public Health Service, U.S. Dep't of Health, Educ., & Welfare, *The Consequences of Smoking: A Report to the Surgeon General* (1975).

<sup>15</sup> Moorby, *supra* note 12, at 832, *citing* Marilyn Dunlop, *Proof Rises Against Second-Hand Smoke*, THE TORONTO STAR, July 12, 1991 at A2.

<sup>16</sup> Julie E. Lippert, *Prenatal Injuries from Passive Tobacco Smoke: Establishing a Cause of Action for Negligence*, 78 KY. L.J. 865 (1990), *citing* Fielding & Phenow, *Health Effects of Involuntary Smoking*, 319 NEW ENG. J. MED. 1452 (Dec. 1988).

<sup>17</sup> *Id.*, *citing* Schwartz-Bickenbach & Schulte-Hobien, *Smoking and Passive Smoking During Pregnancy and Early Infancy: Effects on Birth Weight, Lactation Period, and Botinine Concentrations in Mother's Milk and Infant's Urine*, 35 TOXIC LETTERS 73 (1987).

<sup>18</sup> Hall, *supra* note 14, at 119, *citing* A.B. Berman, *Relationship of Passive Cigarette Smoking to Sudden Infant Death Syndrome*, 58 PEDIATRICS 665, 665-68 (1976).

## Child Custody and Second Hand Smoke

The pivotal consideration when making child custody determinations is the “best interests of the child.<sup>19</sup>” This is a broad standard that gives the court considerable discretion when deciding with which parent to place the child. Courts are allowed to consider all factors they deem relevant when determining what is in the best interests of a child. Common factors considered include the character of each parent, the wishes of the parents, the wishes of the child, the child’s adjustment to his home, school, and community, the mental well being of the parents and the child, as well as many other factors<sup>20</sup>. Accordingly, courts have the latitude to consider a parent’s smoking habit as an appropriate factor when making custody determinations.

With the effects of ETS on children becoming well known, many courts are in fact considering parental smoking as an important factor in deciding child custody cases. In *Satalino v. Satalino*<sup>21</sup>, the court considered a parent’s smoking habit a legitimate factor to consider when making custody determinations. Just as a court would consider a parent’s alcohol or drug abuse, the court should also consider a parent’s smoking habits. In *Satalino*, the non-smoking father was seeking custody of his son since the mother and her parents (whom she was living with) continued to smoke in front of the child. Although the court took the mother’s smoking into consideration, it chose to award custody of the child to the mother since other factors outweighed the smoking factor.

In *Roofeh v. Roofeh*<sup>22</sup>, the plaintiff father had sought an order of protection against the mother based solely on her smoking in front of himself and his children. While the mother did not disagree about the dangers of second hand smoke, she felt the order inappropriate since she was not a “chain smoker” and smoked in only one room in the house<sup>23</sup>. The court did not grant the order of protection since it found that the legislature had never intended to grant the court the power to issue an order of

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<sup>19</sup> Moorby, *supra* note 12, at 834.

<sup>20</sup> *Id.*

<sup>21</sup> *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct. Oct. 10, 1990).

<sup>22</sup> *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (1988).

<sup>23</sup> *Id.* at 766.

protection against a spouse for smoking in the marital home which could result in her being jailed and forced to defend a criminal charge of criminal contempt<sup>24</sup>. However, the court did issue a temporary order directing the smoking mother not to smoke in the presence of her children and to confine her smoking to the small television room located in the home<sup>25</sup>. It based its order on the court's "inherent power in matrimonial matters to issue orders safeguarding the health and safety of the defendant and the children."<sup>26</sup>

Courts will often give considerable weight to parental smoking when the smoke is exacerbating a child's existing health problems. In *Lizzio v. Lizzio*<sup>27</sup>, the mother lost joint custody of her children. The non-smoking father was awarded primary and physical custody of the children. The court rested its decision *exclusively* on the mother's smoking habits, and even went against the recommendation of the guardian ad litem that joint custody continue<sup>28</sup>. The court stated that:

it is not as optimistic as the Law Guardian nor can it permit a child to be exposed to imminent danger upon the supposition that a mother who has ignored medical advice for many years will now see the light and do the right thing to protect her children. We are at a point in time when a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive tobacco smoke.<sup>29</sup>

