

NOTES

PARENTAL AUTONOMY VERSUS CHILDREN'S HEALTH RIGHTS: SHOULD PARENTS BE PROHIBITED FROM SMOKING IN THE PRESENCE OF THEIR CHILDREN?

I. INTRODUCTION

Increased awareness of the dangerous effects of passive smoking¹ has led state legislatures, courts, and even private businesses to take action in an effort to protect the health of non-smokers. Various state and local laws have been enacted to restrict smoking in public areas.² Courts also have acted to try to prevent exposure to passive smoke. *Roofeh v. Roofeh*³ is one of the first cases in which a court deciding a matrimonial action considered the spouse's smoking habit. Since *Roofeh*, courts have increasingly examined a child's exposure to smoking as a determinative factor for denying a parent custody.⁴ Courts have also allowed employers to dictate employees' smoking habits in the work place. In *Grusendorf v. City of Oklahoma City*,⁵ a firefighter trainee was fired for smoking on his

1. See CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986) [hereinafter THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING].

2. See *infra* note 191.

3. 525 N.Y.S.2d 765 (N.Y. App. Div. 1988). Plaintiff-wife commenced an action for divorce. The defendant, a physician, sought an order of protection against his wife on the sole ground that she smoked cigarettes in the presence of the defendant and their children, thus harming them. *Id.* at 766. The Supreme Court for Nassau County, New York refused to grant the defendant's request for an order of protection because such orders, in the court's opinion, were reserved for protecting family members from domestic violence. *Id.* at 769. However, the court noted that it had inherent power in matrimonial matters to issue orders protecting the health and safety of the defendant's children. *Id.* Thus, the court issued a temporary order enjoining the plaintiff-wife from smoking in the marital residence and confining her cigarette smoking to the small television room of the house and only if none of her children were present in the room. *Id.*

Since the *Roofeh* decision, many courts have used smoking as a justification for limiting visitation rights or awarding custody to the other parent. See, e.g., *Unger v. Unger*, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994). For a general discussion on smoking and custody adjudications, see *infra* notes 112-32 and accompanying text; see generally Carolyn J. Wheatley, Note, *Should the Ill Effects of Environmental Tobacco Smoke Exposure Affect Child-Custody Decisions?* 32 U. LOUISVILLE J. FAM. L. 115 (1993-94).

4. See *infra* part IV.A.

5. 816 F.2d 539 (10th Cir. 1987).

lunch break, in violation of the fire department's non-smoking rule.⁶ The Tenth Circuit rejected the trainee's constitutional challenge to his termination.⁷ In *McKinney v. Anderson*,⁸ a prisoner in a Nevada state prison filed suit against the prison officials, claiming that his exposure to passive smoking while in prison was a violation of his Eighth Amendment right against cruel and unusual punishment.⁹ The Ninth Circuit Court of Appeals held that exposure to smoking constitutes cruel and unusual punishment under the Eighth Amendment in circumstances where an inmate's health may be harmed.¹⁰ Private businesses have also contributed to the fight against passive smoke; for example, major airlines offer smoke-free international flights.¹¹

Today, the harmful effects of passive smoke, referred to as Environmental Tobacco Smoke ("ETS"), are widely recognized.¹² Some contemporary commentators question whether parents should be allowed to smoke in the presence of their children.¹³ Some even argue that a child's exposure to ETS constitutes child abuse and warrants sanctions such as termination of parental rights and criminal convictions.¹⁴

Smoking is already regulated in the work place, prisons, and in child custody cases. This Note argues that smoking should also be regulated in homes where parents smoke in front of their children, even in the absence of a custody battle. Such regulation, however, could conflict with not only parents' rights as individuals to determine their own behavior, but also with their right to determine how to raise their children.¹⁵

6. *Id.* at 540, 543.

7. For an explanation of the *Grusendorf* holding, see *infra* notes 147-51 and accompanying text.

8. 924 F.2d 1500 (9th Cir. 1991).

9. *Id.* at 1502.

10. *Id.* at 1509.

11. See *infra* note 191.

12. For detailed discussion of ETS, see *infra* part III and see generally THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, *supra* note 1, at 7-8 (explaining the various harms caused by ETS).

13. See, e.g., Allison D. Schwartz, Comment, *Environmental Tobacco Smoke and Its Effect on Children: Controlling Smoking in the Home*, 20 B.C. ENVTL. AFF. L. REV. 135 (1993).

14. Jon D. Anderson, *Parental Smoking: A Form of Child Abuse?* 77 MARQ. L. REV. 360, 375-76 (1994); see also David B. Ezra, *Sticks and Stones Can Break My Bones, but Tobacco Smoke Can Kill Me: Can We Protect Children from Parents That Smoke?* 13 ST. LOUIS U. PUB. L. REV. 547, 575-86 (1994).

15. The concept of family autonomy refers to parents' control over "private" matters that occur within the family unit. See Jennifer Trahan, *Constitutional Law: Parental Denial of a Child's Medical Treatment for Religious Reasons*, 1989 ANN. SURV. AM. L. 307 (1990). Courts and authors use the concepts of family autonomy and parental autonomy interchangeably. *Id.* Raising children in a smoking environment not only involves personal choices, but also involves parental or family autonomy.

Part II of this Note examines the evolution of society's attitude towards children and families. Because our society has come to regard children as individuals who deserve protection, dignity, and respect, the Supreme Court has occasionally permitted the law to interfere with family privacy in situations where a child's welfare is at stake. Although family privacy is constitutionally protected and parents are, to a degree, free to make any and all decisions concerning their families, interference with family privacy is legitimate and constitutional when such decisions harm children.

Part III of this Note demonstrates the dangers of ETS and its harmful effects on non-smokers, especially children. Therefore, the argument set forth in Part IV is ineluctable. Based on the criteria set forth in Part II permitting state intervention in family matters, Part IV argues that states may constitutionally restrict parents' autonomy and prevent them from smoking near their children.

Part V concludes that although one could constitutionally restrict parental smoking under child abuse and neglect statutes, using criminal child abuse statutes to terminate parental rights is too drastic a solution. An all-or-nothing approach only substitutes one harm for another. This Note proposes other solutions to protect children from exposure to ETS at home, such as parental prevention and treatment programs, orders restraining parents from smoking near their children, creation of professional duties to report smoking at home, and fines.¹⁶

II. HISTORY AND EVOLUTION OF PARENTAL RIGHTS FROM COLONIAL TIMES TO THEIR CONSTITUTIONAL CONSECRATION

A. *Evolution of Societal Attitudes Toward Children and Emergence of the Concept of Family Privacy*

The notions that parents are not absolutely free to raise their children as they see fit and that society has a compelling interest in protecting children against parental abuse are relatively new. An examination of the evolution of societal views on families and children is critical to understanding why the Supreme Court protects family privacy under the Constitution, yet allows states to interfere with family life in certain limited situations.

In early colonial years, American families¹⁷ tended to be rural family

16. See *infra* part V.B.

17. See generally Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569 (1992) (describing the evolution of the American family from the colonial era to

units, in which a child's role was to assist the parents: "[C]hildren faced severe social and legal restraints . . . [and] strict discipline and parental respect were the hallmarks of child-rearing practices."¹⁸ Families were organized according to the same principles of organization that applied to society at large—Hobbesian authoritarian views of sovereignty and Puritanical principles emphasizing hierarchical organization and strict authority.¹⁹ The parents' responsibility was to ensure that their children would become productive members of a society in which children were considered "economic assets."²⁰

Colonial society only interfered with families in order to ensure that children became productive members of society and not put burdens upon it.²¹ For instance, neglected children were taken away from their families only when it was feared that such children would become delinquents.²² However, unless a child's condition posed a risk to society as a whole, courts would not interfere with family decisions.²³ Maximum parental authority was perceived as necessary to maintaining an orderly society.

A radical change occurred during the nineteenth century: the family unit migrated from rural to urban areas, and factories replaced the household or family farm as the primary unit of economic production.²⁴ This new separation between work and home forced society to regard the family home as a shelter or refuge, out of society's reach.²⁵ Children were no longer considered economic assets, but individuals.²⁶ The parents' primary role was to educate their children and inculcate sound values and principles.²⁷ As the notion that child-rearing and family relationships were

present times).

18. SANDRA STENCEL, EDITORIAL RESEARCH REPORTS ON THE CHANGING AMERICAN FAMILY 12-13 (1979).

19. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1139.

20. STENCEL, *supra* note 18, at 12.

21. McMullen, *supra* note 17, at 573-74.

22. *Id.* at 574. For the same reason, state officials would also take away poor children and place them in apprenticeships. LAURENCE D. HOULGATE, *THE CHILD AND THE STATE*, 23 (1980) (citing Harold Goldstein, *Child Labor in America's History*, 30 CHILDREN TODAY 5 (1976)). For example, under a 1646 Virginia law, county commissioners were required to send poor children over six or seven years old to work in the public flax houses in Jamestown. *Id.* See generally SOPHONISBA P. BRECKENRIDGE, *THE FAMILY AND THE STATE: SELECT DOCUMENTS* 344 (1934).

23. McMullen, *supra* note 17, at 575.

24. Teitelbaum, *supra* note 19, at 1140-41.

25. *Id.* at 1141.

26. *Id.* at 1143.

27. *Id.*

part of a "private sphere"²⁸ emerged, society began to believe that the family was not a proper area for government intervention.²⁹

Concomitant to recognizing that families were part of a "private sphere," society also came to recognize that parents were not absolutely free to raise their children without some restrictions. States began to impose limits on family autonomy through neglect and delinquency statutes.³⁰ Courts primarily upheld these statutes by invoking the *parens patriae* power of the state.³¹ *Parens patriae* is defined as the state's power to protect and promote the welfare of individuals who lack the capacity to act in their own best interest, such as children or mental incompetents.³²

Because most neglect and delinquency statutes, as originally enacted, were vague, judges often resorted to using subjective standards to determine

28. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 14 (1985).

29. See McMullen, *supra* note 17, at 577. The concept of family autonomy emerged in a social atmosphere where government's interference with individual choices was generally regarded as evil: "[L]eaving people to themselves is always better . . . than controlling them." JOHN STUART MILL, *ON LIBERTY* 97 (C. Shields ed., 1956), *quoted in* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 *VILL. L. REV.* 1705, 1712 (1992).

