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Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air?

MICHAEL S. MOORBY*

I. Introduction

Democracy can be harsh. As the lone nonsmoker in a large family, I have often been exposed to the cigarette smoke of others. I have frequently protested, claiming a right to breathe fresh air. My family members have consistently countered by asserting a right to smoke. To date, my position has not once carried the day. The result has invariably been smoke-filled holidays and family reunions.

Nonetheless, my plight is not so bad. As an adult, I have the power to prohibit smoking in my own home or to walk away from objectionable, smoky areas. Children, however, do not have these options and are less capable of protecting their own health and safety. Additionally, children are more susceptible to the dangers of secondhand smoke than adults.

Recently, courts in several states have recognized the need to protect children, ordering parents to refrain from smoking in the presence of their children. Such orders, typi-

* This article is written in memory of my late brother, Robert J. Moorby II. Robert was a harsh critic of the views reflected in this article until his untimely passing in December 1994. Ironically, his insights allowed me to better address the arguments of my opponents.

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cally issued in the context of child custody proceedings, have elicited vigorous opposition from smokers, many of whom have asserted that smoking in the home is a fundamental privacy right.¹

This Comment examines the propriety of court orders prohibiting parents from smoking in their homes in the presence of their children. Section II discusses the effects of secondhand smoke on children, with emphasis on the risk assessment released by the Environmental Protection Agency (EPA) in December 1992. Section III presents the judicial and legislative treatment of secondhand smoke issues. Section IV outlines the privacy issues involved in court orders that prescribe the circumstances under which parents can smoke in their own home. Section V espouses the view that smoking in the home is not a fundamental privacy right and therefore the courts have the authority to curtail parental smoking in the home. Section VI concludes that courts not only have the authority, but also the duty, to issue orders that protect children from exposure to secondhand smoke in the home.²

1. See *Judge Restricts Smoking in Custody Case*, UPI, Aug. 15, 1993, available in LEXIS, News Library, Crnws File. The mother in a California custody case, who was ordered to refrain from smoking in the presence of her five-year-old son, was quoted as saying, "This is crazy. This is the first time ever that a court comes into your house and dictates to you how you are to behave in your own home." *Id.* Terry Eagan of the Tobacco Institute and Tobacco Action Network, also quoted in the story, said he would ask his lawyers to investigate the case: "The first thing that comes to mind is the privacy issue." *Id.* For an additional example of a court-ordered ban on smoking in the presence of children, see *Lamacchia v. Lamacchia*, No. 91D 0004 (P. and Fam. Ct., Middlesex Co., Ma. 1991). The *Lamacchia* case got considerable attention from the media. See, e.g., *Judge Bars Smoking in Presence of Child*, UPI, Jan. 9, 1992, available in LEXIS, News Library, Crnws File.

2. Issues of enforceability are beyond the scope of this article. This article focuses, instead, on whether the court has the authority and duty to issue orders prohibiting smoking in the home.

II. Effects of Secondhand Smoke on Children

More than thirty years have passed since the 1964 Surgeon General's Report linked smoking with lung cancer.³ An estimated 434,000 smokers die each year in the United States as a result of their habit.⁴ In 1986, the Surgeon General concluded that exposure to secondhand smoke presents serious health risks to nonsmokers.⁵ The debate between smokers and nonsmokers has raged ever since, with smokers claiming a fundamental right to smoke and nonsmokers claiming a right to breathe fresh air.⁶

In December 1992, the EPA released an extensive report categorizing environmental tobacco smoke, otherwise known as ETS or secondhand smoke, as a Group A carcinogen⁷ and attributed an estimated 3,000 deaths of nonsmokers annually to secondhand smoke exposure.⁸ This categorization attracted the attention of parents, employers, attorneys, legislators, businessmen, the public at large,⁹ as well as the

3. See Christopher Scanlan, *Last Puff: EPA Report Could Bring Tougher Limits on Smoking, Tobacco Foes Say*, THE PHOENIX GAZETTE, Jan. 7, 1993, at A1.

4. ENVIRONMENTAL PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS, at 2-1 (1992) [hereinafter HEALTH EFFECTS OF PASSIVE SMOKING].

5. See PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUM. SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL, 37-65 (1986) [hereinafter PUBLIC HEALTH SERVICE] (determining that there was a link between secondhand smoke exposure and acute and chronic respiratory disease).

6. See, e.g., Susan Freinkel, *Ex-Spouses Can't Light Up; Non-Smokers Find New Cudgel in Custody Fights*, LEGAL TIMES, Oct. 4, 1993, at 2.

7. See HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 2-9. EPA has listed three classifications of suspected human carcinogens: "(1) Group A consists of known human carcinogens; (2) Group B consists of probable human carcinogens; and (3) Group C consists of possible human carcinogens." *Palmer v. Del Webb's High Sierra*, 838 P.2d 435, 448 n.15 (Nev. 1992). Other examples of Group A carcinogens are asbestos, arsenic and benzene. *Id.*

8. See HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 1-4.

9. Employers, when faced with smoking-in-the-workplace issues, must now consider the possibility of negligence and workers' compensation claims arising from exposure to secondhand smoke. See ACTION ON SMOKING AND HEALTH (ASH), ASH SMOKING AND HEALTH REVIEW, SPECIAL REPORT, INVOLUNTARY SMOKING: A FACTUAL BASIS FOR ACTION at 9, (July-Aug. 1992). Some divorced parents have sought orders preventing their ex-spouses from smoking in the presence of their children. See Tamar Lewin, *Smokers Find Mark Against*

tobacco industry.¹⁰ The report, several years in the making,¹¹ also included staggering conclusions regarding the ef-

Them In Fight for Custody of Their Children, N.Y. TIMES, Oct. 16, 1993, at § 1, 8. See also generally Martin Dyckman, *Make the Smokers Pay Up*, ST. PETERSBURG TIMES, Jan. 12, 1993, at 9A. The Texas Attorney General recently filed lawsuits against five major fast food chains, including McDonald's, Kentucky Fried Chicken, Taco Bell, Long John Silver's, and Burger King, demanding better protection for children against secondhand smoke. See Robert Frank, *Fast-Food Chains Face Texas Suit On Smoking Areas*, WALL ST. J., Feb. 17, 1994, at B14. The Texas Attorney General alleged that the non-smoking areas in those restaurants did not adequately shield children from secondhand smoke exposure. *Id.* Less than two weeks later, McDonald's announced it would make its domestic company-owned restaurants smoke-free, which led to Texas dropping its lawsuit against McDonald's. *Texas Drops Suit After Firm Sets Smoke-Free Restaurants*, WALL ST. J., Feb. 28, 1994, at A9. The suits filed by the Texas Attorney General quickly followed an announcement by another major fast food chain, Arby's, that it was implementing a no-smoking policy at all its corporate-owned restaurants and would encourage its franchisers to do the same. See *Arby's Snuffs Smoking in Restaurants*, Reuters, Jan. 25, 1994, available in LEXIS, News Library, Wires File.