Other cases have also considered parental smoking in making custody determinations. In *Helm v. Helm*<sup>30</sup>, the court recognized parental smoking as a legitimate factor to consider in deciding the best interests of the child but chose not to reverse the decision by the trial court which had granted custody to the smoking parent. Helm involved a healthy child who had no medical condition that was being worsened by the second hand smoke. In *Mitchell v. Mitchell*<sup>31</sup>, the non-smoking father was awarded custody of the children while the smoking mother was

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<sup>24</sup> *Id* at 771.

<sup>25</sup> *Id* at 772.

<sup>26</sup> *Id* at 771.

<sup>27</sup> *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (F. Ct. Fulton Co. 1994).

<sup>28</sup> *Id* at 937.

<sup>29</sup> *Id* at 938.

<sup>30</sup> *Helm v. Helm*, 1993 Tenn. App. LEXIS 109 (1993).

<sup>31</sup> *Mitchell v. Mitchell*, 1991 WL 63674 (Tenn. Ct. App. 1991).

granted visitation rights conditioned on her not smoking in the presence of the children. In *Pizzitola v. Pizzitola*<sup>32</sup>, the court awarded custody of the child to the non-smoking father, even though the mother had been the primary caregiver of the children throughout the marriage.

Courts have also considered parental smoking in the context of visitation rights. In *Badeaux v. Badeaux*<sup>33</sup>, the court affirmed the trial court's judgment reducing his visitation time with his child. The court found that the visitation schedule disrupted the twenty-month-old child's schedule. The court also noted that the child's bronchial asthma worsened after visits with his father, since his father lived with his smoking parents<sup>34</sup>. The father admitted that he knew that exposing the child to second hand smoke was harmful. The trial court found that the father was loving and affectionate, but determined that the effect of the second hand smoke on the child was an important factor in limiting visitation<sup>35</sup>.

The exposure of children to second hand smoke has also been considered when courts are determining whether or not to terminate parental rights. The Indiana Court of Appeals considered the mother's inadequate housing, low income, sexual abuse, failure to provide the children with care and necessities, and the mother's smoking habit when deciding to terminate the mother's parental rights<sup>36</sup>. While no court has considered parental smoking exclusively in a termination of parental rights case, courts are increasingly looking to it as a factor to consider, much as they are in cases of child custody<sup>37</sup>.

Many courts now consider parental smoking an important factor to consider in child custody disputes<sup>38</sup>. The cases where

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<sup>32</sup> *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. Ct. App. 1988).

<sup>33</sup> *Badeaux v. Badeaux*, 541 So.2d 301 (La. Ct. App. 1989).

<sup>34</sup> *Id.* at 301.

<sup>35</sup> *Id.* at 303.

<sup>36</sup> *In re. D.T.*, 547 N.E.2d 278 (Ind. Ct. App. 1989).

<sup>37</sup> Jon D. Andersson, *Parental Smoking: A Form of Child Abuse?* 77 *MARQ. L. REV.* 360, 371 (Winter 1994).

<sup>38</sup> See also *Wilk v. Wilk*, 781 S.W.2d 217 (Mo. Ct. App. 1989); *Cowgill v. Cowgill*, 1993 Del Fam. Ct LEXIS 40 (1993); *Scott v. Steelman*, 953 S.W.2d 147 (Mo. Ct. App. S.D. 1997); *Hollister v. Hollister*, 678 N.Y.S.2d 820 (App. Div. 3d Dep't 1998); *Heck v. Reed*, 529 N.W.2d 155 (N.D. 1995); *Cooley v. Cooley* 643 So.2d 408 (La App. 1994); *Lizzio v. Jackson*, 640 N.Y.S.2d 330 (1996).

courts have considered parental smoking share certain themes. Cases that involve healthy, normal children are not likely to have ETS exposure impact a custody determination. In contrast, in cases where ETS exposure exacerbates a child's existing medical condition, such as asthma, the parental smoking is likely to be given considerable weight. Most courts consider parental smoking only a factor to consider among many, and unlike the court in *Lizzio*<sup>39</sup>, do not consider it the determinative factor. As such, if the current trend continues, healthy children will continue to be exposed their parent's smoke until they develop some sort of chronic, medical condition.