30. The affair that prompted the enactment of child abuse and neglect legislation is the famous 1874 case of Mary Ellen. See Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 *GEO. WASH. L. REV.* 243, 244 nn.6-11 (1982). The child, Mary Ellen, was subjected to daily beatings and other forms of abuse by her stepparents. A social worker sought to intervene, but discovered that no laws existed allowing intervention in family matters to protect battered children. HOULGATE, *supra* note 22, at xi. The social worker was forced to resort to the Society for the Prevention of Cruelty to Animals, which successfully prosecuted the parents under the existing cruelty to animals laws. They prevailed on the grounds that children are an animal species, possessing the right to be free from cruelty. *Id.* The publicity of the Marie Ellen affair prompted many states to enact laws regulating child abuse and neglect. *Id.*

31. Courts could also use the state police power to justify interferences with family autonomy. See Ernest Gellhorn, *Developments in the Law—The Constitution and the Family*, 93 *HARV. L. REV.* 1156, 1198 (1980) (book review). Under the police power, the state has plenary power to promote the health, safety, morals and general welfare of its citizens. *Id.* at 1198-99. Thus, if an individual's conduct endangers any of these interests, the state may intervene under the police power. The *parens patriae* power, however, is designed to protect the welfare of individuals as opposed to society. *Id.* at 1199. Thus the state may intervene even when there is no possibility of harm to public welfare. *Id.* Generally, courts invoke the state's *parens patriae* power rather than the state's police power to uphold child abuse or neglect legislation. *Id.* at 1221.

32. *Id.* at 1199. The state's *parens patriae* power originated as an equitable concept in the English chancery courts. *Id.* at 1221. The courts permitted a chancellor to act as "general guardian of all infants, idiots, and lunatics." *Id.* at 1221-22. Initially, the chancellors only used their power when property was at issue and the child lacked a natural guardian. *Id.* at 1222 n.153. Eventually, the English courts began to use their *parens patriae* power to protect children in other situations, e.g., to protect children from "grossly immoral or heretical parents." *Id.* at 1222.

whether state intervention was justified.³³ As a result, even though society considered the home an inviolable sanctuary, nineteenth century courts allowed states to intervene in family life fairly frequently.³⁴ During the twentieth century, however, the Supreme Court extended constitutional protection to family privacy, and, in a long line of cases, severely limited the states' power to interfere with parental autonomy.³⁵

B. *Constitutional Protection of Family Autonomy*

The constitutional protection of family privacy originated in *Meyer v. Nebraska*.³⁶ In *Meyer*, the Court invalidated a statute that in effect prohibited parents from teaching their children foreign languages before the child finished eighth grade.³⁷ The Court held that the statute unreasonably interfered with parental autonomy and violated the Due Process Clause because the word "liberty," found in the Fourteenth Amendment, grants parents the right to "establish a home and bring up children."³⁸ Thus, the Court recognized that parents have certain fundamental rights in determining how to raise their children.³⁹ Because the Court did not believe that the state had a sufficiently compelling interest that outweighed the parents' right to direct their child's upbringing, the Court concluded that the statute was unconstitutional.⁴⁰ However, the Supreme Court suggested that had the State demonstrated that teaching foreign languages harmed children's

33. *Id.* at 1224.

34. *Id.* at 1221-27.

35. The Supreme Court has constitutionally protected parental autonomy under the Due Process Clause of the Fourteenth Amendment. See *infra* notes 36-41 and accompanying text.

36. 262 U.S. 390 (1923).

37. *Id.* at 396-97. The Nebraska Act read: "Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides." *Id.* at 397 (quoting 1919 Neb. Laws ch. 249).

38. *Id.* at 399.

39. *Id.* at 401.

40. *Id.* at 403. The state asserted that the legislation was valid because its purpose was to "promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals . . ." *Id.* at 401. The Court declared that the state could go "very far" in order to improve the quality of its citizens. However, the Court noted the state also had to respect individuals' fundamental rights. *Id.* The Court noted that Plato's Ideal Commonwealth, where children would be taken from their families and raised by Sparta, was inconsistent with the American tradition of parental autonomy, and thus with the Constitution. *Id.* at 401-02. The Court concluded that the only way that state interference with parental autonomy could survive a constitutional challenge was if knowledge of a foreign language clearly harmed the child's health or morals. *Id.* at 403. Because the state could not make such a showing, the Court concluded that the statute was invalid. *Id.*

health, the state's interference would have been justified.⁴¹

Two years later, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*,⁴² the Supreme Court invalidated a state statute requiring parents to send children between ages eight and sixteen to public schools.⁴³ The State had attempted to compel general attendance at public schools.⁴⁴ The Court recognized that requiring children to attend schools was a valid state interest.⁴⁵ However, the statute, in effect, precluded parents from sending their children to religious schools. Because religious schools were not "unfit" for or "harmful" to children,⁴⁶ the Court found that the statute unreasonably interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁴⁷

In *Prince v. Massachusetts*,⁴⁸ the Supreme Court held that the guardian of a child had violated a Massachusetts child-labor law by allowing the child to sell religious literature on the streets.⁴⁹ The Court, in accord with *Meyer* and *Pierce*, acknowledged that there is a private realm of family life into which the state could not enter.⁵⁰ However, the Court also recognized that family life is not beyond all forms of regulation.⁵¹ The Court declared that state intervention into family privacy and parental autonomy is constitutionally permissible if the challenged statute is designed to prevent harm to the child and the statute is a necessary means to accomplish that objective.⁵² Because "propagandizing the community"⁵³ could be physi-

41. *Id.* at 403. "No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." *Id.* "[E]xperience shows that [proficiency in a foreign language] is not injurious to the health . . . of the ordinary child." *Id.*

42. 268 U.S. 510 (1925).

43. *Id.* at 530.

44. *Id.* at 531.

45. The Court expressly declared that "[n]o question is raised concerning the power of the State reasonably to regulate all schools . . . [and] to require that all children of proper age attend some school" *Id.* at 534.

46. On the contrary, the Court noted that sending children to religious schools was both encouraged and meritorious. *Id.* at 534.

47. *Id.* at 534-35.

48. 321 U.S. 158 (1944).

49. *Id.*

50. *Id.* at 166.

51. *Id.*

52. *Id.* at 166-69.

53. The court considered that "propagandizing the community," i.e., street preaching (whether oral or by handing out leaflets), created situations that were difficult for adults to cope with and a fortiori for children of tender years. *Id.* at 169.

cally and emotionally harmful to children, the Court upheld the statute.⁵⁴ Thus, *Prince* stands for the proposition that whenever parents' actions or decisions threaten to harm their children, states may interfere with family autonomy.

The Court refined the *Prince* holding in *Wisconsin v. Yoder*.⁵⁵ In *Yoder*, an Amish couple refused to comply with a state statute requiring children to attend secondary school.⁵⁶ The State of Wisconsin asserted that under the *parens patriae* doctrine, it had the power to require children to attend secondary schools in situations where the parents refused to voluntarily send them.⁵⁷ The Court again recognized that the state may only interfere with parents' decisions regarding a child's upbringing if the state can show that the parents' conduct or decisions will somehow "jeopardize the health or safety of the child, or have a potential for significant social burdens."⁵⁸ Finding no showing of harm to the children,⁵⁹ the Court concluded that the state's interest in requiring a few more years of education did not outweigh the parents' interest in raising their children according to Amish customs.⁶⁰ Accordingly, the Court ruled in favor of the parents.⁶¹

The Supreme Court's rulings in *Meyer*, *Pierce*, *Prince*, and *Yoder*⁶² indicate that the Court is generally reluctant to allow state intervention in the private sphere of family life. The Supreme Court generally recognizes parents as the uncontested authorities of the home, *except* when their decisions harm their children. Thus, where parental decisions are likely to harm their children, the Court believes that the state has a "compelling

54. *Id.* at 169-70.

55. 406 U.S. 205 (1972).

56. *Id.* at 207-08 n.2. The Wisconsin statute provided that "any person having under his control a child who is between the ages of seven and sixteen years shall cause such child to attend school regularly." *Id.* (citing WIS. STAT. § 118.15 (1969)).

57. *Id.* at 229.

58. *Id.* at 234. The Court, reiterated that "the power of the parent . . . may be subject to limitation under *Prince* . . ." and noted that the state might have had a compelling interest justifying intervention if the record had demonstratively shown that forgoing one or two years of school damaged the children or otherwise "materially detract[ed]" from the welfare of society. *Id.* at 233-34.

59. An expert witness for the Amish couple asserted that compulsory high school attendance could result in great psychological harm to Amish children because modern high schools impart values contrary to those espoused by the Amish. Thus, compulsory secondary school attendance might ultimately prevent the Amish children from integrating into both the Amish community and contemporary society. *Id.* at 211-13.

60. *Id.* at 234.

61. *Id.* at 234-36.

62. *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510; *Prince*, 321 U.S. 158; *Yoder*, 406 U.S. 205.

interest⁶³ in protecting the children, which gives the state the power to limit a parent's authority.⁶⁴ Therefore, to determine whether state regulations restricting parental smoking in the presence of their children are constitutional, it is necessary to first examine the dangers of smoking and whether passive smoking actually harms children.

III. THE DANGERS OF ETS FOR CHILDREN⁶⁵

Tobacco smoke contains approximately 4,000 chemical components,⁶⁶ forty-three of which are carcinogens⁶⁷ and two hundred of which are known poisons.⁶⁸ Tobacco smoking⁶⁹ is one of the major public health hazards in the United States today,⁷⁰ causing an estimated 434,000 deaths

63. The Court's decisions show that the state always has a compelling interest where it intervenes to protect children from parental conduct that threatens their physical or mental health. *See, e.g., Yoder*, 406 U.S. at 234 (invalidating Wisconsin statute requiring all children to attend secondary school because foregoing continued education did not harm them and, in fact, prepared them for Amish life); *Prince*, 321 U.S. 158, 170 (upholding a statute prohibiting children from selling magazines in public places because of possible harmful physical and emotional consequences associated with that activity); *Meyer*, 262 U.S. 390, 403 (holding that the state had not established a legitimate interest warranting intervention because the state statute which required learning a foreign language was in fact beneficial to children); *see also Oldfield v. Benavidez*, 867 P.2d 1167, 1173 (N.M. 1994) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

64. *Prince*, 321 U.S. at 166-67.

