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# Puffing Away Parental Rights: A Survey and Analysis of Whether Secondhand Smoke Exposure is Child Abuse

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# PUFFING AWAY PARENTAL RIGHTS: A SURVEY AND ANALYSIS OF WHETHER SECONDHAND SMOKE EXPOSURE IS CHILD ABUSE

KARLY HUML, CLEVELAND MARSHALL COLLEGE OF LAW, J.D. 2019

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## I. INTRODUCTION

“I will die from secondhand smoke and I have never smoked in my life.”<sup>1</sup> This is a quote from Lynda Mitchell, a fifty-two-year-old woman dying of Chronic Obstructive Pulmonary Disease (COPD).<sup>2</sup> From the day Lynda was born, her parents smoked sixty cigarettes every day.<sup>3</sup> By the time she was one-year-old, Lynda suffered from her first bout of pneumonia and was diagnosed with asthma as a young child.<sup>4</sup> From age nine to fourteen, Lynda went to boarding school so she could escape the toxic air she was living in, but her lungs were already permanently damaged.<sup>5</sup> Lynda now has only twenty two percent lung function and relies on an oxygen machine to help her breathe twenty-four hours a day.<sup>6</sup> Sadly, Lynda’s story is not unique and foretells the future health concerns for millions of children in the United States.

Like Lynda, over 36 million children in the United States<sup>7</sup> will ingest chemicals that are found in pesticides, batteries, gasoline, embalming fluid, paint thinners, and 7,000 other toxins when they inhale secondhand smoke.<sup>8</sup> Every year, over 300,000 of

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<sup>1</sup> *Mother who has never smoked a cigarette has terminal lung disease because of her parents’ 60-a-day habit*, DAILY MAIL (June 23, 2010), <http://www.dailymail.co.uk/health/article-1288525/Shes-cigarette-woman-die-smokers-lung-60-day-parents-second-hand-smoke.html>.

<sup>2</sup> *Id.* The disease is a chronic combination of bronchitis and emphysema caused by noxious particles or gas that trigger an inflammatory response in the lungs. As the air passages become narrower and eventually become fixed, lung capacity is diminished making the simple act of breathing impossible. *Id.* Although COPD is considered a smoker’s disease, 20% of people with COPD never smoked and developed the disease from secondhand smoke. Wyatt Myers, *COPD Diagnosis in Non-Smokers*, EVERYDAYHEALTH (July 23, 2012), <https://www.everydayhealth.com/copd/copd-diagnosis-in-nonsmokers.aspx>.

<sup>3</sup> *Mother who has never smoked a cigarette has terminal lung disease because of her parents’ 60-a-day habit*, *supra* note 1.

<sup>4</sup> *Id.* Infants who are exposed to secondhand smoke are at a much higher risk of being hospitalized for pneumonia before they are one-year-old or dying from Sudden Infant Death Syndrome than children who are not exposed to secondhand smoke. *Protecting Infants and Children from Secondhand Smoke*, HEALTH ALLIANCE PLAN, <https://portal.hap.org/health/smoking/infants.php>.

<sup>5</sup> *Mother who has never smoked a cigarette has terminal lung disease because of her parents’ 60-a-day habit*, *supra* note 1 (“One cigarette in your car, even with the window down, is like forcing a child to spend an evening in a night club full of smokers”).

<sup>6</sup> *Id.*

<sup>7</sup> See Centers for Disease Control, U.S. Dep’t of Health & Human Servs., *Surgeon General’s Report, How Tobacco Smoke Causes Disease* (2010). “Over half of all children in the United States breathe secondhand smoke at home, in cars, or in public places.” *Id.* at 13. There were 73.6 million children in the United States in 2016. ChildStats.gov, *Forum on Child and Family Statistics*, <https://www.childstats.gov/americaschildren/tables/pop1.asp>.

<sup>8</sup> See Centers for Disease Control, U.S. Dep’t of Health & Human Servs., *Secondhand Smoke: Children in the Home* (2017); see also Centers for Disease Control, U.S. Dep’t of Health & Human Servs., *supra* note 7. The following is a list of the most abundant of the 7,000 chemicals found in cigarette smoke: Acetone (damages liver and kidneys), Acrolein (found in tear gas), Benzene (found in gasoline; causes several cancers), Benzopyrene (causes lung and skin cancers and is linked to infertility), Cadmium (found in metal coating and batteries; damages the brain, kidneys and liver), Catechol (found in oil and dye; causes high blood pressure and irritates upper respiratory tract), Crotonaldehyde (found in gasoline; irritates immune system

those children are reported as suffering from bronchitis, pneumonia, and ear infections caused by the toxins found in secondhand smoke and the high exposure they suffer from their parents' smoking habits.<sup>9</sup> This year, secondhand smoke will hospitalize 15,000 children under the age of two due to respiratory infections.<sup>10</sup>

Secondhand smoke is an issue for everyone in our country and a serious health risk for our children. Children are most heavily exposed to secondhand smoke at home because harmful toxins are unavoidable when living with a smoker.<sup>11</sup> In the 1988 landmark case of *Roofeh v. Roofeh*,<sup>12</sup> a New York Appellate Court took the first step in protecting children from their parents' secondhand smoke in the home. In the course of divorce proceedings, Mr. Roofeh filed for a protection order to shield himself and his children from Mrs. Roofeh's secondhand smoke. The court denied the protection order but ordered Mrs. Roofeh to limit her smoking to a single room in the house and prohibited her from smoking in the presence of her husband and children.<sup>13</sup>

After *Roofeh*, many courts around the country<sup>14</sup> began defending children's constitutional rights by considering parental smoking as a factor in custody and visitation rights and started limiting parents' smoking habits. Subsequently, courts have been partially protecting children from secondhand smoke when their parents are getting divorced. However, children whose families are not going through divorce are still largely unprotected from secondhand smoke because their parents are not at the mercy of the court.<sup>15</sup>

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and can cause chromosomal changes), Formaldehyde (found in insulation; damages the digestive system, skin, and lungs), Hydrogen Cyanide (used for gas chamber executions), Lead (damages the brain and kidneys), Nitric Oxide (leads to Alzheimer's disease, Parkinson's disease, and Huntington's disease), Phenol (found in construction materials; damages the central nervous system, cardiovascular system, kidneys, and liver), Quinoline (used to stop corrosion; causes genetic mutation), Styrene (found in fiberglass; heightens risk of leukemia), Toluene (causes confusion, memory loss, and permanent brain damage), Carbon Monoxide (decreases muscle and heart function). Christian Nordqvist, *What Chemicals Are In Cigarette Smoke*, MEDICAL NEWS TODAY (July 13, 2015), <https://www.medicalnewstoday.com/articles/215420.php>.

<sup>9</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *supra* note 7.

<sup>10</sup> See Americans for Nonsmokers' Rights, *Health Effects of Secondhand Smoke on Children* (2009), <http://no-smoke.org/document.php?id=212>.

<sup>11</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Vital Signs: Tobacco Use* (2013), <https://www.cdc.gov/vitalsigns/TobaccoUse/SecondhandSmoke/index.html>. About 50% of children aged 3-19 are exposed to secondhand smoke in their home. *Id.*

<sup>12</sup> *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (N.Y. App. Div. 1988).

