

Smoke Screens: Why State Laws Making It a Crime to Smoke in Cars Containing Children Are a Bad Idea

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I. A New Trend in Antismoking Legislation

Since 1998, workplace smoking bans, including restaurants, bars, and public buildings, have been the preferred form of tobacco and environmental tobacco smoke¹ (ETS) regulation.² Within the last year, a new and rapidly growing movement has emerged among state legislatures to ban people's smoking in cars containing children. Representative Bob Mathis of Arkansas ignited the fire when he introduced legislation in April 2006.³ Critics were sure his bill would fail, but the state legislature passed it overwhelmingly in less than two days.⁴ Louisiana became the second state to adopt a similar law in August, 2006.⁵ Although only two states have adopted these new smoking bans, the last year has made clear that vehic-

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1. Environmental Tobacco Smoke is the currently accepted name in the medical and legal fields for what was formerly called "second-hand smoke."

2. Andrew Knapp, *States Go After Smoking in Vehicles with Kids*, stateline.org (Mar. 6, 2007), at <http://www.stateline.org/live/details/story?contentId=186298>.

3. *Id.*

4. *Id.* For a description of the bill's rapid path to law see Jake Bleed & Michael R. Wickline, *Lighting Up With Young Kids in Vehicle Banned Under Bill*, ARKANSAS DEMOCRAT GAZETTE, Apr. 8, 2006. The Arkansas law provides:

[S]moking is prohibited in any motor vehicle in which a child who is less than six (6) years of age and who weighs less than sixty pounds (60 lbs.) is restrained in a child passenger safety seat properly secured to the motor vehicle in accordance with The Child Passenger Protection Act . . .

ARK. CODE ANN. § 20-27-1903 (2006).

5. The Louisiana law prohibits anyone from smoking in a car with a child under the age of thirteen:

ular smoking bans to protect the health of children are quickly becoming a popular choice among state legislators.

On January 22, 2007, New Jersey State Senator Raymond Lesniack proposed legislation that would ban anyone in New Jersey from smoking in a car containing children under the age of sixteen.⁶ Violators would be charged with a disorderly person offense and face a maximum penalty of thirty days in jail and a \$500 fine.⁷ Fines and jail time would increase for subsequent offenses.⁸ The week before the New Jersey legislation was introduced, Bangor, Maine, became the first city in the nation to enact a vehicular smoking ban. The Bangor ordinance prohibits people from smoking in cars containing children less than eighteen years of age and empowers police to issue a fifty dollar fine.⁹

The opening months of 2007 witnessed an explosion of similar proposals. As of April, aside from those mentioned above, legislators had introduced bills to ban people from smoking in cars with children in the following states: Arizona (H.B. 2729), California (S.B. 7), Illinois (H.B. 1769), Indiana (H.B. 1337), Kansas (S.B. 37), Massachusetts (H.B. 2070), Montana (H.B. 653), New York (A. 156), Oregon (H.B. 2796), Pennsylvania (H.B. 362), Rhode Island (2007-S 0090 and 2007-H 5209), Utah (S.B. 43), Vermont (H. 0418), Washington (H.B. 3007), and West Virginia (S.B. 219).¹⁰

These apparent public health victories¹¹ are not what they seem, and should actually cause public-health and family-welfare advocates concern. The most obvious concern is perhaps the least troubling: a fear that these laws invite a new level of government intrusion into people's private lives. Many people believe that they have a sphere of privacy in their cars, much

It shall be unlawful for the operator or any passenger in a motor vehicle to smoke cigarettes, pipes, or cigars in a motor vehicle, passenger van, or pick-up truck, when a child who is required to be restrained in a rear-facing child safety seat, a forward-facing child safety seat, a booster seat, or a motor vehicle's safety belt as required in R.S. 32:295 is also present in such vehicle, regardless of whether windows of the motor vehicle are down.

LA. REV. STAT. ANN. § 32:300.4(A) (Supp. 2007).

6. *NJ Lawmaker Proposing Car Smoking Ban* (WCBS 800 NEWSRADIO, Jan. 19, 2007), available at <http://www.wcbs880.com/pages/186643>.

7. *Id.*

8. *Id.*

9. Bob Jamieson, *Maine Initiative Keeps Kids Out of Smoke-Filled Autos* (ABC NEWS, Jan. 19, 2007), available at <http://abcnews.go.com/US/story?id=2808626&page=1>.

10. In 2004, Georgia legislators considered a bill, but none are presently pending.

11. See David B. Ezra, *Sticks and Stones Can Break My Bones, But Tobacco Smoke Can Kill Me: Can We Protect Children From Parents That Smoke?*, 13 ST. LOUIS U. PUB. L. REV. 547, 588 (1994) ("Perhaps one of the most depressing sights people see on a daily basis is a family packed into a vehicle in which the children are inhaling the tobacco smoke produced by their parents.").

like in their homes.¹² That belief is unjustified, given that cars are exposed to public view and are already subject to significantly greater police and government intrusion than private homes. What should really make family-welfare advocates recoil are the hidden dangers of the new bans.

On their face, laws that ban smoking in cars containing children appear to be positive legislation promoting the health and well-being of innocent, vulnerable children. What is less obvious is their attack on parents and their potentially devastating consequences on the rights of women to make decisions during pregnancy. Parents are the most likely drivers of children and are the real targets of these new laws. The laws will criminalize the act of parenting by subjecting parents to increased police harassment and potential jail time for minor offenses. The laws increase parents' likelihood of criminal sanction, yet offer parents little help in preventing other adults from smoking in the presence of their children. Laws that target parents for smoking unjustly burden them with a responsibility that all of society should share.

Car smoking bans are also dangerous because they will be used to erode the rights of pregnant women to engage in "risky" behaviors that have the potential to harm fetuses. The new laws are premised on evidence that ETS exposure in small confined spaces harms children's health. From that foundation, anti-abortion advocates will be able to analogize to the growing body of law that allows criminal and civil suits against drug-addicted pregnant women to argue that pregnant women should not be allowed to smoke. If courts and legislatures are empowered to enjoin pregnant women from smoking, there is no logical stopping point to restricting women from engaging in all kinds of behaviors that have the potential to harm fetuses. Thus, state bans on parental smoking in cars containing children are surprisingly bad social policy.

II. The History of Tobacco Regulation

A. Regulating Tobacco

Common use of tobacco in the United States extends back to the Native Americans and early colonists in the 1600s.¹³ Tobacco regulation began in the late nineteenth century for a variety of reasons.¹⁴ Some states, like

12. See Ezra, *supra* note 11, at 559 ("The home has traditionally been accorded a special status as a place of private respite. Thus, the government has been reluctant to inject itself into the home."); Michele L. Tyler, Note, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 795 (1998) ("There is a common belief that an individual has the right to do what she wants within the confines of the home . . .").

13. Ezra, *supra* note 11, at 557.

14. Tonia Ettinger, *Parens Patriae: Protecting Our Children or Crossing the Line? The Lingering Smoke Debate*, 11 BUFF. WOMEN'S L.J. 1, 1-2 (2002); Ezra, *supra* note 11, at 557-58.