10. On June 22, 1993, six tobacco growers, including Philip Morris and R.J. Reynolds, Co., filed a lawsuit against the EPA in the United States District Court for the Middle District of North Carolina, challenging the validity of EPA's risk assessment which categorized secondhand smoke as a "Group A" carcinogen. *Flue-Cured Tobacco Cooperative Stabilization Corp. v. United States Environmental Protection Agency*, 857 F. Supp. 1137 (M.D.N.C. 1994). See also Julie Tilsner, *Secondhand Smoke's Second Hearing?*, BUS. WK., July 5, 1993, at 40. The EPA subsequently filed a motion to dismiss, on the grounds that the federal courts did not have jurisdiction over the report, since it was neither a regulation nor an administrative action. See Andrea Shalal-Esa, *EPA Files Motion to Dismiss Tobacco Suit*, Reuters, July 21, 1993, available in LEXIS, News Library, Wires File. Accordingly, the EPA's secondhand smoke report had no binding effect on anyone and technically amounted to no more than an official opinion. ENVIRONMENTAL PROTECTION AGENCY, EPA DESIGNATES PASSIVE SMOKING A "CLASS A" OR KNOWN HUMAN CARCINOGEN, 1993 WL 52157 (Jan. 7, 1993) [hereinafter EPA DESIGNATION]. The tobacco industry is concerned with the practical effect of the EPA Report. See Shalal-Esa, *supra*. OSHA is expected to take action based on the report. *Id.* Despite the report's non-binding effect, the lawsuit brought by Philip Morris, et al., survived EPA's motion to dismiss. See *Flue-Cured Tobacco Cooperative Stabilization Corp.*, 857 F. Supp. at 1140, 1145 (M.D.N.C. 1994) (holding that plaintiffs had stated a valid cause of action under the Administrative Procedure Act alleging "that the classification of ETS as a known human carcinogen is arbitrary and capricious . . . [and] EPA did not follow its guidelines when classifying ETS. . . .")

11. The report had been in development since 1988. EPA DESIGNATION, *supra* note 10, at 2. It was prepared under authority of the Radon Gas and Indoor Air Quality Research Act of 1986 (Title IV Superfund). *Id.* Following a second review in the summer of 1992, EPA's Science Advisory Board (SAB) en-

fects of secondhand smoke on children.¹² The EPA found that exposure to secondhand smoke causes additional episodes and increased severity of asthma attacks in children,¹³ and may also be responsible for creating new cases of asthma in children without any previous symptoms.¹⁴ Each year secondhand smoke exposure contributes to 150,000 to 300,000 lower respiratory tract infections in children less than eighteen months old, resulting in 7,500 to 15,000 hospitalizations.¹⁵ Additionally, secondhand smoke exposure increases respiratory symptoms of irritation and middle ear effusion, and reduces lung function.¹⁶

The EPA report has encouraged anti-smoking activists by providing them with a comprehensive study that supports their views.¹⁷ The EPA is not alone in its warnings about secondhand smoke.¹⁸ In fact, other studies have revealed

dorsed the report, including the conclusion that secondhand smoke is appropriately categorized as a "Group A" carcinogen. *Id.* The first review by SAB occurred in December, 1990. *Id.*

12. See HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 1-5.

13. *Id.* The report estimates that exposure to secondhand smoke exacerbates symptoms in approximately twenty percent of the two million to five million asthmatic children in the United States and that it is a major aggravating factor in about ten percent of those children. *Id.*

14. *Id.* "Data suggest[s] that relatively high levels of [ETS] exposure are required to induce new cases of asthma in children." *Id.* The report estimates that between 8,000 and 26,000 new cases of asthma in previously asymptomatic children exposed to ETS from mothers who smoke at least ten cigarettes a day will emerge annually. HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 1-5, 1-6.

15. *Id.* at 1-5. Lower respiratory infections include pneumonia, bronchitis and bronchiolitis. *Id.*

16. *Id.*

17. John Banzhaf III, founder of Action on Smoking and Health, an anti-smoking group in Washington, D.C., was among those elated when EPA released the report: "Before the EPA report came out, we were literally sending attorneys a fax of [articles] from the New England Journal of Medicine or . . . [the Journal of the American Medical Association]. We had nothing which was a single authoritative governmental-type report." Freinkel, *supra* note 6, at 2.

18. Groups which have concluded that secondhand smoke exposure causes cancer include the United States Public Health Service, National Academy of Sciences, National Cancer Institute, National Institute for Occupational Safety and Health, World Health Organization, American Medical Association, and the American Cancer Society. See ACTION ON SMOKING AND HEALTH (ASH), ASH SMOKING AND HEALTH REVIEW, SPECIAL REPORT, INVOLUNTARY SMOKING:

that additional risks are associated with secondhand smoke exposure. For example, a study at Stanford University in California concluded that secondhand smoke exposure in the home causes six percent of cancers in children and eighteen percent of childhood leukemia.¹⁹ Furthermore, the Center for Disease Control estimated that 702 deaths previously attributed to Sudden Infant Death Syndrome²⁰ actually resulted from maternal smoking.²¹ Additionally, a study at the University of North Carolina found that smokers' children scored lower on vocabulary and reasoning ability tests than children of non-smokers.²² Riding the tide of a movement that has transformed a once-glamorous habit into one often resulting in the ostracism of smokers, litigants desiring bans on cigarette smoking are increasingly bringing these reports and studies into courtrooms.²³

III. Judicial and Legislative Treatment of Secondhand Smoke Issues

A. Background

Courts have considered the effects of secondhand smoke in a variety of legal contexts. In a recent case, *Helling v. McKinney*,²⁴ the Court held that a prisoner who claimed he was

A FACTUAL BASIS FOR ACTION, ASH 4-PAGE SPECIAL SECTION (July-Aug. 1992) [hereinafter ASH SPECIAL SECTION].

19. See Marilyn Dunlop, *Proof Rises Against Second-Hand Smoke*, THE TORONTO STAR, July 12, 1991, at A2.

20. Sudden Infant Death Syndrome is the most frequent cause of death in infants aged one month to one year. See HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 7-52. About two of every 1,000 live-born infants die unexpectedly, usually during sleep, with no significant evidence of fatal illness at autopsy. *Id.* The causes of these deaths are unknown; the most widely accepted theories suggest that these unexplained deaths involve some sort of respiratory failure. *Id.*

21. See HEALTH EFFECTS OF PASSIVE SMOKING, *supra* note 4, at 8-15. While the EPA report concurred with the numbers and methodology used in the CDC study, it was unable to pinpoint the degree to which secondhand smoke was responsible for the deaths, since it was believed that in utero and lactation exposure also contributed. *Id.*

22. See ASH SPECIAL SECTION, *supra* note 18. The study accounted for a large number of other factors in coming to its conclusion. *Id.*

23. See Scanlan, *supra* note 3, at A1.

24. 113 S. Ct. 2475 (1993).

involuntarily subjected to secondhand smoke stated a valid cause of action under the Eighth Amendment's clause²⁵ prohibiting cruel and unusual punishment.²⁶ In another case, *Alexander v. California Unemployment Insurance Appeals Board*,²⁷ the court found that an allergic nonsmoker, who quit her job after refusing to work in an area where co-workers smoked, was entitled to unemployment benefits.²⁸ Furthermore, a few courts have held that a person who exposes another person to secondhand smoke can, under certain circumstances, be liable for battery.²⁹

Though the protective tenor of these cases may suggest otherwise, there is no fundamental right to breathe fresh air. A fundamental right to breathe fresh air was asserted and rejected in *Gasper v. Louisiana Stadium & Exposition District*,³⁰ which involved plaintiffs who objected to smoking in the Louisiana Superdome. The *Gasper* court dismissed the action, holding that there was no constitutional authority for the plaintiffs' position.³¹

Agency members and legislators, as well as judges, are dealing with secondhand smoke issues. Last year, for example, the Occupational Safety and Health Administration (OSHA) introduced proposed rules that would substantially

25. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

26. To prevail on the merits, the prisoner must show, inter alia, that "society considers the risk [of secondhand smoke exposure] to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *Helling*, 113 S. Ct. at 2482.

27. 163 Cal. Rptr. 411 (Cal. Ct. App. 1980).

28. *Id.* at 412. The *Alexander* court held that because she was able to work and continued to search for work in a non-smoking environment she was entitled to benefits. *Id.*

29. See Junda Woo, *Blowing Smoke Around Others May Be Battery*, WALL ST. J., April 11, 1994, at B1. According to the article, civil courts in California, Georgia and Ohio have held that exposing another to secondhand smoke can amount to battery: "[A] smoker who knows that someone nearby is allergic [to secondhand smoke] - and who continues to smoke in that person's presence - is a fair target for a civil suit. . . ." *Id.*

30. 577 F.2d 897 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979).