65. Schwartz, *supra* note 13; Wheatley, *supra* note 3; Anderson, *supra* note 14.

66. AM. LUNG ASS'N, LEAFLET NO. 0006, FACTS ABOUT SECOND-HAND SMOKE (1992) [hereinafter FACTS ABOUT SECOND-HAND SMOKE].

67. U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING THE HEALTH CONSEQUENCES OF SMOKING, 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 21 (1989).

68. FACTS ABOUT SECOND-HAND SMOKE, *supra* note 66, at 1. Tobacco smoke not only contains nicotine, which is poisonous and addictive, but also cyanide, ammonia, acetone and poisonous gases such as nitrogen oxide and carbon monoxide. AM. CANCER SOC'Y, LEAFLET NO. 2023-LE, THE MOST OFTEN ASKED QUESTIONS ABOUT SMOKING, TOBACCO, AND HEALTH AND . . . THE ANSWERS, questions 3 & 9 (1993) [hereinafter QUESTIONS ABOUT SMOKING].

69. Tobacco smoking not only designates cigarette smoking, but also includes cigar and pipe smoking. FACTS ABOUT SECOND-HAND SMOKE, *supra* note 66, at 1. Because it is virtually impossible to avoid inhaling tobacco smoke totally, even smokers who do not inhale—generally cigar and pipe smokers—increase their risk of lung cancer. *See* QUESTIONS ABOUT SMOKING, *supra* note 68, question 11. Smokers are also at an increased risk for contracting lip, mouth, and tongue cancer. *Id.* Neither chewing tobacco nor snuff are safe alternatives to smoking. *Id.* question 32. Smokeless tobacco actually contains even more cancer-causing substances (known as nitrosamines) than smoking tobacco does. *Id.* In fact, some smokeless tobacco brands contain up to 20,000 times the legal limit of nitrosamines permitted in various foods and consumer products. *Id.*

70. U.S. DEP'T OF HEALTH & HUMAN SERVS., NAT'L INSTITUTES OF HEALTH, CLINICAL OPPORTUNITIES FOR SMOKING INTERVENTION: A GUIDE FOR THE BUSY PHYSICIAN 2 (NIH Publication No. 92-2178, reprinted 1992).

annually.⁷¹

Over thirty years have passed since tobacco smoking was first officially recognized as a primary cause of many deaths and diseases.⁷² Since then, our knowledge of the lethal effects of tobacco smoking has continued to grow. In addition to lung cancer, there are at least seven other kinds of cancer related to smoking.⁷³ Tobacco smoke also increases the risk of heart disease⁷⁴ and is the major cause of chronic obstructive pulmonary diseases, which are often fatal.⁷⁵

Non-smokers are also affected by tobacco smoking when they are exposed to so-called passive smoking, also commonly known as ETS or second-hand smoke.⁷⁶ ETS is a combination of mainstream smoke exhaled by the smoker, and sidestream smoke emitted from the tip of a burning cigarette.⁷⁷ Cigarettes, when not inhaled, burn at a lower temperature than sidestream smoke.⁷⁸ Sidestream smoke, which results from the combustion of the cigarette at lower temperature, contains larger amounts of harmful components than mainstream smoke.⁷⁹ Sidestream smoke is more toxic than mainstream smoke because the mainstream smoker receives the benefit of both a filter and a higher burning temperature.⁸⁰ In 1992, the

71. U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: FACT SHEET 1 (1993) [hereinafter EPA FACT SHEET].

72. U.S. DEP'T OF HEALTH, EDUC., & WELFARE, SURGEON GENERAL'S REPORT ON THE HEALTH CONSEQUENCES OF SMOKING (1964).

73. QUESTIONS ABOUT SMOKING, *supra* note 68, question 4. Smoking increases the risk of cancer of the oral cavity, the esophagus, the larynx, the bladder, the kidney, the pancreas, and the uterine cervix. *Id.* See also AM. LUNG ASS'N, LEAFLET NO. 0588, WHAT YOU SHOULD KNOW ABOUT SMOKING AND CANCER, 6-9 (1991); *A Smoking Gun*, NEWSWEEK, Oct. 31, 1994, at 61A.

74. QUESTIONS ABOUT SMOKING, *supra* note 68, question 12. "Medical authorities believe that CO [carbon monoxide], like nicotine, plays an important role in increasing smokers' risk of heart disease and stroke." *Id.* question 10. "Nicotine causes blood pressure to go up and increases heart rate by as much as 33 beats per minute." *Id.* question 3. Carbon monoxide displaces large amounts of oxygen from the red blood cells, thus depriving the body of oxygen by making it harder for the oxygen to get to muscles and organs. *Id.* question 10.

75. QUESTIONS ABOUT SMOKING, *supra* note 68, question 7. "Chronic obstructive pulmonary disease (COPD), which includes chronic bronchitis and emphysema, kills about 81,000 people each year; cigarette smoking is responsible for 65,000 or approximately 80% to 90% of these deaths." *Id.*

76. *Id.* question 24. See also AMERICAN CANCER SOC'Y, CANCER RESPONSE SYSTEM, ENVIRONMENTAL TOBACCO SMOKE, view 2604 (1993) [hereinafter ENVIRONMENTAL TOBACCO SMOKE].

77. QUESTIONS ABOUT SMOKING, *supra* note 68, question 24. "When a cigarette is smoked, about one-half of the smoke generated is side stream smoke emitted from the burning cigarette between puffs." *Id.*

78. *Id.*

79. *Id.*

80. AM. LUNG ASS'N, WHAT EVERYONE SHOULD KNOW ABOUT SMOKING IN THE WORKPLACE 5 (1994) [hereinafter SMOKING IN THE WORKPLACE]. "When a smoker inhales, oxygen "fans" the fire

Environmental Protection Agency ("EPA") released a report⁸¹ concluding that ETS should be classified as a group A carcinogen⁸² (i.e., known to cause cancer in humans) along with arsenic and asbestos.⁸³

In the United States, one half of all children under five years of age have been exposed to cigarette smoke and more than a quarter of all young children are exposed to passive smoke both before and after birth.⁸⁴ The effects of ETS on children are diverse and acute.⁸⁵ The most serious effect of a child's exposure to ETS, however, is a greatly increased risk of lung cancer.⁸⁶

and tobacco burns more cleanly." *Id.* Because sidestream smoke burns more slowly it is less clean and contains more poison. *Id.* Sidestream smoke is also worse than mainstream smoke, which is partially cleaned by the filter and unburned tobacco because it goes directly into the air. *Id.* According to the American Lung Association, sidestream smoke contains twice as much nicotine, five times as much carbon monoxide, two times as much tar, seventy-three times as much ammonia, three times as much benzopyrene, and more cadmium than mainstream smoke. *Id.* at 4.

81. U.S. ENVTL. PROTECTION AGENCY, PUB. NO. 006F, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992) [hereinafter PASSIVE SMOKING REPORT]. The report indicates that "ETS is . . . responsible for approximately 3,000 lung cancer deaths annually in U.S. non-smokers." *Id.* at 1-1. The number of lung cancer deaths caused by ETS annually has been estimated at 4,000 deaths per year, almost three percent of all annual lung cancer deaths. AMERICAN CANCER SOC'Y, LEAFLET NO. 2060, THE SMOKE AROUND YOU: THE RISKS OF INVOLUNTARY SMOKING (1992) [hereinafter RISKS OF INVOLUNTARY SMOKING]; see also Health Effects of Passive Smoking; Assessment of Lung Cancer in Adults and Respiratory Disorders in Children; External Review Draft, 55 Fed. Reg. 25,874 (1990). For a list of other diseases associated with ETS, see *infra* notes 86-98 and accompanying text.

82. EPA FACT SHEET, *supra* note 71, at 3.

83. U.S. ENVTL. PROTECTION AGENCY, METHODOLOGY FOR EVALUATING POTENTIAL CARCINOGENICITY IN SUPPORT OF REPORTABLE QUANTITY ADJUSTMENTS PURSUANT TO CERCLA SECTION 102 (1988), cited in *McKinney v. Anderson*, 924 F.2d 1500, 1506-07 (9th Cir. 1991). The EPA carcinogen classification consists of the following: Group A, known human carcinogens; Group B, probable human carcinogens; Group C, possible human carcinogens; Group D, agents that are unclassifiable as to human carcinogenicity; Group E, agents for which there is evidence supporting that they are noncarcinogens for humans. *Id.* Other than ETS, Group A carcinogens also include arsenic, asbestos, benzene, chromium compounds, and vinyl chloride. *Id.*

84. U.S. DEP'T OF HEALTH & HUMAN SERVS., HHS NEWS, June 18, 1991, at 1 [hereinafter HHS NEWS].

85. *Id.* "[I]n households with current smokers, 4.1% of children—well over a quarter of a million children five years old or younger—were in fair or poor health compared to 2.4% of children in households where no one smoked and 3.5% in families where smokers quit." *Id.* A study lead by the Centers for Disease Control's National Center for Health Statistics found that children in households with smokers were generally in poorer health than children in families where no one has ever smoked.

86. Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW. ENG. J. MED. 632 (1990). In that study the authors found that "[h]ousehold exposure to 25 or more smoker-years [determined by multiplying the number of years in the household by the number of smokers in the household] during childhood and adolescence doubled the risk of lung cancer." *Id.* at 632. The authors concluded that high levels of exposure to tobacco smoke during childhood and teen

Aside from lung cancer, ETS is also the cause of various other health problems in children exposed to parental smoking.⁸⁷ The 1992 EPA report,⁸⁸ reviewing previous studies,⁸⁹ indicates that children and infants exposed to ETS from parental smoking have significantly higher rates of respiratory disorders than those not exposed to ETS.⁹⁰ The report, based on the overall results of several epidemiological studies,⁹¹ shows that parental smoking, especially by the mother, correlates with detrimental respiratory effects in children.⁹² These effects are so diverse and severe that they are listed specifically in order to make the reader fully understand the consequences of ETS on children. Symptoms include respiratory irritation, such as coughing, wheezing,⁹³ or the production of sputum;⁹⁴ acute diseases in the lower respiratory tract, such as pneumonia or bronchitis, which often require hospitalization;⁹⁵ acute and chronic middle ear infections, predominantly middle ear effusion, the most common reason

years account for approximately 17% of lung cancer among non-smokers. *Id.*

87. PASSIVE SMOKING REPORT, *supra* note 81, at 1-12 to 1-16.

88. *Id.*

89. ENVIRONMENTAL TOBACCO SMOKE, *supra* note 76, view 2605.

90. PASSIVE SMOKING REPORT, *supra* note 81, at 1-1.

91. *Id.* at 1-7. To a certain degree, epidemiological studies are imprecise. The only way to irrefutably demonstrate the link between second-hand smoke and respiratory diseases would be to expose a large amount of people to second-hand smoke for various years. *Second-Hand Smoke: Is it a Hazard?*, CONSUMER RPT., Jan. 1995, at 27-33. Such an experiment is obviously impossible to conduct. However, because "different investigators, using different definitions and study designs" have all reached similar conclusions, the results of epidemiological studies are the most accurate available evidence on second-hand smoke. *Id.* The EPA considered other factors that might have played a role in causing respiratory diseases when it reviewed the available evidence between ETS exposure and other non-cancer respiratory diseases examined in the report. PASSIVE SMOKING REPORT, *supra* note 81, at 1-15. For example, the EPA carefully examined factors including: "indoor air pollutants; socioeconomic status; effect of parental symptoms; and characteristics of the exposed child, such as low birthweight or active smoking." *Id.* The EPA nevertheless concluded that no single factor nor combination thereof could explain the respiratory conditions observed in children exposed to passive smoking. *Id.*

92. PASSIVE SMOKING REPORT, *supra* note 81, at 1-15.

93. *Id.* at 1-13. Wheezing is defined as "breathing with difficulty, producing a hoarse whistling sound." THE AMERICAN HERITAGE COLLEGE DICTIONARY 775 (3d ed. 1993).

94. PASSIVE SMOKING REPORT, *supra* note 81, at 1-13. Sputum is defined as "[e]xpectorated matter including saliva and substances from the respiratory tract." THE AMERICAN HERITAGE COLLEGE DICTIONARY 662 (3d ed. 1993).

95. The EPA report indicates that evidence from studies reporting a significant association between parental smoking and acute lower respiratory tract illness leads to the conclusion that parental smoking increases the risk of lower respiratory tract infections in young children and infants within the first 18 months to three years of life. PASSIVE SMOKING REPORT, *supra* note 81, at 1-14. Exposure to ETS contributes to the 150,000 to 300,000 annual cases of lower respiratory tract infections in that age group. *Id.* at 1-16. Between 7,500 and 15,000 of these cases require hospitalization. *Id.*

for hospitalization and surgery on young children;⁹⁶ reduced lung function;⁹⁷ exacerbated symptoms in asthmatics;⁹⁸ and acute and frequent colds and sore throats.⁹⁹

The above findings corroborate the previous conclusions of the 1986 Report of the Surgeon General, which linked exposure to ETS with respiratory illnesses and reduced pulmonary output functions.¹⁰⁰ The 1992 EPA Report also reviews new studies linking parental smoking to the induction of asthma and to increases in the number and severity of asthma attacks in children.¹⁰¹ Additionally, the report reviewed, for the first time, data on the relationship between maternal smoking and sudden infant death syndrome ("SIDS"), which is thought to be caused by an unknown respiratory condition.¹⁰²

In the United States, SIDS kills more than 5,000 infants per year and is the main cause of death in infants between the ages of one month and one year.¹⁰³ The 1992 report concludes that a clear connection between deaths from SIDS and smoking mothers exists.¹⁰⁴ Not only are children exposed

96. *Id.* at 1-14.

97. *Id.* Until the 1992 EPA report, medical authorities were unsure whether the decreases in tests of pulmonary output function in children of parents who smoke were caused by the direct action of agents in ETS or whether they were consequences of respiratory illnesses caused by ETS. *Id.* The EPA report indicates a causal rather than indirect relationship between ETS and reduced lung functions in children. *Id.*

98. EPA FACT SHEET, *supra* note 71, at 2-3. The report indicates that ETS worsens the condition of 200,000 to over one million asthmatic children and causes new cases of asthma in previously non-asthmatic children. *Id.*

99. PASSIVE SMOKING REPORT, *supra* note 81, at 1-13.

100. The 1986 report of the Surgeon General had previously concluded that respiratory symptoms such as irritation and lower respiratory tract infections are more frequent and acute in children whose parents smoke. THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, *supra* note 1, at 37. The EPA reviewed 18 new studies on respiratory symptoms and 10 new studies on acute lower respiratory tract illnesses and confirmed the Surgeon General's 1986 report. PASSIVE SMOKING REPORT, *supra* note 81, at 1-13 to 1-14.

101. PASSIVE SMOKING REPORT, *supra* note 81, at 1-14. Based on several studies, the EPA estimated that children's exposure to ETS caused by a mother smoking 10 or more cigarettes per day is responsible for 8,000 to 26,000 cases of childhood asthma per year. *Id.* at 1-15. However, if additional cases with less ETS exposure are included, the number of cases ranges from 13,000 to 60,000 per year. *Id.* Overall, the "impact of ETS on asthmatic children includes more than 200,000 children whose symptoms are significantly aggravated and as many as 1,000,000 children who are affected to some degree." *Id.* at 1-15. These figures correlate with "20% of this country's 2 million to 5 million asthmatic children and is a major aggravating factor in approximately 10%." *Id.* at 1-5.

102. *Id.* at 1-6.

103. *Id.* at 1-15. See also ENVIRONMENTAL TOBACCO SMOKE, *supra* note 76, view 2605.

104. PASSIVE SMOKING REPORT, *supra* note 81, at 1-6. However, available studies do not disclose "whether and to what extent this connection is related to in utero versus postnatal exposure to tobacco

to ETS in the womb and in early infancy at an increased risk of dying from SIDS, but they are also more likely to suffer from lower respiratory tract infections and alterations of lung functions that predispose them to long term pulmonary risks.¹⁰⁵

Other harms associated with ETS exposure are cardiovascular problems, heart disease, and death.¹⁰⁶ Medical researchers indicate that non-smokers experience an increased risk of contracting heart disease when exposed to other people's smoke:¹⁰⁷ "[T]his includes people who have no say in the matter, such as children whose parents smoke."¹⁰⁸

In view of all of the harms ETS causes to children's health, the need to eliminate ETS from the homes of children is obvious.¹⁰⁹ Moreover, the effects of involuntary smoking on children whose parents smoke continues beyond the early years. Just as battered children are far more likely to become abusive,¹¹⁰ children who grow up with smokers are more likely to become smokers themselves.¹¹¹

smoke products." *Id.* Thus, the EPA could not assert whether "ETS exposure [after birth] is by itself a risk factor for SIDS independent of smoking during pregnancy." *Id.*

105. ENVIRONMENTAL TOBACCO SMOKE, *supra* note 76, view 2605. Smoking during pregnancy also retards a baby's growth. Studies indicate that seven-year old children whose mothers smoked heavily during pregnancy, were "shorter in stature, had slower reading abilities and lower ratings on social adjustments than children of non-smoking mothers." See AM. CANCER SOC'Y, LEAFLET NO. 2740, CANCER RESPONSE SYSTEM, SMOKING AND PREGNANCY, (1993). See also AM. CANCER SOC'Y LEAFLET, NO. 2717, WHY START LIFE UNDER A CLOUD (1992); AM. LUNG ASS'N, LEAFLET NO. 0176, FACTS ABOUT SMOKING AND PREGNANCY, at 6 (1992).

106. Aubrey Taylor et al., *Environmental Tobacco Smoke and Cardiovascular Disease: A Position Paper from the Cardiopulmonary and Critical Care Council of the American Heart Association*, 86 CIRCULATION 699 (1992).

107. The increased risk of death from heart disease is about 30% among those exposed to ETS at home. *Id.*

108. Aubrey E. Taylor, Ph.D., Professor and Chairman of Physiology at the University of South Alabama, Remarks at a News Conference Co-sponsored by the American Heart Association, the American Lung Association, and the American Cancer Society (June 10, 1992).

109. ENVIRONMENTAL TOBACCO SMOKE, *supra* note 76, view 2605.

110. One might object that this is an unnecessarily inflammatory assertion. However, in terms of physical harm, there is arguably no difference between battering a child and smoking in front of a child. Both types of behavior can lead to the child's death. Even former United States Surgeon General C. Everett Koop has compared smoking near children to child abuse. See Wheatley, *supra* note 3, at 115.

111. AM. CANCER SOC'Y, LEAFLET NO. 2719, QUIT SMOKING . . . THE LIVES YOU SAVE COULD BE THEIRS (1993) [hereinafter QUIT SMOKING]. Statistics indicate that children of parents who smoke are "twice as likely to smoke" as children of parents who do not smoke. *Id.*

IV. THE CONSTITUTIONALITY OF RESTRICTING PARENTAL SMOKING IN THE PRESENCE OF THEIR CHILDREN

A. *Court Action in Custody Cases*

Many courts dealing with custody cases have restricted parents from smoking in the presence of their children. Following the precedent set in *Roofeh v. Roofeh*,¹¹² several courts have considered parents' smoking habits when evaluating custody decisions. For instance, in *Badeaux v. Badeaux*,¹¹³ a couple's twenty-month old child had bronchial problems and endured repeated upper-respiratory infections.¹¹⁴ The Court of Appeals for the Fifth Circuit affirmed the lower court's decision to limit the father's visitation privileges.¹¹⁵ The appellate court specifically articulated that one of the reasons it limited the father's visitation rights was the detrimental effects the father's cigarette smoking had on the child's health.¹¹⁶

Not only do courts consider smoking when restricting or conditioning visitation rights, but they also use smoking as a factor to decide which parent should be awarded custody. In *Pizzitola v. Pizzitola*,¹¹⁷ the jury's decision to deny a mother custody was partly based on evidence that the child was allergic to smoke and that the mother smoked in the child's presence.¹¹⁸ In *Mitchell v. Mitchell*,¹¹⁹ the Court of Appeals for the Middle Section of Tennessee affirmed the trial court's decision not to award custody to a mother on the grounds that the mother and grandmother continued to smoke in the presence of the child¹²⁰ after a physician had warned them that it aggravated the child's asthmatic condition.¹²¹ The

112. 525 N.Y.S.2d 765 (N.Y. Sup. Ct. 1988).