Massachusetts, banned smoking in designated areas to protect against the danger of fire.¹⁵ Tennessee, on the other hand, entirely banned cigarette sales as an expression of societal condemnation of the immoral practice and in recognition of cigarettes' "harmful and deleterious" effects.¹⁶

By the turn of the twentieth century, nearly every state had at least considered partial restrictions or total bans on the tobacco trade, and regulations continued in the early twentieth century.¹⁷ In 1900, the United States Supreme Court affirmed the decision of the Supreme Court of Tennessee that a state law banning the sale of cigarettes was constitutional.¹⁸ The defendant argued that the law was invalid because the Commerce Clause grants Congress the exclusive power to regulate interstate commerce, but the Court disagreed and found that regulation of tobacco is properly within the police powers of the state.¹⁹ Although the Court was not prepared "to take judicial notice of any special injury resulting from [cigarette] use or to indorse the opinion . . . that 'they are inherently bad and bad only,'" it did recognize a growing belief in cigarettes' "deleterious effects, particularly upon young people."²⁰

States soon abandoned tobacco regulations, owing to judicial invalidation of total tobacco bans and a shift in public opinion towards greater tolerance of smoking.²¹ Several factors helped to create this more tolerant atmosphere and the ultimate acceptance of smoking as fashionable: cigarettes became a "staple" to soldiers fighting in World War I, the prohibition on alcohol caused people to rebel, increased advertising of cigarettes, the discovery of tobacco as a major tax revenue source, and the power and wealth of tobacco companies.²²

Like the public, the courts also shifted in their approach to tobacco. In *Hershberg v. City of Barbourville*,²³ for example, the Kentucky Court of Appeals struck down a local ordinance that made it illegal to smoke within the city limits of Barbourville because the law was so broad as to make

15. Victoria L. Wendling, Note, *Smoking and Parenting: Can They Be Adjudged Mutually Exclusive Activities?*, 42 CASE W. RES. L. REV. 1025, 1030 (1992).

16. *Id.* (quoting *Austin v. State*, 48 S.W. 305, 306 (Tenn. 1898), *aff'd sub nom.*, *Austin v. Tennessee*, 179 U.S. 343 (1900)).

17. *Id.* at 1031.

18. *Austin*, 179 U.S. at 363.

19. *Id.* at 344, 349–50.

20. *Id.* at 348.

21. Wendling, *supra* note 15, at 1031 (citing *City of Zion v. Behrens*, 104 N.E. 836 (Ill. 1914); *Hershberg v. City of Barbourville*, 133 S.W. 985 (Ky. 1911)).

22. Ezra, *supra* note 11, at 558; Carrie-Anne Tondo, Note, *When Parents Are on a Level Playing Field, Courts Cry Foul at Smoking: Smoking as a Determining Factor in Child Custody Cases*, 40 FAM. CT. REV. 238, 240–41 (2002).

23. *Hershberg*, 133 S.W. 985 (Ky. 1911).

it illegal to smoke within one's own home or other private premises.²⁴ In *City of Zion v. Behrens*,²⁵ the Supreme Court of Illinois invalidated a city ordinance that made it unlawful to smoke tobacco in any public place because it was "apparently an attempt on the part of the municipality to regulate and control the habits and practies [sic] of the citizen without any reasonable basis for so doing."²⁶ The court further found that the ordinance could not be upheld on the grounds of preventing fire and protecting city property because it sought to control smoking in places other than those with highly combustible materials.²⁷

In the 1970s the dangers of ETS exposure came to light, and by the 1980s the pendulum had begun to swing back to a more critical view of tobacco.²⁸ Regulations to curtail smoking, particularly to prevent non-smokers' exposure to ETS, appeared.²⁹ Today, "[t]he prevailing view is that while smokers may have a right to damage their own health, they have no right to expose others to the risks associated with tobacco smoke inhalation."³⁰ Nearly all states now prohibit smoking in public places and government buildings, and many also ban smoking in private workplaces.³¹

Before the detrimental health effects of ETS exposure were clear, the crowded world theory prevailed in the courts and prevented the bringing of a battery claim for exposure to smoke.³² Courts were unwilling to recognize tobacco smoke as sufficient for a "contact" in battery or as the basis for any other cause of action.³³ In 1994 a court first recognized an intentional tort for the blowing of smoke at someone, but not for mere exposure to ETS.³⁴ In a complete reversal from the crowded world view,

24. *Id.* at 986.

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

26. *Id.* at 837–38.

27. *Id.* at 837.

28. *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 816 (Sup. Ct. 2002); Ezra, *supra* note 11, at 550; Mark J. Horvick, Note, *Examining the Underlying Purposes of Municipal and Statewide Smoking Bans*, 80 IND. L.J. 923 (2005).

29. See Wendling, *supra* note, 15, at 1032–35 (describing the "Clean Air Movement").

30. Ezra, *supra* note 11, at 550.

31. Ettinger, *supra* note 14, at 2. See generally Horvick, *supra* note 28, for a discussion of the underlying goals and motivations of city and state smoking bans. See Westlaw, *50 State Regulatory Surveys: Regulations Restricting Smoking in Indoor Areas* (2006) for a list of state laws restricting indoor smoking, but not including smoking in vehicles.

32. In *McCracken v. Sloan*, 252 S.E.2d 250, 252 (N.C. Ct. App. 1979) (holding that smelling cigar smoke is part of life and must be tolerated, even where it is deliberately blown at a person with an aversion and allergy to tobacco smoke. In this early case, decision in part rested on the fact that there was no evidence that a single exposure caused the person any harm.) *Id.*

33. See *Gasper v. La. Stadium & Expo. Dist.*, 577 F.2d 897, 898–99 (5th Cir. 1978) (holding there is no constitutional right to stop others from smoking and therefore no basis to enjoin spectators at Superdome from smoking).

34. See *Leichtman v. WLW Jacor Comm., Inc.*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994)

the majority of people today believe that nonsmokers do not assume the risk of ETS exposure merely by going out into the world.³⁵ Eighty-seven percent of adults believe that people have a right to be free from breathing ETS, and antismoking regulations abound.³⁶

B. The Effects of Environmental Tobacco Smoke

About one-third of the world's adults smoke and, as a result, half will die prematurely.³⁷ Smoking causes approximately four-million deaths annually.³⁸ Most smokers start smoking while they are still children, and the addiction is severe.³⁹ A shocking fifty percent of lung cancer patients resume smoking after surgery for their disease.⁴⁰ The addictive nature of cigarettes, and the related psychological benefits they bestow, explain why so many smokers persist, even upon learning of the harm smoking causes to them and those around them.⁴¹

According to the Environmental Protection Agency, ETS is a Group A, or known human lung carcinogen.⁴² ETS is the only known human carcinogen for which scientists have actually documented an increased risk of cancer in people exposed to *typical* environmental levels of the toxin.⁴³ For every eight smokers who die from smoking, an additional one person will die from ETS.⁴⁴ The nonsmoking spouse of a smoker faces twice the risk of developing heart and lung disease than he or she would face if the spouse did not smoke.⁴⁵

Children of smokers are in the worst position. Children are less able to control their exposure to smoke, they inhale more air and breathe more

(citing *Richardson v. Hennly*, 434 S.E.2d 772, 774–75 (1993)) (holding there is no “smoker’s battery” even though this plaintiff stated a claim); *Blowing Smoke Around Others May Be Battery*, WALL ST. J., Apr. 11, 1994, at B1 (noting that courts in California, Georgia, and Ohio recently held that exposing another to ETS constitutes battery).