31. *Id.* at 899.

curtail smoking in the workplace.³² Under the proposed rules, employers must either prohibit smoking or establish designated smoking areas.³³ If the employer opts for designated smoking areas, it must ensure that smoking is confined to that area and that the area sufficiently contains the tobacco smoke from escaping into smoke-free areas.³⁴ Furthermore, the proposed rules state that "[t]he employer shall assure that employees are not required to enter designated smoking areas in the performance of normal work activities."³⁵ While the OSHA rules target workplaces, a bill known as the "Indoor Air Act of 1993"³⁶ could lead to regulation of smoking in all public places. The bill, which provides for "a national program to reduce the threat to human health posed by exposure to contaminants in the air indoors,"³⁷ is headed for the Senate.³⁸

B. Child Custody Determinations

Recently, secondhand smoke issues have appeared with increasing frequency in child custody proceedings.³⁹ The paramount consideration in deciding which parent should be awarded custody in a child custody action is the "best interests of the child."⁴⁰ The "best interests of the child" standard is very broad and allows judges to consider all factors they deem relevant.⁴¹ Some courts have recognized parental smoking habits as a relevant factor in their custodial determinations.⁴² However, since so many other factors are in-

32. See 65 Fed. Reg. 15968 (1994).

33. *Id.* at 16037.

34. *Id.*

35. *Id.*

36. H.R. 2919, 103d Cong., 1st Sess. (1993).

37. *Id.*

38. Tony Dawe, *Facilities at Glaxo's U.S. Headquarters in North Carolina*, THE TIMES, Feb. 22, 1995, at —.

39. See Nathan Cobb, *Air Battle; In Divorce Proceeding, Father Cites Wife's Smoking in Bid for Custody*, THE BOSTON GLOBE, Feb. 8, 1994, at 1; see also *infra* notes 50-83 and accompanying text.

40. 4 AM. JUR. 2D *Annulment of Marriage* § 103 (1962). See also *Freiderwitzer v. Freiderwitzer*, 55 N.Y.2d 89 (1982).

41. See *infra* notes 42-48 and accompanying text.

42. See *infra* notes 50-83 and accompanying text.

volved in such determinations, the weight to be placed on parental smoking habits fluctuates depending upon the facts of each case. Factors commonly used in determining child custody are the character and resources of the parents,⁴³ the advantages that are expected to be given to the child if custody is awarded to either of them,⁴⁴ the wishes of the parents,⁴⁵ the wishes of the child,⁴⁶ the interaction and interrelationship of the child with his parents, siblings and other persons who have a significant impact upon the child,⁴⁷ the child's adjustments to his home, school and community,⁴⁸ and the mental and physical health of all individuals involved.⁴⁹ Since the "best interests of the child" gives a judge a great deal of discretion, the weight to be placed on parental smoking habits may also depend on a judge's personal convictions. The existing cases that address this issue vary greatly. As a result, a litigant cannot be certain how much consideration parental smoking will receive in his or her case, or that it will be considered at all.

Some courts have acknowledged that parental smoking negatively impacts a child's health, yet have placed little weight on this factor when determining custody. In *Helm v. Helm*, for example, the court affirmed a custodial decision in favor of the smoking father.⁵⁰ In *Helm*, the nonsmoking mother raised the issue of her ex-husband's smoking habit and asserted that his secondhand smoke posed risks to their child's health.⁵¹ The court recognized secondhand smoke exposure as a legitimate factor in assessing the best interests of the child, yet did not disturb the custodial decision made by the trial court. The court stated that "[i]deally, no child should be exposed to cigarette smoke in any degree. It must be given some consideration in the selection of a custodian for

43. 59 AM. JUR. 2D *Parent and Child* § 26 (1987).

44. *Id.*

45. UNIF. MARRIAGE AND DIVORCE ACT § 402 (1970).

46. *Id.*

47. *Id.*

48. *Id.*

49. UNIF. MARRIAGE AND DIVORCE ACT § 402.

50. 1993 Tenn. App. LEXIS 109 (Tenn. Ct. App. Nashville 1993).

51. *Id.*

the child. However, it is one of many factors to be considered, and is not necessarily the dominant or decisive consideration."⁵² *Helm* involved a healthy child, which may partially explain that court's unwillingness to alter the original custodial determination.

Other courts have placed considerable weight on parental smoking habits where the child's existing health problems were exacerbated by secondhand smoke exposure. For example, in *Lizzio v. Lizzio*,⁵³ a smoking mother lost joint custody of her children, one of which was asthmatic.⁵⁴ The court's decision rested entirely on the smoking habits of the mother and her husband.⁵⁵ Despite a recommendation by the children's law guardian that joint custody continue, the court awarded primary and physical custody to the father.⁵⁶ The *Lizzio* opinion contains some of the strongest anti-smoking language found in the line of custody cases:

The Court is not as optimistic as the Law Guardian nor can it permit a child to be exposed to imminent danger upon the supposition that a mother who has ignored medi-

52. *Id.* The court gave the following explanation for its affirmance:

The decision of the Trial Court was influenced by the fact that the child would remain in a familiar day care facility if left with the father, but would be transferred to a different facility if transferred to the mother, who is employed. Undoubtedly, the Trial Court was impressed by the testimony of a third party, the day care provider of the child, that she had cared for the child from infancy, that the father was the one who ordinarily brought the child to the care center and returned for him; that she observed the mother's supervision of the child to be "chaotic,"[;] that the father is orderly and cooperative in managing the child and promoting his best interests; and that, from the time the father received custody . . . the child has been content, happy and has improved.

Id. at *4, *5.

53. 618 N.Y.S.2d 934 (F. Ct. Fulton Co. 1994).

54. *Id.* at 935-6.

55. *Id.* at 937-8.

56. *Id.* at 937. The opinion states: "While the Law Guardian finds that the mother and stepfather's smoking habits are injurious to the children and that, to date, she has not recognized the serious threat that smoking poses to her son, he stops short of recommending a custodial change and hopes that the mother will come to her senses and will stop jeopardizing her child's life." *Id.*

cal advice for many years will now see the light and do the right thing to protect her children.

[Furthermore, w]e are at a point in time when . . . a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive tobacco smoke.

The pivotal issue in this case is cigarette smoke. But for that issue and the health risk that smoking poses, the Court would continue the custody arrangement⁵⁷

Mitchell v. Mitchell,⁵⁸ another child custody proceeding, hinged on the adverse effects of the mother's smoking on her asthmatic child.⁵⁹ Both the child's mother and maternal grandmother smoked in the presence of the child.⁶⁰ The court awarded custody to the child's father, a nonsmoker, while the child's mother was granted conditional visitation rights requiring her to provide a smoke-free environment for the child.⁶¹ The court concluded that the mother's failure to refrain from smoking in the child's presence, despite the recommendation of the child's physician that she do so, was strong evidence of a "lack of proper concern for the welfare of the child."⁶²

A similar result was reached in *Pizzitola v. Pizzitola*,⁶³ where the court awarded custody of the child to the nonsmoking father, despite the mother's status as primary caretaker during the marriage.⁶⁴ In yet another custody case, *In re Brett Lee Bryant v. Wakely*,⁶⁵ a mother serving a prison term sought to place her child, who suffered from severe respira-

57. 618 N.Y.S.2d at 937.

58. 1991 WL 63674 (Tenn. Ct. App. 1991).

59. *Id.* at *1.

60. *Id.*

61. The court granted visitation rights to the mother "with the condition that [she] and the grandmother not smoke in the presence of the child, and that they take all acts necessary to rid their homeplace of any lingering smoke before the child arrives for his visitation." *Id.*

62. 1991 WL 63674 at *3.