### **Parental Rights to Smoke v. Children's Rights to a Smoke Free Environment**

When defending their right to smoke in front of their children, parents will often raise their constitutional right to privacy and their constitutionally protected liberty interest in raising their children as they see fit. These are both important rights that have received constitutional protection.

One should note, however, the difference between a parent asserting these rights that is not before the court and one asserting these rights when in the context of a custody dispute. In the former, the smoking parent enjoys greater protection; the state has not yet intervened in his or her private family affairs. In the later, however, the state is already actively intervening in the family. Because the state is empowered to determine the best interests of the child, the parents enjoy far less protection under the right to privacy and liberty right to raise their children as they see fit. These rights will be evaluated in the context of how they affect the child. Accordingly, while parents involved in custody disputes still enjoy these important constitutional rights, they cannot rely on them to the same degree that other parents can.

#### *A. The Right to Privacy*

One principal argument that smoking parents will assert is their right to privacy. Parents will argue that they have the right to smoke in their home, free of all governmental intrusion. This

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<sup>39</sup> *Supra* note 27.

right is based upon the premise that people have the fundamental right to privacy in their homes. While the government might be able to impose restrictions on smoking in public places, it has no place in regulating smoking in the home, even if it is in front of one's children.

Although the term "right to privacy" cannot be found in the United States Constitution, the Supreme Court of the United States has found the right to privacy to exist as a right implied in the Fourteenth Amendment's Due Process clause<sup>40</sup>. It is the liberty component of the Fourteenth Amendment's Due Process clause that confers upon citizens a right to privacy<sup>41</sup>. The right to privacy exists to insure individual autonomy and to keep conduct that society feels ought to be kept purely private free from governmental intrusion<sup>42</sup>.

Privacy rights fall into two categories: fundamental and non-fundamental<sup>43</sup>. The Supreme Court has defined a fundamental right as one that is "implicit in the concept of ordered liberty. . .such that neither liberty nor justice would exist if it were sacrificed".<sup>44</sup> To abolish such rights would violate a "principle of justice rooted in the traditions and conscience of the people".<sup>45</sup> The distinction between fundamental and non-fundamental rights is an important one. If the law substantially burdens a fundamental personal liberty, it is subject to strict scrutiny. Strict scrutiny requires the state to show that it has a compelling interest in regulating the activity which justifies the burden placed upon the activity. The law must also impose the least restrictive means available to achieve the state's end.<sup>46</sup> If the law does not burden a fundamental personal liberty, the state is only required to show that it has a legitimate interest in regulating the activity and that it is using means rationally related to furthering that interest<sup>47</sup>.

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<sup>40</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>41</sup> *Id.* at 152.

<sup>42</sup> Schwartz, *supra* note 6, at 155.

<sup>43</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>44</sup> *Id.* at 325-26.

<sup>45</sup> *Palko*, 302 U.S. at 325.

<sup>46</sup> *Roe*, 410 U.S. at 156.

<sup>47</sup> *Id.*



The courts have extended the right to privacy on a case-by-case basis<sup>48</sup>. Whether or not the right to smoke is a fundamental right subject to strict scrutiny has not yet been addressed by the Supreme Court. Accordingly, it is instructive to look at cases where the court has extended the right to privacy and compare the similarities to the activities the court has deemed protected to the activity of smoking in the home.