35. Ezra, *supra* note 11, at 586.

36. 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, 807 (2003).

37. *Id.* at 802.

38. *Id.*

39. The average age to begin smoking is twelve-and-a-half, and most smokers start before age eighteen. *Id.* at 803.

40. *Id.* at 819.

41. Wendling, *supra* note 15, at 1028.

42. Chinnock, *supra* note 36, at 806–7 (citing EPA, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (1992), available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835>).

43. Ross C. Brownson et al., *Epidemiology of Environmental Tobacco Smoke Exposure*, 21 ONCOGENE 7341, 7343 (2002).

44. Chinnock, *supra* note 36, at 805.

45. *Id.* at 808.

rapidly than adults, and they are less likely to know of smoke's harmful effects on them.⁴⁶ Moreover, children of smokers are twice as likely as children of nonsmokers to become smokers themselves.⁴⁷ According to a surgeon general's report, children of smokers are hospitalized more often for bronchitis and pneumonia in their first year of life than children of nonsmokers.⁴⁸ Those children are also more likely to suffer from acute respiratory illnesses and infections during their first two years as compared with children of nonsmokers.⁴⁹ Exposure to ETS is believed to cause up to 300,000 cases of bronchitis and pneumonia in infants each year and to aggravate asthma in up to one-million children each year.⁵⁰ Exposure to ETS in the home increases children's risk of middle-ear disease, asthma, bronchitis, pneumonia, and impaired pulmonary function.⁵¹ Due to the overwhelming evidence on the health risks associated with ETS exposure, courts have taken judicial notice of the hazard ETS poses to children.⁵²

A developing body of literature documents the effects of prenatal smoking on fetuses. Prenatal smoking has been shown to impair the physical and mental development of the fetus, reduce oxygen supply to the fetus, and slow fetal breathing.⁵³ Prenatal smoking is also the largest inde-

46. See Jon D. Anderson, Comment, *Parental Smoking: A Form of Child Abuse?*, 77 MARQ. L. REV. 360, 365 (1994) (explaining children's increased risks).

47. Chinnock, *supra* note 36, at 818, 820.

48. Ezra, *supra* note 11, at 565 (citing U.S. Dep't of Health & Hum. Servs., Pub. Health Serv., The Consequences of Involuntary Smoking: A Report of the Surgeon General, 13, 39-44 (1986)).

49. *Id.*; Joseph R. DiFranza et al., *Prenatal and Postnatal Environmental Tobacco Smoke Exposure and Children's Health*, 113 PEDIATRICS 1007, 1007 (2004) (collecting studies).

50. Ezra, *supra* note 11, at 566 (citing EPA, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, 1-1 (1992)).

51. DiFranza et al., *supra* note 49, at 1007-08 (collecting studies).

52. "A superabundance of judicially noticed authoritative studies demonstrates by clear and convincing evidence that secondhand smoke is real and substantial danger to the health of children . . ." *In re Julie Anne*, 780 N.E.2d 635, 653 (Ohio Com. Pl. Juv. Div. 2002); see, e.g., *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 817-18 (Sup. Ct. 2002) (surveying literature and taking judicial notice of effect of ETS exposure on healthy children); *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 937 (Fam. Ct. 1994) ("The Court takes judicial notice of the hazards to health caused by cigarette smoke, both actively and passively."); *Smith v. Smith*, No. 03A01-9603-CV-00078, 1996 WL 591181, at *1-2 (Tenn. Ct. App. Oct. 11, 1996) (reporting lower court's final divorce decree, in which court took judicial notice of dangers of ETS on children). The United States Supreme Court has also recognized the hazards of ETS. In *Helling v. McKinney*, it held that a prisoner can state a cause of action under the Eighth Amendment's Cruel and Unusual Punishment Clause against prison officials for acting with deliberate indifference toward his ETS exposure due to a chain-smoking cellmate. 509 U.S. 25, 35 (1993). The Court specifically acknowledged that ETS exposure poses an "unreasonable risk of serious damage to his future health." *Id.*

53. DiFranza et al., *supra* note 49, at 1008-09 (collecting studies); Cori S. Annapolen, Comment, *Maternal Smoking During Pregnancy: Legal Responses to the Public Health Crisis*, 12 VA. J. SOC. POL'Y & L. 744, 745-46 (2005).

pendent risk factor for sudden infant death syndrome.⁵⁴ Some of the effects linger into the life of the child. Prenatal smoking can lead to lower birth weight, preterm birth, and growth retardation.⁵⁵ It can also cause congenital deformities including cleft palate, tumors of the central nervous system, cancer, limb reduction, and urinary tract anomalies.⁵⁶ It may increase the risk of mother-to-fetus transmission of HIV.⁵⁷

Not everyone agrees that the data on the effects of ETS exposure are conclusive. Some commentators view ETS as an irritant but not a dire health concern.⁵⁸ Other common conditions, they argue, are worse or at least as bad for children's health, such as dampness, coal heating devices, gas cooking stoves, and lead paint.⁵⁹ Harsher critics call the medical conclusions about ETS exposure "second-rate science" because reports disregard statistical significance and lack of causation.⁶⁰ For example, a popular World Health Organization study announced that the risk of lung cancer increased in nonsmoking spouses of smokers by sixteen to seventeen percent, but glossed over the fact the findings were not statistically significant due to small sample size.⁶¹

In the reality of expanding data documenting the connection between ETS exposure and adverse health effects, the view that we ought to wait to change our behaviors until there is absolute proof of causation is foolish. It is undisputed that ETS contains dangerous toxins. It is reasonable to shift the burden to tobacco proponents to prove that ETS exposure is safe.⁶²

C. Regulating Children's and Fetuses' Exposure to ETS

Before the recent trend among state legislatures to statutorily ban smoking in cars with children, family courts had been considering and restricting parental smoking habits when determining custody and visitation rights.⁶³ The first case to ban a parent's smoking in her home or car

54. Chinnock, *supra* note 36, at 810; DiFranza et al., *supra* note 49, at 1008 (collecting studies); Annapolen, *supra* note 53, at 746–47.

55. Chinnock, *supra* note 36, at 810; Annapolen, *supra* note 53, at 747–48.

56. Annapolen, *supra* note 53, at 749.

57. *Id.* at 749–50.

58. See Wendling, *supra* note 15, at 1054–55 (“Cigarette smoke poses no immediate or demonstrable threat to a child’s well-being. . . . [any] potential danger does not seriously jeopardize a child’s life.”).

59. Wendling, *supra* note 15, at 1065.

60. Robert A. Levy, *Arizona's Anti-Tobacco Crusade: Smoke Free or Free to Smoke*, ARIZONA ISSUE ANALYSIS 176, at 11 (Oct. 8, 2002), <http://goldwaterinstitute.org/Common/Files/Multimedia/173.pdf>.

