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SMOKING AND PARENTING: CAN THEY BE ADJUDGED MUTUALLY EXCLUSIVE ACTIVITIES?

This note addresses the potential implications of a recent California case ordering the parent of a minor child to refrain from smoking in the child's presence. Exploring the constitutional issues raised by the order, the author concludes that courts may not regulate parents' smoking in the child's home.

INTRODUCTION

On August 14, 1990, Anna Marie De Beni Souza was issued a custody modification order which prohibited her from smoking cigarettes in her child's presence.¹ The order is to remain in force until her child reaches age eighteen.² If De Beni Souza smokes³ in the child's presence prior to that time, her custody rights will terminate and physical custody of the child will vest in the father.⁴ The impact of this decision goes beyond the fact that it is the first time a court has restricted parental use of cigarettes in the home. Not only has the decision laid a foundation for further abrogation of smokers' rights in general, but it raises distinct legal questions concerning De Beni Souza's individual and parental rights. The decision challenges De Beni Souza's rights as an individual to formulate her own habits and to preside over her home, raising an issue as to whether a court may intrude upon this sphere of priva-

1. *De Beni Souza v. Kallweit*, No. 807516 (Sacramento Sup. Ct. Oct. 11, 1990). See *The Custody Case That Went Up in Smoke*, NEWSWEEK, Aug. 27, 1990 (reporting the De Beni Souza decision).

2. *De Beni Souza*, No. 807516.

3. For purposes of this note, consistent with current legislative terminology, "smoking" is defined as the carrying or holding of any lit tobacco product. See Carl D. Mayhew, Note, *Smoking in Public: This Air Is My Air, This Air Is Your Air*, 4 S. ILL. U. L.J. 665, 680 (1984).

4. *De Beni Souza*, No. 807516.

cy. Additionally, the opinion implicates De Beni Souza's right as a parent to interact freely with and control over her child. Giving due consideration to the interests of the parent, child and state, does the state have the power to regulate such conduct within the home under the guise of a custody determination? Do parental rights bar the state's actions or are these rights outweighed by the state's interests?

This note explores the issues raised by this unprecedented action. Section one examines smoking's physical effects, its prior regulation and the ensuing controversy. Section two addresses the validity of restricting smoking in private. First, section two analyzes whether this decision is unconstitutional on the grounds that it violates either the right to smoke or the right to privacy. The right to privacy discussion reviews the degree and variety of protection offered the home, the activity and the participant. Second, section two examines the court's action as a custody decision and questions its propriety under generally applicable custody standards.

The author concludes that private regulation of smoking is not legitimate so long as smoking remains a lawful activity. Smoking itself does not garner constitutional protection, even within the home. However, a parent's autonomy in raising a child is protected, even if the manner of upbringing chosen involves some incidental exposure to cigarette smoke. Furthermore, since smoking bears no relation to the parent-child bond, smoking cannot be a criterion in a custody decision unless it can be shown to have a clear detrimental effect upon the child. Thus, while a parent's smoking may be a sufficient factor to deny custody of a child who is predisposed to respiratory problems or has developed specific complications warranting a smoke-free environment, there is no sound basis for abridging parental rights absent these special circumstances.

I. THE ESSENCE OF SMOKING AND SMOKING REGULATION

A. Health Concerns

Smoking is harmful both because of the chemicals which are inhaled and because of the by-products it contributes to indoor air pollution. Composed of gaseous and incidental particulate matter, tobacco smoke harbors a variety of chemical substances.⁵ Research

5. Curtis R. Cowan, Note, *Florida Nonsmokers Need Legislative Action to "Clear the*

indicates that tobacco smoke contains as many as 4,000 distinct substances, some of which are toxic.⁶ On average, a single cigarette injects "approximately seventy milligrams of dry particulate matter and twenty three milligrams of carbon monoxide" into the environment.⁷ While this release of smoke is inevitable, its effect will be dissipated to some degree. The volume of "untainted" air into which the smoke is released lessens the concentration, and, consequently, the effect of the smoke.⁸ This dilution process is commonly referred to as "aging."⁹

Nonetheless, once released, tobacco smoke holds the potential to cause physical harm. The dry matter comprising tobacco smoke can exacerbate eye, nose and throat irritations and can trigger coughing and headaches, even in non-allergic persons.¹⁰ Carbon monoxide decreases the effectiveness of the circulatory system by restricting the vital flow of oxygen to the body.¹¹ In addition to the physical harm, carbon monoxide may encourage other adverse effects "such as altered auditory discrimination, visual acuity, ability to distinguish relative brightness, and impaired time interval discrimination."¹²

The pollutants pose a health risk to smokers and nonsmokers alike.¹³ Risks to the smoker were first officially identified in a

Air," 8 NOVA L.J. 389, 392 (1984).

6. Tobacco smoke contains tar, nicotine, benzene ammonia, hydrogen cyanide, polonium, hydrocyanic acid and aldehydes. *Id.* Carbon monoxide and nitrogen dioxide have been found as well. Lynn F. Vuich, Note, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. U. CHI. L.J. 610, 611 (1974).

7. Osborne M. Reynolds, Jr., *Extinguishing Brushfires: Legal Limits on the Smoking of Tobacco*, 53 U. CIN. L. REV. 435, 437 (1984). Note that the number, concentration and variety of contaminants found in each cigarette differ significantly according to the brand chosen. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF SMOKING 5 (1975) [hereinafter 1975 REPORT].

8. Vuich, *supra* note 6, at 611.

9. ROBERT D. TOLLISON, CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 8 (1988).

10. Reynolds, *supra* note 7, at 437.

11. *Id.* Interference with the circulatory system could in turn act as a catalyst for further difficulties by accelerating the heart rate and reducing productivity. *Id.* at 437-38.

12. Vuich, *supra* note 6, at 612.

13. Arguably, an additional area of harm is America's pocketbook. One scholar suggests a universal harm since the habit itself leads to poor health which in turn leads to huge medical care bills and business/productivity expenses, and since the public bears the costs of environmental consequences and government subsidies to the tobacco industry. Les Nelkin, Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL. L. 317, 322-30 (1987). Countering this line of argument are the huge benefits that the tobacco industry contributes as a primary source of revenue for many state econ-

1964 United States Surgeon General's report.¹⁴ The report targeted cigarette smoking as a substantial contributor "to mortality from certain specific diseases and to the overall death rate."¹⁵ Specifically, the report found a causal link between tobacco usage and cancer,¹⁶ chronic bronchitis,¹⁷ emphysema,¹⁸ non-malignant respiratory disease,¹⁹ cardiovascular disease,²⁰ premature coronary heart disease²¹ and low birth weight.²² Furthermore, though a causal link has yet to be shown, smokers are generally more prone to peptic ulcers, cirrhosis of the liver and amblyopia.²³

Nonetheless, smoking is not necessarily without benefit to the smoker. "The significant beneficial effects of smoking occur primarily in the area of mental health, and the habit originates in a search for contentment."²⁴ The bond between smoker and cigarette appears to take root in a psychological desire or as an expression of social and personal freedom.²⁵ Cigarette consumers willingly choose to risk some physical harm to themselves in exchange for the mental satisfaction and reduced anxiety that results from smoking. Unfortunately, these subjective effects are largely immeasurable and, therefore, cannot be concretely balanced against those that have been scientifically documented.²⁶

omies. Mayhew, *supra* note 3, at 665.

14. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL, SMOKING AND HEALTH 33, 37-40 (1964) [hereinafter 1964 REPORT].

15. *Id.* at 31. Although the actual number of deaths caused by cigarette use was unknown, the committee estimated that each age group of males experienced a seventy percent increase in the death rate as a direct result of smoking. *Id.*

16. Lung cancer is by far the most prevalent cancer connected to cigarette smoking. In addition, evidence suggests a causal link between smoking and oral, laryngeal, esophageal and urinary bladder cancer. *Id.* at 31-32. A later report also linked cancer of the pharynx and pancreas to smoking. 1975 REPORT, *supra* note 10, at 4.

17. "Cigarette smoking is the most important of the causes of chronic bronchitis in the United States" 1964 REPORT, *supra* note 15, at 31.

18. While research reveals a relationship between smoking and emphysema, it has failed to demonstrate a causal link. *Id.*

19. 1975 REPORT, *supra* note 7, at 5.

20. 1964 REPORT, *supra* note 14, at 32.

21. Premature coronary heart disease is "[t]he most important specific health consequence of cigarette smoking in terms of the number of people affected." 1975 REPORT, *supra* note 7, at 4.

22. 1964 REPORT, *supra* note 14, at 39.

23. *Id.* Amblyopia is a "dimness of vision unexplained by an organic lesion." *Id.*

24. *Id.* at 32.

25. *See id.* (noting that smokers usually begin their habit as a result of peer pressure).

26. *Id.*

Smoking places nonsmokers²⁷ at risk by virtue of the air they breathe. Cigarette consumption produces mainstream smoke which is inhaled through the cigarette filter by the smoker and sidestream smoke which flows unfiltered from the burning tip of the cigarette.²⁸ To enjoy a single cigarette, the typical smoker inhales "[eight to nine] times . . . for a total of [twenty-four] seconds, but the cigarette burns for [twelve] minutes and pollutes the air continuously . . ."²⁹ The nonsmoker takes in both sidestream and exhaled smoke,³⁰ but rarely, if ever, in their purest forms. The smoke flowing from the cigarette's tip and the residue exhaled by the smoker are aged by the clean air in the environment.³¹ Moreover, the nonsmoker, who employs a respiratory pattern consisting of regular inhaling and exhaling, necessarily absorbs less pollutants than the smoker who draws in and holds the smoke in the mouth and respiratory organs before exhaling.³² Even so, some studies have suggested that, when exposed to a large dosage of smoke, the nonsmoker suffers many of the same effects as the smoker himself.³³ However, these conclusions have been criticized as being premised upon inaccurate and unsupported data.³⁴

27. Also referred to as passive, secondhand or involuntary smokers.

28. Morley Swingle, Note, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 447 (1980).

29. Cowan, *supra* note 5, at 392 (quoting Epstein, *The Effects of Tobacco Smoke Pollution on the Eyes of the Allergic Nonsmoker*, 2 SMOKING AND HEALTH 337, 338 (1975)).

30. Sidestream smoke presents a greater danger to the nonsmoker because it is unfiltered. By contrast, the incidental exhaled smoke which the nonsmoker consumes has been filtered twice — once by the cigarette filter and once by the smoker's lungs. Swingle, *supra* note 28, at 447.

31. See *supra* text accompanying notes 8-9.

32. Tollison, *supra* note 9, at 9.

33. For instance, several researchers have concluded that there is a causal link between lung cancer and secondhand smoke inhalation. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE SURGEON GENERAL, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING 96 (1986) [hereinafter 1986 REPORT]. Others have suggested, but have yet to prove conclusively, the role of secondhand smoke in cancers of the paranasal sinus, brain, breast, cervix and endocrine organs. *Id.* at 102-04. Inconclusive evidence also demonstrates a link to cardiovascular disease. *Id.* at 105-06. In addition, a correlation has been observed between increases in carbon monoxide poisoning, allergies and general illness and the permeation of secondhand smoke. Cowan, *supra* note 5, at 393-97.

Recently, the findings of the 1986 REPORT were bolstered by a draft report released by the United States Environmental Protection Agency ("EPA"). The EPA's conclusions mirror the 1986 REPORT and add more supporting studies and information. See Geoffrey Cowley, *Poison at Home and at Work*, NEWSWEEK, June 29, 1992 (discussing the EPA analysis and reporting that, if the EPA's edicts are adopted, "cigarette smoke could soon enjoy the same status as arsenic, asbestos and coke-oven emissions").

34. One author has compiled the conclusions of more than seventy-five independent

B. Regulatory History

In the nineteenth century, states regulated cigarette usage to safeguard against the dangers of fire and disease and to reflect current mores dubbing the habit socially and morally reprehensible.³⁵ For instance, an early Massachusetts law banned smoking in public streets due to the danger that a smoldering cigarette could initiate a blaze.³⁶ Louisiana prohibited smoking in streetcars due to the discomfort and inconvenience the smoke caused patrons.³⁷ Possibly the most restrictive of the early laws was a Tennessee statute that completely banned the sale of cigarettes within the state.³⁸ The Tennessee Supreme Court upheld the restriction as a legitimate exercise of the state's police power.³⁹ In doing so, it took "judicial notice of the fact that [cigarette] use [was] harmful and deleterious for all purposes" and, therefore, declared that cigarettes were not legitimate articles of commerce.⁴⁰

By 1901, all but two states had considered legislation which would restrict or prohibit the tobacco trade and a dozen states had successfully implemented such measures.⁴¹ The attack continued throughout the early 1900's with increasingly strict measures

studies and commentators criticizing the studies linking risk to passive smoke. See TOLLISON, *supra* note 9, at 119-44. Problems identified in the studies range from inaccurate premises and faulty test methods to suspect control groups. *Id.* In addition, there is widespread disapproval of the proposition that cigarette smoke is a cause. *Id.* The authorities cited did not find that this factor could be isolated or tagged as a proximate cause of ill health. *Id.* With so many inaccuracies and lurking questions, these authorities argue that it would be inaccurate or, at the very least, premature to conclude that passive smoke entails a tangible harm. *Id.*

35. Sally A. Bude, Note, *Smoking in Public: Nonsmokers' Rights and the Proposed Iowa Clean Indoor Air Act*, 37 *DRAKE L. REV.* 483, 486 (1987-88).