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

<sup>14</sup> *Id.* After *Roofeh*, several states began to factor parental smoking into custody decisions, including Ohio, Delaware, Connecticut, Alabama, Louisiana, and Texas.

<sup>15</sup> 50% of children in the United States are not affected by divorce, leaving half of the children in this country unprotected from secondhand smoke. Gretchen Livingston, *Fewer than half of U.S. kids today live in a 'traditional' family*, PEW RESEARCH CENTER (Dec. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>.

Legislators have taken a second step to protect non-smokers from secondhand smoke in workplaces, restaurants, athletic venues, and other public spaces by banning smoking indoors or on the premises and by designating outdoor smoking sections, but these are often unenforced.<sup>16</sup> This is an important step, but non-smoking adults and children are still at risk when smoke carries from room to room and gets blown indoors from designated smoking areas.<sup>17</sup> There is no safe amount of secondhand smoke, thus inhaling it for only a second is dangerous and toxic.<sup>18</sup>

In 2006, Arkansas was one of the first states to take a third step by protecting children from secondhand smoke in vehicles. After only half of a cigarette has been smoked in a car, the air quality levels are ten times higher than what the EPA considers hazardous.<sup>19</sup> These air quality levels are dangerous for everyone, but especially children because their lungs are not yet fully developed.<sup>20</sup> Currently, eight states<sup>21</sup> ban smoking in vehicles with children under specific ages, ranging from 8 to 18.<sup>22</sup> These statutes were enacted to protect children from inhaling toxic chemicals in an enclosed space.<sup>23</sup> While this is another positive step, children are still unprotected in their homes and around their smoking relatives where they are most heavily exposed to secondhand smoke.

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<sup>16</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Smoking & Tobacco Use: Secondhand Smoke Facts* (2017), [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/secondhand\\_smoke/general\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/general_facts/index.htm).

<sup>17</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *supra* note 7. In addition to blowing from room to room or across open air, researchers have begun studying the issue of "thirdhand" smoke, which is secondhand smoke that lingers on the walls, chairs, tables, clothing, and other objects long after the actual smoke is gone. This "thirdhand" smoke contains residual of the most abundant and powerful toxins. Americans for Nonsmokers' Rights, *Thirdhand Smoke Harms People Even After Smoking Stops* (2019), <https://no-smoke.org/smokefree-threats/thirdhand-smoke/>.

<sup>18</sup> See Centers for Disease Control, U.S. Dep't of Health & Human Servs., *Surgeon General's Report, The Health Consequences of Involuntary Exposure to Tobacco Smoke* (2006).

<sup>19</sup> *Smoking In Cars Is Toxic*, TOBACCO FREE CA, <http://tobaccofreeca.com/secondhand-smoke/in-cars/>.

<sup>20</sup> *Id.* A person's lungs are not fully mature and do not reach their full potential capacity until they are 20-25 years old. *Lung Capacity and Aging*, AMERICAN LUNG ASSOCIATION (Mar. 20, 2018), <http://www.lung.org/lung-health-and-diseases/how-lungs-work/lung-capacity-and-aging.html>.

<sup>21</sup> Arkansas (bans smoking with children under the age of 14 in the vehicle), California (<18), Louisiana (<13), Maine (<16), Oregon (<18), Puerto Rico (<18), Utah (<16), Vermont (<8).

<sup>22</sup> See Americans for Nonsmokers' Rights, *Smoke Free Cars* (2017), <http://www.no-smoke.org/learnmore.php?id=616>.

<sup>23</sup> *Id.* "Secondhand smoke in cars can be especially harmful to children because cars are small, confined spaces where children are closer to the smoker and the smoke. While a child's lungs are still developing, they can be easily damaged by exposure to the high level of secondhand smoke in a car." Environmental Protection Agency, *Secondhand Smoke and Smoke-free Homes*, <https://www.epa.gov/indoor-air-quality-iaq/secondhand-smoke-and-smoke-free-homes>.

The steps taken thus far to protect children in public areas, custody cases, and in vehicles show the legislature's awareness of the chemical harms of secondhand smoke for children. This article will analyze those steps and discuss what they mean for both parents' and children's constitutional rights. This article will propose that the legislature take a vital fourth step by including secondhand smoke exposure in child abuse laws.

Section II of this article provides the history of smoking tobacco and its transition from a trendy social status to an unpopular, harmful habit. Section II will also introduce the steps that have been taken so far to protect children from secondhand smoke. Section III, Part A will discuss how and why there has never been a successful constitutional argument against smoking bans. Section III, Part B will look further into the three steps that courts and legislators have already taken to protect children from secondhand smoke and how those steps are constitutionally permissible. Section III, Part C will discuss whether courts and legislators can apply the same constitutional basis of existing statutes to take the next step and interpret child abuse statutes to include secondhand smoke exposure.

## II. BACKGROUND

### A. *Surgeon General's Reports*

Historically, smoking tobacco was socially acceptable and was a symbol of social status. Hollywood favorites like Audrey Hepburn and Humphrey Bogart made smoking tobacco look stylish, and eventually the mass production of cigarettes made them much more affordable and readily available.<sup>24</sup> However, that began to change in 1964 when the Surgeon General released a report condemning tobacco as the cause of cancer and other serious diseases.<sup>25</sup>

The 1964 Surgeon General's report was based on an extensive study and concluded that cigarette smoking was linked to a 70% death increase.<sup>26</sup> More than 50,000 studies concluded that this extreme increase in tobacco users' death rate was attributable to smoking related diseases such as lung cancer, bronchitis, emphysema, and cardiovascular diseases.<sup>27</sup> The Surgeon General's report went on to explain why smoking tobacco became so popular, making this the first study to prove that tobacco is a psychologically addicting substance.<sup>28</sup>

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<sup>24</sup> Jason Rodrigues, *When smoking was cool, cheap, legal and socially acceptable*, THE GUARDIAN (March 31, 2009), <https://www.theguardian.com/lifeandstyle/2009/apr/01/tobacco-industry-marketing>.

<sup>25</sup> See U.S. Dep't of Health, Education, and Welfare Public Health Servs., *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service, Publication No. 1103* (1964), <https://profiles.nlm.nih.gov/ps/access/NNBBMQ.pdf>.

<sup>26</sup> *Id.* This death rate is attributable to over 14 different diseases caused by secondhand smoke.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* Tobacco smokers become dependent on the practice of smoking and can suffer significant emotional disturbances if they are deprived of tobacco.

In 1986, the Surgeon General released a subsequent report that exposed the serious health risks of secondhand smoke.<sup>29</sup> The Surgeon General prefaced this report by stating “for smokers, it is their responsibility to assure that their behavior does not jeopardize the health of others.”<sup>30</sup> Not only did this report reiterate the findings of the 1964 report, it also proved how smokers are subjecting non-smokers to all the health defects and diseases that they expose themselves to.<sup>31</sup> This report offered the numbing fact that inhaling secondhand smoke is the largest preventable cause of death and disability in the United States.<sup>32</sup> Further, this report refers to secondhand smoke as “involuntary smoking,” because non-smokers who are forced to inhale secondhand smoke suffer the same harmful effects as the people who choose to put themselves at risk.<sup>33</sup> Following the release of this report, tobacco’s popularity began to rapidly decrease.