Procreative activities have been found to be protected by the right to privacy. In *Griswold v. Connecticut*<sup>49</sup>, the Supreme Court recognized the right to use contraceptives. In *Roe v. Wade*<sup>50</sup>, the court found that the right to privacy was broad enough to encompass a woman's decision whether or not to continue a pregnancy to term. The court qualified that right, however. When a fetus becomes viable, the state has a compelling interest in the potential life of the unborn child; therefore, the state can ban abortion after the point of viability<sup>51</sup>. The right to privacy also includes the right to "marry, establish a home, and bring up children<sup>52</sup>."

In *Stanley v. Georgia*<sup>53</sup>, the court protected a person's right to view obscene materials in his or her home. Even though the law could prohibit the possession of such materials outside the confines of the home, the state could not prosecute someone because they found obscene materials in his or her home. The court reasoned that "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch".<sup>54</sup>

The right to privacy places great importance upon the home as a sacred place. This right is supported by both the Third and Fourth Amendments. The Third Amendment does not allow the state to quarter soldiers in citizens' homes without their consent<sup>55</sup>. The Fourth Amendment guarantees "the right of the peo-

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<sup>48</sup> Moorby, *supra* note 12, at 841.

<sup>49</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>50</sup> *Supra* note 40.

<sup>51</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>52</sup> *Meyers v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>53</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>54</sup> *Id* at 565.

<sup>55</sup> U.S. CONST. amend. III.

ple to be secure in their houses” and prohibits the state from engaging in “unreasonable searches and seizures”.<sup>56</sup> These amendments suggest that the Constitution places great importance on the sanctity of the home, and several cases have illustrated the right to privacy in the home by greatly curtailing the state’s ability to search one’s home<sup>57</sup>.

The court, however, has not always extended the right to privacy. In *Bowers v. Hardwick*<sup>58</sup>, a divided court upheld a law prohibiting sodomy. The law was being challenged by a man who was prosecuted for engaging in voluntary, homosexual conduct in the privacy of his own home. The court did not frame the issue as whether one has the right to engage in consensual sexual acts with another adult in the privacy of the home but rather as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”.<sup>59</sup> While the defendant focused on where the act occurred - his home - the court focused on the act itself - sodomy - and concluded that it was not a fundamental right protected by the Constitution<sup>60</sup>.

Is smoking within one’s home a fundamental right that should be kept free from any governmental intrusion? The beginning point in analyzing this question is the *Palko* criteria. Is the right to smoke in the home “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist if it were sacrificed<sup>61</sup>”? In making this determination, the court will look to the “traditions and conscience of the people”.<sup>62</sup> Traditionally, smoking in the home, in the presence of children, has been a question solely for the parent’s determination. However, society’s attitude toward smoking has changed dramatically over the last few decades. As medical research details the harm of smoking and of second hand smoke, society has imposed more and more limitations upon the right to smoke. Smoking is curtailed in most public places. Forty-six states, as well as the District of Columbia, have laws restricting smoking in public

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<sup>56</sup> U.S. CONST. amend. IV.

<sup>57</sup> See *Katz v. United States*, 389 U.S. 347 (1967).

<sup>58</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>59</sup> *Id.* at 190.

<sup>60</sup> *Id.* at 195.

<sup>61</sup> *Supra* at notes 43-44.

<sup>62</sup> *Griswold*, 381 U.S. at 487.

places<sup>63</sup>. Even inmates have successfully asserted the right to be free from second hand smoke<sup>64</sup>. If society has come to the point that it believes that inmates should be free of second hand smoke, it is not much of a leap to assume that society also believes that children, a much more sympathetic group than inmates, should be free from the harm inflicted by second hand smoke.

Further, smoking bears little relation to the activities that have been deemed protected under the right to privacy. The right to privacy has been extended to marriage, procreation, contraception, family relations, child rearing, and education<sup>65</sup>. The right is closely linked to family relationships and autonomy. Smoking is not linked to any of these important family decisions. Smokers might argue that smoking in the home is protected under *Stanley*<sup>66</sup>. While the court in *Stanley* found that one could limit the possession of obscene materials in public, the same did not hold true for limiting possession of those same materials in the home<sup>67</sup>. A smoker would argue that the same holds true for smoking - the state can regulate smoking in public, but not in the privacy of one's home.