113. 541 So. 2d 301 (La. Ct. App. 1989).

114. *Id.* at 302.

115. *Id.* at 303.

116. *Id.* at 302-03. Because the father stayed with his mother and stepfather, who also smoked, the child's exposure to ETS during the visits was greatly increased. *Id.*

117. 748 S.W.2d 568 (Tex. Ct. App. 1988).

118. *Id.* at 569.

119. No. 01-A-01902CV00442, 1991 WL 63674 (Tenn. Ct. App. Apr. 26, 1991).

120. *Id.* at *1. The trial court noted that both the mother and grandmother admitted to smoking near the child, even in enclosed and poorly ventilated areas such as their car. *Id.*

121. The fact that the mother and the grandmother chose to continue smoking, despite a physician's recommendation that they quit for the sake of the child's health, was, in the eyes of the trial judge, "strong evidence of a lack of proper concern for the welfare of the child." *Id.* at *4.

court found that granting custody to the father was in the child's best interest.¹²² The court also affirmed the lower court's decision to condition the mother's visitation rights on assurances that the mother and grandmother not smoke in the presence of the child and take all acts necessary to dissipate any lingering smoke before the child's arrival.¹²³

Custody and visitation rights involving no-smoking conditions are now commonly imposed in custody orders. In *Unger v. Unger*,¹²⁴ the Superior Court of New Jersey, pending a final resolution of the custody matter, prohibited a mother from smoking in her home or in her vehicle when her children were present.¹²⁵ Moreover, the court ordered her to ensure that there was no ETS in her home or vehicle for a period of ten hours prior to the children's presence.¹²⁶ The court rejected Mrs. Unger's argument that regulating the presence of ETS in the air might open a "floodgate" of litigation.¹²⁷ The court noted that it did not prohibit Mrs. Unger from smoking, but limited the times and places where she could smoke,¹²⁸ and insisted that it could impose sanctions if she violated their order.¹²⁹

Similarly, in *De Beni Souza v. Kallweit*,¹³⁰ the Superior Court of Sacramento County, California ordered a mother to refrain from smoking in the presence of her child.¹³¹ The court was addressing the parents' claim for modification of their custody and visitation rights. The father had requested that the child's health be protected from the effects of the mother's smoking habits. The court granted the request, and issued "a directive from the bench banning smoking by the mother in the direct presence of the child *within the home*."¹³² These decisions explicitly recognize that ETS impairs the health and safety of children.

122. *Id.*

123. *Id.* at *2.

124. 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994).

125. *Id.* at 695.

126. *Id.* at 693. Expert testimony indicated that ventilators "do not completely eliminate the dangers of ETS," and "in an ordinary ventilated area," smoke takes eight to ten hours to dissipate. *Id.*

127. *Id.* at 696 (citing *Falzone v. Busch*, 214 A.2d 12, 16 (N.J. 1965)).

128. *Id.* at 693. The court indicated that in her place of employment, Mrs. Unger's smoking was already restricted to certain areas. *Id.*

129. *Id.* at 696. The court indicated that violations could be detected by Mr. Unger. *Id.*

130. No. 807516, Slip op. (Cal. Super. Ct. Sacramento County Aug. 4, 1990), cited in 16 FAM. L. REP. 1496 (1990) (Bureau of National Affairs) (legislative notes).

131. *Id.*

132. *Id.*

B. Restricting Parental Smoking in Non-Custody Cases: Permissible State Interference with Parental Autonomy

As illustrated above, courts have gone as far as prohibiting parents from smoking in front of their children.¹³³ This shows that courts are aware of the dangers of ETS and are willing to take action to protect children from these dangers. However, interference with family privacy in the context of divorce is not subject to the same restraints as interference with family privacy when the family is intact. Courts can tell parents how to behave with respect to their children in the divorce context because those parents have specifically asked the state to arbitrate their dispute. Could similar interventions occur in non-divorce situations without constituting an impermissible intrusion into the "private realm"¹³⁴ of the family?

Even though courts are deferential to parental autonomy,¹³⁵ the Supreme Court decisions in *Meyer*, *Pierce*, *Prince* and *Yoder*¹³⁶ indicate that state intervention is permissible when parents' decisions are likely to have a harmful impact on their children.¹³⁷ Although the Fourteenth Amendment protects the "fundamental liberty interest of natural parents in the care, custody, and management of their children,"¹³⁸ the Supreme Court has been willing to uphold state intervention to prevent harm to children under two conditions. First, the state's interest in the child's welfare must be sufficiently compelling¹³⁹ to outweigh parents'

133. Courts may even go as far as to refuse to grant custody to a smoker who may otherwise be a loving and affectionate parent. In *Badeaux*, for instance, the trial judge noted "the love and affection of the father for his son." 541 So.2d at 302. Nevertheless, the trial judge, whose decision was confirmed on appeal, held that the father's smoking was a sufficient reason to limit his visitation rights. *Id.* at 302-03.

134. The Supreme Court recently repeated that there is a "private realm of family life which the state cannot enter." *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791, 2807 (1992) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

135. McMullen, *supra* note 17, at 585-96. Judith McMullen argues that such deference is based on two questionable assumptions: that respect for parental choices is necessary for a child's healthy development and that parents can be trusted to act in the best interest of their children. *Id.* According to McMullen, there is no clear evidence showing that state intervention harms children. *Id.* at 588. Moreover, McMullen asserts that good parenting is not instinctive and that parents may be unable to assess the best interests of their children. *Id.* at 592.

136. *Meyer*, 262 U.S. 390 (1923); *Pierce*, 268 U.S. 510 (1925); *Prince*, 321 U.S. 158 (1944); *Yoder*, 406 U.S. 205 (1972).

137. For a discussion of the Supreme Court's view on state intervention, see *supra* part II.B.

138. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

139. The reason the state has a compelling interest in the welfare of children is explained in *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). "It is the interest of youth itself, and of the whole

rights.¹⁴⁰ Second, the state's means must be narrowly tailored to the interest asserted.¹⁴¹

An abundance of evidence indicates that ETS actually harms children and that the harm inflicted is often deadly.¹⁴² Thus, when a state acts to protect children against exposure to ETS, it asserts a traditionally compelling state interest: protecting children from physical harm.¹⁴³ Moreover, prohibiting parents from smoking in the presence of their children is arguably the least restrictive means available to ensure that the child will become a healthy adult. Evidence shows that even smoking a few cigarettes in the presence of children directly endangers their health by exposing them to ETS,¹⁴⁴ and indirectly by encouraging them to begin

community, that children be . . . given opportunities for growth into free and independent well-developed men and citizens." *Id.*

140. For a demonstration of how the Supreme Court has consistently interpreted harm to children as a sufficiently compelling state interest that clearly outweighs parents' rights, see *supra* note 63 and accompanying text.

141. The Supreme Court will uphold a state statute interfering with family autonomy only if the state can show that the statute was reasonably related to "some purpose within the competency of state." *Pierce v. Soc'y of Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). Additionally, the Court requires that the statute be tightly drawn to the compelling purpose in order to be valid. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986); see also *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977).

142. For a discussion of ETS's deadly consequences, see *supra* part III.

143. States have a compelling interest in protecting children's welfare and ensuring society that once they become adults, they will not be a burden on society. See *supra* note 139. If children are harmed or unhealthy because they have been exposed to ETS, they may be unable to discharge the duties and responsibilities of citizens and will unduly tax the resources of society. This idea carries some weight when one considers the enormous social and monetary burdens smoking puts on society. For example, smokers miss 32% more work days than non-smokers. AM. LUNG ASS'N, LEAFLET NO. 0930, QUESTIONS AND ANSWERS ABOUT SMOKING AND HEALTH (1992). Although the tobacco industry is very profitable, the societal costs of smoking represent approximately twice the profits of cigarette sales. QUESTIONS ABOUT SMOKING, *supra* note 68, question 31. These costs have prompted states to enact new laws and sue tobacco companies, holding them liable for smoking related health-care costs paid by taxpayers. William Booth, *Chiles Signs Law That Would Allow Florida to Sue Cigarette Makers*, WASH. POST, May 28, 1994, at A3. In Florida, these costs have reached at least \$1.2 billion in Medicaid payments over the past five years. *Id.* Similar laws and lawsuits have been instituted in Mississippi and Minnesota and are being contemplated in Maryland and Massachusetts. See generally, Joseph Menn, *Tobacco Firms Sued by Mississippi*, PHIL. INQUIRER, July 1, 1994, at C2; Gordon Slovut, *State, Blue Cross Sue Tobacco Industry: Seek Reimbursement for Treating Illnesses*, STAR TRIBUNE (Minneapolis), Aug. 18, 1994, at A1; Liz Spayd, *Md. May Sue Tobacco Firms Over Health: State Would Seek to Recoup Cost of Treating Smoking-Related Ills*, WASH. POST, July 7, 1994, at M1; Doris S. Wong, *Rider Would Let AG Sue Tobacco Firms for Health Costs*, BOSTON GLOBE, July 8, 1994, at A1. Nationally, smoking-related illnesses cost the United States about \$50 billion a year. Ron Scherer, *More States Plan to Sue for Costs of Smoking*, CHRISTIAN SCI. MONITOR, July 12, 1994, at 6.

144. ETS contains more harmful substances than mainstream smoke, so that smoking even a few cigarettes produces dangerous amounts of harmful chemicals. For a discussion of how side stream

smoking later in life.¹⁴⁵ Therefore, it seems that states and courts may be able to constitutionally prohibit parents from smoking in their children's presence even in the absence of divorce proceedings.

However, parents who smoke could argue that even if a prohibition on smoking is a valid interference with parental autonomy, it is nevertheless an invalid infringement of their fundamental right to liberty. Although the Fourteenth Amendment does not expressly protect the right to smoke, the right to smoke may be inferred from the right to liberty, privacy, or the right to be let alone, which are all constitutionally protected rights.¹⁴⁶

In *Grusendorf v. City of Oklahoma City*,¹⁴⁷ a firefighter trainee asserted this argument, claiming that a regulation prohibiting him from smoking on and off duty constituted a violation of his Fourteenth Amendment rights.¹⁴⁸ The *Grusendorf* court presumed that the non-smoking regulation restricted a liberty interest protected by the Constitution.¹⁴⁹ The court nevertheless upheld the prohibition on smoking because the state's interest in the good health of its firefighters outweighed the individual liberty interest to smoke on and off duty for a year.¹⁵⁰ Noting the Supreme Court's reluctance to "discover new fundamental rights," the *Grusendorf* court merely presumed that "a liberty interest" was implicated; the court

smoke is more dangerous than mainstream smoke, see generally SMOKING IN THE WORKPLACE, *supra* note 80.