36. See *Commonwealth v. Thompson*, 53 Mass. (12 Met.) 231 (1847) (stating that the statute's purpose was to safeguard Boston against fire damage).

37. See *State v. Heidenhain*, 7 So. 621, 621 (La. 1890) (attacking smoking as a nuisance and suggesting that "contaminated air" was dangerous to the health).

38. See *Austin v. State*, 48 S.W. 305, 306 (Tenn. 1898), *aff'd sub nom.*, *Austin v. Tennessee*, 179 U.S. 343 (1900). The Tennessee statute provided "that it shall be a misdemeanor for any person . . . to sell, offer to sell, or to bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same . . ." *Id.*

39. *Id.* at 309.

40. *Id.* at 306. Although it affirmed the Tennessee decision, the United States Supreme Court declined to recognize that cigarettes were "inherently bad and bad only." *Austin* 179 U.S. at 348.

41. Christopher Cobey, Note, *The Resurgence and Validity of Antismoking Legislation*, 7 *U.C. DAVIS L. REV.* 167, 169 (1974).

passed to combat the smoker.⁴² This "anti-smoking" movement peaked in 1921.⁴³ In that year alone, twenty-eight states considered ninety-two different anti-smoking bills and fourteen states succeeded in enacting such legislation.⁴⁴ However, the heyday for anti-smoking laws was short-lived. By 1927, all anti-smoking legislation had been removed from the books and from legislature floors.⁴⁵

The backbone of the early anti-smoking crusade was crushed by two developments, an imposition of judicial criticism and a sway in public opinion. In 1911, the Kentucky Supreme Court invalidated an ordinance which completely banned cigarette smoking within the city's corporate limits.⁴⁶ It found the restriction unreasonable, arguing that "[t]o prohibit the smoking of cigarettes in the citizen's own home or on other private premises is an invasion of his right to control his own personal indulgences."⁴⁷ In 1914, the Illinois Supreme Court refused to uphold an ordinance prohibiting the use of tobacco in any streets, parks or public buildings within the municipality.⁴⁸ Again, the legislation was heavily criticized as "an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing."⁴⁹ Hence, it became apparent that outright prohibitions would not be tolerated.

Coupled with these judicial decisions, public attitude helped clinch the demise of the early anti-smoking movement. A number of factors led to the acceptance of smoking as fashionable. First, as American forces became entrenched in World War I, tobacco came to be a soldier's staple.⁵⁰ Second, Prohibition led to rebellion against bans on consumptions of choice.⁵¹ Third, cigarettes became the darling of the blossoming new advertising industry.⁵² Finally, state lawmakers discovered the tobacco industry as a major source of tax revenue and quickly began to line the state coffers

42. *Id.* at 170-71.

43. *Id.* at 171.

44. *Id.* at 170-71.

45. *Id.*

46. *Hershberg v. City of Barbourville*, 133 S.W. 985 (Ky. 1911).

47. *Id.* at 61.

48. *City of Zion v. Behrens*, 104 N.E. 836 (Ill. 1914).

49. *Id.* at 837-38.

50. *Cobey*, *supra* note 41, at 173.

51. *Id.* at 173-74.

52. *Id.* at 174.

with monies from production and sales of cigarettes.⁵³ Slowly but surely, "[e]veryone started [smoking] and [smoking] everywhere, creating an American custom which gave to the smoker consent to smoke at will."⁵⁴

For the first seventy years of the twentieth century, the habit was widely accepted.⁵⁵ Yet, as a trend of health consciousness grew, the public's perception of smoking changed once again. Nonsmokers began to assert their desire to be free "from the annoyance and unhealthiness of smoke-polluted air."⁵⁶ Nonsmokers were no longer willing to view the problem as that of smokers, nor were they content to passively absorb contaminated air. Cigarettes have come to be known not as a substance of choice, but as a drug of addiction.⁵⁷ In the public's eyes, nicotine binds the smoker to the cigarette, and the cigarette in turn binds society to ill-health and polluted air.⁵⁸ "[T]he attention has shifted from the smoker himself to the effects that his habit imposes on others in the immediate vicinity."⁵⁹

C. Responses to the Clean Air Movement

Recently, smoking has gained notoriety as a premier component of environmental awareness. Air quality has emerged as a key issue, implicating smoking as a producer of airborne contaminants. In the quest for a healthier atmosphere, clean air activists now urge the government to promulgate regulations that would reduce risks associated with passive smoke inhalation and promote a healthier environment.⁶⁰

To a limited degree, nonsmokers have been successful. Most states have sponsored some legislation restricting smokers' free-

53. *Id.*

54. Larry Kraft, *Smoking in Public Places: Living with a Dying Custom*, 64 N. DAK. L. REV. 329, 336 (1988).

55. After the turn of the century, "Americans went on a tobacco smoking binge." *Id.* at 336. By 1963, "more than 50% of the adult men and over 30% of adult women in the U.S. smoked cigarettes." *Id.* at 336 n.23. See also Bude, *supra* note 35, at 487 ("Smoking became acceptable, and it was no longer considered morally reprehensible to smoke.").

56. Bude, *supra* note 35, at 483.

57. Kraft, *supra* note 54, at 336.

58. *Id.* at 338.

59. Vuich, *supra* note 6, at 611.

60. See Cowan, *supra* note 5, at 391 (discussing the concerns raised by non-smokers before various courts and legislatures and the impact of those concerns on parent-child relationships).

dom.⁶¹ Efforts have been made to segregate the nonsmoker from the smoker. Most notably, smoking has been prohibited in public transportation, elevators, health care centers and recreational and entertainment facilities.⁶² Restrictions are also common in public schools, state-owned buildings, restaurants, groceries and department stores.⁶³ Additionally, a smattering of jurisdictions specifically enumerate an exemplary list of smoke-free public places or allow property owners the discretion to restrict smoking with the placement of a "No Smoking" sign.⁶⁴ The common basis for these statutes is the elimination of a nuisance and the protection of public health, safety and welfare.⁶⁵

In addition to these legislative prohibitions, common law restrictions have been imposed for public areas and in the workplace. In the public sector, courts have sought to effectuate a comfortable degree of segregation without imposing an outright ban.⁶⁶ Many of the suits seeking an outright ban on smoking in public places have employed various constitutional arguments, though none has been successful. For instance, nonsmokers have argued that the First Amendment protects their right to enter public buildings and facilities freely to receive information without being subjected to smoke-contaminated air.⁶⁷ This argument fails because it ignores the fact that information is not necessarily without cost.⁶⁸ Just as admission fees may prevent the flow of ideas originating at a public event from reaching a given class of patrons, i.e., those who cannot afford to pay the fee, cigarette smoke may deter reception

61. Eric J. Morrison, Comment, *The Rights of Nonsmokers in Tennessee*, 54 TENN. L. REV. 671, 683 (1987); Swingle, *supra* note 28, at 454.

62. Swingle, *supra* note 28, at 454 (listing specific restrictions by state).

63. *Id.*

64. *Id.*

65. Morrison, *supra* note 61, at 683.

66. Mayhew, *supra* note 3, at 672 ("A state's smoking regulation should not attempt to interpose a complete shield between smoke[rs] and nonsmokers, but to minimize their contact where feasible.").

67. Federal Employees for Nonsmokers' Rights (FENSR) v. United States, 446 F. Supp. 181, 183-84 (D.D.C. 1978) ("contend[ing] that their First Amendment right to petition their government for redress of grievances is infringed by the defendant's failure to make safe smoke-filled hallways, corridors, and meeting rooms"); Gasper v. Louisiana Stadium & Expo. Dist., 418 F. Supp. 716, 717-18 (E.D. La. 1976) ("The nonsmokers argue that the existence of tobacco smoke in the Superdome creates a chilling effect upon the exercise of their First Amendment rights, since they must breathe that harmful smoke as a precondition to enjoying events in the Superdome."); *see also* Reynolds, *supra* note 7, at 453 (arguing that smoke effectively bans nonsmokers from libraries, museums and other such points of dissemination).

68. Gasper, 418 F. Supp. at 718.

by a certain portion of the audience.⁶⁹ Since this obstacle does not infringe upon First Amendment rights,⁷⁰ neither does the First Amendment argument advance the nonsmokers' cause.

Additionally, nonsmokers assert that being forced to breathe smoke-filled air violates their Fifth and Fourteenth Amendments rights to due process.⁷¹ Nonsmokers claim they are deprived of life, liberty and property without due process of law because they are forced to choose between remaining in a smoke-polluted area and retreating from a place where they have a right to be.⁷² This argument has also failed to rally judicial support since nonsmokers are not considered a "captive audience." Moreover, there is no constitutional right to a healthy environment.⁷³ As one judge observed, "[t]he liberty of each individual in a . . . public place is subject to reasonable limitations in relation to the rights of others."⁷⁴ In essence, that court's position was that nonsmokers are not entitled to clean air, and to grant a request that would provide a smoke-free environment would sabotage another's prerogative to smoke.⁷⁵

These and other similarly unsuccessful arguments⁷⁶ compel the conclusion that an outright ban on smoking is not likely to be promulgated for public arenas.⁷⁷

69. *Id.* The same argument could be made that alcohol vendors chill speech that might otherwise reach patrons who curtail their patronage as a result of their opposition to the sale of alcoholic beverages.

70. *FENSR*, 446 F. Supp. at 184; *Gasper*, 418 F. Supp. at 718.

71. *FENSR*, 446 F. Supp. at 184-85; *Gasper*, 418 F. Supp. at 718-21.

72. See *FENSR*, 446 F. Supp. at 184-85 (arguing that nonsmokers were discriminated against in a workplace which favored smokers); *Gasper*, 418 F. Supp. at 716-17 (claiming that smoking interfered with nonsmokers enjoyment of an event for which they paid an admission fee).

73. *FENSR*, 446 F. Supp. at 185; *Gasper*, 418 F. Supp. at 720.

74. *Gasper*, 418 F. Supp. at 719 (quoting *Pollack v. Public Util. Comm'n*, 343 U.S. 451, 465 (1952)).

75. *Gasper*, 418 F. Supp. at 719-20; see also *FENSR*, 446 F. Supp. at 184-85 (noting that any governmental regulation must consider all of the interests concerned).

76. One commentator suggests an Equal Protection argument. However, because nonsmokers are not a suspect class and clean air is not a fundamental right, this argument is weak. Nonsmokers would have to prove that states have no rational basis for allowing smoking in public places. Reynolds, *supra* note 7, at 453. Another theory, rejected by a state appellate court, argues that nonsmokers who are disabled by cigarette smoke should be deemed legally handicapped and, therefore, treated as if unlawfully denied equal access to public buildings. *GASP v. Mecklenberg County*, 256 S.E.2d 477, 478-79 (N.C. Ct. App. 1979).

77. This conclusion is consistent with judicial responses to the legislative bans imposed in the early 1900's. See *supra* text accompanying notes 46-49.

Nonsmokers have been somewhat more successful in the workplace. The landmark decision in this area, *Shimp v. New Jersey Bell Telephone Co.*, imposed a duty on employers to provide smoke-free workplaces.⁷⁸ Reasoning that an employer has a common law duty to provide a safe working environment and that secondhand smoke presents a significant health hazard, the New Jersey Superior Court held that employers must act reasonably to eliminate the risk.⁷⁹ Since the *Shimp* decision, several safeguards have been introduced and judicially approved.⁸⁰ While employers are not required to maintain a completely smoke-free environment, they must take reasonable steps to accommodate nonsmokers' comfort.⁸¹

While the workplace and the public arena have been the forums most visible and profitable to the nonsmokers' cause, other attacks have been launched. Grounded largely in tort, these attacks have met with guarded optimism and virtually no judicial support.⁸² Nonetheless, the movement for clean air continues to prog-

78. 368 A.2d 408, 415-16 (N.J. Super. Ct. Ch. Div. 1976).