63. 748 S.W.2d 568 (Tex. Ct. App. 1988).

64. *Id.* at 569-70.

65. No. 131708 (Mich. Ct. App. 1991).

tory problems, in the custody of the child's maternal grandmother, who smoked.⁶⁶ The trial court found that the child needed a smoke-free environment which the grandmother could not provide.⁶⁷ Accordingly, the court denied custody to the grandmother, terminated the mother's custodial rights, and awarded custody to the Department of Social Services.⁶⁸

Visitation rights have also been altered by courts as a result of a child's exposure to secondhand smoke. In *Badeaux v. Badeaux*,⁶⁹ for instance, the nonsmoking mother of a twenty-month-old asthmatic child⁷⁰ sought and won a reduction of the father's visitation rights.⁷¹ The Court of Appeals of Louisiana emphasized the father's smoking habits in affirming the trial court's decision.⁷²

C. Protective Orders

Judicial consideration of parental smoking habits is not limited to child custody determinations. Some courts have gone a step further by issuing protective orders that prescribe when and where a parent may smoke.⁷³ Other courts have

66. *Id.*

67. *Id.*

68. *Id.*

69. 541 So.2d 301 (La. Ct. App. 1989).

70. The child in *Badeaux*, who had bronchial asthma, was prone to repeated upper respiratory infections requiring antibiotics. *Id.* at 302.

71. *Id.* Originally, the father's visitation rights were as follows: every other weekend from 6 p.m. Friday to 6 p.m. Sunday; every Wednesday from 9 a.m. to 5 p.m. when the father was not working, from 6 p.m. to 8:30 p.m. when he was working; one week in June; one week in July; one week in August and four specified holidays. *Id.* The visitation rights were reduced to: every other weekend from 8 a.m. Saturday to 6 p.m. Sunday; one week in June; one week in July and specified holidays. *Id.*

72. *Id.* at 302-303. The Court of Appeals of Louisiana, in looking for justification for the trial court's reduction of the father's visitation rights, placed great weight on the smoking habits of the father:

Timothy Badeaux [the father] testified that he, his mother and his step-father, with whom he lived when [his son] visited, were smokers. He admitted knowing that exposure to cigarette smoke was bad for the child. While noting the love and affection of the father for his son, the trial judge cited the cigarette smoking and its effect on the child's health as a further reason for limited visitation.

Id.

73. See *infra* notes 74-82 and accompanying text.

even issued orders protecting healthy children. For example, in *Unger v. Unger*,⁷⁴ a divorced couple sought to finalize custody arrangements for their two healthy children.⁷⁵ A joint custody agreement signed by both parents contained a provision prohibiting the parents from smoking in the presence of their children.⁷⁶ The agreement limited the mother's smoking to her bedroom when the children were in her home.⁷⁷ The nonsmoking husband later sought to reopen the custody issue, alleging that one of his children suffered from a serious cough resulting from exposure to the mother's secondhand smoke.⁷⁸ The court reopened the custody issue, the result of which is pending.⁷⁹ Moreover, the court revoked the mother's bedroom smoking privileges and required her to "ensure that there [be] no [smoke] in her home or her vehicle for a period of ten hours before the children are present."⁸⁰ The court based its rulings in great part on the EPA report.⁸¹

Perhaps the most far-reaching decision in this area is *Strathmann v. Foster*,⁸² a child custody case. The court required the father to refrain from smoking in the presence of

74. 644 A.2d 691 (N.J. Super. Ct. Ch. Div. 1994).

75. *Id.* at 692.

76. *Id.* The provision stated:

Both parties are restrained from allowing smoking of tobacco in the presence of the children at any location and any enclosed areas such as homes or automobiles and to prevent the effect of secondary inhalation of tobacco smoke. The wife shall designate her bedroom as the only area where she will smoke or anyone else will smoke if the children are present in her home. The wife shall be permitted to smoke in the living area if the children are not present with the understanding that she will purchase, at her own expense, an air purifier which shall be a sufficient air purifier which shall be operated at all times when she is smoking in such area.

Id.

77. *Id.*

78. *Id.*

79. *Unger*, 644 A.2d at 694. The court reopened the custody issue following a hearing during which the father supported his allegations to the satisfaction of the court. *Id.* The matter was referred to a psychologist for an evaluation to aid the court in its custody determination. *Id.*

80. *Id.* at 695.

81. *Id.* at 692-3. The court placed great weight on the testimony of a doctor who relied upon the EPA report in establishing the serious health risks to children stemming from secondhand smoke exposure. *Id.*

82. No. 4663-A-1990 (C.P. Erie County, Pa. 1991).

his children; he was further prohibited from smoking in his home for at least forty-eight hours prior to the children's visits.⁸³

The above cases focus on smokers who are divorced or in the process of divorcing.⁸⁴ However, protection from second-hand smoke has also been provided to children in the marital home. In *Roofeh v. Roofeh*,⁸⁵ the court issued a temporary order requiring the wife to confine her smoking to one room in the house and to refrain from smoking in the presence of her children and husband.⁸⁶ Although the wife in *Roofeh* had filed for divorce,⁸⁷ the court derived its authority to issue the temporary order from its "inherent power in matrimonial matters to safeguard the health and safety of [spouses] and children."⁸⁸ Thus, courts seem willing to provide protection to children whether their parents are married or divorced.⁸⁹

83. *Id.*

84. Attorney C. Clay Greene, who is currently representing a client in opposing an anti-smoking court order in a child custody case in Contra Costa County, California, claims that divorcing parents who smoke are being unfairly singled out. See Lewin, *supra* note 9. But John Banzhaf III, founder of Action on Smoking and Health (ASH), an anti-smoking group in Washington, D.C., said the divorce setting was merely the logical first step for a movement that he hopes will ultimately protect the children of married couples as well, since the courts have already gained entree into the lives of divorcing families. Freinkel, *supra* note 6.

85. 525 N.Y.S.2d 765 (Sup. Ct. 1988).

86. *Id.* at 769.

87. The wife filed for divorce on May 22, 1987 on the grounds of cruel and inhuman treatment. *Id.* at 766. The husband brought the *Roofeh* case on Jan. 14, 1988, while the divorce action was still ongoing. *Id.*

88. *Id.* at 769.

89. A court has the power to protect children in broken and stable households, but the courts cannot open the door to the home on their own initiative. When a spouse reaches the point where he or she is willing to bring suit against his or her spouse, chances are that divorce is imminent. Thus, orders protecting children from secondhand smoke will continue to arise almost exclusively in the context of divorce proceedings, despite the judicial system's increasing willingness to safeguard children from secondhand smoke regardless of the parental circumstances, unless other statutory avenues capable of getting the smoking issue to the court are utilized.

IV. The Right to Privacy

The term "right to privacy" cannot be found in the Constitution.⁹⁰ Instead, the right to privacy is an implied right rooted in the Fourteenth Amendment's Due Process Clause.⁹¹ The Fourteenth Amendment provides in part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."⁹² Specifically, the "liberty" component of the Due Process Clause gives rise to the right to privacy.⁹³

The right to privacy has gradually been expanded by the courts on a case-by-case basis.⁹⁴ The protection afforded a specific privacy right depends upon how it is categorized.⁹⁵ Privacy rights are split into two categories: fundamental and non-fundamental.⁹⁶ In *Palko v. Connecticut*,⁹⁷ the Supreme Court defined a fundamental right as one that is "implicit in

90. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (stating that "[t]he Constitution does not explicitly mention any right of privacy.>").