### B. What is Secondhand Smoke?

Secondhand smoke is the combination of mainstream smoke—the smoke exhaled by the smoker— and sidestream smoke—the smoke from the burning end of a cigarette.<sup>34</sup> Secondhand smoke emits over 7,000 chemicals, 70 of which are cancer-causing and hundreds of which are toxic and cause many different health defects and diseases.<sup>35</sup> Exposure to secondhand smoke immediately affects the cardiovascular system and blood vessels, carrying these toxins throughout the body and to the inhalant’s heart, brain, and lungs.<sup>36</sup>

People are exposed to secondhand smoke at home, at work, in vehicles, and in a vast majority of public places where there are people currently smoking or where a person had been smoking recently and left a smoke-filled space. People inhale secondhand smoke in these places directly from a smoker, from a burning cigarette, from smoke lingering on smokers’ clothing, and from smoke drifting from room to room and through the open air.<sup>37</sup> Even the briefest exposure to secondhand smoke

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<sup>29</sup> See U.S. Dep’t of Health & Human Servs., *The Health Consequences of Involuntary Smoking: a report of the Surgeon General* (1986), <https://profiles.nlm.nih.gov/ps/access/NNBCPM.pdf>.

<sup>30</sup> *Id.* “The quality of the indoor environment must be a concern of all who control and occupy that environment. Protection of individuals from exposure to environmental tobacco smoke is therefore a responsibility shared by all.” *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* This same conclusion has been reached in over 50,000 studies.

<sup>33</sup> *Id.*

<sup>34</sup> See Centers for Disease Control, U.S. Dep’t of Health & Human Servs., *supra* note 16.

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

<sup>36</sup> *Id.* Secondhand smoke is responsible for almost 34,000 heart disease deaths and 7,300 lung cancer deaths every year from 2005-2009 among non-smoking adults, and increases their risk for having a stroke by 20-30%.

<sup>37</sup> See Centers for Disease Control, U.S. Dep’t of Health & Human Servs., *How We Can Protect Our Children From Secondhand Smoke: A Parent’s Guide* (2017), [https://www.cdc.gov/tobacco/basic\\_information/secondhand\\_smoke/protect\\_children/pdfs/gen-pop-2ndhand-508.pdf](https://www.cdc.gov/tobacco/basic_information/secondhand_smoke/protect_children/pdfs/gen-pop-2ndhand-508.pdf). Smoke travels under doors, through open windows, and through very

immediately affects vital organs, proving that there is no risk-free amount of secondhand smoke.<sup>38</sup>

C. *How Does Secondhand Smoke Harm Children?*

Children have a higher risk of secondhand smoke exposure than adults.<sup>39</sup> While people of all ages are subject to secondhand smoke in public, children are more likely to be exposed to it at home, at daycare, and in vehicles where they cannot escape it.<sup>40</sup> Children cannot escape secondhand smoke for a number of reasons. Infants physically cannot get up and walk away from exposure. Children inhale secondhand smoke from the clothing of parents and caregivers, which are unavoidable encounters for dependent children. One judge described this as children involuntarily smoking while being held captive in a highchair.<sup>41</sup> Older children are prevented from avoiding secondhand smoke when their parents smoke in the house and do not allow them to go outside or leave the home. Even if a parent limits their smoking to one room of the house, the smoke still carries throughout the entire house, including into the children's bedrooms, bathrooms, and the kitchen.<sup>42</sup> Children who are forced to inhale these chemical toxins tend to have underdeveloped lungs and frequently suffer from diseases like pneumonia, bronchitis, asthma, and ear infections as children.<sup>43</sup> This is because children's bodily tissues and organs are not yet fully developed, putting them at a much higher risk to suffer from secondhand smoke exposure than adults.<sup>44</sup> When exposed children grow into adulthood, they are at high risk of suffering from heart disease, lung cancer, stroke, and premature death.<sup>45</sup>

Almost half of all the children in the United States live with at least one smoking adult.<sup>46</sup> This number does not account for children who live in an apartment building with smoking neighbors, where the smoke carries from apartment to apartment and still affects non-smoking households.<sup>47</sup> Furthermore, parents who smoke in the home

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small cracks. Air purifiers cannot effectively remove smoke and its toxins. The only way to have no secondhand smoke toxins in the home is to not smoke in the home at all.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* "Children are almost twice as likely as non-smoking adults to be exposed to secondhand smoke."

<sup>40</sup> *Id.*

<sup>41</sup> Judge William F. Chinnock, *No Smoking Around Children: The Family Courts' Mandatory Duty To Restrain Parents And Other Persons From Smoking Around Children*, 45 Ariz. L. Rev. 801 (2003).

<sup>42</sup> *Id.*

<sup>43</sup> *Protecting Infants and Children from Secondhand Smoke*, *supra* note 4. Severe asthma attacks can kill children. Additionally, frequent ear infections caused by secondhand smoke requires young children to undergo surgery to have tubes put in their ears. Smoking while pregnant or exposing an infant to secondhand smoke greatly increases the child's risk of dying from Sudden Infant Death Syndrome (SIDS).

<sup>44</sup> Chinnock, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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



even when their children are not there are still endangering their health.<sup>48</sup> After smoking just one cigarette in a room, it takes over three hours for 95% of the smoke and carcinogens to dissipate.<sup>49</sup>

*D. Courts and State Legislators Have Taken Three Steps to Begin Protecting Children from Secondhand Smoke*

In recent years, we have seen tobacco's declining popularity manifest in court cases and legislation. Tobacco use has been considered in court cases where parental smoking is factored into decisions on custody and visitation rights. As more courts began imposing smoking limitations on parents, restaurants, sports arenas, college campuses, and many others, certain places began implementing smoking restrictions on their own or because of legislation. Soon after, state legislators took a stand in protecting children against secondhand smoke by enacting laws that ban smoking in vehicles when there are children present.

1. Protecting Children in Custody Cases

*Roofeh v. Roofeh* in 1988 was the landmark case that spearheaded the movement for family courts to consider tobacco use as a factor in deciding custodial rights.<sup>50</sup> The Texas Court of Appeals ruled in *Pizzitola v. Pizzitola* that the adolescent daughter would be safer and healthier with her non-smoking father than with her smoking mother who was her primary caregiver.<sup>51</sup> In *Badeaux v. Badeaux* in 1989, the Louisiana Appeals Court limited a father's visitation rights. The father lived with his parents who both smoked, and the court found that the one-year old child's, who suffered from asthma and repeated respiratory infections, living environment when he was with his father was detrimental to his health.<sup>52</sup> In *Skidmore-Shafer v. Shafer* in 1999, the Alabama Appellate Court held that a parent who smoked and knowingly exposed their child to harm "directly contributed to the child's misery and suffering".<sup>53</sup> The Alabama court found that taking custody away from the smoking parent would be in the child's best interest and best for the child's welfare.<sup>54</sup> These courts and many others have taken a beneficial step in protecting children in divorce cases from secondhand smoke. However, the other 50% of children in America that are not involved in divorce cases are still unprotected.<sup>55</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Roofeh*, 525 N.Y.S.2d 765. Mrs. Roofeh initiated divorce and custody proceedings. In the course of trial, the Mr. Roofeh filed for an order to protect himself and his children from Mrs. Roofeh's secondhand smoke. The Supreme Court of New York ordered Mrs. Roofeh to limit her smoking to a single room in the house and prohibited her from smoking in the presence of her children.