145. For a discussion of how parental smoking influences children, see *supra* notes 110-11. Most teenagers start smoking "because it is the accepted thing to do, because adults or friends smoke, to try to express independence, or to try to act mature." QUIT SMOKING, *supra* note 111. Studies show that if children "grow up to smoke cigarettes at the current adult rate, then at least 5 million of them will die from smoking-related diseases." QUESTIONS ABOUT SMOKING, *supra* note 68, question 29.

146. In *Griswold v. Connecticut*, the Supreme Court acknowledged that various constitutional provisions create liberty rights that are not spelled out in the text of the Constitution, but are contained in the "penumbra" of other provisions. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Supreme Court has consistently recognized the fundamental right to privacy. See, e.g., *Lanza v. New York*, 370 U.S. 139 (1962); *Monroe v. Pape*, 365 U.S. 167 (1961); *Frank v. Maryland* 359 U.S. 360 (1959); *Pub. Util. Comm'n. v. Pollak*, 343 U.S. 451 (1952); *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Skinner v. Oklahoma*, 316 U.S. 535 (1942). See also William M. Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212. The Court even recognized the right to be let alone. *Olmstead v. United States*, 277 U.S. 438 (1928). See also Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216 (1960).

147. 816 F.2d 539 (10th Cir. 1987)

148. *Id.* at 540.

149. *Id.* at 543.

150. *Id.* at 543. The court noted that the state government had a "heightened interest" in regulating firefighters because it acted as their employer. *Id.* The court only examined whether the state purpose was legitimate and whether a rational connection between regulating the firefighters and the state purpose existed. *Id.* Because good health and physical fitness are prerequisites for being a firefighter the court found the regulation valid. *Id.*

did not declare the right to smoke a fundamental right.¹⁵¹

But even if one were to argue that the right to smoke is implicitly protected by the Fourteenth Amendment and recognized as a fundamental right, it is not rendered immune from state intervention. A state may constitutionally intrude upon a fundamental right, regardless of whether it is parental autonomy or a personal right to liberty, so long as it demonstrates a compelling state interest and the requisite connection between the means employed and the ends achieved.¹⁵² Protecting children and assuring that they develop into healthy adults and responsible citizens is a compelling state interest.¹⁵³ Given the pervasive dangers of ETS, only a total prohibition on parental smoking in the presence of their children can achieve such an end.¹⁵⁴

Another objection that smokers might raise is that prohibiting parents from smoking in enclosed areas in the presence of their children would, in effect, deny them the right to do what they please in their own homes.¹⁵⁵ Contrary to the belief that such a restriction is constitutionally impermissible as an unwarranted invasion of privacy, conduct that occurs in the home is not necessarily out of state reach merely because it takes place in the home.¹⁵⁶ States and courts frequently interfere with conduct that takes place inside the home, for instance in child abuse cases.¹⁵⁷ Courts even prohibit parents from engaging in conduct inside the home that is otherwise legal.¹⁵⁸ Professor Banzhaf¹⁵⁹ points out that courts have gone as far as terminating parental rights when parents drink excessively,¹⁶⁰ when the

151. *Id.* at 543 & n.3 (citing *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986)).

152. Once the Supreme Court recognizes a particular right as a constitutional liberty interest protected under the Due Process Clause of the Fourteenth Amendment, the Court then considers the importance of the state's interests and the extent to which the statute reflects and serves the purpose asserted. See *Moore v. City of Cleveland*, 431 U.S. 494, 499 (1977).

153. For a discussion of why states have a compelling interest in protecting children, see *supra* note 139.

154. For an explanation of the dangers of side stream smoke, see *SMOKING IN THE WORKPLACE*, *supra* note 80.

155. This Note not only recommends that parents be prohibited from smoking at home, but also that they be prohibited from smoking in front of their children in any enclosed area.

156. Wheatly, *supra* note 3, at 130.

157. *Id.*

158. *Id.*

159. Telephone Interview with Professor John F. Banzhaf, III, Executive Director and Chief Counsel for Action on Smoking and Health and Professor of Law at George Washington University in Washington, D.C. (Dec. 16, 1994).

160. *In Re Christopher S.*, 1992 WL 43234 (Conn. Super. Ct. 1992). The court's decision to terminate the father's parental rights was based on the fact that he was a chronic alcoholic. *Id.* at *10.

children and the house are not clean,¹⁶¹ and even when parents exhibit improper sexual behavior in front of their children.¹⁶² Thus, there is little support for the claim that courts, through state statutes, may not constitutionally prohibit parents from smoking at home in the presence of their children.¹⁶³

Prohibiting parents from smoking in their children's presence should be constitutionally permissible. Such a conclusion should not be surprising. If a state statute prohibited parents from administering arsenic to their children, or from exposing them to asbestos,¹⁶⁴ the Court would certainly uphold the statute as constitutional.¹⁶⁵ As a matter of fact, courts routinely convict parents who have administered poisonous drugs to their chil-

See also Snipes v. State Dep't of Human Resources, 542 So. 2d 282, 284 (Ala. Civ. App. 1989) (ordering termination of parental rights where evidence indicated that the mother had an extreme alcohol abuse problem); Wood v. State Dep't of Human Resources, 523 So. 2d 129, 130 (Ala. Civ. App. 1988) (ordering termination of parental rights where parents had a history of marital and employment instability and alcohol abuse).

161. State v. M.L.S., 348 N.W.2d 138 (Neb. 1984). In *M.L.S.*, the Nebraska Supreme Court affirmed a lower court's order, terminating the mother's parental rights. *Id.* Finding evidence that the children were habitually filthy, that the home was infested with roaches, that garbage was stored in the house, and that there was frequently no heat despite evidence of adequate income to pay bills, the court terminated the mother's parental rights. *Id.* at 139-40. *See also* Knott v. Tippecanoe County Dep't of Pub. Welfare, 632 N.E.2d 752, 756 (Ind. Ct. App. 1994) (holding that termination of parental rights was in the best interest of the children because the home was filthy and unsafe); J.L.L. v. Dep't of Pub. Welfare, 628 N.E.2d. 1223, 1227 (Ind. Ct. App. 1994) (affirming an order terminating both parents' parental rights because the children were filthy and the house unclean).

162. In one case, the Supreme Court of Nebraska held that evidence of the mother's alcohol addiction and explicit sexual habits justified the termination of her parental rights. State v. N.H., 467 N.W.2d 682, 687 (Neb. 1991). *See also* In Re Young, 342 So. 2d 1205, 1207 (La. Ct. App. 1977) (affirming the trial judge's order terminating parental rights based on evidence that the children were improperly subjected to viewing sexual activity at home).

163. Interview with Barbara Flagg, Professor of Law at Washington University School of Law, in Saint Louis, MO (Jan. 12, 1995). Professor Flagg believes that competing values are at stake. On the one hand, the child's health must be considered. On the other hand, one must respect privacy in the home. If ETS in fact seriously harms children, the state's interest may very well outweigh the concern with privacy in the home. Thus, restricting parental smoking at home would be constitutional. *Id.*

164. Both arsenic and asbestos are group A carcinogens. For a list of EPA classifications, see *supra* note 83.

165. *Cf.* People v. Vandiver, 283 N.E.2d 681 (Ill. 1971). In *Vandiver*, the Supreme Court of Illinois upheld the constitutionality of an Illinois child abuse statute, which states that parents are guilty of child abuse if they "willfully cause or permit . . . the health of [a] child to be injured." *Id.* at 683 (citing ILL. REV. STAT. ch. 23, para. 2354 (Smith-Hurd 1969)). This type of statute is more vague than a statute specifically prohibiting parents from exposing their children to arsenic or asbestos. By analogy, if the Illinois statute is constitutional, a more specific statute prohibiting parents from poisoning their children through exposure to arsenic or asbestos should be constitutional as well.

dren.¹⁶⁶ Thus, if states and courts can reach the behavior of parents who expose their children to poisonous substances, there is no reason why states and courts should not be able to prohibit parents from exposing their children to ETS. One could reject this conclusion on the belief that ETS is not as dangerous as arsenic. However, it bears repeating that an overwhelming number of scientific studies have established that ETS, like arsenic, causes death.¹⁶⁷ Aside from the fact that smoking generally causes death over a longer period of time,¹⁶⁸ the only difference between poisoning one's child and exposing a child to smoking is that one behavior—smoking—is socially acceptable, while the other—giving arsenic—is not. Social bias should not stop states and courts from intervening when children's health and the future of our society¹⁶⁹ are at stake.

V. PROPOSED FORMS OF INTERVENTION TO RESTRICT PARENTAL SMOKING

A. *The Use of Child Abuse and Neglect Statutes*

If states can constitutionally prevent parents from smoking in front of their children, the next question that arises is what form such intervention may take. One possibility is the use of child abuse and neglect statutes. This Note only examines whether civil, not criminal, child abuse or neglect statutes could be used to prevent parents from smoking in front of their children. Authors¹⁷⁰ who argue that parents should be criminally convicted, even in limited situations,¹⁷¹ appear to misunderstand the issue at

166. For example, in *State v. Hofford*, the Superior Court of New Jersey criminally convicted the defendants, husband and wife, under a child abuse statute for intentionally administering dangerous controlled substances to their twin daughters. 377 A.2d 962 (N.J. Super. Ct. 1977). Similarly, in *People v. Bergerson*, the Supreme Court of New York ruled that the defendant violated a criminal child abuse statute by encouraging 16 year old youths to drink alcohol. 218 N.E.2d 288 (N.Y. 1966). Although these convictions occurred in the criminal context, similar results could be attained under civil statutes.

167. See *supra* part III.

168. Smoking one cigarette will not cause immediate death, but it greatly increases the risk of death, so that in certain cases, depending on the duration and intensity of smoking, death is almost ineluctable. In the case of lung cancer for instance, a person who started smoking at age 13 may only develop lung cancer at age 50. But the risk at age 50 for the person who started smoking at age 13 is 350% greater than for a 50 year old who started smoking at age 23. PREVENTING TOBACCO USE AMONG YOUNG PEOPLE, REPORT OF THE U.S. SURGEON GENERAL 2a (1994).