61. *Id.* at 12.

62. Ezra, *supra* note 11, at 568–69.

63. See Wendling, *supra* note 15, at 1025–26 (discussing *De Beni Souza v. Kallweit*, No. 807516 (Cal. Sacramento Sup. Ct. Oct. 11, 1990) (the first time a court restricted parental

because of the potential deleterious effects on her healthy child was *Johnita M.D. v. David D.D.*⁶⁴ In that case, thirteen-year-old Nicholas wrote a letter to the court seeking relief from exposure to ETS during court-ordered visitation with his mother.⁶⁵ Without the use of experts, the court relied on the “substantial body of literature” to take judicial notice of the hazards of ETS exposure to children and ordered Nicholas’s parents

not to smoke or allow smoking of any type either at home or in the car at any time so that Nicholas may occupy both free of ETS exposure or risks. Nicholas’ exposure to ETS . . . is unacceptable in any parental residence or vehicle or other indoor situations. The Court will find any avoidable exposure of Nicholas to ETS is unacceptable because said exposure will place him both presently and in the future as an adult at increased risk to develop asthma, reduced lung function, coronary artery disease, lung cancer, and respiratory disorders.⁶⁶

In *Lizzio v. Lizzio*,⁶⁷ custody of an asthmatic child with two smoking parents was initially granted to the mother.⁶⁸ The father quit smoking, and, at a subsequent modification proceeding, the court reversed the custody award, explaining that it would have maintained the prior arrangement but for the issue of smoking.⁶⁹ On the recommendation of the child’s allergist, the court prohibited smoking in either household.⁷⁰

Typically, courts consider smoking only when the child has a medical condition that ETS exacerbates.⁷¹ On occasion, however, family courts have based their decisions on the effect of parental smoking on healthy children.⁷² To demonstrate their authority to regulate parental smoking, courts take judicial notice of the deleterious effects of smoking on children, rely on the doctrine of *parens patriae*,⁷³ and use the best-inter-

smoking in the home). In *De Beni Souza*, the court banned a mother from smoking in the presence of her child until her child reached age eighteen, and if the mother violated the order, her custody rights would be automatically terminated and physical custody would move to the father. *Id.*

64. Ettinger, *supra* note 14, at 4 (citing *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 813 (Sup. Ct. 2002)).

65. *Johnita M.D.*, 740 N.Y.S.2d at 813.

66. *Id.* at 815, 822–23.

67. *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (Fam. Ct. 1994).

68. *Id.* at 935.

69. *Id.* at 937.

70. *Id.*

71. Anderson, *supra* note 46, at 372.

72. See *Badeaux v. Badeaux*, 541 So. 2d 301 (La. Ct. App. 1989) (finding no abuse of discretion where trial court considered effect of father’s smoking on child’s health in making determination on visitation and custody); *Unger v. Unger*, 644 A.2d 691, 694 (N.J. Super. 1994) (“Clearly, the effect of ETS is a factor that may be considered by a court in its custody determination as it affects the safety and health of the children.”); *In re Julie Anne*, 780 N.E.2d 635, 640 (Ohio Com. Pl. Juv. Div. 2002) (restraining parents from smoking in presence of a healthy child for whom smoke is not special allergen).

73. *Parens patriae* is the state’s interest “in preserving and promoting the welfare of the

est-of-the-child standard.⁷⁴ The court in *In re Julie Anne*⁷⁵ reached “the inescapable conclusion that a family court that fails to issue court orders restraining persons from smoking in the presence of children under its care is failing the children whom the law has entrusted to its care.”⁷⁶ The Tennessee Court of Appeals in *Smith v. Smith*⁷⁷ exercised tremendous power over the liberty of a parent when it found that the trial court did not abuse its discretion in holding a father in criminal contempt, sentencing him to time in jail and suspending his visitation privileges with his child where he was found guilty of violating a court order not to smoke in the presence of his child.⁷⁸

On rare occasions, a family court has not only considered the effect of parental smoking, but has actually called it child abuse. The court in *Skidmore-Shafer v. Shafer*⁷⁹ found that if a mother continued to smoke in the presence of her asthmatic child, she would be “directly contributing to the misery and suffering this child has had to endure. To do this to a child is no less child abuse than if you had deprived him of food or medical treatment.”⁸⁰ While there is no evidence regarding how frequently family court judges consider parental tobacco use, advocates seeking to enhance restrictions on parental smoking outside of the custody context frequently rely on the reasoning used in custody cases.

Despite the growing acceptance of considering parental smoking in custody suits, courts have been loathe to expand the scope of civil or criminal child abuse statutes to apply to parental smoking. In *Roofeh v. Roofeh*⁸¹ the court denied a father’s request for a protection order against

child.” *Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

74. The “best interest of the child” standard is a broad standard that enables courts to consider all relevant factors, such as parental resources, wishes of the child, location of child’s school, and the mental and physical health of the parents. Michael S. Moorby, Note, *Smoking Parents, Their Children, and the Home: Do the Courts Have the Authority to Clear the Air?*, 12 PACE ENVTL. L. REV. 827, 834–35 (1995). One court described it as the “paramount consideration” in any custody contest, and explained that the standard requires “a weighing and balancing of factors favoring or opposing custody in respective competing parents on the basis of the evidence presented.” *Stewart v. Stewart*, 705 So. 2d 802, 805 (La. Ct. App. 1998).

75. *In re Julie Ann*, 780 N.E.2d 635, (Ohio Com. Pl. Juv. Div. 2002).

76. *Id.* at 641; *cf. Helm v. Helm*, No. 01-A-01-9209-CH00365, 1993 WL 21983, at *2 (Tenn. App. Feb. 3, 1993) (upholding grant of custody to smoking father despite mother’s objection because parental smoking is merely one factor courts may consider in making custody award but it “is not necessarily the dominant or decisive consideration.”).

77. *Smith v. Smith*, No. 03A01-9603-CV-00078, 1996 WL 591181 (Tenn. App. Oct. 11, 1996).

78. *Smith*, 1996 WL 591181 at *5–8.

79. *Skidmore-Shafer v. Shafer*, 770 So. 2d 1097 (Ala. Civ. App. 1999).

80. *Id.* at 1100 (quoting lower court order).

81. *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (NY 1988).

his ex-wife on the sole ground that she smoked around him and their children.⁸² The father claimed that smoking is as offensive as “hitting, slapping, punching or spitting.”⁸³ The court held that it could only grant a protection order for statutory crimes or violations and that the father’s creative analogy was inadequate to transform smoking into child abuse.⁸⁴ The court was uninterested in expanding the justifications for issuing protective orders because law enforcement officials prefer not to police private family affairs where there is no criminal conduct.⁸⁵ Moreover, the consequences that follow a violation of a protection order—finger printing, arrest, jail time, and criminal charges—are far too great to warrant issuance for mere smoking.⁸⁶ The court did, however, grant a temporary order restricting the mother from smoking near the children and confining her habit to one room in her house when the children were not home.⁸⁷

Courts’ reticence to apply criminal statutes to smoking is echoed in the context of prenatal drug abuse. Courts have overturned child abuse and homicide convictions of pregnant women who used illegal drugs during pregnancy based on legislative intent to protect, not punish, pregnant women, and on the belief that a pregnant woman’s self-abuse is different than injury inflicted on a fetus by a third party.⁸⁸ Of paramount importance

82. *Roofeh*, 525 N.Y.S.2d at 766.