<sup>51</sup> *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. App. 1988).

<sup>52</sup> *Badeaux v. Badeaux*, 541 So. 2d 301 (La. Ct. App. 1989).

<sup>53</sup> *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097 (Ala. Civ. App. 1999).

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

<sup>55</sup> *Id.*

## 2. Protecting Children in Public

In addition to suffering from secondhand smoke exposure at home, children are exposed to secondhand smoke in public.<sup>56</sup> Prior to public smoking bans, children were exposed to secondhand smoke at sporting events, parks, the beach, and other places, regardless of whether their parents were smokers.<sup>57</sup> Children whose parents did smoke were exposed even more in public when their parents chose to sit in the smoking section of restaurants or to only go to places that allowed smoking.<sup>58</sup>

In 1995, California became the first state to make a statewide public smoking ban, which banned smoking in all enclosed workplaces.<sup>59</sup> Today, a majority of states have a statewide smoking ban in enclosed workplaces,<sup>60</sup> but each state has varying exemptions from the ban ranging from casinos to bars and banquet halls.<sup>61</sup> Outdoor smoking bans have also been steadily increasing<sup>62</sup> but have been more controversial than indoor public bans. Some opponents argue that secondhand smoke isn't nearly as harmful in the open air as it is in enclosed spaces.<sup>63</sup> However, research overwhelmingly shows that the harm from secondhand smoke is still present, no matter how minimal the exposure.<sup>64</sup> Legislators have relied on the vast amount of research to legally enact public smoking bans, which are sweeping the country and show that legislators are aware of their duty to protect non-smokers.<sup>65</sup>

## 3. Protecting Children in Vehicles

As courts were protecting children in divorce cases and public venues were banning smoking, the legislature took another step to protect children from secondhand smoke by enacting vehicle smoking bans. In 2006, Arkansas took the next step to protect children from secondhand smoke by enacting legislation to ban

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<sup>56</sup> Associated Press, *Report: Ban smoking in public places*, NBC NEWS (June 27, 2006), [http://www.nbcnews.com/id/13569976/ns/health-addictions/t/report-ban-smoking-public-places/#.Wq\\_psmrwbIU](http://www.nbcnews.com/id/13569976/ns/health-addictions/t/report-ban-smoking-public-places/#.Wq_psmrwbIU).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *List of Smoking Bans in the United States*, [https://en.wikipedia.org/wiki/List\\_of\\_smoking\\_bans\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_smoking_bans_in_the_United_States). This happened nine years after the Surgeon General's first report on the harms of secondhand smoke.

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

<sup>61</sup> *Id.*

<sup>62</sup> *Outdoor Smoking Bans Double in U.S. Past 5 Years*, CBS NEWS (Aug. 8, 2013), <https://www.cbsnews.com/news/outdoor-smoking-bans-double-in-us-past-5-years/>. Over 2,600 outdoor venues around the country have banned smoking in zoos, on beaches, and at bus stops, to name a few. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* Research is still developing to determine the differences between indoor and outdoor secondhand smoke.

<sup>65</sup> *List of Smoking Bans in the United States*, *supra* note 59.

smoking in vehicles with children present.<sup>66</sup> In the past twelve years, six more states and Puerto Rico have taken this step.<sup>67</sup>

However, this protection<sup>68</sup> for children, as well as the punishment<sup>69</sup> for violating these laws, varies greatly between these eight states. For example, all children under the age of eighteen are protected in Oregon, while Vermont only protects children under the age of eight.<sup>70</sup> In some states, violating the smoking ban is only a secondary offense, meaning that the smoker can only be ticketed if they are pulled over for something else and smoking at the time they're pulled over.<sup>71</sup> Furthermore, some states will fine the offender one hundred and fifty dollars while other states will only fine the offender fifty dollars.<sup>72</sup>

The discrepancies among the eight states that ban smoking in vehicles and states that do not have any vehicle smoking bans highlight the lack of knowledge and awareness throughout the country regarding the harmful and toxic effects of secondhand smoke, especially in the forty-three unprotected states. This step that eight states have taken shows some legislative recognition of the injustice and maltreatment of children when they are exposed to secondhand smoke and that legislative recognition needs to be mandated nationwide to protect children more consistently.

### III. ANALYSIS

#### A. *There Has Never Been a Successful Constitutional Argument Against Smoking Bans*

In the United States, there are currently no federal smoking bans, leaving the issue to state regulation.<sup>73</sup> Cities, state legislators, public venues, and courts have increasingly imposed smoking bans in different ways over the past several years. As these smoking bans grow in number, so has the opposition to the smoking bans. Many people have tried to bring suit against smoking bans with constitutional rights

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<sup>66</sup> See ARK. CODE ANN. § 20-27-1903 (2015).

<sup>67</sup> Arkansas bans smoking with children under the age of 14 in the vehicle. California (<18), Louisiana (<13), Maine (<16), Oregon (<18), Puerto Rico (<18), Utah (<16), Vermont (<8).

<sup>68</sup> Vermont only protects children under the age of eight, whereas California, Oregon, and Puerto Rico protect children under the age of eighteen. In four of the eight states – Arkansas, Louisiana, Puerto Rico, and Vermont – violating the smoking ban is a primary offense, but in the other four states it is a secondary offense, meaning the driver cannot be pulled over and ticketed solely for this violation. See 23 V.S.A § 1134b (2014); CAL. HEALTH & SAFETY CODE § 118948 (2007); O.R.S. § 811.193 (2015); 24 L.P.R.A. § 892 (u) (2006).

<sup>69</sup> In Maine, violating the smoking ban is a secondary offense punishable by a fifty dollar fine. In Louisiana, it is a primary offense punishable by a fine of up to one hundred and fifty dollars or a minimum of twenty-four hours of community service. See ME. REV. STAT. ANN. TIT. 22 § 1549 (2008). See LA. REV. STAT. ANN. § 32:300.4 (2006).

<sup>70</sup> *Supra*, note 67.

<sup>71</sup> See ME. REV. STAT. ANN. TIT. 22 § 1549 (2008).

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

<sup>73</sup> *List of Smoking Bans in the United States*, *supra* note 59.

arguments under the First Amendment and the Fourteenth Amendment but none have succeeded.<sup>74</sup>

1. Smoking Bans Do Not Violate the First Amendment Right to Assembly and Association or to Free Expressive Speech

First, plaintiffs have argued that smoking bans are a violation of First Amendment rights to assembly and association and to free expressive speech.<sup>75</sup> Courts have consistently held that, at the very most, smoking is only a single component of associational interactions that a person can experience and, therefore; smoking bans do not unreasonably restrict smokers' freedom to associate with whomever they choose.<sup>76</sup> Smoking bans are constitutional because they are not imposed for the purpose of suppressing expressive speech, but for the purpose of protecting the greater good.<sup>77</sup> Additionally, smoking is not "sufficiently expressive conduct that would merit protection under the First Amendment."<sup>78</sup>

For protection under the First Amendment, conduct must be sufficiently expressive, meaning that the message of the conduct is not too vague to be received by most people who encounter the conduct.<sup>79</sup> Courts have held that most smokers' motivation to light up a cigarette is not to convey an expressive message, and even if it was, most people would not receive the action as a message of political speech, therefore rendering smoking insufficiently expressive and not deserving of protection under the First Amendment.<sup>80</sup> Accordingly, the New York Southern District Court, joined by many other courts, reject First Amendment arguments against smoking bans.<sup>81</sup>

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<sup>74</sup> Saad v. Vill. of Orland Park, U.S. Dist. No. 11-C-7419 (N. Dist. Ill. 2011) (citing *Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois*, 39 Loy. U. Chi. L.J. 847, 871). The most common question and argument raised is whether smoking bans are constitutional.