169. See *supra* note 139.

170. See generally Anderson, *supra* note 14; Ezra, *supra* note 14.

171. See, e.g., Ezra, *supra* note 14. Professor Ezra recognizes that the state should only criminally convict parents who smoke under the most egregious circumstances. *Id.* Thus, he proposes the use of criminal abuse or neglect statutes only after analyzing four factors: the child's health, where the

stake. The focus of this Note is to try to find a way to *protect* children. A child's best interest is not always served by punishing parents, taking away a parent's custody or depriving the child of the parental relationship.¹⁷²

Statutes that address child abuse and neglect broadly define the terms "neglect" and "abuse." In the case of neglect,¹⁷³ various states define the term as the failure of the child's guardian to give the child proper care and attention under circumstances indicating that the child's health or welfare is significantly harmed or at risk of being significantly harmed.¹⁷⁴ The definition of neglect in state statutes thus seems to require two elements: harm and negligent treatment.¹⁷⁵ In light of the evidence showing that ETS harms children,¹⁷⁶ smoking in front of one's child should at least constitute neglect under state statutes that define neglect as "harm caused through negligent treatment" or "failure to provide proper care under circumstances that indicate that the child's health is significantly harmed."¹⁷⁷

As explained in Part III of this Note, ETS causes actual harm to children. Given the increased awareness of the dangers of ETS, one who exposes his or her children to such dangers fails to provide the requisite care. One custody case, *Mitchell v. Mitchell*,¹⁷⁸ confirms the idea that exposing one's child to ETS constitutes negligent treatment. The *Mitchell* court indicated that parental smoking, after the child's physician had recommend-

smoking occurs, the amount of smoking, and finally, the history of the particular case.

172. Civil statutes are primarily concerned with children's welfare and their protection. See ALASKA STAT. § 47.17.010 (Michie 1990); FLA. STAT. ANN. § 415.501(1) (West 1993); GA. CODE ANN. § 19-7-5(a) (Michie 1993); MD. CODE ANN., FAM. LAW § 5-702 (Michie 1984).

Criminal statutes, on the other hand, emphasize punishment. See generally 22 C.J.S. *Criminal Law* § 3 (1989). Parental behavior may, on occasion, appear to deserve punishment. For example, if a parent of a child in poor health keeps smoking, despite the parent's awareness that smoking aggravates the child's condition, punishment may be warranted. See, e.g., *Badeaux v. Badeaux*, 541 So. 2d 301, 302-03 (La. Ct. App. 1989); *Mitchell v. Mitchell*, 1991 WL 63674, at *1 (Tenn. Ct. App. 1991). However, a child's best interest is not necessarily served when parents are punished and custody is taken away from them. Thus, this Note attempts to find alternative methods of eliminating the source of the harm. For existing and possible alternatives, see *infra* notes 197-210 and accompanying text.

173. For an analysis of abuse statutes, see *infra* notes 180-87 and accompanying text.

174. See, e.g., MD. CODE ANN., FAM. LAW § 5-701(g) (Michie 1984). Michigan law defines neglect as "harm or threatened harm to a child's health . . . by a parent . . . which occurs through . . . negligent treatment, including the failure to provide adequate food, clothing, shelter, medical care." MICH. COMP. LAWS § 722.622(d) (West 1979). See also ALASKA STAT. § 47.17.290(10) (Michie 1990).

175. *Id.*

176. For a discussion of the harms caused by ETS, see *supra* part III.

177. See ALASKA STAT. § 47.17.290(10) (Michie 1990); MD. CODE ANN., FAM. LAW § 5-701(g) (Michie 1984); MICH. COMP. LAWS § 722.622(d) (West 1979).

178. 1991 WL 63674 (Tenn. Ct. App. 1991).

ed against it, indicated a lack of proper concern for the welfare of the child.¹⁷⁹

Additionally, parental smoking could constitute abuse under existing state statutes. State statutes defining abuse fall into two categories. The first category focuses on acts that endanger the health of children. For instance, the Illinois statute prohibiting child endangerment provides:

It is unlawful for any person to willfully cause or permit the life or health of a child under the age of 18 to be endangered or to willfully cause or permit a child to be placed in circumstances that endanger the child's life or health.¹⁸⁰

Thus, under this first category of statutes' any harm, whether latent or patent, if willfully caused, constitutes child abuse.¹⁸¹ Even though its effects on children are not immediate, ETS clearly causes a child's health to be endangered; thus, passive smoking could constitute abuse under this first category.

The second category of statutes focuses on physical injuries purposely inflicted upon a child by a parent or caretaker.¹⁸² The injury requirement would seem to imply either a physical wound or a bruise. However, these statutes do not define injury.¹⁸³ Thus, under principles of statutory construction one must turn to the common definition of the term "injury" which is "damage or harm."¹⁸⁴ Therefore, for purposes of these statutes, ETS could constitute a "physical injury" because even though its effects are neither immediate nor visible, ETS physically harms children.

Regardless of whether a the child abuse statute defines harm as endangerment or as physical injury, both types of abuse require intent—that

179. *Id.*

180. 720 ILCS 5/11-17 (West 1994).

181. The Minnesota child abuse statute provides an example of a statute in which the harm that constitutes abuse is not specified. MINN. STAT. ANN. § 609.378(2)(b)(1) (West Supp. 1993). Under Minnesota law, abuse occurs when a parent "endangers the child's person or health by . . . intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical or mental health . . ." *Id.*

182. Delaware defines child abuse as "the physical injury by other than accidental means, injury resulting in a mental or emotional condition which is a result of abuse or neglect, negligent treatment, sexual abuse, maltreatment, mistreatment, nontreatment, exploitation or abandonment, of a child under the age of 18." DEL. CODE ANN. tit. 16, § 902 (Michie 1993); *see also* COLO. REV. STAT. ANN. § 18-6-401(1) (West 1994); GA. CODE ANN. § 19-7-5(b)(3)(A) (Michie 1993); MD. CODE ANN., FAM. LAW § 5-901(b)(1) (Michie 1984).

183. *Id.*

184. THE AMERICAN HERITAGE COLLEGE DICTIONARY 359 (3d ed. 1993)

the harm be willfully inflicted.¹⁸⁵ Some commentators argue that cigarette smoking is an intentional infliction of harm.¹⁸⁶ If a parent smokes and is aware that smoking subjects the child to respiratory diseases, lung cancers, and cardio-vascular diseases, the parent is knowingly harming the child.¹⁸⁷ Thus, it appears that states could intervene in family matters and prevent parents from smoking in front of their children under existing child abuse and neglect laws without constitutional obstacles.

However, because smoking tobacco remains socially acceptable and a large number of Americans still smoke,¹⁸⁸ there would surely be strong societal resistance to such forms of intervention. Society as a whole does not perceive smoking to be the type of behavior that courts should prohibit under the rubric of child abuse or neglect.¹⁸⁹ This misconception may exist because smoking cigarettes does not always pose an immediate or visible harm to non-smokers. Cigarette smoking may also occur in homes where parents are misinformed or refuse to take health information seriously, but are otherwise loving and caring parents.¹⁹⁰ However, in recent decades, the rising movement against smoking has prompted the

185. Some states, such as Maryland, require a heightened degree of intent. MD. CODE ANN., FAM. LAW § 5-901(b)(1) (Michie 1984). Under Maryland law, abuse is "the sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or caretaker . . ." *Id.*

186. *See supra* note 14.

187. This argument has been developed in the context of prosecution under criminal child abuse statutes. *See Anderson, supra* note 14, at 376-80. Frequently, a parent who is aware of the dangers of smoking continues to smoke. *See Badaeux v. Badaeux*, 541 So. 2d 301, 302-03 (La. Ct. App. 1989); *Mitchell v. Mitchell*, 1991 WL 63674 (Tenn. App. 1991).

188. *See QUESTIONS ABOUT SMOKING, supra* note 68, question 33. People began to realize the dangers of smoking 30 years ago when the Surgeon General began to issue health warnings on packs of cigarettes. *Id.* question 30. Another reason why the public chose to ignore smoke's harmful effects is that tobacco revenues were perceived as a benefit to the American economy. *Id.* question 33. It is clear, however, that any revenue tobacco generates cannot compensate for the greater health and social burden it places on our society. *Id.* In 1985, cigarette sales procured \$32 billion in revenue for the American economy. *Id.* question 31. However, the Office of Technology Assessment estimated that the total yearly economic loss due to smoking, including Medicare-Medicaid costs and lost earnings due to early death and diseases, could reach \$65 billion. *Id.* The cost of smoking has led many states to sue tobacco companies for reimbursement for the tremendous Medicaid and Medicare health-costs that they incur annually to treat smoking-related illnesses. For a list of the various states that are either suing tobacco companies or contemplating doing so, *see supra* note 143. If cigarettes were introduced today, based on the current medical knowledge concerning the dangers of smoking, there is no doubt that its use would be banned. *QUESTIONS ABOUT SMOKING, supra* note 68, question 33.

189. *See id.*

190. Some studies show that children whose parents smoke may suffer emotional consequences manifesting in anxiety over their parents' premature death. *See Anderson, supra* note 14, at 368.

enactment of legislation protecting non-smokers.¹⁹¹ Additionally, people's attitudes towards smoking have changed.¹⁹² Smoking is no longer as socially acceptable as it once was. Parents who continue to smoke in front of their children have less of an excuse than they did ten years ago. There is no objective reason why state intervention in the name of protecting children from exposure to ETS in the home should encounter social resistance.