83. *Id.* at 769.

84. *Id.*

85. *Id.* at 768.

86. *Id.* When courts order parents not to smoke, they may be extending their power to protect children too far. Ettinger, *supra* note 14, at 6. Once a court issues the order, a parent is perpetually “in the danger of being hauled back into court at any moment.” *Id.* A violation of a court order could lead to a charge of contempt, fines, jail time, or the loss of one’s children. *Id.*

87. *Roofeh*, 525 N.Y.S.2d at 769. At least one court has ordered a parent not to smoke near his children and held him in criminal contempt for violating the order. *Smith v. Smith*, No. 03A01-9603-CV-00078, 1996 WL 591181, at *7-8 (Tenn. Ct. App. Oct. 11, 1996). Although holding a parent in criminal contempt is different procedurally from holding that the act of smoking itself is a crime, the effect on the parent is the same. See *supra* notes 77–78 and accompanying text for further discussion of the *Smith* case.

88. See *State v. Ashley*, 701 So. 2d 338, 342, n.13 (Fla. 1997) (relying on defendant’s contention that every court to consider question of whether born alive doctrine can be used to hold pregnant women guilty of homicide for prenatal conduct has held it cannot); *State v. Aiwohi*, 123 P.3d 1210, 1214 (Haw. 2005) (collecting cases refusing to permit prosecution of woman for prenatal conduct that harmed a subsequently born child); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (collecting other state cases holding same); *State v. Deborah J.Z.*, 596 N.W.2d 490, 491 (Wis. Ct. App. 1999) (holding statutory requirement of perpetrating act against “human being” does not apply to unborn child where mother ingested excessive alcohol one week before due date). Analogously, a court reversed the conviction of a pregnant woman under a criminal abortion statute where she shot herself in the abdomen. *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. Ct. App. 1998). The court reasoned that the law was never intended to apply to women who seek illegal abortions, only to providers, and that a broad construction of the statute would place every woman who suffers a post-viability miscarriage at risk of criminal indictment if she engaged in:

were these courts' concerns that they would be paving the way for the prosecution of pregnant women for a whole range of ordinary, but arguably risky behavior.⁸⁹

States continue to bring charges against women for their prenatal conduct, and courts are beginning to hold women civilly and criminally liable for ingesting illegal drugs or alcohol while pregnant.⁹⁰ In the past, courts used the parent immunity rule to prevent children from suing their parents to maintain family harmony, preserve parental discipline and authority, and avoid the potential for collusion between parents and children to defraud insurance.⁹¹ Today, however, every jurisdiction in the United States uses the "born alive" rule to allow a child a cause of action for prenatal injuries suffered as a fetus.⁹² Some jurisdictions use a viability rule and allow parents to bring a wrongful death claim for fetuses not born alive.⁹³ In either situation, courts tend to permit civil actions and criminal

any perceived self-destructive behavior during her pregnancy which could cause a later term miscarriage, to wit: smoking or drinking heavily; using illegal drugs or abusing legal medications; driving while under the influence of drugs or alcohol; or any dangerous or reckless conduct. Taken to its extreme, prohibitions during pregnancy could also include the failure to act, such as the failure to secure adequate prenatal medical care, and overzealous behavior, such as excessive exercising or dieting.

Id. at 612–13 (citation omitted).

89. See *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (fearing rule that would subject women to criminal prosecution for driving over the speed limit, not wearing prescriptive lenses, downhill skiing, or addiction to over-the-counter medication); *Deborah J.Z.*, 596 N.W.2d at 494 (noting mother's behavior was "egregious," but fearing such broad statutory construction that "a woman could risk criminal charges for any perceived self-destructive behavior during her pregnancy that may result in injuries to her unborn child"). Although the cause of miscarriages is rarely identified, health care providers believe a number of factors contribute to increased risk: poor nutrition, smoking, sexually transmitted diseases, exposure to radiation, exposure to certain drugs, high fever, diabetes, and use of an intrauterine device (IUD) at time of contraception. HEIDI MURKOFF, ARLENE EISENBERG & SANDEE HATHAWAY, *WHAT TO EXPECT WHEN YOU'RE EXPECTING*, 122 (3d ed. 2002).

90. See, e.g., *Whitner v. State*, 492 S.E.2d 777, 780 (S.C. 1997) (holding that criminal child neglect statute applied to pregnant woman who ingested crack cocaine in her third trimester because fetus is recognized as "person" under that state's law for homicide statutes and wrongful death civil liability); *Aiwohi*, 123 P.3d at 1214–19 (examining prosecutions of women for prenatal drug use alleged to have harmed later born child).

91. *Ezra*, *supra* note 11, at 583.

92. Nova D. Janssen, Note, *Fetal Rights and the Prosecution of Women for Using Drugs During Pregnancy*, 48 *DRAKE L. REV.* 741, 750 (2000). In the landmark case in this area of law, the court held that if a fetus is born alive and viable, the child can maintain an action against a party other than the mother, for injuries suffered while in utero. *Bonbrest v. Kotz*, 65 *F. Supp.* 138, 141 (D. D.C. 1946).

93. *Bolin v. Wingert*, 764 N.E.2d 201, 205 (Ind. 2002) (citing *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995); *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996); *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995)). For further discussion of the born alive rule and the legal status of fetuses, see Mamta K. Shah, Note, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 *HOFSTRA L. REV.* 931 (2001) and Sheldon R. Shapiro, *Right to Maintain Action or to Recover Damages for Death of Unborn Child*, 84

prosecutions only against third parties, that is, they have not permitted cases against pregnant women. That has not stopped prosecutors from prosecuting women for prenatal conduct.

The first successful prosecution of a pregnant woman for drug use during pregnancy was *State v. Johnson*.⁹⁴ Ms. Johnson was convicted of delivering a controlled substance to her minor children on the state's theory that she "delivered" ingested cocaine through the umbilical cord during the minute after her child was born, but before the cord was cut.⁹⁵ The Florida Supreme Court, basing its decision on legislative intent, answered "no" to a certified question inquiring whether the "ingestion of a controlled substance by a mother who knows the substance will pass to her child after birth is a violation of Florida law."⁹⁶

In a similar case, *Whitner v. State*,⁹⁷ the South Carolina Supreme Court used the same reasoning to reach an opposite result. It upheld an eight-year sentence for child neglect against a woman who ingested crack cocaine while pregnant.⁹⁸ The woman argued that her guilty plea was void for ineffective assistance of counsel because her lawyer failed to advise her that the child neglect statute did not apply to prenatal drug use.⁹⁹ The court rejected her argument because it held that the South Carolina statute, unlike those of other states, was unambiguous in its applicability to the prenatal conduct and the facts of the case.¹⁰⁰

The experience of prenatal drug use cases teaches that courts will not hold a woman liable for abuse to her fetus unless there is statutory authorization to do so or clear legislative intent. Antismoking advocates are urging courts to expand the reasoning in custody cases to the context of prenatal smoking. If legislatures enact statutes that open the door to banning prenatal smoking, some courts are ready to enter.