<sup>75</sup> In one such case, *New York City C.L.A.S.H. v. City of New York*, a lobbyist group against smoker harassment argued that a smoking ban inside bars and food service establishments violated the First Amendment. CLASH argued that the smoking bans burden smokers' rights to assembly and association because smoking is so inherent to social interactions at bars and restaurants. *New York City C.L.A.S.H. v. City of New York*, 315 F. Supp. 2d 461, 472 (U.S. Dist. 2004). Next, CLASH argued that smoking bans violate smokers' First Amendment right to free expressive speech. CLASH alleged that smoking is a type of political speech used to convey a message against the repressive State laws. *Id.* at 476-80.

<sup>76</sup> *Id.* Smoking is only one social component among others in a bar such as eating, drinking, talking, viewing entertainment, and mingling with other customers.

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

<sup>78</sup> *Id.*

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

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

<sup>81</sup> *Id.* See also *Curious Theater Co. v. Colo. Dep't of Pub. Health & Env't*, 216 P.3d 71 (Colo. App. 2008); *Am. Legion Post No. 149 v. Dep't of Health*, 192 P.3d 306 (2008); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522 (S.D.N.Y. 2005).

## 2. Smoking Bans Do Not Violate Fourteenth Amendment Rights Under the Equal Protection Clause or the Privileges and Immunities Clause

Second, plaintiffs have argued that smoking bans violate Fourteenth Amendment rights under the Equal Protection Clause<sup>82</sup> and the Privileges and Immunities Clause.<sup>83</sup> Smoking ban opponents argue that their rights under the Equal Protection Clause are violated because they are discriminated against and classified as “second class citizens”.<sup>84</sup> Opponents argue that smoking bans violate the Privileges and Immunities Clause because they infringe upon their right to enter into contracts with bar and restaurant owners.<sup>85</sup> Courts have consistently rejected arguments under the Equal Protection Clause on the grounds that smokers are not a protected class and smoking bans do not interfere with any fundamental rights.<sup>86</sup> Furthermore, smoking bans do not violate equal protection because the government is able to articulate a rational basis for smoking bans; the government has a greater interest in protecting “the health and welfare” of people exposed to secondhand smoke than it does in protecting smokers.<sup>87</sup>

Courts have also found arguments against public smoking bans under the Privileges and Immunities Clause to be “wholly without merit” because there is no implied requisite agreement to smoke when a smoker enters an establishment.<sup>88</sup> Accordingly, courts have held that there is no merit to Fourteenth Amendment claims, and no court has ever upheld a Fourteenth Amendment claim against a smoking ban.<sup>89</sup>

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<sup>82</sup> *C.L.A.S.H.*, 315 F. Supp. 2d 461 at 472-76. In its Equal Protection argument, CLASH alleged that smoking bans classify smokers as “second class citizens”. CLASH also makes a Due Process argument, in which it asserts that the language of the smoking ban is too vague in defining “bar” and “food service establishment” and that this vagueness will “lead to arbitrary and discriminatory enforcement”. *Id.*

<sup>83</sup> In its Privileges and Immunities argument, CLASH asserted that the smoking ban impaired “the right of smokers to enter into implied contracts” with bar and restaurant owners. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* This police power is “well-recognized and far-reaching”.

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

<sup>89</sup> *Id.* See also Amanda Bosky, *Ashes to Ashes: Secondhand Smoke Meets a Timely Death in Illinois*, 39 LOY. U. CHI. L.J. 847, 871; *Am. Legion Post No. 149*, 192 P.3d 306; Thiel v. Nelson, 422 F. Supp. 2d 1024 (W.D. Wis. 2006).

*B. Courts Across the Country Have Taken Three Noteworthy and Constitutionally Proper Steps in an Effort to Protect People's Health and Welfare Against Secondhand Smoke*

1. The First Step: Weighing Parental Smoking as a Factor in Custody and Visitation Rights Cases

In 1988, courts took the first monumental step in protecting children from the harmful effects of secondhand smoke.<sup>90</sup> As detailed in the background section, divorce courts began giving custody to the non-smoking parent or setting restrictions on when and where parents could smoke. These restrictions on parents are legally permissible because smoking is not a constitutional right.<sup>91</sup> There is no constitutional right to smoke because it is not enumerated in the Constitution and is not protected under the Due Process Clause or Equal Protection Clause.<sup>92</sup> Further, the court has discretion to restrict parents' constitutional rights when their activity impairs the physical health of their child.<sup>93</sup>

Courts have held that "the right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her."<sup>94</sup> This rationale specifically pertains to children because of their dependence on their parents and their inability to walk away from their parents or leave their home when a parent is smoking.<sup>95</sup> Furthermore, courts have authority to protect children

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<sup>90</sup> *Mother who has never smoked a cigarette has terminal lung disease because of her parents' 60-a-day habit*, *supra* note 1.

<sup>91</sup> Samantha K. Graff, *There is No Constitutional Right to Smoke*, TOBACCO CONTROL LEGAL CONSORTIUM, <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-constitution-2008.pdf>. The right to smoke is not specifically listed in the Constitution and is not protected under the Due Process Clause or Equal Protection Clause. Therefore, the Constitution "does not bar the passage of local, state, or federal smoke-free laws and other restrictions on smoking." *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Unger v. Unger*, 611 A.2d 691 (Super. Ct. 1994). This case involved a custody battle over two children, one of which had chronic bronchitis that a doctor ruled was caused by the mother's excessive smoking. The court held that "the fact that a parent smokes cigarettes is a permissible parental habit to consider when determining what is in the best interests of the children because it may affect their health and safety." The court further stated "the resolution of the conflict between the right of the smoker to smoke and the right of nonsmokers to breathe clean air involves a determination of when and where rather than whether a smoker may legally smoke." *Id.*

<sup>94</sup> *Id.* (citing *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516 (Super. Ct. 1976)). "Every day is a fight to breathe. I am terrified of catching a cold because it goes to my lungs and I end up in the emergency room. I can't dance with my husband, run with my children or even call to them because of the strain on my lungs. To be around a smoker is torture for me and makes me ill for days. I am a prisoner in my own body, unable to do the normal things others take for granted... [A]lthough I have never smoked, my parents and their friends were all heavy smokers... I now know that my lung problems are the result of 18 years of breathing secondhand smoke." This is the account of a thirty-seven-year-old woman. Jon D. Anderson, *Parental Smoking: A Form of Child Abuse?* 77 Marq. L. Rev. 360 (1994).