91. The contemporary view is that the "liberty" component of the Fourteenth Amendment's Due Process Clause provides the strongest constitutional basis for the right to privacy. See *id.* at 152-53 (identifying the Fourteenth Amendment as the basis for the right to privacy: "[The] right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153 (emphasis added); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2804 (1992) (stating that the word liberty in the Fourteenth Amendment's Due Process Clause gives rise to the constitutional protection of a woman's decision to abort her pregnancy); *Cf.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (alluding to several possible bases for the right to privacy, including the First, Third, Fourth, Fifth and Ninth Amendments).

92. U.S. CONST. amend. XIV, § 1.

93. See *Roe*, 410 U.S. at 152.

94. See also *infra* notes 95-102 and accompanying text.

95. One commentator, opining that the characterization of a right as fundamental invariably leads to the invalidation of the infringing law, described the heightened scrutiny applicable in fundamental rights analysis as "'strict' in theory and fatal in fact." Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

96. See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), for the rationale behind varying levels of judicial scrutiny.

97. 302 U.S. 319 (1937).

the concept of ordered liberty"⁹⁸ such that "neither liberty nor justice would exist if [it] was sacrificed."⁹⁹ Infringements on fundamental rights are subject to a strict scrutiny analysis.¹⁰⁰ The strict scrutiny standard requires the state to show a compelling interest justifying the infringement¹⁰¹ and further requires that legislative enactments be narrowly drawn to express only the interest at stake.¹⁰² Infringements on non-fundamental rights, however, are examined with a lower, more deferential standard, requiring only that the state have a legitimate interest with means that are rationally related to furthering that state interest.¹⁰³

Procreative activities are at the forefront of the right to privacy. For instance, *Roe v. Wade*¹⁰⁴ tested the constitutionality of a state law criminalizing abortions.¹⁰⁵ The Supreme Court opined that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹⁰⁶ The Court further stated that the right to decide whether to have an abortion is fundamental.¹⁰⁷ Accordingly, it was incumbent upon the state to show a compelling interest justifying the infringement on that right. The state asserted that it had a compelling interest in protecting prenatal life from the time of conception.¹⁰⁸ However, the parties challenging the law argued that a "woman's right [to

98. *Id.* at 325.

99. *Id.* at 326, quoting *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

100. See, e.g., *Roe*, 410 U.S. 113.

101. *Id.* at 155-6.

102. *Id.*

103. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1943).

104. 410 U.S. 113 (1973).

105. *Id.*

106. *Id.* at 153.

107. The Court characterized this right as fundamental by implication, not explicitly. The Court cited *Palko* to define "fundamental rights" and later applied strict scrutiny to the anti-abortion law at issue: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest'. . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Roe*, 410 U.S. at 155 (citations omitted).

108. *Id.* at 156. The Court acknowledged that the state also had an interest in the health of the mother; this interest became "compelling" at approximately the end of the first trimester. *Id.* at 163.

decide] is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reasons she alone chooses.”¹⁰⁹ The Court did not fully agree with either position, stating that the interests of a pregnant woman must be weighed against the state’s interest in protecting potential human life.¹¹⁰ The Court, relying heavily on medical authority,¹¹¹ held that a state’s interest in protecting a fetus becomes compelling, and prohibitions against abortion permissible, when the fetus is “viable.”¹¹² Thus the *Roe v. Wade* holding was not an “all-or-nothing” result, but rather acknowledged and balanced a multitude of interests.¹¹³ *Roe v. Wade* was unique among the right to privacy cases in that it involved “an act [namely, abortion]

109. *Id.* at 153.

110. The Court stated:

The pregnant woman cannot be isolated in her privacy. . . . [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of the health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. at 159.

111. The *Roe v. Wade* decision makes several references to medical authority in its opinion. Early in the opinion, Justice Blackmun wrote “[I]n this opinion [we] place some emphasis upon medical and medical-legal history and what this history reveals about man’s attitudes toward the abortion procedure over the centuries.” *Id.* at 117. Blackmun, near the end of the majority opinion, wrote: “[Our] holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of *medical* and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.” *Id.* at 165 (emphasis added).

112. *Roe*, 410 U.S. at 163. A fetus is “viable” when it is “potentially able to live outside the mother’s womb, albeit with artificial aid.” *Id.* at 160. A fetus is usually viable about seven months after conception. *Id.*

113. The medical profession had a lot to say about abortion rights under the *Roe v. Wade* decision. The court selected viability as the point at which the state could prohibit abortions. Thus, medical advancements increasing the period of viability necessarily resulted in the expansion of states’ powers to prohibit abortions. Under *Roe v. Wade*, a pregnant woman in the 1980s had a fundamental right to an abortion until the third trimester (about seven months) of her pregnancy. A woman pregnant in the year 2030, for example, would likely have far less time in which to exercise her fundamental right to abort her pregnancy. The result is a waning fundamental right, the breadth of which hinges on technology.

fraught with consequences for others."¹¹⁴ *Roe v. Wade* not only added an item to the privacy rights menu, but also emphasized a key strand in privacy rights analysis which is the assessment of non-actors' interests.

A common bond among many of the recognized privacy rights is their close relationship with the family and the home. *Griswold v. Connecticut*¹¹⁵ recognized the right to use contraceptives.¹¹⁶ The right to privacy also includes the right "to marry, establish a home and bring up children."¹¹⁷ The protection given these privacy rights has strengthened the home's status as a refuge from governmental intrusion. The Third and Fourth Amendments further contribute to the perception that the home is a hallowed place.

The Third Amendment limits the use of a person's home to quarter soldiers, with no intrusion allowed in times of peace without the consent of the owner.¹¹⁸ The Fourth Amendment guarantees "[t]he right of the people to be secure in their . . . houses" and prohibits "unreasonable searches and seizures."¹¹⁹ Statutes imposing criminal or civil liability for

114. *Casey*, 112 S. Ct. at 2807.

115. 381 U.S. 479 (1965).

116. *Id.*

117. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Justice McReynolds espoused a concept of "liberty" that included, inter alia, the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness. *Id.*

A general right of parents to direct the upbringing and education of their children was recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a statute requiring children to attend public schools). A general right to establish a home was recognized in *Moore v. East Cleveland*, 431 U.S. 494 (1977) (striking down a zoning regulation prohibiting extended families from living together). A right to marry was recognized in *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a statute prohibiting parents from remarrying without proof that all court-ordered child support had been paid and that the child would not ultimately become financially dependent on the state).

118. U.S. CONST. amend. III. The Third Amendment states "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.*

119. U.S. CONST. amend. IV.

acts that offend public sensibilities, such as public lewdness and public intoxication provisions,¹²⁰ imply that the home represents a base of immunity that the government cannot freely pierce.¹²¹ Traditional rights bestowed upon property owners, particularly the rights to use and exclude,¹²² lend further credibility to what has generally been described as a right "to do what you want in the confines of your own home."¹²³

In *Stanley v. Georgia*,¹²⁴ the Court illustrated how conduct unprotected outside of the home can, under some circumstances, be protected within its confines.¹²⁵ *Stanley* involved a law prohibiting possession of obscene materials.¹²⁶ Stanley was charged under the law after such materials were found in his home.¹²⁷ The Court, in holding that the First Amendment protects the private possession of obscene materials, stated that the "right to receive information and ideas, regardless of their social worth, . . . is fundamental to our free

120. N.Y. PENAL LAW, §§ 245.00, 240.40 (McKinney 1992).

121. The existence of these statutes reveals that the government is more tolerant of certain types of conduct when occurring within the home. See generally N.Y. PENAL LAW, tit. N (McKinney 1992) (including public lewdness, public use of obscene language and/or gestures, appearance in public under the influence of narcotics).

122. The power of ownership is reflected in the following:

[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1782).