A.L.R. 3d 411 (1978 & Supp. 2001).

94. Janssen, *supra* note, 92, at 755 (citing *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992)).

95. *Johnson*, 602 So. 2d at 1290-91.

96. *Id.* at 1290, 1294.

97. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997).

98. *Whitner*, 492 S.E.2d at 786.

99. *Id.* at 779.

100. *Id.* at 784. The statute, however, had no unique features indicating that the legislature intended to prosecute pregnant women for prenatal conduct. The statute read:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person, so that the life, health or comfort of such child or helpless person is endangered or is likely to be endangered, shall be guilty of a misdemeanor and shall be punished within the discretion of the circuit court.

Id. at 779 (citing S.C. CODE ANN. § 20-7-50 (1985)).

III. Smoke Screens

Despite their supposed public health goals and their seeming constitutionality, state and local statutory bans on parental smoking in cars with children are bad social policy because they criminalize parenting and will lead to the erosion of the rights of pregnant women.

A. No Constitutional Roadblocks

On their face, there are no constitutional problems with state bans against vehicular smoking in the presence of children. The chief constitutional arguments against the bans are the interest of the parent in choosing to smoke,¹⁰¹ and the right of the parent to determine how to raise his or her child.¹⁰² Neither argument stands up to analysis.

There is no constitutional right to smoke.¹⁰³ Smoking is not a fundamental right like the decision to marry or procreate, and therefore laws regulating smoking do not receive strict scrutiny.¹⁰⁴ One author describes the right to smoke as occupying the hazy ground in between illegality and protected right: “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.”¹⁰⁵ As with other nonfundamental rights, a state needs nothing more than a rational basis to regulate smoking, a standard that demands judicial deference. Privacy rights are not absolute and do not trump harm to third parties.¹⁰⁶ Even if there were a right to inhale smoke into one’s own lungs, such a right would fall to the interests of child third-parties not to inhale smoke.¹⁰⁷ “It would be strange indeed if privacy protected the ability of a parent to force [his or her] child to inhale

101. See Wendling, *supra* note, 15, at 1025–26 (arguing that preventing parents from smoking at home intrudes on individual rights and presiding over one’s home, and that smoking cannot be banned so long as it is a lawful activity).

102. See *id.* at 1026 (arguing that preventing parent from smoking in home implicates right to interact freely with and to control child).

103. *In re Julie Anne*, 780 N.E.2d 635, 654 (Ohio Com. Pl. 2002).

104. The status of “fundamental right” is reserved for things such as the right to privacy in procreative rights. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding state law, which prohibits married couples from using contraception, violates “fundamental” constitutional protections).

105. Wendling, *supra* note, 15, at 1049.

106. Chinnock, *supra* note 36, at 817; see *Unger v. Unger*, 644 A.2d 691, 695 (N.J. Super. Ct. Ch. Div. 1994) (“While no court in New Jersey has found that the right to smoke has risen to the level of a constitutionally protected right, even a parent’s constitutionally protected right may be restricted upon a showing that the parent’s activity may tend to impair the physical health of a child.”).

107. Ezra, *supra* note 11, at 556.

suspected carcinogens.”¹⁰⁸

A second argument in favor of protecting parents’ right to smoke is that the parent–child relationship is accorded special status, and parents are generally free from state intervention in parenting decisions.¹⁰⁹ It is equally clear, however, that the state, under its policing power and in the role of *parens patriae*, is permitted to intervene into some parenting decisions.¹¹⁰ Courts have already ruled that *parens patriae* enables courts to supersede parents’ religious freedom in an effort to protect children.¹¹¹ It cannot be argued that parental interest in “unhindered cigarette smoking,” which offers no possible benefit to the child, is greater than parental interest in practicing religion or making choices about a child’s medical care.¹¹² Thus, the Constitution presents no barrier to a literal reading of state laws that ban parents’ smoking in cars with children.

B. Criminalization of Parenting

Parents, as the most likely drivers of cars containing children, are the true targets of these state bans. Statutes criminalizing smoking in a car with children have the effect of criminalizing parenting. First, criminalizing smoking in a car with children has the unjust effect of singling parents out for criminal sanction when in fact ETS from any source harms children’s health. Unlike other environmental regulations to protect societal health, these statutes place the burden of protecting children on parents. The statutes condemn parents for a behavior that others may freely engage in, purportedly to protect child health. At the same time the statutes offer parents no help in reducing their children’s exposure to ETS because smoking in the presence of children outside of cars remains legal.

The state proposals to ban smoking in cars containing children are the next chapter in our national struggle over the appropriate role of tobacco in American life. The proposals represent a compromise between our unwillingness to make smoking illegal and our simultaneous fears about smoking’s effect on health. We express moral outrage that parents would expose their children to harm, but we are reluctant to call smoking child abuse because millions of people are unable to end their addiction and smoke in the presence of children every day. Antismoking advocates

108. *Id.* at 561.

109. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (collecting cases that demonstrate “this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”).

110. *Ezra*, *supra* note 11, at 563–64; *Wendling*, *supra* note, 15, at 1050–51; *Annapolen*, *supra* note 53, at 776.

111. *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 814–15 (Sup. Ct. 2002).

112. *Id.* at 815.

suggest that exposing one's child to ETS should be treated under the law as child abuse because it is no different than administering poison, except that smoking is socially acceptable.¹¹³ That argument sweeps aside the central point: smoking *is* both socially acceptable and legal and therefore it is *not* the same as intentionally feeding a child arsenic. If we are prepared to recognize the science on ETS as evidence that smoking in the presence of children is child abuse, then smoking should be illegal for everyone. If we are unwilling to make smoking illegal, we should question whether it is fair to place the burden of our collective indecision on the backs of parents.

Second, parental smoking bans criminalize parenting because they do not account for the addictive nature of tobacco and set up an easy trap for parents. Smoking, for many, is a lifelong addictive habit. The majority of smokers begin smoking before they are fourteen years old, and as many as ninety percent of smokers have tried to quit but failed.¹¹⁴ Parents who smoke in the presence of their children are not exercising a "choice" in the traditional sense.¹¹⁵

Some advocates who seek to enjoin parents from smoking, in cars or otherwise, lack any sensitivity to parents' perspective or to the challenge of addiction. They conclude that parents who smoke are reckless child abusers.¹¹⁶ "In addition to reckless child abuse, it may not be unrealistic

113. Mireille O. Butler, Note, *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, 244 (1996).

114. Tyler, *supra* note 12, at 801–02.

115. See *Johnson v. State*, 602 So. 2d 1288, 1296 (Fla. 1992) ("To punish a person for substance abuse ignores the impaired capacity of these individuals to make rational decisions concerning their drug use."); Tyler, *supra* note 12, at 802.