<sup>95</sup> *Id.* In a case similar to those detailed in the background section, an Ohio Court of Appeals held that the lower court rightfully restricted the parents' smoking habits to protect the children. The court stated that "an avalanche of authoritative scientific studies is clear and convincing

from substantial harms under the doctrine of *Parens Patriae*, which gives the state the duty of protecting those that are unable to protect themselves.<sup>96</sup> This first step, though very important and precedent setting, only protects children that are in the midst of divorce cases. Following this first step, state legislators noticed the large void and took the next step to further protect non-smokers.

## 2. The Second Step: Public Smoking Bans

Not only have courts taken notice of the issue of childhood secondhand smoke exposure and obeyed their duty to react, state legislators have also taken a stance on this issue. A majority of states have acted on behalf of non-smokers by enacting public smoking bans.<sup>97</sup> These bans protect employees, customers, tourists, and many other non-smokers that go to public places. State legislators realize that regulating personal behavior can be controversial, so many states that ban smoking have given individual businesses the choice of having a designated smoking area, but it must meet certain regulations and codes.<sup>98</sup>

States can legally enact public smoking bans because they have a higher interest in protecting non-smokers from disease and illness than they do in protecting smokers who subject people to disease and illness.<sup>99</sup> Furthermore, public smoking bans have constitutional foundations similar to many other laws that seek to protect society from the actions of other people or from behavior that could cause injury or disease.<sup>100</sup> For example, bans on lead paint are constitutionally proper because they preserve the health and welfare of the general public and protect against disease and illness.<sup>101</sup> As

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evidence that secondhand smoke constitutes a real and substantial danger to children because it causes and aggravates serious diseases in children" and that family courts are mandated to consider the danger of secondhand smoke as a "relevant factor" and a "physical health factor." *Day v. Day*, 2005-Ohio-4343 (Ct. App.); see *In re Julie Anne*, 121 Ohio Misc.2d 20 (Ct. Com. Pl).

<sup>96</sup> "The courts, in their *parens patriae* role, are an arm of the State serving the important societal function of protecting children, even from their parents if necessary." *Johnita M.D. v. David D.D.*, 191 Misc.2d 301, 740 N.Y.S.2d 811 (Sup. Ct. 2002); see also *Stephanie L. v. Benjamin L.*, 158 Misc.2d 665, 602 N.Y.S.2d 80 (Sup. Ct. 1993). *Parens patriae* is further defined as "the capacity of the state to care for and protect those unable to do so for themselves such as children. The authority and responsibility of the court to protect children in their role as civil litigants is well-settled. Additionally, under *parens patriae*, we are empowered to intervene to protect children from both physical and emotional harm." *Segal v. Lynch*, 413 N.J. Super. 171, 993 A.2d 1229 (Sup. Ct. App. Div. 2010).

<sup>97</sup> Centers for Disease Control, U.S. Dep't of Health & Human Servs., *supra* note 37.

<sup>98</sup> *Id.* Some regulations consist of a fenced in outdoor area, a separate closed off room, or signs requiring smokers to stand at least twenty feet from the building.

<sup>99</sup> Associated Press, *supra* note 57.

<sup>100</sup> Dustin Heap, *No Smoking Laws for all Fifty States*, SIGNS, <https://www.signs.com/blog/no-smoking-laws-for-all-fifty-states/> (May 2004). Similar to laws prohibiting assault and driving recklessly, states can constitutionally enact smoking bans because individuals do not have the right to act in a way that harms other people or endangers their health and wellbeing.

<sup>101</sup> *Prevention Tips*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/nceh/lead/tips.htm>.

public smoking bans spread across the country, legislators began to realize that vehicles are hot-spots for secondhand smoke and that children are highly affected.

a. The Third Step: Smoking Bans in Vehicles with Children Present

As the research surrounding the harmful effects of secondhand smoke on children continues to expand, so does the legislation to protect children. In 2006, state legislators started banning smoking in private vehicles when children are present to protect them from inhaling secondhand smoke in an inescapable, confined space.<sup>102</sup> The constitutional foundations for vehicle smoking bans are similar to the past two steps. First, individuals do not have a constitutional right to smoke, and that is true even in the privacy of a person's vehicle.<sup>103</sup> Second, the State has a duty to protect children that are unable to care for themselves.<sup>104</sup> Children are at a much higher risk of harm from secondhand smoke in a vehicle because of the small, confined space and their inability to leave the vehicle for fresh air, triggering the State's duty to protect them.<sup>105</sup>

This third step is a positive movement towards further protecting children. Overall, these first three steps take a relaxed approach at protecting children whose parents are divorcing, children who go out to public places, and children in vehicles. However, these steps are not sufficiently monitored and have many loopholes,<sup>106</sup> leaving a majority of the children in the United States exposed to the thousands of toxins in secondhand smoke and the diseases that come with it.<sup>107</sup>

The current approach at protecting children from secondhand smoke is secondary. Children in "secondary vehicle ban states" are only protected when the smoking adult is caught speeding or making another primary violation and is smoking at the time they get pulled over. Children only get secondary protection in the home as well. Parents' smoking habits are only sometimes regulated in the course of divorce proceedings and even those restrictions are very lightly monitored. Children who live with married parents will likely never end up in family court, and therefore, will never get the opportunity to be legally protected from secondhand smoke.

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<sup>102</sup> However, the secondary nature of many vehicle smoking bans still leaves children widely unprotected. The results of a 2012 study proved that ventilating a car by rolling down the windows or turning on the air conditioner while smoking was not enough to keep the air quality at a safe level. *When Adults Smoke in Cars, Child Passengers Suffer: Study*, U.S. NEWS (Oct. 16, 2012, 9:00am), <https://health.usnews.com/health-news/news/articles/2012/10/16/when-adults-smoke-in-cars-child-passengers-suffer-study>.

<sup>103</sup> *Outdoor Smoking Bans Double in U.S. Past 5 Years*, *supra* note 62.

<sup>104</sup> ARK. CODE ANN. § 20-27-1903.

<sup>105</sup> *Id.*; see also *Smoking in Cars is Toxic*, TOBACCO FREE CA, <http://tobaccofreeca.com/secondhand-smoke/in-cars/>.

<sup>106</sup> Parents' whose smoking habits are limited by family courts are not sufficiently monitored and likely only get caught violating the court-imposed limitations if their ex-spouse reports the behavior. Public smoking bans are hard to monitor in large areas like college campuses and public beaches. Vehicle smoking bans are difficult to monitor because a parent who smokes with a child in the car will likely get caught if they are speeding and smoking when they get pulled over.

<sup>107</sup> *Mother who has never smoked a cigarette has terminal lung disease because of her parents' 60-a-day habit*, *supra* note 1.



These secondary steps that have been taken are important, but children can only be successfully protected from secondhand smoke if the courts and legislators take a primary approach at protecting children's health and wellbeing. To take the necessary primary step, courts and legislators must include secondhand smoke exposure in child abuse laws.