The difference between *Stanley* and smoking in the home is that *Stanley* involved a well-established right embodied the First Amendment. Smoking in the home does not implicate any such established right. Further, the state is only seeking to regulate smoking in the presence of children; it is not prohibiting smoking in the home altogether. A parent can still choose to smoke in his or her home, just not in the presence of his or her child. It seems that smoking in the home is clearly distinguishable from the First Amendment rights implicated in *Stanley*.

If smoking in the home is not deemed a fundamental right, then the state need only show that it has a legitimate interest in restricting smoking in the home in the presence of children and that it is using a means rationally related to achieving that interest<sup>68</sup>. Given the established health consequences that children

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<sup>63</sup> Hall, *supra* note 14, at 125.

<sup>64</sup> *Helling v. McKinney*, 113 S.Ct. 2475 (1993).

<sup>65</sup> *Supra* at notes 43-58.

<sup>66</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>67</sup> *Id.*

<sup>68</sup> *Roe*, 410 U.S. at 156.

suffer when exposed to second hand smoke, the state has a legitimate interest in protecting children from second hand smoke. Prohibiting parents from smoking in front of their children, including prohibiting them from smoking in the presence of their children in their home, is not only rationally related to achieving that interest, but is arguably necessary to achieving that interest.

Even if smoking in the home is deemed a fundamental right, the health consequences of being exposed to second hand smoke are so serious that the state may even be said to have a compelling interest in restricting that right<sup>69</sup>. By allowing parents to smoke in the home, but forbidding them from doing it in the presence of their children, the state could also be said to be using the least restrictive means possible to protect its interest. Parents can still smoke in their home; they simply must confine it to an area of the home where their children will not be exposed.

#### B. *Parental Autonomy*

A second argument smoking parents put forth is that parents do have a fundamental liberty interest in directing the upbringing and education of their children<sup>70</sup>. This liberty interest has been recognized and protected in many cases. In *Meyers v. Nebraska*<sup>71</sup>, the Supreme Court held that a statute which prohibited teaching children a foreign language before the children had completed the eighth grade was unconstitutional. A teacher who had taught German in a parochial school was challenging the statute. The court found the statute to infringe upon a parent's Fourteenth Amendment liberty interest. The court stated that

while this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness<sup>72</sup>. (emphasis added).

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<sup>69</sup> *Id.*

<sup>70</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 399.

In *Pierce v. Society of Sisters*<sup>73</sup>, the Supreme Court held an Oregon law compelling children between the ages of eight and sixteen to attend public schools unconstitutional. The court thought it “entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.<sup>74</sup>” The court went on to say that “the child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.<sup>75</sup>”

While the courts have extended parents great control in deciding how to raise their children, not all parental action will be protected. In *Prince v. Massachusetts*<sup>76</sup>, the guardian of a child was convicted of violating child labor laws when she allowed her nine-year-old niece to sell religious literature. The guardian claimed that the law interfered with her First Amendment right to practice her religion as well as her liberty interest in raising the child as she saw fit. The court upheld the guardian’s conviction. The court reasoned that:

The family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting child labor, and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience<sup>77</sup>.

Should parents be the ones to decide whether or not to smoke in front of their children, or is it up to the State, acting under its *parens patriae* authority, to protect the children? Much of current federal and state regulation involving children, such as abuse, neglect, and delinquency laws, holds as a central tenant the doctrine of *parens patriae*<sup>78</sup>. The central idea behind the doctrine is that state should protect the welfare of certain vulnerable

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<sup>73</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>74</sup> *Id.* at 534.

<sup>75</sup> *Id.* at 535.

<sup>76</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>77</sup> *Id.*

<sup>78</sup> Douglas E. Abrams & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy, and Practice* (West 2000).

individuals, such as children and mental incompetents, who are unable to promote and protect their own best interests<sup>79</sup>.