79. *Id.*

80. Employers cannot partition smoking and nonsmoking employees in such a way as to adversely affect the compensation or job description of those requesting smoke-free air. *Smith v. Western Elec. Co.*, 643 S.W.2d 10, 13 (Mo. Ct. App. 1982). Further, if alternative, comparable employment which provides a smokeless atmosphere is available, the employer must either offer that alternative employment to the nonsmoking employee or pay disability benefits. *Parodi v. Merit Sys. Protection Bd.*, 690 F.2d 731, 739-40 (9th Cir. 1982).

81. See *Vickers v. Veterans Admin.*, 549 F. Supp. 85, 87 (W.D. Wash. 1982) (refusing to hold that employer had to provide a wholly smoke-free environment, particularly in light of the attempts made to reduce the problem); *Gordon v. Raven Sys. & Research*, 462 A.2d 10 (D.C. 1983) (refusing to require employer to adapt workplace to the particular sensibilities of an individual employee where defendant had taken steps to reduce plaintiff's exposure to cigarette smoke).

Notwithstanding the judiciary's refusal to effectuate an absolute ban, some employers have taken such measures on their own. Lately, employers have reacted to rising insurance costs and increasing demands for sick days by instituting bans on tobacco usage, both on and off the job. For example, in January 1987, the U.S. Gypsum Corporation, now the USG Corporation, announced that smoking employees must either give up the habit or find another job. *Your Habit or Your Job*, WASH. POST, Jan. 24, 1987, at A22. The company's policy has sparked many questions regarding employment discrimination, surveillance techniques both on and off the job, and privacy rights. See, e.g., Gary T. Marx, *The Company is Watching You Everywhere*, N.Y. TIMES, Feb. 15, 1987, § 4, at 21 (describing various practices by which companies monitor employees both on and off the employers' premises). Moreover, this far-reaching action is not going without official notice or reaction. The Indiana legislature has introduced a bill which would prohibit termination of employees for off-the-job smoking. See James Grass, *In-Puff*, GANNETT NEWS SERV., Feb. 11, 1991. This legislation was introduced in response to an employee's suit based on termination for off-the-job smoking. *Id.*

82. Nonsmokers have been encouraged to proceed on theories of nuisance, assault and

ress. Some commentators assert that the movement's most powerful weapon, a constitutional right to clean air, exists but remains unveiled.⁸³ First suggested in dicta,⁸⁴ the right allegedly stems from the penumbra of rights emanating from the Constitution.⁸⁵ However, such penumbral protection has yet to be formally recognized.⁸⁶ In fact, one federal district court has stated that "[t]o hold that the . . . Amendments recognize as fundamental the right to be free from cigaret [sic] smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries."⁸⁷ Almost certainly, recognition of a constitutional right to a smoke-free environment is not forthcoming.⁸⁸

II. THE VALIDITY OF REGULATING SMOKING IN PRIVATE

The second antismoking crusade has reached a plateau; it has

battery, intentional infliction of emotional distress, strict liability and product liability. For a discussion of these claims and their inherent limitations, see Reynolds, *supra* note 7, at 456-63, and Swingle, *supra* note 28, at 465-74.

Issues similar to those faced by passive smokers in establishing their rights to smoke free air and in pursuing remedial actions against smokers must also be addressed by those claiming legally cognizable harm to fetuses by mothers who smoked during pregnancy. While some would not condone liability based on the use of legal substances such as tobacco, alcohol or caffeine, one scholar argues that, as women are becoming more legally accountable for the health of their fetuses and "[a]s the evidence of harm to the fetus from alcohol and tobacco mounts, the distinction between 'illegal' and 'legal' drugs becomes irrelevant." Kraft, *supra* note 54, at 348 n. 74. The viability of such actions claiming fetal harm as a result of tobacco intake will depend upon the resolution of issues similar to those addressed herein in the custody context.

83. See Cowan, *supra* note 5, at 399-402; Reynolds, *supra* note 7, at 450-55; Vuich, *supra* note 6, at 614-18. The value of this proposed right, may be *de minimis* because a constitutional violation depends upon state action. Arguably, however, the state's involvement in the tobacco industry constitutes sufficient state action to assert a violation. See Cowan, *supra* note 5, at 401; Reynolds, *supra* note 7, at 466.

84. See *Environmental Defense Fund v. Hoerner*, 1 Env't Rep. (BNA) 1640, 1641 (Mont. 1970) (noting that everyone has a right to be constitutionally protected against government action that endangers their "personal state of life and health").

85. See *Gaspar v. Louisiana Stadium & Expo. Dist.*, 418 F. Supp. 716, 718 (E.D. La. 1976) (considering plaintiff's argument that penumbral protections of the Fifth and Fourteenth Amendments include the right to be free from tobacco smoke while in certain areas).

86. Cowan, *supra* note 5, at 402.

87. *Gaspar*, 418 F. Supp. at 721.

88. Morrison, *supra* note 61, at 676. *But see* Reynolds, *supra* note 7, at 444 (noting that Arkansas and Rhode Island specifically recognize nonsmokers' right to clean air); Mayhew, *supra* note 3, at 677 (noting that the Illinois Constitution guarantees each individual the right to a healthful environment, but conceding that the provision was probably not intended to aid citizens in pursuing smokers).

gained as much ground as the first movement had before it was stifled by a sway in public opinion and by court-imposed boundaries.⁸⁹ The question looming is whether or not the narrow regulations established in government facilities and workplaces can carry over into a previously uncharted area — the private home.

A. Constitutional Inquiry

In assessing the level of constitutional protection afforded cigarette users, the primary question is whether smoking in one's own home constitutes a fundamental right. Restriction of purely private smoking, as in the *De Beni Souza* case,⁹⁰ implicates two areas of constitutional concern: the right to smoke and the right to privacy. This note considers each category to determine the existence and derivation of such rights, the degree of protection they command and their application to smoking in the home.

1. Definition and Standard

Fundamental rights include those specifically enumerated in the Constitution as well as those referenced by the Ninth Amendment.⁹¹ If the right is enumerated, then it clearly warrants constitutional protection. If the Constitution does not mention the activity, then it is necessary to determine whether the right is fundamental by implication. The Ninth Amendment is said to grant the power to look beyond the written words of the Constitution to the intent of the framers and the conscience of the people.⁹² The liberties inferred through this process are referred to as penumbral

89. Once again, restrictions have succeeded only to the extent they are reasonable and limited in operation. See *supra* text accompanying notes 47-50.

90. See *supra* text accompanying notes 1-4.

91. MICHAEL F. MAYER, *RIGHTS OF PRIVACY* 45, 46 (1972). The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend IX.

92. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (citing the right of "privacy and repose" as emanating from the penumbra of guaranteed rights); *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) ("Liberty" is a conception that sometimes gains content from the emanations of other specific guarantees or from experience with the requirements of a free society." (citation omitted)); see also Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE* 243, 245 (Randy E. Barrett ed., 1989) (presenting Justice Goldberg's argument that the framers of the Ninth Amendment believed there are extra, unenumerated rights which should be awarded fundamental protection). But see *Griswold*, 381 U.S. at 521-22 (Black, J., dissenting) (arguing that the Court should not find any fundamental rights beyond those found in the written words of the Constitution).

rights of the Constitutional Amendments.⁹³

Inquiries into the scope and contents of the penumbra have been posed in a variety of ways. Courts may consider whether a freedom "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' . . . "94 whether it is rooted in the "traditions and [collective] conscience of our people, . . . "95 or whether it is consistent with one's common "experience with the requirements of a free society."⁹⁶ Fundamental freedoms are also framed as those which are "implicit in the concept of ordered liberty"97 Moreover, the right sought should enjoy current reverence and vitality if it is to be afforded constitutional protection.⁹⁸

When a state enacts a law that restricts an individual's enjoyment of a fundamental right, the constitutionality of that law may be challenged.⁹⁹ If the right is fundamental, the law will be upheld only if the governmental intrusion serves a compelling interest that cannot be achieved in a less restrictive manner.¹⁰⁰ If the right is not fundamental, the restriction will be upheld so long as it is rationally related to a legitimate state interest.¹⁰¹

93. *Griswold*, 381 U.S. at 485.

94. *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)), quoted in *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

95. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

96. *Id.* at 493-94 (quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting)).

97. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

98. See *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1179 (1980) (noting that past vitality of a fundamental right is irrelevant, since the right must enjoy current acceptance); see also *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (cautioning that rights not expressly identified in the Constitution must encompass more than the imposition of judges' own values).

99. See *Griswold*, 381 U.S. at 485 ("[State goals] . . . may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.") (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (citation omitted)).

100. For examples of statutes that did not advance a compelling interest, see *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (state unemployment benefits statute infringing on religious freedom); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (state statute regulating marriage); and *Griswold*, 381 U.S. at 479 (state statute forbidding use of contraceptives).

101. See *United States v. Carolene Prods.*, 304 U.S. 144, 152-53 (1938). Some commentators believe that the rational basis standard of review should be strengthened to require courts to examine the purposes for the challenged regulation, looking beyond the proffered justifications to the validity and utility of the restriction. STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 76 (1987). Cf. *City of Cleburne v. Cleburne Living Center*,

2. The Right To Smoke

The first consideration in determining the validity of any restriction is whether the activity itself invites constitutional protection.¹⁰² Many people, particularly smokers, assert that the very concept of personal freedom includes a fundamental right to smoke.¹⁰³ Where and when this idea took root is unclear. Some suggest that its origin is in custom.¹⁰⁴ Others assert that it derives from the penumbral right to determine one's own lifestyle and to control one's own life.¹⁰⁵ Still others rely upon the constitutionally recognized zone of privacy and integrity surrounding the human body, guarding against all intrusions except those that mitigate a "clear and present" danger.¹⁰⁶

In 1986, the "right" to smoke gained some notoriety by its mention in a Surgeon General's report.¹⁰⁷ The report stated that "[t]he *right* of smokers to smoke ends where their behavior affects the health and well-being of others"¹⁰⁸ Although the distinction may have been the result of careless semantics, the report lends at least rhetorical credence to the concept that a right to smoke exists and intrusion upon it is proper only in response to demonstrable harm.

To date, courts have adopted neither the language of custom nor the arguments of bodily integrity as creating a right to smoke. In one recent opinion, a federal circuit court squarely faced the right's existence.¹⁰⁹ Rejecting arguments that the right was em-

Inc., 473 U.S. 432, 445-46 (1985) (suggesting in dictum that regulations affecting "quasi-suspect" classes be subjected to heightened scrutiny).

102. The degree of protection to be afforded smokers in their own homes is discussed in the next section. See *infra* text accompanying notes 119-34. This section addresses only the right of individuals to participate in the activity itself.

103. Kraft, *supra* note 54, at 338-39.

104. *Id.* at 338 n.28.

105. H. Ward Classen, *Restricting the Right to Smoke in Public Areas: Whose Rights Should Be Protected?*, 38 SYRACUSE L. REV. 831, 835 (1987) (relying upon *Doe v. Bolton*, 410 U.S. 179, 210 (1973)).

106. *Id.* at 837 (relying upon the holdings in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Griswold v. Connecticut*, 381 U.S. 481 (1965)). Note, however, that the boundary lines delineating this zone of personal bodily right are not impenetrable. For example, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court restricted a woman's right to an abortion and, thus, her absolute right to control her own body.

107. 1986 REPORT, *supra* note 33, at xii.

108. *Id.* (emphasis supplied).

109. *Gruesendorf v. Oklahoma City*, 816 F.2d 539, 540-41 (10th Cir. 1987). The right was asserted by an Oklahoma firefighter in response to a city policy denying trainees the

bodied by liberty and privacy interests, the court held that neither the Constitution's words nor its meaning guaranteed a right to smoke.¹¹⁰ Currently, no court has disagreed and no constitutional protection has been extended to smoking.

3. The Right To Privacy

Although smoking itself is not guaranteed constitutional protection, restrictions on purely private smoking may nevertheless enjoy Constitutional protection through the right to privacy. One of the most widely-recognized emanations from the Bill of Rights, the right to privacy, envelops the "moral fact that a person belongs to himself and not to others nor to society as a whole."¹¹¹ The realm of privacy is elite in that it includes only a select group of rights; only those personal rights which are adjudged "'fundamental' or 'implicit in the concept of ordered liberty'" fall within this exclusive realm.¹¹² Hence, a smoker will be afforded heightened protection only if the act of smoking is subsumed by some other constitutional right.¹¹³ Since there are no prior cases on point, the inquiry must focus on the general boundaries established in this area.

Succinctly stated, "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."¹¹⁴ This right to privacy, how-

right to smoke, on or off the job, for one year. *Id.* at 540.

110. *Id.* at 542-43. See also Cowan, *supra* note 5, at 415 (stating that neither smokers nor nonsmokers have constitutional protection).

111. Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288, 288 (1977) (quoted in *Thornburg v. American College of Obstetrics and Gynecology*, 476 U.S. 747, 777 (1986) (Stevens, J., concurring)). From a Lockean perspective, the right to privacy embodies the maxim that the government cannot regulate an individual's autonomy and liberty any more than could his neighbors. *Id.* at 334. The exact substantive protection offered in the context of the right to privacy is difficult to quantify because the right itself is an emerging concept not yet fully defined.

112. *Paul v. Davis*, 424 U.S. 693, 713 (1976) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Brandeis, J., dissenting)).

113. Recall that the concept of smoking itself as a textually supplied or inferred constitutional right has been rejected. See *supra* text accompanying notes 107-10.

114. *Thornburg v. American College of Obstetrics and Gynecology*, 476 U.S. 747, 772 (1986) (citations omitted). See also *Bowers v. Hardwick*, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (noting that the right to privacy has both decisional and spatial aspects); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (arguing that the Framers "'sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations'") (emphasis added) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

ever, is not absolute. It extends only to personal autonomy in making certain important decisions¹¹⁵ and in forming certain intimate relationships.¹¹⁶ Notwithstanding its widespread acceptance, the right to privacy has yet to gain universal recognition. Some judges, including former Supreme Court Justices Black and Stewart,¹¹⁷ have been hesitant in accrediting the unenumerated concept.¹¹⁸

The question at hand is whether the realm of privacy, in its current state, embodies a personal right which would protect smoking in the home. The inquiry that follows begins with the protection offered smoking solely because it is practiced in the home. The discussion then expands to examine the privacy right which attaches to smoking itself and to the smoker's parental status. If one of these three sources, the home, the activity or the participant, guarantees the right to smoke in the home, then such behavior cannot be restricted absent a compelling government interest.

a. The Private Home

There seems to be a common belief that the home is secure from government intrusion as a matter of course — that it provides a place to think, to do, and simply to be, undaunted by societal morality and unmolested by state intrusion.¹¹⁹ Historically, this

115. See *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) ("The cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."); *Bowers*, 478 U.S. at 190-91 (rejecting the proposition that any kind of private sexual conduct between two consenting adults is constitutionally protected).

116. See *Bowers*, 478 U.S. at 190 (stating that relationships such as those formed in marriage, family and childrearing are protected); Classen, *supra* note 105, at 834 (arguing that the right to privacy does not depend upon a particular place, but upon certain protected intimate relationships).

117. See *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting) ("I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."); *id.* at 503 (Stewart, J., dissenting) (stating that there is no right to privacy).

118. See Bennett B. Patterson, *The Forgotten Ninth Amendment*, in *THE RIGHTS RETAINED BY THE PEOPLE*, 107, 125 (Randy E. Barrett ed., 1989) ("While the courts seem to feel that it should exist, there is a great timidity and lack of forthrightness in the protection of this right, because its existence is not to be found in the written and enumerated law.").

119. The home and its curtilage are places to which significant measures of privacy and security attach. See Rosemarie Falcone, Note, *California v. Ciraola: The Demise of Private Property*, 47 LA. L. REV. 1365, 1368 (1987) (exploring the protection against warrantless searches offered the home and the area surrounding it).

idea derives from the conception that a man's home is his castle, deserving special immunity from outside intervention.¹²⁰

Arguably, this concept of absolute solicitude was officially adopted in amendments to the Constitution. The Third Amendment guarantees that a man's home may not be confiscated for government use;¹²¹ the Fourth Amendment protects the home, person and property from unreasonable searches and seizures.¹²² It seems logical that the unwritten agenda in adopting these amendments was to safeguard the home as a place beyond the reach of government disturbance — a place in which each man is free to do as he pleases.¹²³

Indeed, prominent dissenting opinions cite the Third and Fourth Amendments as the basis for recognition of an umbrella of rights encompassing personal freedoms within the home.¹²⁴ At the very least, these amendments lend credence to the argument that the home should provide some degree of shelter for self-expression and autonomy. Thus, smoking could logically acquire immunity from unreasonable restriction when done in the home, even though

120. See *Bowers*, 478 U.S. at 206 (Blackmun, J., dissenting) ("Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there."); Caplan, *supra* note 92, at 321 (noting that "[p]rivacy has historical authenticity"); see also *Poe v. Ullman*, 367 U.S. 497, 550 (1961) (Harlan, J., dissenting) ("I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments, amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character.").

121. The Third Amendment provides: "No 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." U.S. CONST. amend. III.

122. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. Amend. IV.

123. "While this textual warrant is concededly attenuated, it is safe to derive from the context and intent of these enumerated rights a concern that individuals, in their homes and with respect to their persons and effects, remain free from unwarranted governmental intrusion." Caplan, *supra* note 92, at 321-22.

124. See *Bowers*, 478 U.S. at 208 (Blackmun, J., dissenting) (citing the Fourth Amendment right to be secure in one's own house as the most textual constitutional provision with respect to the right to privacy); *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting) (citing the combination of the Third and Fourth Amendments as creating a constitutional right to privacy).

smoking itself is not a fundamental right.

Notwithstanding this textual support, the home itself does not necessarily elicit a heightened degree of protection. The Court has constructively held that the walls of a house are neither a necessity for nor a guarantee of the right to privacy, a conclusion which derives from a comparison of the holdings in *Griswold v. Connecticut*¹²⁵ and *Bowers v. Hardwick*.¹²⁶

Considered a landmark decision in the development of the right to privacy, the *Griswold* court invalidated a law banning the use of contraceptive devices.¹²⁷ Viewed alone, the Court's reasoning seems to support the idea that protection should be attached to the home itself.¹²⁸ The Court concluded that the sanctity of the marital relationship fell within a "zone of privacy."¹²⁹ The statute making contraception illegal permitted an unwarranted trespass into the marital bedroom.¹³⁰ In identifying a zone of privacy, a portion of the Court's reasoning focused on the home.¹³¹ From this precedent, a strong argument can be made that the home prompts the protection and that any activity therein would be guarded by this same auspice of privacy.

However, twenty-one years later, the Court's holding in *Bowers v. Hardwick* made clear that the privacy to be revered was that existing in the relationship between husband and wife and not that provided by the walls of the home.¹³² The underlying facts of

125. 381 U.S. 398 (1965).

126. 478 U.S. 186 (1986).

127. *Griswold*, 381 U.S. at 479. Note that the Court had previously avoided the question when it refused standing in a similar action regarding a statutory ban on contraceptive counselling. See *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting) (finding that despite the majority's avoidance of the issue, the confines of the home do protect the right to privacy).

128. The Court concluded that the use of contraceptives in the marital setting "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Griswold*, 381 U.S. at 485 (emphasis added). In preceding paragraphs, the Court had discussed the Third, Fourth and Fifth Amendments to the Constitution and their link to the home as a fortress against certain state intrusions. *Id.* at 484-85. This acknowledgment of the home in the context of the constitutional provisions most directly supporting the right to privacy establishes judicial support for protecting activities in the home solely on the basis of their occurrence in the home. See *supra* notes 121-24 and accompanying text.

129. *Griswold*, 381 U.S. at 485.

130. *Id.* The injustice of this statute was further exacerbated by its overbreadth since law, which was intended to deter illicit sexual activity, failed to distinguish between married and unmarried consumers. *Id.*

131. See *id.*

132. 478 U.S. 186, 195 (1986).

Bowers mirrored those in *Griswold* with two important differences: (1) the criminal conduct alleged was the sexual act (sodomy) rather than the prescription of contraceptives and (2) the parties were homosexual lovers rather than marital partners.¹³³ The Court held that the privacy associated with the home did not secure the freedom to engage in a "publicly condemned" activity, sodomy.¹³⁴

Taken together, the *Griswold* and *Bowers* holdings upset the concept of the home as a safe harbor of absolute privacy. While it has historical validity as a refuge against societal interference, the home, in and of itself, is not a legal bar to state intrusion into personal activities. Behavior conducted in the home is protected only to the extent that the conduct or the actor is protected. Smoking, therefore, does not command heightened protection merely because it takes place in the home.

b. The Specific Conduct

If behavior at home is not necessarily protected from government interference, what benefit does the right to privacy offer? Because it is neither enumerated nor explicitly defined, the right's substance must be gleaned from case law. The right to privacy has been asserted in two distinct contexts, associations (including both relationships and decisions) and possessions. As the act of smoking involves both a decision to partake in an activity and the possession of cigarettes, consideration of both aspects of privacy is necessary.

The right to privacy has been interpreted by the courts to extend only to the performance of personal acts and to decisions within certain contexts.¹³⁵ The difficulty arises in determining which personal acts and decisions deserve protected status. The right to privacy has been interpreted to include personal choices with respect to marriage,¹³⁶ procreation,¹³⁷ contraception,¹³⁸

133. *Id.* at 187-88.

134. *Id.* at 195-96.

135. See *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (noting that the zone of privacy protects a person's "interest in independence in making certain kinds of important decisions"); *Hanzel v. Arter*, 625 F. Supp. 1259, 1261-63 (S.D. Ohio 1985) (recognizing that of the right to privacy exists in the context of certain interpersonal decisions such as in matters of marriage and family life); *Lovisi v. Slayton*, 363 F. Supp. 620, 626 (E.D. Va. 1973) (noting that the right to privacy has been extended only to acts and decisions such as those involving parent and child, husband and wife, and mother and fetus), *aff'd*, 539 F.2d 349 (4th Cir. 1976), *cert. denied*, 429 U.S. 977 (1976).

136. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long

family relations,¹³⁹ child rearing and education.¹⁴⁰ The Court has held that the right focuses particularly upon matters of marriage and family life.¹⁴¹

In defining this realm of protection, the Court has taken care to distinguish truly traditional values from incidental notions of privacy. As noted above, *Griswold v. Connecticut*, the landmark case espousing the "zone of privacy,"¹⁴² recognized marriage as an institution of sufficient magnitude to support the privacy right.¹⁴³ Subsequent decisions made clear that it was the essence of the marital relationship that warranted protection, not the activities incidental to marriage.¹⁴⁴ Essentially, the right to privacy de-

been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

137. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices."); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (stating that the power to sterilize infringes on one of the basic civil rights and procreation is "fundamental to the very existence and survival of the race").

138. See *Thornburg v. American College of Obstetrics and Gynecology*, 476 U.S. 747, 759-65 (1986) (allowing the state to distribute information informing a woman about abortions, but disallowing inclusion of data which would influence her choice); *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (holding the decision to terminate a pregnancy within the zone of privacy, but subject to regulation in certain instances); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating a statute which distinguished between married and unmarried women regarding the legality of obtaining contraceptives).

139. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (acknowledging that the private realm of family life is to be respected and protected against interference from the state).

140. See *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding that compulsory public school education law infringes liberty of parents and guardians to direct the upbringing of their children); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding it the natural duty of parents to educate their children within certain limitations proscribed by the state); see also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974) (invalidating maternity leave policy that infringes on freedom of personal choice in matters of marriage and family life). This prong of the relational protection is discussed further in the following subsection dealing with the smoker as a parent. See *infra* text accompanying notes 171-200.

141. See *Akron Cir. for Reprod. Health*, 462 U.S. 416, 427 (1983).

142. 381 U.S. 479, 485 (1964).

143. The *Griswold* Court stated that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred [I]t is an association for as noble a purpose as any involved in our prior decisions." *Id.* at 486. See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the Fourteenth Amendment protects the freedom to choose a marital partner).

144. Consistent with this notion, the *Bowers* Court held that sodomy, even as the "natural" extension of a homosexual relationship, was not an activity protected by a logical extension of the marital and familial privacy decisions. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986). Dissenters urged that the right to privacy encompassed more than just the freedom to privately engage in currently accepted or morally approved practices. *Id.* at

pended upon the judiciary's determination of whether or not the underlying relationship warranted protection.¹⁴⁵

The Court has also held that the right to privacy extends to certain personal decisions. One carefully guarded personal choice is the right to marry. The Court has held fundamental the right to decide when¹⁴⁶ and whom¹⁴⁷ to marry. Similarly, the state may not impinge upon a person's decisions with respect to procreation¹⁴⁸ and contraception.¹⁴⁹ Additionally, decisions about family living arrangements are so personal that they are beyond judicial or legislative intervention.¹⁵⁰ Thus, choices made regarding familial associations are granted a significant degree of deference and respect.¹⁵¹

The task at hand, then, is to determine whether this right to associational privacy shields smoking in the home. A key consideration in this analysis focuses upon whether the Constitution's framers specifically intended to safeguard tobacco use¹⁵² or, alter-

199-200 (Blackmun, J., dissenting). Justice Blackmun, in particular, argued that the majority had incorrectly characterized the case "'to be about the right to engage in homosexual sodomy,'" rather than a case about "'the right to be let alone.'" *Id.* at 199. *See also* Classen, *supra* note 105, at 834 ("This right of privacy is not concerned with a particular place, but with protected intimate relationships.").