C. *The Next Step, Child Abuse Charges – Closing the Loopholes Based on The Constitutional Foundations of the First Three Steps*

1. Where Are the Loopholes that Allow Secondhand Smoke to Harm Children?

Children who are not in the midst of divorce proceedings, children whose divorced parents are disregarding their court-mandated smoking bans, children in the presence of adults who are not caught smoking in vehicles, children that are in vehicles with a smoking adult in a state where it is a secondary offense – these are only a small sample of the ways that children are still unprotected from secondhand smoke in our country. The three steps that have already been taken to protect children are a positive start, but many children are still unprotected from adults who are unaware of bans and regulations, parents who are unaware of the toxic harms of secondhand smoke on their children, and people who smoke around children in unregulated areas.

2. Why Haven't We Closed the Loopholes?

Regulated parental smoking is difficult to monitor. In custody cases, the parents are putting themselves into the courts discretion, and therefore, subjecting their kids to an opportunity for protection.<sup>108</sup> The same is not true for non-divorcing families, so it is difficult for the court to protect children when they are unaware of the harms they are suffering. Further, courts are reluctant to regulate parents' habits, both inside and outside the home, because they would likely face backlash for intervening in a parent's right to raise their child and make their own decisions.<sup>109</sup> Several Supreme Court rulings show that the court is usually hesitant to intervene in the privacy of family life.<sup>110</sup> However, courts that have intervened, justify the intervention with their duty

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<sup>108</sup> Mireille O. Butler, *Parental Autonomy Versus Children's Health Rights: Should Parents Be Prohibited from Smoking in the Presence of Their Children?*, 74 WASH. U. L. Q. 223, 239 (1996).

<sup>109</sup> Many families would push back against regulations because of the notion of the "family sphere" and the belief that the government should not intervene in family privacy. *Id.* at 227.

<sup>110</sup> In *Meyer v. Nebraska*, the court held that a statute was unreasonable that prevented parents from teaching their children a foreign language before finishing eighth grade because it interfered with parental autonomy and violated parents' rights to liberty. However, the Supreme Court suggested that the statute would have been justified in interfering with parental rights if the State had shown that teaching children foreign language was detrimental to their health. *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although courts respect individual's privacy, they only do so where a person is not violating laws in their home. Like laws prohibiting assault and fraud, laws to protect children do not stop at the door of a person's home and a person's rights to privacy does not give them immunity inside their home.

to protect children from harm.<sup>111</sup> Parents do have a right to privacy and autonomy in raising their children, but the Supreme Court has ruled that the right to privacy is not absolute and does not give parents the right to harm their children.<sup>112</sup>

### 3. How Can We Close the Loopholes?

Courts and legislators can fill this void by relying on the same constitutional foundations in the first three steps: smoking is not a constitutional right, the state has a duty to protect children who cannot protect themselves, and the right to risk one's own health does not come with the right to risk another person's health.<sup>113</sup> By relying on these constitutional foundations, courts can interpret child abuse laws to include exposure to secondhand smoke and legislators can enact statutes prohibiting smoking cigarettes in the presence of children.

Most states' child abuse laws contain some close variation of the following elements:

Any act (or failure to act) that:

- (1.) Results in imminent risk or serious harm to a child's health and welfare due to physical, emotional, or sexual abuse;
- (2.) Affects a child (typically under the age of 18);
- (3.) By a parent or caregiver who is responsible for the child's welfare.<sup>114</sup>

The second element – “affects a child” – is automatically satisfied because it is well settled that smoking has both physical and behavioral effects on children.<sup>115</sup> The third element – “By a parent or caregiver” – is automatically satisfied whenever a parent or caregiver smokes around the child. Secondhand smoke affects everyone in the vicinity of the smoker, and this affect is more frequent for children when the smoker is the parent or caregiver.<sup>116</sup> However, the first element is the one that gives courts leeway to interpret secondhand smoke as an “imminent risk or serious harm,” thereby making secondhand smoke exposure child abuse.

Exposing a child to secondhand smoke can only be considered child abuse if the secondhand smoke “results in imminent risk or serious harm to a child's health and welfare.” The typical imminent risks or serious harms that lead to child abuse convictions include punching or hitting a child, burning a child with a cigarette,

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<sup>111</sup> In *Prince v. Massachusetts* and *Wisconsin v. Yoder*, the Supreme Court stated that not every aspect of family life is protected from regulation. The Court held that a statute is constitutionally proper when its purpose is to prevent harm to children, and the State can show that the parents' conduct will endanger the health of the child. *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>112</sup> Chinnock, *supra* note 41.

<sup>113</sup> Rodrigues, *supra* note 24; see also *Outdoor Smoking Bans Double in U.S. Past 5 Years*, *supra* note 62.

<sup>114</sup> *Child Abuse Overview*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/child-abuse-overview.html>.

<sup>115</sup> *Protecting Infants and Children from Secondhand Smoke*, *supra* note 4.

<sup>116</sup> U.S. Dep't of Health, Education, and Welfare Public Health Servs., *supra* note 25.

pushing a child into a wall or onto the floor, and depriving a child of food or water.<sup>117</sup> These typical types of harm come with corresponding, imminent, and visible effects such as bruises, cuts, burns and blisters, broken bones, and malnourishment.<sup>118</sup> Compared to these harms, secondhand smoke exposure and the diseases caused by it seem to not fit in.

*a. Satisfying the “Imminent Risk” Element*

One way to satisfy the first element of child abuse is to prove an “imminent risk”. Asthma attacks triggered by secondhand smoke are the most immediately obvious type of imminent risk.<sup>119</sup> However, there are many other imminent risks caused by secondhand smoke that are not immediately apparent, like a bruise or a broken bone, but are often more serious. Secondhand smoke inhalation puts children in imminent risk of serious illnesses like pneumonia, lung cancer, heart disease, and respiratory infections.

Since secondhand smoke exposure is not currently considered child abuse, there is hardly any case law on whether secondhand smoke is an imminent risk to children. However, courts have answered the question of whether causing disease or illness constitutes an imminent risk in other contexts. In cases concerning inmates’ exposure to secondhand smoke, courts have held that inmates have a cause of action under the Eighth Amendment, even when the inmate does not show symptoms of illness, because the health risks from secondhand smoke exposure are “sufficiently imminent.”<sup>120</sup>

In a case questioning whether food that could possibly cause illness should be marked with a warning, the court held that only the exposure to the risk must be imminent, not the physical onset of disease.<sup>121</sup> In a case concerning a child with asthma, the court held that granting custody to his smoking mother would expose the child to imminent danger.<sup>122</sup> In accordance with the precedent that proves causing illness or disease constitutes an imminent risk, courts have a duty to interpret “imminent risk” in child abuse statutes to include secondhand smoke exposure.

*b. Satisfying the “Serious Harm” Element*

The other way to satisfy the first element of child abuse is to prove “serious harm.” As the court stated in *Day v. Day*, “an avalanche of authoritative scientific studies is

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<sup>117</sup> *Effects of Child Abuse and Neglect*, JOYFUL HEART FOUNDATION, <http://www.joyfulheartfoundation.org/learn/child-abuse-neglect/effects-child-abuse-neglect>; *The Issue of Child Abuse*, CHILDHELP, <https://www.childhelp.org/child-abuse/>.

<sup>118</sup> *The Issue of Child Abuse*, *supra* note 117.

<sup>119</sup> *Protecting Infants and Children from Secondhand Smoke*, *supra* note 4.