123. Attorney C. Clay Greene, who represented Susan Tanner in a 1993 child custody case in which Tanner was the target of a court order prohibiting her from smoking in the presence of her two daughters, cited a pair of abortion cases (*Roe*, 410 U.S. 113 and *Planned Parenthood Affiliates v. Van de Kamp*, 226 Cal. Rptr. 361 [1986]) in his brief to support his assertion that a person generally has a fundamental right to do as he or she wishes while in the privacy of the home. Freinkel, *supra* note 5, at 2. With this initial point made, the brief concluded that the right to smoke in the privacy of one's home is accordingly fundamental. *Id.* For further discussion of the *Tanner* case, see *supra* note 84.

124. 394 U.S. 557 (1969).

125. *Id.* at 564, 568.

126. *Id.* at 558.

127. *Id.*

society.”¹²⁸ Furthermore, “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”¹²⁹ However, laws prohibiting public possession of obscene materials were not invalidated by *Stanley*.¹³⁰

The right to do what one wants in the home is not absolute. *Bowers v. Hardwick*¹³¹ involved a law prohibiting sodomy.¹³² Hardwick, the adult male challenging the law, was charged under the law after committing an act of sodomy in his bedroom with another adult male.¹³³ The Court phrased the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . .”¹³⁴ After noting a long history of anti-sodomy laws in this country, the Court concluded that it was “at best, facetious”¹³⁵ to claim that the act of sodomy fell within the *Palko* definition of a fundamental right.¹³⁶ Hardwick asserted that since the acts of sodomy occurred in the privacy of the home, the acts were protected under *Stanley*.¹³⁷

In declining to broadly construe *Stanley* and apply it to Hardwick’s conduct, the Court stated that

Stanley did protect conduct that would not have been protected outside the home . . . ; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the pre-

128. *Stanley*, 394 U.S. at 564.

129. *Id.* at 565.

130. See *United States v. Reidel*, 402 U.S. 351, 352 (1971) (holding that distribution of obscene materials could be prohibited).

131. 478 U.S. 186 (1986).

132. Georgia law defines sodomy as “any sexual act involving the sex organs of one person and the mouth or anus of another.” *Id.* at 188 n.1.

133. *Id.* at 187-88.

134. *Id.* at 190.

135. *Bowers*, 478 U.S. at 194.

136. See *supra* notes 96-98 and accompanying text.

137. 478 U.S. at 195.

vailing principles for construing the Fourteenth Amendment.¹³⁸

Hence, since the right to engage in sodomy was not guaranteed by the Fourteenth Amendment or any other provision of the Constitution, the challenge to the law in *Bowers* was unsuccessful.

Although the place where conduct occurs is sometimes relevant to privacy rights analysis, it is not dispositive. For example, *Roe v. Wade* involved the conduct, namely abortion prior to viability, which is permissible regardless of where it occurs.¹³⁹ However, *Stanley* involved conduct, the possession of obscene material,¹⁴⁰ which could be prohibited anywhere except the home. In contrast, *Bowers* involved conduct, namely sodomy, that could be prohibited regardless of where it occurred.¹⁴¹ Thus, only under the First Amendment analysis in *Stanley* was the place where the conduct occurred relevant to the determination of the case. In contrast, Fourteenth Amendment analysis begins and ends with a careful examination of the asserted right, not with an inquiry into where the exercise of that right occurs.

V. Analysis

A. Is Smoking a Fundamental Right?

The right to privacy has emerged as the smokers' constitutional weapon of choice in opposing orders that curb smoking in the home. Specifically, smokers assert a fundamental right to smoke in the privacy of their homes without governmental interference.¹⁴² The United States Supreme Court

138. *Id.*

139. *See* 410 U.S. 113.

140. It is important to note that *Stanley* did not permit all private possession of obscene materials, but more narrowly held that the type of material privately possessed by Stanley could never lead to liability. *See* *Osborne v. Ohio*, 495 U.S. 103 (1990) (holding that the defendant did not have a First Amendment right to privately view pictures of nude minors because of the overriding state interest in protecting minors).

141. *See* 478 U.S. 186.

142. For example, when a California judge ordered Anna Maria De Beni Souza, the mother of a five-year-old boy, to refrain from smoking in his presence

has not yet addressed the issue of whether smoking in the home is a fundamental right. In *Collins v. City of Harker Heights*,¹⁴³ the Court stated that "[s]ubstantive due process must begin with a careful description of the asserted right, for the doctrine of self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."¹⁴⁴ Thus, smokers do not yet have any authority for their claims that smoking in the home is a fundamental privacy right. Until the Supreme Court decides the issue, the question remains whether the right to privacy is broad enough to encompass a right to smoke in the home.

Smokers' arguments in favor of treating smoking in the home as a fundamental right are characteristically location, rather than activity, oriented.¹⁴⁵ In other words, the smokers' arguments focus on the sanctity of the home and the degree to which that sanctity is disturbed by orders prohibiting smoking.¹⁴⁶ The smokers' approach resembles the First Amendment analysis of *Stanley*, but is not aligned with Fourteenth Amendment privacy analysis as reflected in *Roe v. Wade* and *Bowers*. *Stanley* turned on the place where obscene materials were possessed; public possession could be curtailed while private possession could not. While the Fourteenth Amendment right to privacy is admittedly closely connected to the home, it is not infringed each time the home is invaded. The right to privacy exists to protect certain *activities*. The protection it gives to the home or any other *location* is merely incidental.¹⁴⁷ For example, *Roe v. Wade* and *Bow-*

as part of a 1990 child custody ruling in her favor, De Beni Souza responded, "What right does the court have to dictate my behavior in my own home? This is not Russia, right?" *Judge In Custody Fight Tells Mom: No Smoking*, CHI. TRIB., Aug. 16, 1990, § 1 at 3. See also Freinkel, *supra* note 6.

143. 112 S. Ct. 1061 (1992).

144. *Collins*, 112 S. Ct. at 1068.

145. See generally Victoria L. Wendling, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?*, 42 Case W. Res. L. Rev. 1025, 1046 (1992).

146. See *id.* at 1067.

147. See *Poe v. Ullman*, 367 U.S. 497 (1961). Justice Harlan, in his dissent, asserted that a right to privacy analysis properly focuses on the activity in question, not the location in which it occurs: "if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of

ers focused exclusively on the activity involved, rather than the location in which the activity occurred. Since smoking is not a First Amendment issue, a location-oriented analysis is inappropriate. If smoking in the home is to receive protection as a fundamental right, it must qualify under Fourteenth Amendment right to privacy analysis.

Palko provides the first step in the right to privacy analysis. The right to smoke in the home is fundamental only if "implicit in the concept of ordered liberty"¹⁴⁸ such that "neither liberty nor justice would exist if [it was] sacrificed."¹⁴⁹ In determining whether the *Palko* criteria have been met, a court must look to the "traditions and conscience of [the] people."¹⁵⁰ Tradition appears to be on the side of the smokers, who have historically had free reign to smoke in the presence of their children. However, the conscience of the people, as it relates to smoking, has changed dramatically over the past ten years.¹⁵¹ Public awareness of the dangers of secondhand smoke exposure has led to a decline in the number of smokers in this country.¹⁵² State and federal legislatures have responded with laws banning smoking in certain areas.¹⁵³ Thus, it appears that the long-accepted tradition of smokers lighting up at their leisure has been replaced with a newer, critical wave of public opinion.

A smoker's freedom of choice is impaired when a court prescribes the circumstances under which the smoker can light up in his own home. That is not to say, however, that such an order "sacrifice[s] . . . liberty and justice" as contem-

the life within. . . . The home derives its pre-eminence as the seat of family life." *Id.* at 551 (emphasis added).

148. *Palko*, 302 U.S. at 325.

149. *Id.* at 326, quoting *Twining*, 211 U.S. at 99.

150. *Griswold*, 381 U.S. at 487.