B. *Enforcing Prohibitions on Parental Smoking*

Resistance to state restrictions on smoking in the home may be exacerbated by the fact that those who advocate treating parental smoking as a form of child abuse propose extreme solutions. For example, some advocates for state intervention have proposed terminating parental rights,¹⁹³ thereby coercively intervening just as the state does in cases of

191. Although tobacco is still legal, many laws restrict its use. Congress banned television and radio advertising of cigarettes in 1970. 15 U.S.C. § 1335 (1994). Not only has Congress banned smoking aboard domestic flights under six hours, but many federal workplaces are smoke-free environments. QUESTIONS ABOUT SMOKING, *supra* note 68, question 30. "As of 1993, forty-eight states and Washington D.C. had passed laws banning the sale of cigarettes to minors." *Id.* Moreover, in most states, there is a minimum legal age to purchase tobacco products, which varies between sixteen and nineteen. *Id.* See, e.g., MICH. COMP. LAWS ANN. § 722.641 (West 1993) (setting minimum age at 18). "As of 1990, smoking laws in 45 states, Washington, D.C. and 480 municipalities restrict smoking in public places." RISKS OF INVOLUNTARY SMOKING, *supra* note 81. The private sector has also taken measures to restrict smoking. United Airlines in Chicago announced that it would add three more smokeless international flights to the daily smoke-free flights. Stanley Ziemba & George Gunset, *AMA on Tobacco Attack, Calls Cigarettes a Drug*, CHI. TRIB., June 8, 1994, at 1.

192. Some recent government figures, however, are worrisome. They indicate that smoking among young people may be increasing. Approximately 28% of high school seniors say they smoke and that girls smoke as much as boys. Deborah Sharp, *Fired-up Florida Governor Takes on Tobacco Giants: New Law Would Allow State to Sue Firms for Smokers' Care*, USA TODAY, June 6, 1994, at 13A. Some authors argue that smoking is unacceptable social conduct, which should be eliminated because smokers do not have a moral right to smoke. Keith Butler, *The Moral Status of Smoking*, 19 SOC. THEORY & PRAC. 1 (1993). Dr. Butler invites us to consider the difference between shooting someone and being shot. *Id.* at 2. A, the shooter, has done something to P, the person who has been shot. With respect to the shooting, A is active and P is passive. *Id.* A may have the right to discharge firearms. However, where A aims the bullet at P, A's right becomes limited. *Id.* at 3. The right to take action exists as long as exercising that right does not infringe upon the right of another to be free from harm. *Id.* By analogy, Dr. Butler argues, "the right to smoke persists only so long as the act, smoking, does not conflict with the more basic right of nonsmokers to be free from harm." *Id.* at 6. If nonsmokers are harmed by the presence of smoke, smokers, who are causing harm, must refrain from smoking. *Id.* The inconvenience to smokers, which smokers claim is a harm to them, "is asymmetrically related to the harm caused to nonsmokers." *Id.* In effect, "it is the smokers who are doing something to the nonsmokers, while the reverse is not true." *Id.*

193. For a discussion of how exposing children to ETS constitutes child abuse and how state intervention is a socially acceptable solution to certain forms of child abuse, see Anderson, *supra* note

drug and alcohol abuse.¹⁹⁴ However, those holding such views appear to be more concerned with "punishing" parents rather than protecting the child.¹⁹⁵ Preserving a child's physical health at the expense of a child's mental health and emotional stability is a drastic measure that makes little sense.¹⁹⁶

In order to gain adequate protection from ETS, children do not have to sacrifice either their health *or* their emotional well-being; the state can intervene in family matters to protect a child's health without resorting to draconian measures. In substance abuse cases, commentators have insisted on implementing prevention and treatment programs.¹⁹⁷ Some states already provide prevention programs in child abuse cases.¹⁹⁸ States could use prevention and training programs similar to those designed for physical, sexual, drug or alcohol abuse, to deal with parents' nicotine addiction.¹⁹⁹ Additionally, the state could provide children and parents with information in locations such as schools. Such information could address the problems associated with smoking and provide possible solutions to help smokers quit.²⁰⁰

14, at 367-76.

194. See Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213 (1991); Anderson, *supra* note 14, at 383. See also Schwartz, *supra* note 13.

195. Child abuse and neglect statutes generally define abuse or neglect solely in terms of parental conduct. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000-04 (1975). Typically, abuse is defined as non-accidental physical injury to the child by a parent and neglect is defined as the parent's failure to provide proper care. For a list of statutes and definitions, see *supra* part V.A. The problem with laws that define abuse and neglect in terms of parental behavior is that they only permit state intervention when the parent's conduct conforms or not with what the law proscribes as illegal, regardless of whether or not the child actually needs protection from her parents. Wald, *supra*, at 1002-03.

196. Except in cases where a child is seriously harmed, coercive intervention is unlikely to improve a child's situation and may actually put the child in a more detrimental situation, particularly when the child is placed in an institution or a foster home. Wald, *supra* note 195, at 993-1000. Because the government is incapable of meeting a child's emotional needs, coercive intervention should be the exception rather than the rule. See Wald, *supra* note 195, at 993-1000. (1986). Removing a child may be the most painful thing to do in this type of situation and may cause the most serious psychological damage to the child. *Id.* at 993-94. Moreover, institutions and foster homes are often ill-suited to the child's needs. *Id.* at 994. This situation is frequently aggravated when children are moved from one foster family to another. *Id.*

197. For an examination of alternative solutions to removing a child from home, see Dolgin, *supra* note 194, at 1213, 1262-66.

198. See, e.g., FLA STAT. ANN. § 415. 501 (West 1993).

199. See, e.g., FLA STAT. ANN. § 415. 5015(3)(c) (West 1993).

200. The broad range of existing programs designed to help smokers quit include self help programs, such as freedom from smoking guides, audio tapes designed by the American Lung Association, and expert-led group sessions offered by the Young Men's Clubs of America and local

Under current state statutes, courts have jurisdiction over abused or neglected children and over any other adult living in the same home.²⁰¹ Courts usually have various options when a child requires protection, including restraining the abusive party from committing further acts of abuse.²⁰² Theoretically, courts could order parents to refrain from smoking in front of their children.²⁰³ A willful violation of such an order would constitute an act in contempt of court, punishable by fine.²⁰⁴

Some claim that even if the state could intervene to prohibit parents from smoking at home in the presence of their children, as a practical matter, such regulation would not effectively control smoking because of enforcement problems.²⁰⁵ One author argues that the only effective way to monitor domestic smoking is to subject children who live with smokers to random blood, urine, or saliva tests to detect nicotine.²⁰⁶ Such interventions would be too intrusive, too disruptive, impossible to organize, and would surely face challenges on constitutional grounds.²⁰⁷

Those who advocate this position fail to see that there are other methods of monitoring smoking at home. Less restrictive and equally efficient solutions are available. Physicians, for instance, are in a privileged position to determine whether children are being subjected to ETS. In the same way that the physician has a duty to report episodes of abuse,²⁰⁸ a physician who reasonably suspects that a child is exposed to parental smoking at home might have a duty to report the case to social services or other agencies. These agencies would then conduct an investigation. Upon a finding that the parent smokes in front of the child, these agencies would have the authority to impose fines, require the parent to smoke only in one

hospitals.

201. WIS. STAT. ANN. § 48.12 (West 1987).

202. MINN. STAT. ANN. § 260.191(1b) (West 1992).

203. Such orders already exist in custody cases. *See, e.g.*, *De Beni Souza v. Kallweit*, No. 807516 (Cal. Super. Ct. Sacramento County Aug. 4, 1990); *Unger v. Unger*, 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994); *Strahman v. Foster*, No. 4663-A-1990 (Ct. of Common Pleas, Erie County, Pa. Mar. 21, 1991); *Mitchell v. Mitchell*, No. 01-A-01902CV00442, 1991 WL 63674 (Tenn. Ct. App. Apr. 26, 1991).

204. For an exemplary list of penalties for willful violation of a court order under Oklahoma law, see OKLA. STAT. ANN. tit. 10, § 1122 (West 1987).

205. *See Schwartz, supra* note 13, at 171.

206. *Id.* at 170.

207. *Id.*

208. *See, e.g.*, GA. CODE ANN. § 19-7-5(c)(1)(A) (Michie 1995); MICH. COMP. LAWS ANN. § 722.623(1) (West 1993); MD. CODE ANN., FAM. LAW § 5-903(a) (Michie 1984).

area of the house,²⁰⁹ and recommend counseling programs. Such an investigation would be particularly appropriate in cases of asthmatic children because it could save the child's life.

Although the actual enforcement of legislation that restricts smoking at home may be problematic, difficulty of enforcement is an insufficient reason for failing to sanction certain types of conduct. Regulating adults' actual intake of controlled substances is very difficult. Such difficulty, however, does not justify a lack of legislation on the use of drugs. Similarly, we should not ignore the problem of parental smoking because it cannot be fully prevented.

VI. CONCLUSION

It is well established that children have rights,²¹⁰ and the scope of these rights continues to expand.²¹¹ Article 24 of the Convention on the Rights of the Child recognizes a child's right to enjoy the highest attainable standard of health.²¹²

Opponents of state intervention restricting smoking at home continue to espouse the myth of total family autonomy²¹³ to justify prohibiting the state from restricting parental smoking. However, the Supreme Court has consistently reiterated that parental autonomy gives way to state intervention when children are actually harmed by their parents' decisions. Smoking actually harms children. The only reason why society perceives state intervention in this domain as an impermissible intrusion is because society does not fully comprehend the deadly consequences of smoking.²¹⁴

The same arguments set forth fifty years ago to prevent the state from intervening in child abuse cases²¹⁵ are being used again to prevent the state from intervening to restrict smoking at home. The Supreme Court, however, clearly indicated that "parents may be free to become martyrs

209. In divorce cases, courts have already restricted parents to smoking in one area of the home. *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 769 (N.Y. Sup. Ct. 1988).

210. *HOULGATE*, *supra* note 22, at 17-32.

211. *Id.* at 33-44.

212. On November 20, 1989, the United Nations adopted the Convention on the Rights of the Child. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448. To this date, however, the United States has failed to sign it.

213. *See McMullen*, *supra* note 17, at 596-98. Professor McMullen explains that deference to parental autonomy rests on false presumptions, erroneously rejects state intervention, and allows parents to maltreat children. *Id.*

214. For a discussion of how cigarettes, if introduced today, would be banned, see *supra* note 188.

215. *See Wheatley*, *supra* note 3, at 129.

themselves. But it does not follow that they are free . . . to make martyrs of their children."²¹⁶ Parents who smoke not only engage in a "bad habit," but engage in destructive behavior that at best handicaps their children for life and at worst leads to their deaths. In light of the obvious dangers of smoking, society is well advised to take measures to ensure that children do not suffer anymore harmful consequences of their parents' decision to smoke.

Mireille O. Butler

216. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).