<sup>120</sup> *Joy v. Healthcare C.M.S.*, 534 F. Supp. 2d 482 (U.S. Dist. 2008) (citing *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475 (1993)). The court held that the inmate had a cause of action for cruel and unusual punishment.

<sup>121</sup> *Baur v. Veneman*, 352 F.3d 625 (U.S. 2d Dist. 2003). Child abuse statutes do not specifically state when or if the imminent risk must trigger a physical reaction, so courts can interpret the statute to include imminent risks of long term affects and diseases. *Child Abuse Overview*, *supra* note 114.

<sup>122</sup> *Lizzio v. Lizzio*, 162 Misc. 2d 701, 618 N.Y.S.2d 934 (1994).

clear and convincing evidence that secondhand smoke constitutes a real and substantial danger to children because it causes and aggravates serious diseases in children.<sup>123</sup> It is both scientifically proven and common knowledge that asthma attacks, lung cancer, and heart disease are serious and harmful.<sup>124</sup> The diseases that children can suffer during childhood and later in life as adults should be interpreted as imminent risks of harm to a child's welfare later in life or as a serious harm once the toxins enter their body and put them at risk of disease.

Accordingly, courts and legislators have the constitutional and factual basis to interpret child abuse statutes to include secondhand smoke exposure and enact more effective legislation to protect children because secondhand smoke is both an imminent risk and a serious harm. Once courts and legislators take this next step, legislators can make an effective plan to enforce child abuse statutes, monitor parents' smoking habits, and protect children across the country from secondhand smoke and its avoidable diseases.<sup>125</sup>

#### 4. A Proposed Plan to Close the Loopholes

As established in the above analysis, courts and the legislature have a duty to protect children from harm, and they have a legal and constitutional basis to do so. The courts and legislature have a duty to protect children from harm under the *Parens Patriae* Doctrine that the state must care for people who are unable to care for themselves.<sup>126</sup> Constitutionally, smokers do not have any protections under the First or Fourteenth Amendments, and there is no explicit constitutional right to smoke.<sup>127</sup> Furthermore, parents' right to privacy, although constitutionally protected, is not an absolute right and does not allow parents to physically harm their children.<sup>128</sup> Finally, as defined in child abuse laws, case law, and legislative precedent, secondhand smoke fits soundly within the definition and interpretation of "imminent risk" and "serious harm."

Currently, there are several protections in place to reduce children's exposure to secondhand smoke. However, each approach has major loopholes, and they are not strictly enforced. First, courts protect children in custody cases. However, only 50% of children are children of divorced parents, and even fewer than 50% will be involved in custody disputes and end up in front of a family court judge.<sup>129</sup> For the children who do end up in front of a family court judge, it is not guaranteed that the judge will consider parental smoking as a factor in deciding custody. For the children who are in front of a judge that considers parental smoking, it is not guaranteed that they will be kept away from the smoking parent 100% of the time or that any protections will be

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<sup>123</sup> Day v. Day, 5<sup>th</sup> Dist. Ashland No. 04COA74, 2005-Ohio-4343, ¶ 27.

<sup>124</sup> *Id.*

<sup>125</sup> One way to monitor parents' smoking habits would be to enact legislation requiring mandated reporters such as doctors and teachers to report cases of children who say their parents smoke around them, children who smell of cigarette smoke, or children who frequently suffer from respiratory infections or asthma attacks.

<sup>126</sup> *Johnita M.D.*, 191 Misc.2d 301 at 304.

<sup>127</sup> *Saad*, U.S. Dist. No. 11-C-7419 (N. Dist Ill. 2001).

<sup>128</sup> Chinnock, *supra* note 41.

<sup>129</sup> *Skidmore-Shafer*, 770 So. 2d 1097

followed by the parents and enforced by the courts. One way to enforce smoking bans in the home would be to install smoke detectors that detect tobacco smoke levels in homes with children. Then, the readings would be sent electronically to the appropriate government agency, who could then fine or charge parents with child abuse. Second, people are protected from secondhand smoke in some public places. However, many people are unaware of smoking bans in some public places or they do not obey the bans because they assume there will be no punishment for violating them. Third, legislatures have banned smoking in vehicles in eight states. However, many of those states have relaxed punishments and only consider violations on a secondary basis.<sup>130</sup>

Smoking bans and regulations could be more strictly enforced if they were more uniform. It is difficult for a police officer to punish a smoking parent or for a doctor to report a smoking parent if they do not have basis to believe that the parent is violating any public bans or court mandated restrictions. If smoking bans and regulations were more uniform, it would be cause for concern and punishment if a parent was caught smoking near their child under any circumstance.

Once smoking bans and regulations are more consistent and uniform, smoking ban areas must make patrons aware of the smoking bans, monitor for violations, and punish violators. Monitoring for violations in public places and enclosed venues is admittedly much easier than monitoring for violations inside a person's home. Monitoring for secondhand smoke exposure in homes can be more consistent by requiring all doctors, teachers, and other mandated reporters to report cases of children who are exposed to secondhand smoke. Furthermore, the punishments must be more uniform in order to achieve consistency. Vehicle smoking ban violators are more likely to re-violate the ban in a state that imposes a fifty dollar fine compared to a state that imposes a one hundred and fifty dollar fine. Overall, the current protections have loopholes and appear weak because they are not strictly enforced, and consequently, many children are still being exposed to harmful levels of secondhand smoke.

In addition to the current smoking bans and regulations being more strictly enforced, new bans must be added to protect children in places other than vehicles and public places. Currently, there are no federal smoking bans, leading to inconsistencies across the country. To ensure maximum protection for children nationwide, the legislature must enact federal laws making it illegal to smoke near children in any context. The legislature should, and has the legal foundation to, include secondhand smoke exposure in the definition of "imminent risk" and "serious harm". Subsequently, courts must follow through by punishing secondhand smoke exposure as child abuse.

#### IV. CONCLUSION

Overall, United States' courts, legislators, and public and private venues are slowly ramping up protections against secondhand smoke for non-smokers and children. There is a prevalent, undeniable reason for these growing restrictions: secondhand smoke is toxic and causes deadly diseases. Unfortunately, for our country's most vulnerable population—children—the courts and legislators have yet to stand up in their favor in a meaningful, effective way.

The current laws and restrictions show an awareness of the harms caused by secondhand smoke and they lay a foundation for constitutionally proper action and protection, but they are secondary and passive approaches. It is within the courts' and

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<sup>130</sup> *Supra*, note 67.

legislators' authority and duty to build upon this foundation and take a primary approach to protect all children by interpreting child abuse statutes to include secondhand smoke exposure as an imminent risk and/or serious harm, enact statutes prohibiting smoking in the presence of children, and begin holding parents accountable.

Inhaling secondhand smoke is the largest preventable cause of death and disability in the United States. As one judge explained secondhand smoke is equivalent to a child involuntarily smoking while being held captive in a highchair. By EPA standards, secondhand smoke creates air quality levels that are far beyond the point of being hazardous. Every year, over 300,000 children are reported as suffering from bronchitis, pneumonia, and ear infections from secondhand smoke. These diseases are their underdeveloped bodies crying for help, in need of the government to protect them from being poisoned by smokers' negligence and selfishness. Failing to act to protect children from these toxins that are poisoning them is inexcusable and reprehensible.