116. The angriest voices in the literature tend to focus on pregnant women who smoke, rather than parents who smoke around young children, but in both instances scholars and courts have characterized the parents as vicious abusers: "a court should be able to find that the mother's prenatal [smoking] and indifference towards causing harm to her child are indicative of postnatal abuse." Annapolen, *supra* note 53, at 772. A judge wrote, "We are at a point in time when, in the opinion of this Judge, a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive tobacco smoke." *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 937 (Fam. Ct. 1994). Another advocate proposes removing all infants from the care of women who smoked when they were pregnant because they obviously do not care about their children:

If a pregnant woman still cannot stop [smoking], the courts should be able to use this smoking as evidence that she does not care enough about the health and safety of her child and should be able to place the child, once born, in the custody of another relative who does not smoke. In cases of divorce, the probate courts should use the mother's prenatal smoking as evidence against her in custody hearings. In order to serve the child's best interests, it is important for family courts to eliminate fetal exposure to tobacco smoke whenever possible.

Annapolen, *supra* note 53, at 771 (footnote omitted). An appellate court agreed with Annapolen's interpretation of parental smoking, writing in a divorce decree, "If children are exposed to smoke, it will be strong evidence that the exposing parent does not take good care

to consider smoking parents as intentionally harming their children when exposing them to ETS.”¹¹⁷ One antismoking advocate, in the name of protecting children, actually proposes that states terminate the parental rights of all smokers believing that “[t]he trend is that parental smoking, which results in ETS exposure to children, will clearly be viewed as falling below societal standards. State intervention would then be readily accepted to remedy the harmful health effects of ETS on an exposed child.”¹¹⁸

Third, inevitable policing problems will lead to selective enforcement of the laws and will therefore place unjust criminal burdens on parents. Intentional or not, it is well known that police selectively enforce traffic offenses against racial minorities and use violations of traffic laws as an excuse to stop certain drivers.¹¹⁹ The smoking bans will provide a new opportunity for selective enforcement, yet they will primarily affect parents because the law only applies to people with children in their car.¹²⁰

of them.” See *Smith v. Smith*, 1996 WL 591181, at *1-2 (Tenn. Ct. App. Oct. 11, 1996) (quoting lower court’s divorce decree). The court subsequently held the father in criminal contempt, suspended his visitation rights, and sentenced him to time in jail for exposing his child to ETS. *Id.* at *5-6.

Similar comments have been made about drug addicted parents, revealing a profound lack of understanding about the disease of addiction:

Those women who truly want their children to be born free of the disabling effects of gestational drug use will choose to walk the treatment path on their own. While encouraging pregnant addicts to get treatment should certainly continue, a more significant deterrent [criminal prosecution] is needed.

Janssen, *supra* note, 92, at 744. In contrast, the court in *State v. Johnson* made a more nuanced and scientifically appropriate observation:

In all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance. If a pregnant woman suffers from a substance dependency, it is the physical impossibility of avoiding an impact on fetal health that causes severe damage to the fetus, not an intentional or malicious wish to cause harm.

State v. Johnson, 602 So. 2d 1288, 1296 (Fla. 1992) (quoting Report of the American Medical Association Board of Trustees, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667–68 (Nov. 28 1990)).

117. Anderson, *supra* note 46, at 377; see Moorby, *supra* note 74, at 855–56 (“Courts should recognize that exposing children to secondhand smoke can possibly amount to criminal conduct. . . . the courts should [also] be receptive to suits brought under the states’ child abuse or neglect provisions. . . . In cases involving asthmatic children, a parent’s habit of smoking in the presence of his or her child should be considered a per se violation of New York Penal Law section 260.10 with abuse or neglect a possibility.”); Tyler, *supra* note 12, at 797 (“Parental smoking within the home has been considered by some antismoking advocates as approaching a form of child abuse. . . .”).

118. Anderson, *supra* note 46, at 383.

119. “Driving while black,” is a phrase that has entered common speech to describe this very phenomenon: police using the excuse of a traffic offense to stop, question, search, or otherwise harass black drivers. See generally David Harris, *The Stories, The Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) (offering disturbing statistics, reasons for abuse, and proposing solutions).

120. According to the executive director of the Rhode Island ACLU, laws like this “would

In addition to the potential for misuse of the statutes in stopping cars, there is also the potential for abuse in the issuance of citations. It proves an impossible task for a police officer to verify, as a car speeds by, whether an adult in the car is smoking and, if so, whether a child under a certain age is present. Even if an officer can make that determination, he or she is unlikely to invest time in stopping the driver for the smoking offense when there are far greater hazards on the road.¹²¹ Therefore, police are most likely to enforce smoking bans when they have already stopped a driver for some other unrelated purpose. At that point, the officer has a choice as to whether to add on the additional citation. Some of the proposed smoking bans include jail time as a sanction. Police and prosecutors will therefore be able to use smoking violations to harass and to secure convictions and jail time against people for whom they were unable to collect sufficient evidence to prosecute on a more serious crime.

Police have already demonstrated their willingness to use this kind of tactic against parents who use illegal drugs. For instance, in *Commonwealth v. Welch*¹²² the police had a warrant to search the house of a woman for an alleged drug crime.¹²³ While executing the warrant, the police discovered that Ms. Welch, a drug addict, was pregnant.¹²⁴ In addition to possession, the prosecution used the fact of Ms. Welch's pregnancy to charge her with an additional crime of criminal abuse, arguing that Ms. Welch abused her fetus each time she ingested drugs.¹²⁵ If she had not been pregnant, there would have been no abuse charge. Ms. Welch was sentenced to two years for possession of an illegal substance, and to an additional consecutive five-year sentence for the child abuse.¹²⁶ Had the facts of Ms. Welch's case been identical but for her pregnancy, she would have been prosecuted, convicted, and sentenced for one crime rather than two. Her conviction was appealed, and the abuse conviction was vacated,¹²⁷ but the lesson is an important one. A law that enables police to automatically increase the number of charges in a run-of-the-mill drug possession case every time the accused is pregnant results in an unjust but

allow police to pull over a car for reasons totally unrelated to criminal activity, traffic safety or general motor vehicle enforcement . . . Police powers should not be so easily broadened, even if for a good cause like helping to protect children from secondhand smoke." Scott Mayerowitz, *Legislators Mull Antismoking Bills*, PROVIDENCE J.-BULL., Mar. 1, 2007, at B1.

121. See *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 768 (Sup. Ct. 1988) (observing police avoid involving themselves in private family disputes).

122. *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 280–81.

127. *Id.* at 281.

easy win for the prosecution.¹²⁸ Similarly, a law that allows police to automatically increase the charges against a smoking driver, just because the person is a parent, is a criminalization of parenting. “The best interests of the child are furthered by the child being nurtured and guided by both of his or her natural parents.”¹²⁹ The focus of the government should be on addiction prevention and supporting and maintaining families, not on criminalizing parents and sending them to jail for an otherwise lawful activity.