151. See *supra* note 22 and accompanying text, *infra* notes 152-153 and accompanying text.

152. U.S. Dept. of Health and Human Services, *Cigarette Smoking Among Adults-United States, 1993*, MORBIDITY AND MORTALITY WEEKLY REPORT, Dec. 23, 1994, at 925. This report states that the "annual prevalence of cigarette smoking among adult smokers in the United States declined 40% during 1965-1990" *Id.*

153. See *supra* notes 96-98 and accompanying text.

plated by *Palko*.¹⁵⁴ The court orders opposed by the smokers do not entirely prohibit smoking; they merely prohibit smoking in a manner likely to adversely affect children.¹⁵⁵ Like the abortion decision in *Roe v. Wade*, smoking is "an act fraught with consequences for others."¹⁵⁶ Thus, the competing interests of the children, whose health is negatively impacted by secondhand smoke exposure, must carry considerable weight in determining smokers' rights. Justice is not sacrificed when smokers are told they cannot smoke in the presence of their children; justice is done. Children cannot adequately protect themselves from secondhand smoke exposure and need the state, acting as *parens patriae*,¹⁵⁷ to intervene. Orders limiting smoking in the presence of children effectively juggle the competing interests involved: they protect children's health and allow parents to smoke, albeit in an area away from their children. Smokers should have free reign to light up only when their own health is in danger. However, allowing smokers, as a fundamental right, to endanger the lives of others, is patently unjust.¹⁵⁸

Furthermore, the right to smoke has little in common with other fundamental privacy rights, which typically advance an "individual[s] interest in avoiding disclosure of per-

154. See *infra* note 158 and accompanying text.

155. Some orders, like the order in *Unger*, require a smoke-free period prior to children's visit as well as ban smoking in the children's presence. 644 A.2d 691. These orders are based on the notion that secondhand smoke lingers for a while before dissipating. *Strathmann*, No. 4663-A-1990 (C.P. Erie County, Pa. 1991). Other orders simply ban smoking in the presence of children. *Roofeh*, 525 N.Y.S.2d 765.

156. See *supra* notes 103-113 and accompanying text.

157. *Parens patriae* "is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

158. This point was made in a brief submitted by attorney Thomas Wolfrum in support of a court order requested by his client, Steve Masone, in a 1993 child custody case in California: "This is not an issue of [a] fundamental right of privacy. . . . [A smoker] may shorten his life by smoking tobacco, but he has no constitutional right to shorten his children's lives." See Freinkel, *supra* note 6 and accompanying text.

sonal matters"¹⁵⁹ and "independence in making certain kinds of important decisions."¹⁶⁰ "Important" must be interpreted in light of the rights that the Supreme Court has deemed fundamental, for example, use of contraceptives,¹⁶¹ abortion,¹⁶² marriage¹⁶³ and child rearing.¹⁶⁴ All of these rights are integral components of family planning. Smoking is not. In fact, the Supreme Court held in *Austin v. Tennessee*¹⁶⁵ that a state could entirely prohibit the sale of cigarettes under its police power.¹⁶⁶ It would be illogical for the Supreme Court to treat smoking in the home as a fundamental right while permitting the states to prohibit cigarette sales. Otherwise, the Constitution would yield to the police power. Such a result is, of course, contrary to settled law.¹⁶⁷

Finally, there are strong policies against recognizing smoking in the home as a fundamental right. The states would have almost no leeway to protect children from second-hand smoke exposure in the home if strict scrutiny, rather than the rationality standard, applied to their actions. Children are already powerless to evade the dangers of smoke-filled homes and should be able to rely on the states' police and parens patriae powers for a remedy. A contrary result

159. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (reviewing a New York statute which required the public disclosure of the identity of patients, who were prescribed schedule II drugs).

160. *Id.* at 599-600.

161. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

162. *Roe v. Wade*, 410 U.S. 113 (1973).

163. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

164. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

165. 179 U.S. 343 (1900).

166. *Id.* at 350. See also *Posadas de Puerto Rico Ass'ns. v. Tourism Co.*, 478 U.S. 328 (1986) (reviewing a statute that prohibited the advertising of gambling facilities within Puerto Rico). "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962). The standard to determine whether an exercise of the police power is appropriate is: "first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

167. The police power is subject to limitations of the Constitution, particularly in the area of due process, not vice versa. *Marshall v. Kansas City*, 355 S.W.2d 877, 883-4 (Mo. 1962). See also *Berman v. Parker*, 348 U.S. 26, 31 (1954).

would be particularly undesirable and irresponsible given the increasing awareness in the scientific, political and legal communities, as well as society at large, of the dangers of second-hand smoke.¹⁶⁸

Smoking in the home is not a fundamental privacy right. *Roe v. Wade* instructs that interests of third parties are pertinent to the privacy rights analysis. Smoking adversely and substantially affects the health of children. *Palko* states that fundamental rights are those "implicit in the concept of ordered liberty" such that neither "justice nor liberty would exist if [it] was sacrificed."¹⁶⁹ When the interests involved are balanced, smoking in the home falls considerably short of qualifying as a fundamental right under *Palko*. The Supreme Court determined long ago in *Austin* that states can ban the sale of cigarettes.¹⁷⁰ It would be counterintuitive to recognize smoking in the home as fundamental yet allow states to freely prohibit cigarettes. What right could be more hollow?

B. Smoking and the Slippery Slope

Smoking shares a common thread with the bundle of fundamental privacy rights currently protected by the Fourteenth Amendment: an underlying freedom of choice issue. Indeed, that is an important issue. After all, if the government can prevent parents from smoking around their children, what's next? Can the government order parents to feed their children less candy? Can the government sanction parents because their child watches too much violent television? It is always important in privacy analysis to be aware of the slippery slope: "Neither judges nor legislators nor citizens should permit decisions . . . , focused as each must be upon its

168. See Frank Jones, *Will Smoking Infiltrate Custody Battles?*, THE TORONTO STAR, Dec. 7, 1992, at B1. In his column, Jones states:

We know enough about the damage smoking does to ban it in the workplace, on public transportation, in theatres and in almost any sort of public space you care to imagine. Yet nothing has been done to protect the most vulnerable group of all, children, from the effects of smoking in the home.

Id.

169. See *supra* note 149 and accompanying text.

170. 179 U.S. 343 (1900).

precise context, to be taken without attention to the drift of its cumulative result.”¹⁷¹ Judges must be “scrupulous to distinguish the slip which leads inexorably down the slope from the one that does not.”¹⁷²

The dangers to children stemming from secondhand smoke exposure are real and substantial; medical authority corroborates this fact and a large segment of the public has accepted it.¹⁷³ Nonetheless, skeptics remain. Reluctance to acknowledge the warnings of the medical profession, however, is invariably driven by habit or profit. Both are powerful. Secondhand smoke exposure is unlike the “dangers” lining the slippery slope, like diets high in sugar or violent television shows, because it results from a parent’s habitual, addictive behavior.¹⁷⁴ The habit often impairs a smoker’s ability to neutrally evaluate the risks to their children. This extenuating circumstance makes it especially necessary and appropriate for courts to intervene. Such extenuating circumstances do not underlie high-sugar diets and violent television. Thus, court orders prohibiting at-home smoking in the presence of children do not provide a basis for regulative overkill in the area of child care.

This article takes the position that smoking in the home is not a fundamental right. Regardless, the right to smoke is entitled to the level of protection from interference conveyed by the rationality standard. In order to avoid an undesirable trip down the slippery slope, judges should ensure that their orders are rationally related to the state’s legitimate interest in safeguarding children. Courts should retreat from the stance taken in *Strathmann*, where the judge required, *inter alia*, that the father refrain from smoking forty eight hours prior to his children’s visit.¹⁷⁵ Secondhand smoke does not linger for forty eight hours. Thus, the *Strathmann* order

171. Laurence Tribe, AMERICAN CONSTITUTIONAL LAW, § 15-2, at 892 (1978).

172. *Id.*

173. See PUBLIC HEALTH SERVICE, *supra* note 5, at 21-108.

174. The American Cancer Society reports that nicotine, a drug contained in tobacco leaves, is more addictive than heroin. Anne Rochelle, *News for Kids Kicking the Habit; How to Help your School*, ATLANTA CONSTITUTION, Nov. 14, 1994, at A3.