145. *See Bowers*, 478 U.S. at 212 (Blackman, J., dissenting) (cautioning the judiciary against giving effect to or tolerating private bias and prejudice); *Moore v. City of East Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (warning against imposing the values of white suburbia on the rest of society).

146. *See Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (invalidating a state law requiring state permission for person delinquent in making support payments to marry).

147. *See Loving*, 388 U.S. at 12 (declaring marriage to be "one of the 'basic civil rights of man,' fundamental to our very existence and survival") (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

148. *See Skinner v. Oklahoma*, 316 U.S. 535, 536 (1941) (striking down a statute authorizing sterilization of habitual criminals because the law "deprive[d] certain individuals of a right . . . basic to the perpetuation of a race — the right to have offspring"); *Thornburg v. American College of Obstetrics and Gynecology* 476 U.S. 747, 759 (1986) ("The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies."); *cf. Roe v. Wade*, 410 U.S. 113 (1971) (holding that the right to privacy includes the right to terminate a pregnancy unless the fetus has reached viability, at which time the state's interest becomes compelling).

149. *See Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1964); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1971).

150. *See Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1976) (overturning a statutory scheme by which certain classes of relatives were prohibited from sharing living quarters).

151. *Id.* at 499. "'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.'" *Id.* (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

152. One argument favoring the right to smoke is the long-standing existence of the

natively, whether smoking is "implicit in the concept of ordered liberty"¹⁵³ and thus deserving protection as a fundamentally private prerogative.

Arguably, protection of smoking at home would reinforce "the individual's right to make certain unusually important decisions that would affect *his own, or his family's* destiny" and to retain his autonomy in deciding how to live his own life.¹⁵⁴ Although smoking may not be universally sanctioned, it continues to be a pervasive habit in this country.¹⁵⁵ Nonetheless, the right to privacy has yet to encompass freedoms similar to tobacco use. Thus far, the United States Supreme Court has included only those activities and relationships which relate to marriage and the family in an intimate and procreational sense, failing to consider, much less extend protection to, personal freedom in more trivial contexts.¹⁵⁶

Smoking may appear to be a protected activity because of its historical background, but it fails to meet the crucial test implied by the Court's privacy decisions of vitality and necessity in relation to the intimacies of private life. Smoking is not an integral and necessary human function like procreation¹⁵⁷ or an intimate personal choice like contraception.¹⁵⁸ Historical acceptance of an activity alone is insufficient to support a claim for constitutional protection of the activity performed in the seclusion of the home.¹⁵⁹ Thus, smoking is not a protected activity under the

tobacco industry and the smoking custom. Cigarette smoking, a custom pre-dating the establishment of this country, is firmly rooted in societal tradition. Given tobacco's widespread use at the time of the Constitution's creation, it is unlikely that the framers meant to exclude it from the home. See 1964 REPORT, *supra* note 14, at 5.

153. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

154. *Bowers v. Hardwick*, 478 U.S. 186, 217 (1986) (Stevens, J., dissenting) (emphasis added). Recall the Kentucky Supreme Court's reaction to a complete, city-wide ban on smoking. See *supra* text accompanying notes 46-47. In the Kentucky court's words, "[t]o prohibit the smoking of cigarettes in the citizen's home or on other private premises is an invasion of his right to control his own personal indulgences." *Hershberg v. City of Barbourville*, 133 S.W. 985, 986 (Ky. 1911).

155. As of 1984, one third of all Americans used tobacco products. Reynolds, *supra* note 7, at 435. In fact, one author suggests that "even the most zealous anti-smoker crusaders would be offended by a law banning smoking in [the] private home[]" TOLLISON, *supra* note 9, at 45.

156. See National Org. for Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 133 (D.C. 1980) ("[S]moking [marijuana] does not involve the important values inherent in questions concerning marriage, procreation, or child rearing.").

157. *Skinner v. Oklahoma*, 317 U.S. 535, 541-42 (1942).

158. *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).

159. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (relying on historical condem-

associational prong of the right to privacy.

Smoking might also be afforded constitutional protection under a line of cases guarding the private possession of certain items which are forbidden in public.¹⁶⁰ For example, although obscenity can be appropriately proscribed in public theaters,¹⁶¹ a citizen may legally engage in obscene behavior and consume such materials within a private home.¹⁶² Where materials themselves are protected by the First Amendment, private possession of them is protected as well.¹⁶³

Conversely, where the "contraband" is unworthy of First Amendment protection, there is no special protection for its use in the home. In *National Organization for Reform of Marijuana Laws v. Bell*, a district court refused to grant special immunity to persons privately possessing or using marijuana.¹⁶⁴ It held that the choice to use marijuana was not worthy of constitutional protection because it was a "recreational" choice, not an intimate decision.¹⁶⁵ Furthermore, since the effects of marijuana use extend well beyond the privacy of the home, the choice elicits public concern, thereby forfeiting the user's potential protection.¹⁶⁶ Thus, the right to use or possess certain items does not turn on the location of those

nation of sodomy and homosexuality to justify decision upholding prosecution of those engaging in sodomy at home) *with* *Roe v. Wade*, 410 U.S. 113 (1973) (finding fact that states had historically prohibited abortions insufficient to uphold intrusion into women's privacy).

160. *See Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (considering the state's power to regulate obscenity in private homes).

161. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) ("The states have a long recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation.").

162. *Stanley*, 394 U.S. at 566 ("Whatever the power of the state to control public dissemination of ideas inimical to public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

163. *Id.* at 559-60; *see also Feldman v. Feldman*, 45 A.D.2d 320 (N.Y. App. Div. 1974) (finding a mother's possession of obscene literature beyond the reach of state control).

164. 488 F. Supp. 123, 133 (D.C. 1980). *See also Borrás v. State*, 229 So. 2d 244, 246 (Fla. 1969) (Reasoning that stimulation via consumption did not garner First Amendment protection, the court rejected the argument that marijuana fulfilled the user's "intellectual and emotional needs."). *But see Ravin v. State*, 537 P.2d 494 (Alaska 1975) (holding that the right of privacy protected adult use and possession of marijuana in the home in accordance with the unique provisions of the Alaska state constitution).

165. *Bell*, 488 F. Supp. at 132-33; *cf. Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (refusing to immunize otherwise illegal behavior (sodomy) simply because it was conducted in the home).

166. *Borrás*, 229 So. 2d at 246.

items. Tobacco products, though legal, are like marijuana in that they enjoy no constitutional protection.¹⁶⁷

Because smoking is neither fundamentally protected nor socially outcast, it falls somewhere between the intimate decisions and possessions specifically guaranteed protection and the prohibited harmful activities expressly forbidden.¹⁶⁸ Freedoms such as this, though not elevated to a fundamental level, do not invite uninhibited governmental interference. They simply fall into a category which exacts a less stringent inquiry.¹⁶⁹ The state's intrusion is justified so long as a rational basis for such action exists.¹⁷⁰

c. The Participant's Status

Parent-smokers may also qualify for some protection from the specialized right to privacy traditionally afforded the activity of parenting. Every parent has a fundamental right to "the companionship, care, custody and management of his or her children."¹⁷¹ Arguably, this right includes the choice to smoke in the child's presence. If the liberties available in the guise of parenthood include the act of smoking in the child's presence, constitutional protection will attach.

The boundaries of parental rights are quite broad. Parents owe

167. See *supra* notes 107-18 and accompanying text.

168. While not precisely addressed, cigarettes may be accorded heightened deference due to the fact that they have yet to be outlawed. See *Poe v. Ullman*, 367 U.S. 497, 552-553 (1961) (Harlan, J., dissenting) (concluding that, while the privacy of the home is not absolute, prohibiting that which is not traditionally criminal is preposterous).

169. See *supra* text accompanying notes 100-01.

170. The rational basis test demands only that the state have some logical foundation for its action taken in furtherance of a legitimate goal. For instance, in *Lyng v. Castillo*, 477 U.S. 635 (1986), the Court considered the distinction between distant and close relatives in construing the term "household" for purposes of determining family eligibility for federal food stamps. The Court upheld the state's allocation of assistance against an Equal Protection challenge because it found that the state could reasonably have determined close relatives would budget for, purchase and prepare their meals as a unit. *Id.* at 638-43.

Arguably, restrictions on smoking in private do not even survive the rational basis test. According to one district court judge,

if this court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties

Gasper v. Louisiana Stadium & Expo. Dist., 418 F. Supp. 716, 721 (E.D. La. 1976).

171. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

a legal and moral duty of care to their children; they are responsible for their children's development, education, support and well-being.¹⁷² These obligations are accompanied by the right to raise children "according to the dictates of [the parents'] own consciences."¹⁷³ The decisions made by adults in their role as parents are accorded great deference and are protected against all but compelling state interests.¹⁷⁴ Effectively, a shield has been erected around the family which recognizes its privacy, autonomy and integrity.¹⁷⁵

However, this territory surrounding the family is neither absolute nor impenetrable. Because children lack maturity and standing, the state has been entrusted with protection of their interests.¹⁷⁶ The state has a duty to supervise parental activity and to enforce the requirement that certain obligations be fulfilled.¹⁷⁷ Where there is clear evidence of unfitness, the state can intercede and usurp the parents' right to make decisions for their children.¹⁷⁸

The question then is whether smoking presents a viable basis for intervention in the parent-child relationship. Does the presence of cigarettes supply a sufficient justification for the state to override parental discretion? Because it has been alleged that smoking

172. *Custody of a Minor*, 379 N.E.2d 1053, 1062 (Mass. 1978).

173. *Id.* The Massachusetts court noted that the parental right of control is "akin to a trust 'subject to . . . [a] correlative duty to care for and protect the child, and . . . [terminable] by [the parents'] failure to discharge their obligations.'" *Id.* at 1063 (quoting *Richards v. Forrest*, 180 N.E. 508, 511 (Mass. 1932)).

174. *Custody of a Minor*, 379 N.E.2d at 1063; see also *Griswold v. Connecticut*, 381 U.S. 479, 502 (1965) (White, J., concurring) (noting that there is a "'realm of family life which the state cannot enter' without a substantial justification" (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (noting that freedom of personal choice in family matters is a protected liberty).

175. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1974) (noting the many cases acknowledging a privacy right in family life); *Darryl H. v. Coler*, 585 F. Supp. 383, 390 (N.D. Ill. 1984) (acknowledging a common law right to familial privacy).

176. See *Custody of a Minor*, 379 N.E.2d at 1056 (noting that at some point, the state's interest in enforcing the child's rights sufficiently outweighs the family interest to justify intervention).

177. See *Coler*, 585 F. Supp. at 390 ("The State, in its role as *parens patriae*, is the ultimate protector of the rights of children, and may act to provide for their health, safety and welfare when the parents fail to do so.").

178. See *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding that the state has no interest in separating a fit father from his child). But see *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (disallowing a child's removal from his foster family's care because his natural father reentered his life only after being notified of the child's pending adoption and because the child's removal would destroy the adoptive family unit). Note that the *Quilloin* court's concern was with the family unit and not with the biological bond, highlighting the importance of the parent-child bond to the court's decision.

is morally and physically harmful, cases setting a standard with respect to the child's growth and well-being may provide an appropriate analogy.

From a moral standpoint, parents have been given a great deal of latitude in guiding their children. In the area of education, for example, discretion has proven an effective weapon against state intervention. Courts have recognized parental responsibility for the child's intellectual stimulation and have entrusted parents with nurturing intellectual growth. Parental freedom encompasses the right to demand that the child is educated in a certain manner¹⁷⁹ according to a certain curriculum.¹⁸⁰ Furthermore, the Supreme Court has approved contravention of state mandatory attendance policies by parents striving to instill in their children dedication to a particular religion or lifestyle.¹⁸¹

Subversion of parental authority with respect to smoking may invite state intervention in other areas. If parents are not free to smoke, will they next be declared unfit to determine what children listen to on the radio or watch on television? Will a societal movement override parental discretion concerning what children eat, how late they stay up, or in what sorts of activities they participate? While a substantial number of people may hold smoking to be immoral and unsuitable for impressionable youth, this judgment alone should not be grounds for contraction of firmly-rooted parental rights.

Just as parents are permitted to choose children's educational experiences and religious upbringing, they should be able to select the child's moral influences as well. Even if some members of society believe smoking to be morally corrupt, parents are entitled to control their children's intellect and morality. If parents wish to exemplify the propriety of adult smoking, they should be free to

179. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (recognizing the right to send one's child to private schools as within the realm of parental discretion).

180. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (permitting parents to have their children schooled in German).

181. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court allowed parents to violate compulsory schooling statutes in order to raise children in the Amish tradition. To qualify for this exemption, the Court required that parents demonstrate the existence of a well-established and identifiable religious sect, the sincerity of their beliefs, the vital interrelationship of their religious beliefs and mode of life, and the comparability of their proposed educational scheme to the state minimum standards. *Id.* at 235-36. While the Court is willing to defer to the parent's values and decisions in determining the child's educational course, it will permit avoidance of statutory minimums only where the religious beliefs are well-established and the child's education appropriately achieved.

do so, just as they are free to have their children taught the German language¹⁸² or the Amish culture.¹⁸³ From a purely moral point of view, it seems that smoking should be included in the broad category of choices left exclusively to parental discretion — parents should be able to choose whether to smoke in their children's presence.

If parents are not granted the freedom to choose these sorts of influences, how will the state deal with the problems posed by enforcement and supervision?¹⁸⁴ What sorts of policing capabilities would have to be granted for the state effectively to oversee children's moral upbringing? Some sort of state guardian would have to be ever-present in the home watching for the first sign of smoke, checking the hour of bedtime, noting the acceptability of games and hobbies, and so forth. For a society that prides itself on individual freedom, this sort of intervention is unacceptable.

While smoking poses more than a moral dilemma, a similar pattern of deference can be found with respect to parental control over children's physical condition. Parents are granted a great deal of leeway as long as the child's life is not threatened. In this regard, a logical analogy to the smoking issue lies in the standard articulated with respect to the parent's duty to provide proper medical care. On one hand, the state has an important interest in the health and safety of its citizens.¹⁸⁵ On the other hand, "courts have shown great reluctance to overturn parental objections to medical treatment . . ."¹⁸⁶ due in large part to the subjectivity involved in selecting the proper course of care.¹⁸⁷ Intervention is proper only when parents are unwilling to provide necessary medi-

182. See *supra* note 180 and accompanying text.

183. See *supra* note 181 and accompanying text.

184. This issue echoes one of the Court's concerns in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In questioning the validity of a law banning the use of contraceptive devices, the Court queried whether society "[w]ould . . . allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Id.* at 485.

185. See, e.g., *Hanzel v. Arter*, 625 F. Supp. 1259, 1262 (S.D. Ohio 1985) (upholding a compulsory vaccination statute over parents' objection because of the interest of other school children with whom unvaccinated children would necessarily mingle).

186. See, e.g., *Custody of a Minor*, 379 N.E.2d 1053, 1062 (Mass. 1978) (acting reluctantly in taking custody of a child requiring life-saving leukemia treatment even upon a showing that the child would have a ninety percent chance of recovery).

187. See *In re Hofbauer*, 393 N.E.2d 1009, 1014 (N.Y. 1979) (noting that a decision with respect to the proper course of medical care is one which is "fraught with subjectivity").

cal treatment and only when the untreated condition seriously threatens the child's life.¹⁸⁸ Where there is no immediate and definite threat to the child's life, parental discretion warrants deference.¹⁸⁹

The decision to order medical treatment over parental objection has proven difficult for the courts to make. Each decision necessarily implicates the weighty interests of parent, child, and state, respectively.¹⁹⁰ "Courts which have considered the question, after balancing these three interests, uniformly have decided that State intervention is appropriate where the medical treatment sought is necessary to save the child's life."¹⁹¹ Facing the issue for the first time in *Custody of a Minor*, the Massachusetts Supreme Court ordered chemotherapy for a child over the parents' objections only after considering with "great deference" the parental prerogative in medical care cases.¹⁹² Central to the court's conclusion was the fact that the illness was life-threatening and the prescribed treat-

188. *In re D.L.E.*, 645 P.2d 271, 276 (Colo. 1982) ("The right to practice religion freely does not include the right or liberty to expose the community or the child to ill health or death."); *People ex rel. Wallace v. Labrenz*, 104 N.E.2d 769, 774 (Ill. 1952) (ordering blood transfusion to counteract a life threatening RH abnormality), *cert. denied*, 344 U.S. 824 (1952); *State v. Perricone*, 181 A.2d 751, 757 (N.J. 1962) (authorizing a blood transfusion to correct a chronic lack of oxygen for a critically ill child), *cert. denied*, 371 U.S. 890 (1962); *In re Vasko*, 263 N.Y.S. 552, 555-56 (N.Y. App. Div. 1933) (ordering surgical removal of eye to terminate progression of a life threatening disease); *In re Clark*, 185 N.E.2d 128, 129 (Ohio C.P. 1962) (ordering blood transfusions for badly burned child based on signs of steady deterioration and medical opinion predicting imminent death); *Mitchell v. Davis*, 205 S.W.2d 812, 814-15 (Tex. Civ. App. 1947) (divesting a mother of parental rights when her method of faith healing and prayer failed to stay the effects of debilitating and life-endangering swelling of her child's knee); *see also Hoener v. Bertinato*, 171 A.2d 140 (N.J. Juv. & Dom. Rel. Ct. 1961) (authorizing a blood transfusion for a child yet to be born based on evidence of a life threatening RH condition which had caused the death of several siblings).

189. *See Hofbauer*, 393 N.E.2d at 1014-15 (refusing to override parents' decision to seek nutritional therapy for a child with Hodgkin's disease where there was no immediate peril); *In re Seiferth*, 127 N.E.2d 820, 823 (N.Y. 1955) (holding operation to correct a cleft palate not in court's discretion, but in parents'); *In re Green*, 292 A.2d 387, 388 (Pa. 1972) (refusing to intervene in case of child who could not stand due to paralytic scoliosis); *In re Tuttendario*, 21 Pa. D. & C. 561, 563 (1912) (refusing to order corrective surgery even though rickets would cripple child for life); *In re Hudson*, 126 P.2d 765, 768 (Wash. 1942) (deferring to parents' discretion because physical deformity did not threaten child's life). *But see In re Rotkowitz*, 25 N.Y.S.2d 624, 625-27 (N.Y. Dom. Rel. Ct. 1941) (holding interference proper whenever there is a risk to the child's health, limb, person, or future and ordering correction of a gross physical deformity to protect the child's sense of security and feeling of peer similarity).

190. *Custody of a Minor*, 379 N.E.2d 1053, 1061-62 (Mass. 1978).

191. *Id.* at 1062.

192. *Id.*

ment was more than a promise "merely to prolong life where there is no hope of recovery."¹⁹³ Moreover, to justify the order, the Massachusetts court weighed the factors in terms of the child's best interests, refusing to hold as dispositive the life-threatening nature of the illness and the parental refusal to take corrective action.¹⁹⁴ Similarly, the Supreme Court of New Jersey ordered a blood transfusion for a child suffering from a chronic lack of oxygen only after assuring itself that "the interests of society as a whole necessitate[d this] course of action . . . [and were] paramount to certain personal freedoms."¹⁹⁵

In contrast, *In re Hofbauer* presented the New York Court of Appeals with a situation involving a child suffering from Hodgkin's disease and a physician advocating radiation therapy.¹⁹⁶ Because the parents were following an alternative course of nutritional therapy which had gained some medical recognition and which did not place the child's life in jeopardy, the appellate court deferred to the parents' judgment.¹⁹⁷ Noting that a decision as to proper medical care is "fraught with subjectivity," the *Hofbauer* court observed that parental authority to act on behalf of children demands protection in all but the most serious cases.¹⁹⁸

Cigarette smoke poses no immediate or demonstrable threat to a child's well-being. Therefore, smoking does not provide the dispositive factor of an imminently endangered life which the medical treatment cases suggest is necessary to override parental choice.¹⁹⁹ While some medical evidence suggests that smoking may increase the likelihood of respiratory or cardiovascular difficulties,²⁰⁰ this potential danger does not seriously jeopardize a child's life. Because courts generally overrule parental decisions only when convinced that a child faces death or serious health problems, they should surely be reluctant to step in where the parents' treatment of their children causes only speculative harm. Since incidental exposure to parental smoke does not actually

193. *Id.* at 1063.

194. *Id.* at 1065-66.

195. *State v. Perricone*, 181 A.2d 751, 757 (N.J. 1962) (dealing particularly with parents' interests in freedom of religion and rights to care for and train their children).

196. 393 N.E.2d 1009 (N.Y. 1979).

197. *Id.*

198. *Id.* at 1014.

199. For a discussion of the effect of cigarette smoke on children and its non-life-threatening quality, see *infra* text accompanying notes 258-68.

200. See *infra* text accompanying note 257.

threaten the child's life, the parents' fundamental right to make choices affecting their children's physical care and environment cannot be limited on the basis of their smoking.

4. State Justification

While smoking is not contemplated as an implied constitutional right, it is subsumed within a parent's fundamental right to privacy. Therefore, state restriction of it must serve a compelling end and must be implemented through means narrowly tailored to serve that end.²⁰¹ To justify restricting private cigarette consumption, the state may assert its strong interest in the well-being of minor citizens and its necessary protection of their health and morality. By removing the influence of passive smoke, the state may be able to eliminate the poor health associated with daily inhalation of pollutants or with exposure to and acceptance of an immoral habit.

While protection of a child is indeed a noble cause and a legitimate state concern, closer scrutiny of a state's action to ban smoking by parents at home reveals a plan which falls short of this goal in terms of both ends and means. First, the harm targeted is the *possibility* that the child will be physically or morally influenced in an unfavorable way. While possibilities are not valueless, they do not present a compelling end.²⁰² They certainly cannot excuse interference with a parent's constitutional right to custody. Whether parental smoke harms a child at all is far from set-

201. See *supra* text accompanying note 100. See also *The Constitution and The Family*, *supra* note 98, at 1209 (advocating the use of heightened scrutiny with respect to the rights to privacy and parenting by drawing an analogy to the heightened scrutiny afforded similar First Amendment rights).

202. In decisions responding to infringements on First Amendment rights, the Court has refused to recognize "theoretically imaginable" dangers as compelling state ends. See, e.g., *United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-24 (1967) (recognizing the potential conflicts of interest which exist when a salaried union employee serves as the attorney for union members, but deeming this risk too speculative to justify an infringement of the First Amendment right of association); *Williams v. Rhodes*, 393 U.S. 23, 33 (1968) (holding the potential for voter confusion to be insufficient to justify a violation of the equal protection clause in the promulgation of election procedures). See also *Custody of a Minor*, 379 N.E.2d 1053, 1063 (Mass. 1978) (holding that state may intervene in parental relationship with child only upon "a proper showing that parental conduct threatens a child's well-being . . ."). Cf. *Maher v. Roe*, 432 U.S. 464, 478 (1977) (noting that the state's interest in potential life grows as the pregnancy progresses); *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (allowing the state's interest in potential life to contravene the mother's right to choose whether to bear or beget a child only at the point of viability).

tled.²⁰³ The information available is contradictory and confusing, establishing no more than a potential harm to the child. Thus, the threshold requirement of a compelling state interest is not satisfied.

Furthermore, to characterize the possibility of harm from smoking as compelling would seriously undermine parental control in several areas. It is questionable whether the end would be desirable in light of the consequences likely to follow from the validation of such a restriction. If the state is allowed to enter the home to regulate parental smoking, asserting potential harm to the child as its shield against constitutional protections, it may easily gain authority for a whole host of similar actions.²⁰⁴ For example, a smoking ban could serve as precedent for restrictions upon a child's diet by comparing the detrimental similarities of foods high in cholesterol or other "harmful nutrients" and of passive smoke. Likewise, the perceived immorality of particular television venues may be analogized to the harmful moral and physical effects of parental smoking habits on their children.²⁰⁵ While each of these intrusions seem extreme, their assertion could be viably based upon the same foundations as smoking restrictions.

Assuming arguendo the existence and recognition of a com-

203. See *infra* text accompanying notes 258-68.

204. In voicing his concerns over the increasing scope of regulations of smoking, one commentator explains:

The private choice alternative, [leaving the choice to smoke up to the individual] is consistent with the practices of a free society. The public choice alternative, [permitting strict government regulation] is the route to a tyranny of personal preferences by one group over another. If the tyranny can be implemented over smokers, ask yourself who and what comes next.

TOLLISON, *supra* note 9, at 118.

205. This parade of horribles argument is similar to warnings advanced by critics of employers' recent intrusions into employees' private lives in efforts to terminate their cigarette habits. See *supra* note 81 and accompanying text. As one source reports, the limitation of smoking off-duty creates a precedent for the off-duty regulation of other "bad" influences. Lori Elliott, *Do You Smoke? Drink? If so, Some Employers Say, You May as Well Stay Home*, BUSINESS FIRST-COLUMBUS, May 18, 1987, vol. 3, § 2, at 3. Bernard Dushman, president of the American Civil Liberties Union of Ohio and assistant dean of Yale Law School, questions what management's next concern might be. *Id.* The danger, according to Dushman, is that the company could say:

If you work here, you can't eat butter and if we find out there's butter in your home, you're fired. If you take a pat of butter in a restaurant and someone sees you and reports you, you're fired.