On the other hand, the law is often reluctant to intervene within the private sphere of the family. The idea of the state entering a person's private home and investigating personal, family affairs is a distasteful concept to many people<sup>80</sup>. Further, enforcing the court's orders is not always easy. The conduct that the state is attempting to monitor occurs in a private setting and is therefore much harder to monitor<sup>81</sup>. Children might feel pressured to lie about their parent's activities. Perhaps in the smoking context this could be overcome by certain medical tests, such as measuring the amount of nicotine in a child's blood. Nonetheless, the child may feel great guilt and psychological pressure when trying to protect their parents.

Parents might also argue that if the state is allowed to usurp their authority in the realm of smoking, it may continue its intrusion into other family affairs. What if the child eats too much sugar or watches too much television? Should the state be able to monitor what a child eats? A high fat, high sugar diet can lead to serious medical problems such as obesity and diabetes. Couldn't the state, if allowed to monitor parental smoking, also be allowed to monitor parental selection of their children's food?

Michael S. Moorby counters this "slippery slope" argument in his article entitled "Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air."<sup>82</sup> Moorby argues that the established consequences of second hand smoke make state intervention appropriate. Eating too much sugar or watching too much television will not cause the significant, long term health consequences that second hand smoke will. In order to avoid the slippery slope, courts should be diligent when issuing their non-smoking orders. The orders should curtail the parent's smoking only to the extent necessary to protect the child's health. For example, a judge should not order a parent not to smoke for forty-eight hours prior to a visit by his or her child. Second hand smoke does not remain in the air for forty-eight hours. By making the order as narrowly tailored as

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<sup>79</sup> *Id* at 17.

<sup>80</sup> *Id* at 18.

<sup>81</sup> *Id* at 18.

<sup>82</sup> Moorby, *supra* note 12, at 853.

possible, the courts can balance the parent's right to smoke with the child's right to breathe clean air<sup>83</sup>.

It seems probable that the state may, under the doctrine of *parens patriae*, regulate a parent's smoking habits when the parent is in the presence of his/her children. While parents do enjoy the liberty interest of raising their children how they deem fit, that liberty interest is not without constraint. Parents cannot abuse, neglect, or otherwise cause serious harm to their children. Smoking around one's child has a detrimental and long lasting affect on the child's health that has been well documented in the medical field. So long as the court keeps its non-smoking orders closely tailored so that it is protecting children's health while also protecting a parent's right to smoke, it seems that a parent's argument of parental autonomy is likely to fail.

## Other Avenues of Protection

### A. *The Constitution*

While smokers might claim the right to smoke, non-smokers claim the right to breathe clean air. Just as the constitution does not explicitly address the right to smoke, it does not explicitly address the right to breathe clean air. Non-smokers have argued that the courts should infer the right to breathe clean air from different constitutional amendments<sup>84</sup>. If adult non-smokers can assert that they have a constitutional right to breathe clean air, children could enjoy the same constitutional protection as well.

The Ninth Amendment states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people".<sup>85</sup> Non-smokers argue that although the right to breathe clean air is not one of the liberties explicitly protected by the Bill of Rights, it is nonetheless protected by the Ninth Amendment<sup>86</sup>. The Ninth Amendment has also been used as an argument to advance environmental rights. However, the courts have not found Ninth Amendment

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<sup>83</sup> *Id.*

<sup>84</sup> Schwartz, *supra* note 6, at 145.

<sup>85</sup> U.S. CONST. amend. IX.

<sup>86</sup> Schwartz, *supra* note 6, at 145.

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protection for either environmental rights or for the right to breathe free air cases<sup>87</sup>.

Non-smokers have also sought protection for their right to breathe clean air under the First Amendment, which in part guarantees the right to freely receive information and ideas<sup>88</sup>. In *Gaspar v. Louisiana Stadium and Exposition District*<sup>89</sup>, the plaintiffs claimed that smoking in the Louisiana Superdome violated their right to breathe clean air. The plaintiffs claimed this right was protected by both the Ninth and First Amendment. The United States District Court for the Eastern District of Louisiana rejected both of these arguments, and the United States Supreme Court declined to hear the case<sup>90</sup>.