175. See *supra* notes 81-82 and accompanying text.

needlessly deprived the father of his freedom of choice for much of the forty eight hour period.¹⁷⁶ Although judges have considerable discretion to issue nonsmoking orders under the rationality standard they should, in light of the dangers of the slippery slope, avoid overbroad orders that curtail parents' smoking without a corresponding benefit to a child's health.

C. Protection of the Children

In a custody case, the facts of the case should control the weight placed on parental smoking. A smoker's right of choice should be protected insofar as the smoker refrains from smoking in the presence of children. However, if there is sufficient evidence of a parent smoking near the children, then the habit should be considered in the custodial decision. The degree to which the habit harms the smoker's chances of gaining custody depends on the fragility of the child's health. Smoking in the presence of a healthy child should generally be considered as one of many factors in the custodial decision. The judge in a custody case, who is alerted to the parent's smoking practices, should be prepared to halt such practices should the smoker emerge as the most fit parent.

Where the child has health problems, such as asthma, a parent's smoking habit should be given dispositive weight, since it evidences a blatant disregard for the welfare of the child.¹⁷⁷ Where both parents smoke in the presence of an asthmatic child, an order requiring cessation of such practices should accompany the custody award. Moreover, the court should retain jurisdiction over the matter with appropriate monitoring to assure compliance.¹⁷⁸ The custodial parent should be aware of the court's right to place the child in

176. *Strathmann*, No. 4663-A-1990 (C.P. Erie County, Pa. 1991).

177. *See Mitchell*, No. 01-A-01-9012-CV-00442, 1991 WL 63674 (Tenn. Ct. App. 1991).

178. In *Lizzio*, for example, the court directed the law guardian to visit the households of each parent, consult periodically with the child's physicians, and to periodically submit reports detailing the law guardian's findings. 618 N.Y.S.2d at 934.

foster care and to hold the parent in contempt for violations of the order.

Courts should recognize that exposing children to secondhand smoke can possibly amount to criminal conduct. In New York, for example, exposing a child to secondhand smoke should, under some circumstances, be considered a violation of New York Penal Law section 260.10,¹⁷⁹ which states: "A person is guilty of endangering the welfare of a child when . . . [h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old. . . ." ¹⁸⁰

Fortunately, the number of orders protecting children from secondhand smoke exposure has steadily increased with the public's awareness of the hazard. However, judicial protection should extend beyond situations where a divorcing parent steps forward and demands relief for the child. For example, if both parents smoke in the home there is little chance that the children will be able to escape the smoke-filled environment. Furthermore, children in the marital home are currently afforded little protection, since protective orders have arisen almost exclusively in child custody proceedings as a result of a divorce. Accordingly, the courts should be receptive to suits brought under the states' child abuse or neglect provisions, or under provisions resembling New York Penal Law section 260.10.

In New York, an abused child is one who is

less than eighteen years of age whose parent or other person legally responsible for his care . . . creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which causes or creates a substantial risk of . . . protracted impairment of physical or emotional health . . . ¹⁸¹

In addition, the child neglect statute in New York states

179. N.Y. PENAL LAW § 260.10 (McKinney 1993).

180. *Id.*

181. N.Y. FAM. CT. ACT § 1012 (e)(Consol. 1994).

"[n]eglected child" means a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof . . . by acts of a . . . serious nature requiring the aid of the court¹⁸²

Use of these statutes to combat secondhand smoke exposure is only appropriate in extraordinary circumstances which indicate a parent's frequent and severe habit of smoking in the presence of a child whose intolerance to smoke goes well beyond that of the average child, for example, an asthmatic or highly-allergic child.

In cases involving asthmatic children, a parent's habit of smoking in the presence of his or her child should be considered a per se violation of New York Penal Law section 260.10 with abuse or neglect a possibility. A parent's habit of smoking in the presence of a healthy child should be considered as one of many factors that might collectively support a finding that the child's welfare is endangered, though it would be insufficient standing alone. Similarly, smoking in the presence of a healthy child should not, without more, constitute child neglect or child abuse. Even if a parent is exonerated in a § 260.10 case, a child abuse case, or a child neglect case, the judge should not hesitate to issue a protective order if evidence establishes that the parent smokes in the presence of children.

Factors pertinent in determining whether a parent has developed a "habit" of smoking in the presence of the children include: frequency of such a practice; spatial proximity of the smoking parent to the child; existence of ventilation and the parent's toleration of visitors smoking around the children.

182. N.Y. FAM. CT. ACT § 1012 (f)(Consol. 1994).

VI. Conclusion

There is a trend in the United States toward protecting adults from secondhand smoke exposure while children, ironically, are left to fend for themselves. For example, many states have already enacted laws regulating smoking in the workplace.¹⁸³ In addition, nonsmoking prisoners are now, upon request, often relocated to smoke-free cells.¹⁸⁴ Restaurants, airlines, and many other facilities used by the public are also subject to smoking bans.¹⁸⁵ For an adult, life in a smoke-free world can be a reality.

It is a different story for children, who generally spend much of their time in the home. There are no statutes explicitly banning smoking in the home. As a result, children are often adversely affected by smoke in the home which irritates their eyes, offends their sense of smell, and damages their health. Furthermore, children are more susceptible to the dangers of secondhand smoke exposure than adults, increasing the seriousness of the situation. In short, federal and state governments have made great strides in protecting their adult constituents, but have left children largely unprotected.

The courts have the power and duty to protect children in the home from secondhand smoke exposure. This power applies whether a child's parents are married or divorced. In homes where parents are married, children are inadequately protected because married spouses are unlikely to wage a war in the courtroom over a smoking issue. With divorce cases, the parents are already before the court. The state and federal legislatures can alleviate this discrepancy by enacting laws protecting children in the home from smoke. Asthmatic

183. See *supra* note 168.

184. For example, in *Helling* discussed *supra*, the Nevada state prison refuted the prisoner's claim of cruel and unusual punishment on the grounds that it had relocated the prisoner to a smoke-free cell after he complained of secondhand smoke exposure. 113 S. Ct. at 2477. A Nevada state prison policy makes reasonable efforts to respect nonsmokers' requests for nonsmoking cellmates. *Helling*, 113 S. Ct. at 2482.

185. See Laura Bly, *Smoke-Free Travel: It's On the Rise*, DALLAS MORNING NEWS, Mar. 19, 1995, at 7G.

children are in greatest need of protection and the legislatures must be quick to respond to this need.¹⁸⁶

Laws explicitly tailored to protect children in the home from secondhand smoke are important for several reasons. For instance, judges are more likely to protect children if there is explicit statutory authority for doing so. In addition, such statutes would place parents on notice that smoking around children is an offense. In the interim, courts should utilize existing statutes to provide children protection in the home. This can be accomplished under child abuse and child neglect laws. Furthermore, courts should continue to consider secondhand smoke exposure as a factor in determining the "best interests of the child" in custodial proceedings. Courts should continue to issue orders prohibiting parental smoking in the presence of children, whether the parents are married or divorced.

186. A simplified example of a law explicitly tailored to protect children from smoke exposure is as follows: "It shall be an offense to knowingly and actively expose a child with an asthmatic condition to tobacco smoke." Such a statute would make it perfectly clear to judges and the public that this act is prohibited. Child abuse and neglect statutes are written with very general terms and reasonable minds could differ on the issue of whether they can (or should) be extended to secondhand smoke exposure. The explicit statute provides more reliable and uniform protection to children.