Id. Dushman argues that just as "cigarette" was easily replaced by "butter," so "butter" can be replaced by "scuba diving," "divorce," "alcohol," and so forth, in effect opening each aspect of one's private life to scrutiny to maximize the company's healthy work force. *Id.*

elling state interest in protecting children from cigarette smoke, the particular restriction at issue in this note, a ban on parental smoking, is not sufficiently tailored to meet the goal of safeguarding children's health and morality. On one hand, it is underinclusive. Even if a parent does not smoke in the child's presence, a relative or a friend could smoke in the child's home and presence without recourse since the custody order would apply to the parent alone. Children could be further exposed to smoke at school, during work or in public buildings. There is simply no way to effectively shield children from the tobacco smoke which the public confronts on a daily basis in a myriad of unavoidable situations. Moreover, a child could personally take up the habit, presenting the absurd but very real possibility that the child could smoke at home while the parent could not.

Moreover, by restricting parental smoking, the judiciary effectively takes a stand in an expansive social debate. It lashes out at what it perceives to be a harm but fails to serve a compelling end or promulgate closely-tailored means. No desirable end is furthered by instigating an absolute ban on parental smoking. Since it deals with only a single source, the overreaching restriction does not effectively curtail children's exposure to cigarette smoke. Numerous other points of exposure remain unaddressed. Placing a restriction upon smoking within the home serves only to trample the fundamental right to parental privacy.²⁰⁶

B. Custody Inquiry

The next issue to be considered is whether the special process of selecting the child's custodian justifies such an intrusion into the home.²⁰⁷ In custody disputes, courts act on behalf of the children, not on behalf of the parent-smokers or the state. When custody is at issue, the court's right to intrude upon the home broadens. Complicating the matter is the competition between parents for custody of their children.²⁰⁸ The central question in this context is wheth-

206. Given the speculative nature of the harm involved and the weak protection the restriction offers a child, it is quite possible that the decision would fail to satisfy even a rational basis review.

207. For the purpose of this note, the custody determination will be assumed to relate to a choice between two natural parents. While there are other permutations of such domestic decisions, their unique considerations will be set aside.

208. "Custody 'embraces the sum of . . . rights with respect to rearing a child It includes the right to the child's services and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health and religion.'" IRA

er smoking may be considered a factor in the choice between otherwise equally competent caretakers.²⁰⁹ In essence, can smoking provide the dispositive distinction between two natural parents?

The state's interest in the well-being of the family, and to a greater degree of the child, stems from the English common law concept of *parens patriae*, which posits the state as the patron of its legally disabled citizens.²¹⁰ In this role, the state becomes the caretaker of its children — the protector of those who cannot protect themselves.²¹¹ Unlike their adult counterparts, children are unable to assume responsibility for themselves or to articulate their needs and secure their own welfare.²¹² Thus, the state intervenes on their behalf,²¹³ striving to balance the parents' rights and the child's best interests.

Acting in the *parens patriae* role, the state has advanced various theories of custody, each operating as a "rule of thumb" or presumption to aid in the judges' decisions.²¹⁴ Early courts adhered to the view that children were chattels to be automatically awarded to their fathers' custody and control.²¹⁵ Modern judicial thought completely rejects this notion.²¹⁶ In the early twentieth century, this gender-based standard gave way to another, the so-called "tender years doctrine."²¹⁷ The tender years doctrine re-

M. ELLMAN ET AL., FAMILY LAW 463 (1986) (quoting 59 AM. JUR. 2d, *Parent & Child* §25).

209. For purposes of this note, the inquiry will focus on the standard necessary to make an initial custody determination. To modify a custody order, the same standards must be met, but the proponent of change bears a heavier burden. The proponent must clearly demonstrate a change in circumstances from the time of the initial order and a present detrimental impact on the child's best interests. See Marshall H. Silverberg & Lisa A. Jonas, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations*, 18 FAM. L.Q. 335, 342-43 (1984). This stricter review is justified by the fact that children require stability to develop in a secure and emotionally well-balanced fashion. See *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 513-14 (1982) (noting that "[t]here is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home . . . '").

210. Silverberg & Jonas, *supra* note 209, at 340. *Parens patriae* literally means "parent of the country." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

211. Silverberg & Jonas, *supra* note 209, at 341.

212. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 3 (1979).

213. *Id.*

214. ELLMAN et al., *supra* note 208, at 468.

215. Sharon G. Bradley, *Child Custody and the Alcoholic Parent*, 46 MONT. L. REV. 433, 434 (1985).

216. See *May v. Anderson*, 345 U.S. 528, 533 (1953) (noting that parental interest in custody involves rights more precious than property rights).

217. Bradley, *supra* note 215, at 434.

flected the presumption that young children require their mothers' care and prompted maternal custody in all cases, absent a clear showing of unfitness.²¹⁸ Eventually, however, as fathers' rights and abilities as parents gained recognition, it became evident that a more equitable consideration of the custodial parent necessitated a gender-neutral standard.²¹⁹

Early in this historical progression, judges began to consider the matter from the child's perspective and "began speaking in terms of the child's best interests."²²⁰ At one time, courts employed presumptions to determine the child's "best interests." Currently, a majority of jurisdictions undertake a broader inquiry which accounts for the totality of circumstances surrounding a child's custody and well-being.²²¹

To avoid arbitrary decisions with respect to the child's essential needs,²²² the "best interests" theory uses the child's physical and psychological well-being as its cornerstone.²²³ Courts attempt to strike a balance between the child's "threshold liberty interest" and the parent's fundamental custodial rights.²²⁴ Since the child is

218. *Id.*

219. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that "all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody"). Modern courts profess to have abandoned the "tender years doctrine" and to have shed their gender-based presumptions. However, some jurisdictions still adhere to maternal custody or favor it heavily in an effort to avoid an analysis of the child's interests. Bradley, *supra* note 215, at 434.

220. ELLMAN et al., *supra* note 208, at 468.

221. *Id.* at 469; MELVIN G. GOLDZBAND, *CUSTODY CASES AND EXPERT WITNESSES: A MANUAL FOR ATTORNEYS* 53 (1980).

222. Steve Susoeff, *Comment, Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852, 856 (1985).

223. Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 267 (1987). Notwithstanding the progress which has been made since the equation of children with chattels, some critics maintain that the "best interests" standard gives judges too much discretion and that custody decisions reflect judges' subjective views of what is important or "best." See JAMES C. BLACK & DONALD J. CANTOR, *CHILD CUSTODY* 42, 79-80 (1989) (arguing that the standard is tantamount to coaxing the judge to "do your best!" and advocating a holistic approach to the parent, the child and the relationship between the two); GOLDSTEIN et al., *supra* note 212, at 4 (providing a thorough criticism of the best interests standard and an insightful review of the child's role in the process); Charlow, *supra*, at 267 (claiming the standard is subject to abuse by self-serving parents); Silverberg & Jonas, *supra* note 209, at 342 (characterizing the standard as vague and susceptible to subjective interpretation); Stuart J. Baskin, Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1391 (1974) (adjudging the "best interests" standard to be of little assistance in defining the parties' true interests in an actual setting).

224. See Leonard P. Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 329 (1982) (suggesting that a child has a "threshold liberty interest" and therefore

the intended beneficiary of the adults' exertion of parental rights, the "best interests" standard theoretically places the parties in the same positions they would have been in had the custody dispute never arisen or had they reached an agreement on their own.²²⁵ However, due to the child's vulnerability, care must be taken to resolve any discrepancies in the child's favor.²²⁶

The "best interests" standard is the currently accepted rule in a majority of jurisdictions²²⁷ and, therefore, is the measure by which the restriction on parental smoking must stand or fall. Since smoking is a new area of concern in the context of child custody, the regulation cannot be addressed by reference to past cases or to pending disputes. Instead the issue must be resolved through a comparative review of the treatment of analogous restrictions and the broad discretionary scope of the courts' *parens patriae* power.

1. Alcohol/Drugs

Substance use and abuse has traditionally been accorded little dispositive weight in child custody decisions.²²⁸ Since the child's

the child's best interests must be considered along with other social concerns, such as the parents' interests); *see also In re Hudson*, 126 P.2d 765, 775 (Wash. 1942) ("Parents . . . primarily have the constitutional right to the custody and control of such minor children and may give to those children such attention and training, as in the judgment of such parents or guardians, may seem best for the welfare of the child or children and for the good of society.").

225. Susoeff, *supra* note 222, at 861.

226. *Id.* at 853-54.

227. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMP. PROBS. 226, 236-37 (1975). Most states' articulation of the "best interests" standard mirrors that set forth in the Uniform Marriage and Divorce Act which provides:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE AND DIVORCE ACT, § 402, 9A U.L.A. 561 (1987).

228. Bradley, *supra* note 215, at 433.

welfare is the paramount consideration, the parent's condition presents but one factor to be weighed.²²⁹ Custody may be revoked "only if that parent's use of the substance can be shown to affect that parent's mental or physical health and that parent's relationship with the child."²³⁰ Hence, two essential elements must be proven: (1) that the parent uses alcohol or drugs and (2) that this use is detrimental to the child.²³¹ The key is not the reputed effect of the substance on the child, but the actual effect of the substance on parental abilities or on parent-child interactions.²³²

2. Sexual Promiscuity

The existence of parental sexual "misconduct" does not automatically result in revocation of custody.²³³ Several courts have taken the position that the private lives of adult parents should not be restricted absent proof of an illicit effect upon the child²³⁴ or

229. *Id.*

230. *In re Becton*, 474 N.E.2d 1318, 1325-26 (Ill. App. Ct. 1985) (granting a father liberal rights absent a conclusive demonstration that the father's alleged use of marijuana was detrimental to the child).

231. Bradley, *supra* note 215, at 436. In *Jackson v. Jackson*, 773 S.W.2d 512, 513 (Mo. Ct. App. 1989), a Missouri appellate court explained that "[t]he issue is not condemnation or approval of a moral standard but whether the conduct detrimentally affects the child's welfare." The *Jackson* court relied upon *In re Marriage of Newberry*, 745 S.W.2d 796, 797 (Mo. Ct. App. 1988). *Id.*

232. Alcohol becomes a dispositive factor only when its use reaches a level and degree at which the parent's skills are impaired and the child's care suffers. See, e.g., *In re R.J.*, 436 N.W.2d 630, 637 (Iowa 1989) (terminating a mother's rights where "[h]er debilitating condition pose[d] an immediate as well as long range threat to the children's well-being"); *Duplessis v. Duplessis*, 516 N.Y.S.2d 751, 752 (N.Y. App. Div. 1987) (deeming a mother's drinking problem to produce an unfavorable environment).

233. See, e.g., *Schoonover v. Schoonover*, 228 N.W.2d 31, 32 (Iowa 1975) (sexual promiscuity is one factor to consider in a custody determination); *M.D.R. v. P.K.R.*, 716 S.W.2d 866, 869 (Mo. Ct. App. 1986) (custody may not be based upon extramarital sexual misconduct alone). *But see* *Mansell v. Mansell*, 583 S.W.2d 284, 287 (Mo. Ct. App. 1979) (relying on *L.H.Y. v. J.M.Y.*, 535 S.W.2d 304, 308 (Mo. Ct. App. 1976)) (finding that an immoral lifestyle may influence an impressionable youth and holding that the court did not have to wait for manifestations of harmful consequences before taking action on the child's behalf).

234. See, e.g., *In re Marriage of Wellman*, 164 Cal. Rptr. 148, 152 (Cal. Ct. App. 1980) (holding that a decision should not be based upon disapproval of a parent's morals or other personal characteristics which do not harm or have a significant bearing on the child); *Manley v. Manley*, 389 So. 2d 454, 456-57 (La. Ct. App. 1980) (holding that custody of the child should remain with the mother because the mother's boyfriend's frequent overnight stays did not cause harm to the child); *Michael T.L. v. Marilyn L.J.*, 525 A.2d 414, 420 (Pa. Super. Ct. 1987) (deciding that trial court's perception of mother's conduct as immoral was a "gross abuse of discretion" in the face of the child's healthy development); *In re Custody of Temos*, 450 A.2d 111, 122 (Pa. Super. Ct. 1982) (noting

a detrimental strain upon the parent-child relationship.²³⁵ Thus, even where some degree of sexual promiscuity has occurred, revocation of custody cannot be justified without this clear demonstration.²³⁶

Similarly, this same level of proof is required to revoke custody based on a parent's possession of obscene materials. In one case, a mother's custody was challenged in part on the ground that she had littered her house with sexually-explicit photographs and "dirty" magazines.²³⁷ Relying upon the First Amendment's protection of the "obscene" literature and the privacy protections of the home, the appellate court refused to revoke or regulate the mother's parental rights.²³⁸ Reasoning that "sexual liberation" does not make for an unfit parent, the court noted that, absent specific evidence of harm to the child, there was no basis for intervention.²³⁹

Finally, when courts terminate a parent's custody based on sexual morality, it is of paramount importance that courts look to the children's best interests, not the community's morality.²⁴⁰ Holding a parent unfit should represent immediate concern about the child in a particular home at a particular time rather than subjective assessments of the parent's activity. According to one court, "while the sexual life style [sic] of a parent may properly be considered in determining what is best for the children, its consideration must be limited to its present or reasonably predictable effect

that, for an illicit relationship to cause a change in custody, there must be a showing of harmful effect on the child).