C. *An Attack on the Rights of Women*

Antiabortion rights advocates will use parental smoking bans to severely restrict the rights of pregnant women. As antiabortion advocates have urged, at least one court has used abuse statutes to find a pregnant woman who used drugs automatically liable for the harm she caused to her fetus.¹³⁰ While it remains a minority position, that may only be because courts feel constrained by legislative intent. Indeed, some judges are poised to make the shift, not only for illegal drug use, but for smoking as well: “We are at a point in time when, in the opinion of this Judge, a parent or guardian could be prosecuted successfully for neglecting his or her child as a result of subjecting the infant to an atmosphere contaminated with health-destructive tobacco smoke.”¹³¹

If legislatures start passing laws making it illegal for parents to smoke, based on findings that ETS exposure in a small, confined space harms child health, the foundation is laid for courts to reinterpret child abuse statutes to include prenatal smoking. Antiabortion advocates support this approach, and the April 2007 Supreme Court decision, *Gonzales v. Carhart*,¹³² made plain that Court’s view on the relative rights of pregnant women and their fetuses.¹³³

One antismoking advocate proposes the following statutory protocol:

As several states have done for other harmful substances, mothers testing positive for tobacco use at doctor’s visits should be enjoined from further use and

128. See *Whitner v. State*, 492 S.E.2d 777, 786 (S.C. 1997) (“If the State wishes to impose additional criminal penalties on pregnant women who engage in this already illegal conduct [using crack cocaine] because of the effect the conduct has on the viable fetus, it may do so.”).

129. *Johnita M.D. v. David D.D.*, 740 N.Y.S.2d 811, 813 (Sup. Ct. 2002).

130. See *Whitner*, 492 S.E.2d at 780 (holding that criminal child neglect statute applies to pregnant woman who ingested crack cocaine in her third trimester because fetus is recognized as “person” under that state’s law for homicide statutes and wrongful death civil liability).

131. *Lizzio v. Lizzio*, 618 N.Y.S.2d 934, 937 (Fam. Ct. 1994).

132. *Gonzales v. Carhart*, 127 S. Ct. 1610 (U.S. 2007).

133. See *Gonzales*, 127 S. Ct. at 1626, 1637 (holding federal law banning later term abortions, without an exception for health or life of mother, is constitutional because of strong government interests in protecting potential life of fetus); Annapolen, *supra* note 53, at 773 (“Because tobacco exposure causes similar harm to the fetus and makes it likely that the infant

should have to submit to urine analysis testing. If a pregnant woman continues to test positive for tobacco use, the court should sentence her to time at a rehabilitation facility to ensure that her child develops normally. In doing so, the courts can more effectively protect the development of the fetus and deter other women from smoking cigarettes while pregnant.¹³⁴

She explains that “[w]hile these remedies may appear harsh . . . the courts must examine the rights of the mother before they decide to protect the rights of the fetus, the courts should be able to determine that the right of the fetus to be born healthy supersedes the mother’s right to smoke.”¹³⁵

Supporters of this approach dismiss *Roe v. Wade*¹³⁶ by reasoning that *Roe* allows states to intervene to protect potential life over the wishes of a mother to terminate her pregnancy, and that states may therefore intervene where a woman engages in behaviors that may have the effect of causing a miscarriage.¹³⁷ The horrifying effect of such reasoning is the breadth of ordinary activities that could fall under a miscarriage rule.¹³⁸ Proscribing activities, like smoking, because they *may* lead to miscarriage would lead to prosecutions of women for murder, attempted murder, and incredible state control over the private behaviors of women while pregnant.¹³⁹ As the court in *Welch* cautioned, the issue should be the mother’s self-abuse, not child abuse:

The mother was a drug addict. But, for that matter, she could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk

will experience defects or disabilities, states should also be able to charge mothers with reckless injury, abuse and neglect when the cause of such harm is tobacco rather than alcohol or cocaine.”).

134. See Annapolen, *supra* note 53, at 773 (footnotes omitted).

135. See *Id.* at 774.

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

137. Janssen, *supra* note 92, at 765.

138. One blogger commented on the proposed New Jersey legislation as follows: “If this measure passes what freedoms will be taken away next? If I am such a bad parent because I smoke, what’s going to stop the government from taking my kid away next? Or worse, what’s going to stop Raymond Lesniak from making all female smokers undergo sterilization?” Jiltice9300, Smoking Cigarettes Inside Your Own Car: New Legislation in NJ?, Yahoo Answers, <http://answers.yahoo.com/question/index?qid=20070119114917AACMxKQ> (last visited Apr. 19, 2007).

139. Not only would the state power be unbounded, but it would only affect women, not men. The inherent sexism of this approach to child welfare was revealed in Wyoming when a pregnant woman went to the hospital to seek treatment after her husband beat her. Katha Pollitt, *Fetal Rights: A New Assault on Feminism; Law Protecting the Fetus from the Mother*, THE NATION, Mar. 26, 1990, at 409, 410. The woman was arrested and charged with felony child abuse for ingesting alcohol while pregnant, but authorities took no action against her husband. *Id.*; Michelle D. Mills, Comment, *Fetal Abuse Protections: The Triumph of Reaction Over Reason*, 47 DEPAUL L. REV. 989, 995 (1998).

which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road?

If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new 'crimes.' . . . [this interpretation of statutes] might lead to a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result.¹⁴⁰

Antiabortion advocates, in the name of protecting fetuses, have criticized *Welch* as an illogical distortion of the rules of criminal law that will have a "substantial chilling effect upon state prosecutors' efforts to prosecute pregnant substance abusers."¹⁴¹ Deviating from the *Welch* holding, however, or interpreting state laws banning parental smoking to ban pregnant women from smoking would lead to unconstitutional results and have the effect of undermining *Roe*.¹⁴²

Condemning pregnant women who smoke to jail involuntary treatment, or termination of parental rights is a profound denial of liberty. Preventing children's exposure to ETS is surely an appropriate public health goal, but separating families merely because a parent smokes would create more harm than it would solve and would unfairly persecute women and families.¹⁴³ As long as smoking is a legal, common habit, state laws criminalizing parental smoking have the potential to devastate the rights of women.

IV. Conclusion

A new breed of state smoking bans is developing that would criminalize parenting and undermine women's rights. There are sound public health reasons to limit children's exposure to ETS and to ban peoples' smoking in cars with children, but the hidden danger of these laws is that they will enable police and prosecutors to use abusive tactics against parents, and they will provide fodder to courts in search of statutes that enable them to ban pregnant women's smoking. If women can be enjoined from engaging in an ordinary, lawful activity because of its potential for harm to a fetus, women's rights to bodily integrity and self-determination in procreation will go up in smoke.

140. *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (quoting *Commonwealth v. Kemp*, No. 2707 C 1991, 1992 WL 613723, at *6 (Pa. Com. Pl. Dec. 16, 1992)).

141. K. Christopher Shen, *The Lack of a Judicial Policy Addressing Maternal Drug Abuse Cases*: *Commonwealth v. Welch*, 864 S.W.2d 280 (Ky. 1993), 17 HARV. J.L. & PUB. POL'Y 929, 937-41 (1994).

142. The Court's recent ruling, however, calls into question the viability of *Roe*.

143. See *Johnson v. State*, 602 So. 2d 1288, 1294 (Fla. 1992) ("Criminal prosecution of mothers [who ingest illegal drugs while pregnant] will undermine Florida's express policy of 'keeping families intact' and could destroy the family by incarcerating the child's mother when alternative measures could protect the child and stabilize the family.").