There has been only one instance in which a person has been successful at arguing that the Constitution protected him from second hand smoke. In *Helling v. McKinney*<sup>91</sup>, the Supreme Court held that when prison officials, with deliberate indifference, expose an inmate to ETS levels that pose an unreasonable risk to that inmate's future health, the inmate has an Eighth Amendment claim. The case involved a non-smoking inmate who shared a cell with another inmate that smoked five packs of cigarettes a day. The prison officials ignored the non-smoking inmate's complaints. The Supreme Court held that such deliberate indifference to an inmate's serious medical needs violated the Eighth Amendment<sup>92</sup> because it involved the "unnecessary and wanton infliction of pain contrary to society's standards of decency."<sup>93</sup>

In sum, the Constitution has not yet provided adult non-smokers with a viable claim that they have the right to breathe clean air. Accordingly, children may find little protection for breathing clean air in the Constitution, unless they are at some point detained in an adult prison setting.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Gaspar v. Louisiana Stadium and Exposition District*, 577 F.2d 897 (5th Cir. 1978), *cert denied*, 439 U.S. 1073 (1979).

<sup>90</sup> *Id.*

<sup>91</sup> *Helling v. McKinney*, 113 S.Ct. 2475 (1993).

<sup>92</sup> The Eighth Amendment prohibits the infliction of cruel and unusual punishment. U.S. CONST. amend. XIII.

<sup>93</sup> *Helling*, 113 S.Ct. at 2476.



### B. *Is Smoking in Front of Your Child a Form of Child Abuse?*

Many believe that the health consequences of exposure to ETS are so severe that parents who choose to smoke in front of their children are engaging in a form of child abuse<sup>94</sup>. All states have child abuse statutes, and looking at one state's definition of child abuse can help illustrate the argument that exposing a child to ETS is a form of child abuse.

Under Missouri law, child abuse is defined as "any physical injury, sexual abuse, or emotional abuse of a child, other than by accidental means, by those responsible for the child's care, custody and control, except reasonable discipline".<sup>95</sup> Under this definition, one could argue that exposing one's child to ETS is, in fact, a form of child abuse. Second hand smoke has been shown to cause various physical injuries to children - increased asthma, bronchitis, cancer, cough, lung irritation, and a myriad of other problems<sup>96</sup>. The exposure of the child to the ETS is not on accident - parents deliberately choose to light up in front of their children, knowing full well that it is dangerous to do so. It is obviously not any form of reasonable discipline. As such, one could make a reasonable argument that smoking in the presence of one's children is a form of child abuse.

Courts, however, have not been willing to go this far. No court has yet found smoking in front of one's children a form of child abuse<sup>97</sup>. Perhaps it seems too extreme a position to take. Society may not be at the point where it is willing to equate smoking in front of one's child with beating a child or other physical forms of child abuse. It may be that as public awareness about the dangers of ETS increases that society and the courts will be more willing to entertain the idea that exposing a child to ETS is a form of child abuse. For the present, however, children will not be protected from second hand smoke by child abuse laws.

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<sup>94</sup> Anderson, *supra* note 37, at 375.

<sup>95</sup> Mo. Rev. Stat. § 210.110 (1994).

<sup>96</sup> *Supra* at notes 11-18.

<sup>97</sup> Anderson, *supra* note 37, at 376.

## **Conclusion**

It is now well accepted and known that second hand smoke poses a serious threat to the health of those exposed to it. Courts are beginning to take notice of this and are considering parental smoking when making child custody decisions. Attorneys would be wise to advise their clients involved in a custody proceeding to refrain from smoking in the presence of their children. While the court may not find that the child has a constitutional right to breathe clean air or that the parent is engaging in a form of child abuse, the court may very well decide that the best interests of the child would be served by placing the child in the care and custody of the non-smoking parent. This is especially true when parents are equal in all respects except for the fact that one smokes and one does not. Sometimes legal outcomes can be determined by simple lifestyle changes. As a simple truism, parents who wish to retain custody of their children should not smoke in front of them.

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