Some courts have imposed time and place restrictions to shield the child from certain damaging consequences. See, e.g., *In re Marriage of G.B.S. and A.L.S.*, 641 S.W.2d 776, 777 (Mo. Ct. App. 1982) (conditioning custody on father's agreement not to live with woman to whom he was not married).

235. See, e.g., *Temos*, 450 A.2d at 122 (refusing to consider a mother's personal life where children were well-adjusted and shared a good relationship with their mother).

236. "So long as a court can relate a parent's relevant moral behavior to the best interests of the child, evaluation of such conduct seems unassailable." Strickman, *supra* note 224, at 331.

237. *Feldman v. Feldman*, 358 N.Y.S.2d 507, 509 (N.Y. App. Div. 1974).

238. *Id.* at 510-11.

239. *Id.* at 510. The Court of Appeals in *Feldman* criticized the trial court's willingness to equate fathers' and mothers' participation in the culture of "free sex" with parental unfitness, warning that "[t]he logical extension of the rationale of the trial court's position is to place the children of 'swinging' couples in foster homes or orphanages." *Id.*

240. This point is made especially clear by cases in which the aberrant behavior on which the custody revocation is based is that of a homosexual parent. Susoeff, *supra* note 222, at 859 (arguing that gay and lesbian parents are viewed in terms of stereotypes rather than individual characteristics).

upon the children's welfare."²⁴¹ Thus, before a parent is found unfit, the court must find an actual detrimental effect on the children.

3. Smoking

There are two acceptable justifications for restricting parental smoking, protecting the child's health from the risks commonly associated with passive smoke and/or insulating the child from arguably immoral behavior.²⁴² The critical question is whether either justification provides an acceptable avenue to determine custody and to regulate adult activity under the guise of conditional custody. In light of these concerns, would an outright prohibition on smoking best serve the child's interests?

The assertion that smoking represents an immoral influence on children offers tenuous justification. The fact that so many Americans partake of this habit²⁴³ dampens the fervor of the moralistic approach.²⁴⁴ Nonetheless, assuming the presence of an adverse influence, is this fact alone enough to restrict parental smoking? A comparison with other "immoral" habits suggests it is not.

Considered immoral influences by some, both sexual promiscuity and homosexual activity have been the subject of past regulation.²⁴⁵ However, to justify restricting a parent's supposedly unwholesome activities or possessions, there must be conclusive proof of an actual detriment to the particular child or to the parent-child relationship.²⁴⁶ Without this clear proof, courts cannot interfere.²⁴⁷ Thus, cigarettes must have a detrimental influence on

241. *DiStefano v. DiStefano*, 401 N.Y.S.2d 636, 637 (N.Y. App. Div. 1978) (barring the presence of the mother's lesbian lover during visitation because the mother failed to keep her relationship separate from her role as a mother and such failure had a detrimental effect upon her children).

242. Although there are other conceivable reasons for barring smoking, this note focuses on these two because of their current popularity as societal criticisms of tobacco use in general.

243. TOLLISON, *supra* note 9, at 89 (estimating that, in 1988, almost one third of the American public smoked).

244. Although a majority alone does not determine whether something is moral or immoral, in a situation such as this, where the immorality tag stems from a personal preference rather than an objective criticism, the number of persons who disagree is significant.

245. *See supra* text accompanying notes 233-41.

246. *See supra* text accompanying notes 233-36.

247. *See, e.g., Feldman v. Feldman*, 358 N.Y.S.2d 507, 510 (N.Y. App. Div. 1974) (stating that "amorality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not *ipso facto* constitute unfitness for custody").

the child or on the parent-child relationship for their use to substantiate a legitimate restriction on a parent's custodial rights.

Measured against these criteria, smoking does not constitute an immoral influence worthy of restriction. Even if the child were to imitate the smoking parent and adopt the habit, it is difficult to see how this addiction shared by so many can be labeled an immoral act.²⁴⁸ After all, cigarette smoking is no more immoral than explicit photographs and promiscuity, yet these latter activities have previously been held not to justify intrusion.²⁴⁹

Furthermore, it is difficult to see how the habit would affect the parent-child relationship or impair parental skills. Smoking does not prevent a parent from providing the necessities of life or from loving and caring for a child. Unlike drugs or alcohol, inhalation of tobacco smoke does not impair or alter parental abilities. In fact, a nicotine addict may be a better parent as a result of cigarette use. The fulfillment of a craving for the substance may reduce the parent's anxieties, rendering him or her a more functional and rational person.²⁵⁰

Where morality is the asserted interest, regulation of a parent's smoking would not provide a better parent, only a more socially acceptable home environment. Under the "best interests" standard, this subjective judgment is insufficient to influence a custody decision. Unless a parent becomes so entranced by the habit as to neglect the child²⁵¹ or to impair the parent-child relationship, the state cannot restrict or revoke custody based on the parent's use of cigarettes.

With respect to the child's physical health, the second reason offered for the smoking restriction, the child must face an actual detriment or serious threat before parental freedom can be encroached.²⁵² Courts cannot guess what may be in the child's best

248. See *supra* note 236 and accompanying text.

249. See *supra* text accompanying notes 237-41.

250. Members of the medical community have identified nicotine as an anti-depressant and have noted its positive effects on melancholics. Ken Hoover, *Psychiatric Units Question Smoking Ban*, S.F. CHRON., Jan. 1, 1992, at A13. In addition, tobacco products have been known to be effective stress-relievers. Carol J. Williams, *East Europeans' Anxiety is Going Up in Smoke; Despite Health Risks, Cigarette Sales are Booming in the Region. The Stress of Democratization May be to Blame*, L.A. TIMES, Oct. 9, 1990, at 4.

251. See *Schnexnayer v. Schnexnayer*, 371 So. 2d 769 (La. 1979) (where the court revoked custodian status of a mother who neglected the needs of her young children to carry on a notorious affair).

252. See *supra* notes 228-32 and accompanying text.

interests or what may pose a future threat. To survive judicial scrutiny, the restriction must have some bearing on the child it seeks to protect.

Opponents of parental smoking may argue that the habit damages the child's health, an argument supported by a growing body of research on secondhand smoke.²⁵³ These studies indicate that secondhand smoke is even more harmful for children than adults. There are two reasons for this difference. First, children respire more frequently and, as a result, inhale more pollutants than do adults.²⁵⁴ Second, as a consequence of their youth, children have less opportunity to extract themselves from the pollution.²⁵⁵ Research has suggested that children of smoking parents have "measurable deficiencies in physical growth, intellectual and emotional development, and behavior."²⁵⁶ Further, smokers' children are typically more susceptible to respiratory illness and other smoke-related health problems.²⁵⁷

As persuasive as it sounds, however, this evidence regarding the youthful passive smoker is far from conclusive. Many of the studies have been heavily criticized as inaccurate and incomplete; some have been accused of promoting unwarranted anxiety with respect to tobacco pollution.²⁵⁸ Several experts have suggested that damp living conditions,²⁵⁹ coal heating devices²⁶⁰ and gas cooking stoves²⁶¹ have as much, if not more, to do with the child's poor health than does parental smoking.

Not only have the studies' methods and premises come under attack, but the conclusions also. Only weak scientific evidence appears to support a causative effect between parental smoking and viral infection,²⁶² respiratory illness,²⁶³ lung function and capacity²⁶⁴ and increased mortality rate,²⁶⁵ all prominently tout-

253. See 1986 REPORT, *supra* note 33; see also Cowley, *supra* note 33 (reporting a new EPA study which reiterates the gravity of the risk secondary smoke poses to children).

254. Cowan, *supra* note 5, at 397.

255. *Id.*

256. PUBLIC HEALTH SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN 191 (1980).

257. Reynolds, *supra* note 7, at 438.

258. TOLLISON, *supra* note 9, at 119-20.

259. *Id.* at 123, 133.

260. *Id.* at 135.

261. *Id.* at 128.

262. *Id.* at 136.

263. *Id.* at 136, 143-44.

264. *Id.* at 135, 137, 140-41.

ed effects. Opponents of the causal link suggest that dissipation of harmful tobacco smoke requires no more ventilation than necessary to counteract human by-products such as carbon dioxide and body odor.²⁶⁶ Without proper ventilation, cigarette smoke would build up, but so would dust and other substances capable of producing much more harm than a parent's cigarette.²⁶⁷

Thus, the grave effects presumed to flow from the cigarette's tip may not be so conclusively harmful after all. Secondhand smoke remains a debatable issue, leaving unsettled the question of whether a child's health will be impaired by the parent's habit. The symptoms exhibited by some children of smokers have not been shown to be the result of smoke, instead of the product of independent causes or of genetic predisposition.²⁶⁸

In light of such inconclusive findings, courts may not impose a smoking ban in ordinary cases. If the child has a medical condition, for example, allergies, respiratory disease, or asthma, which the smoke would aggravate, then an objective basis for the restriction would exist and its imposition might be proper. Absent such conditions, the parent's use of tobacco is simply irrelevant to custody. The "best interests" standard takes the child's physical health seriously, but only in tandem with the totality of circumstances surrounding his or her custody.²⁶⁹ The environment itself, no matter how hypothetically bad, may not be altered without demonstration of an existing, concrete harm to the child.²⁷⁰ If a parent's actions produce no detriment in the child, deference must be paid to the parent's rights to custody and control.

Therefore, neither moral nor physical justifications provide a basis for the restriction or revocation of custody. Neither assertion can meet the threshold burden which requires proof of damage to the child or detriment to the parent-child relationship. Smoking is relevant only to the extent it clearly affects the child's health or nurturing. Since a smoker's home is no less fit than a

265. *Id.* at 138, 143.

266. *Id.* at 123-24.

267. *Id.* See also Cowley, *supra* note 33 (relating the Tobacco Institute's position that the studies finding a link between parents' secondary smoke and children's respiratory illnesses do not adequately control the causative factors involved).

268. *Id.* at 144.

269. Silverberg & Jonas, *supra* note 209, at 341 n.59. See also *In re Hudson*, 126 P.2d 765, 776 (Wash. 1942) (citing the child's health and well-being as important considerations in the custody evaluation).

270. See *In re Becton*, 474 N.E.2d 1318, 1326 (Ill. App. Ct. 1985)

nonsmoker's, the distinction is irrelevant. Smoking provides inadequate grounds for intrusion.

CONCLUSION

This most recent step in the antismoking crusade advances a bit too far. While reasonable restrictions may be imposed upon persons in community areas, such as in the employment or public domains, there is no vehicle by which those restrictions may be conveyed into the private home. The right to parent, intrinsic in the concept of the right to privacy, prohibits the state's foray into the home in the interest of the child. Parents are endowed with the right to guide their child's moral and physical upbringing and to impose conditions which they feel are warranted.

Furthermore, even in the context of a custody dispute between two natural parents, each possessing the fundamental right to parent, there is no basis for the restriction. The activity in no way impairs the adult's functioning or fitness, nor does it deter the formation of a nurturing and desirable bond with the child. With the conflicting reports of the actual harm presented, there is no assurance that the harm against which it purports to guard exists. Moreover, while future hazards may loom, in light of the many generations of children reared in smoking homes who have not suffered complications or significant disadvantages, smoking simply does not provide adequate grounds to distinguish a fit parent from an unfit parent.

Finally, if smoking does present a risk to the child, the proper route is not necessarily prohibition of the activity. There are numerous alternatives which may better serve the interests of parent and child alike. For example, educational efforts aimed at informing the parent of the risk at which the child may be placed may serve to induce parents to voluntarily avoid cigarettes.²⁷¹ Alternatively, if the problem is truly significant, a legislative effort could be waged which targets the sale and possession of tobacco rather than the personal use.

Imposition of a ban simply cannot be justified either in constitutional or custodial terms. Its breadth reaches beyond the powers of the court and into the realm of the parent. De Beni Souza

271. In accord with this suggestion, one author advocates that, rather than prosecuting parents for smoking in their homes, the state should attempt to educate parents and make them aware of the risks passive smoke pose. Cowan, *supra* note 5, at 424-25.

should not be subjected to conditional custody but should be allowed to exercise her parental rights and personal freedoms to the fullest extent possible. Like all persons who legally smoke cigarettes and lovingly raise children, she should live free from judicial scrutiny in her home and without intrusion on her personal habits.

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