NO SMOKING AROUND CHILDREN: THE FAMILY COURTS' MANDATORY DUTY TO RESTRAIN PARENTS AND OTHER PERSONS FROM SMOKING AROUND CHILDREN

Judge William F. Chinnock*

"A man's home is his castle, but no one is allowed to hurt little children – even in his castle."**

I. INTRODUCTION

A considered analysis of family law across the United States leads to this inescapable conclusion: a family court that does not issue court orders restraining persons from smoking in the presence of children under the court's care fails those children whom the law has entrusted to its care. A number of cases take judicial notice of the danger of secondhand smoke to children. Those cases recognize this danger is one of the "best interests of the child" factors that a family court should take into account when determining visitation and custody issues. The issue emerges when either a non-smoking parent raises the issue of the dangers of secondhand smoke to the child or if the child has a respiratory problem.[1]

This Article demonstrates that under existing American law, a family court – on its own initiative and regardless of the health of the child – has a legal duty to consider the danger of secondhand smoke to children as a significant, possibly determinative (where child has health problems), factor in deciding issues of visitation and custody. To protect children under their care, family courts, as a matter of

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* William F. Chinnock, Visiting Judge by assignment of the Ohio Supreme Court, 1999–present; former judge of the Cuyahoga County Juvenile Court, Cleveland, Ohio; former Adjunct Professor, Cuyahoga County Community College; Bachelor of Science, John Carroll University, School of Business, 1962; Juris Doctor, Western Reserve University School of Law, 1965.

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1. Jeffrey L. Hall, *Secondhand Smoke as an Issue in Child Custody/Visitation Disputes*, 97 W. VA. L. REV. 115 (1994); Harriet Dinegar Milks, Annotation, *Smoking as Factor in Child Custody and Visitation Cases*, 36 A.L.R. 5th 377 (1996).

standard practice, must issue court orders restraining anyone from smoking in the presence of those children.[2]

II. EVIDENCE OF CAUSAL RELATION BETWEEN SECONDHAND SMOKE AND SERIOUS DISEASE IN CHILDREN

A. Smoking Tobacco as a Cause of Serious Disease Among Smokers

About one third of the world's adults, over one-thousand million people, smoke cigarettes. Half of these smokers will die prematurely.[3] Between one-fifth and two-thirds of men in each country of the world today smoke tobacco.[4] Women's smoking rates vary more widely, and although increasing, generally do not equal the rates of males.[5] More than 80,000 scientific publications have linked tobacco to dozens of causes of death.[6] Lung cancer is the most common cause of cancer deaths in the world; the major cause of lung cancer is smoking tobacco, primarily cigarettes.[7]

Worldwide, smoking causes about four million deaths annually, mainly attributable to cardiovascular disease, chronic lung disease, lung cancer, and other cancers. There is evidence that smoking tobacco causes many types of cancer in humans, including cancer of the lung, oral cavity, nasal cavity, larynx, esophagus, stomach, pancreas, liver, kidney, bladder, and cervix.[8] The risk of developing mouth and throat cancer is seven times greater for people who use tobacco.[9]

Smoking is responsible for approximately 15% of all deaths in the United States, killing more than 430,000 citizens each year.[10] Smoking kills more people each year in the United States than alcohol, AIDS, cocaine, heroin, homicide, suicide, auto accidents, and fire combined.[11] *Stated differently, smoking kills almost three times as*

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2. *See In re* Julie Anne, 780 N.E.2d 635 (Ohio Ct. Common Pleas 2002).

3. WORLD HEALTH ORG., ADDRESSING THE WORLDWIDE TOBACCO EPIDEMIC THROUGH EFFECTIVE EVIDENCE-BASED TREATMENT (1999), *available at* http://www.who.int/tobacco/ health-impact/mayo-report/en/index.html.

4. INT'L AGENCY FOR RES. ON CANCER, WORLD HEALTH ORG., MONOGRAPH VOL. 83, TOBACCO SMOKE AND INVOLUNTARY SMOKING § 5 (2002), *available at* http://www.iarc.fr/pageroot/PRELEASES/pr141a.html.

5. *Id.*

6. WORLD HEALTH ORG., MONOGRAPH: ADVANCING KNOWLEDGE ON REGULATING TOBACCO PRODUCTS (2001), *available at* http://ash.org.uk/html/regulation/pdts/whoprocductregulation.pdf.

7. *See* INT'L AGENCY FOR RES. ON CANCER, *supra* note 4.

8. *Id.*

9. William J. Blot, *Alcohol and Cancer*, 52 CANCER RES. 2119, 2119–23 (1992) (stating that the risk is seven times greater for smokers who smoke forty cigarettes per day for more than twenty years).

10. OFFICE ON SMOKING & HEALTH, U. S. DEP'T OF HEALTH SERV., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE U.S. SURGEON GENERAL ix (1986), *available at* http://www.cdc.gov/tobacco/sgr_1986.htm.

11. NAT'L INST. ON DRUG ABUSE, U. S. DEP'T OF HEALTH SERV., NIDA RESEARCH REPORT: NICOTINE ADDICTION (2002), *available at* http://www.nida.nih.gov/researchreports/nicotine/nicotine2.html.

many smokers each week in the United States as were killed in the September 11th terrorist attacks on the World Trade Center.[12]

Although the prediction by a former United States Surgeon General that America would be a smoke-free society by 2000 has not proven accurate,[13] smokers do receive a dire caution with every package of cigarettes they purchase: "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy."[14] Since 1964, when the Surgeon General first called the nation's attention to the health hazards of smoking, smoking among adults in the United States has declined from 40.4% in 1965, to 25.7% in 1991.[15] In 2000, 23.3% of United States adults were current smokers, down from 25% in 1993.[16]

Despite the dramatic decrease in smoking among adults, the prevalence of cigarette smoking among United States high school students increased from 27.5% in 1991, to 36.4% in 1997, before declining again to 34.8% in 1999.[17] On average, over 3,000 additional children in the United States begin smoking regularly each day.[18] The

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12. CNN, *September 11: A Memorial*, *available at* http://us.cnn.com/SPECIALS/2001/memorial/index.html (last visited August 27, 2003) (September 11, 2001 World Trade Center deaths are set at more than 3,000); OFFICE ON SMOKING AND HEALTH, *supra* note 10; NAT'L INST. ON DRUG ABUSE, *supra* note 11 (U.S. smoking deaths are set at 430,000 annually).

13. *Surgeon General Predicts Isolation for U.S. Smokers*, N.Y. TIMES, Oct. 22, 1985, at C12.

14. 15 U.S.C. § 1333 (2003). In 1965, Congress' first cigarette warning label legislation specified the warning: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92 (1965). In 1970, Congress made the label warning more specific: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health." Pub. L. No. 91-222 (1970). In 1984, Congress enacted legislation expanding the public warning to advertisements and outdoor billboards, and also substituted four specific warnings for the previous single warning, to be rotated quarterly: (1) "SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy;" (2) SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health;" (3) SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight;" and (4) "SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide." Pub. L. No.98-474 (1984) (codified as amended at 15 U.S.C. §§ 1333(a) (2), (a) (3), (c)).

15. GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 7 (Barbara S. Lynch & Richard J. Bonnie eds., 1994).

16. Ctr. for Disease Control & Prevention, *Cigarette Smoking Among Adults – United States 2000*, 51 MORBIDITY & MORTALITY WEEKLY REPORT 642 (2002).

17. Ctr. for Disease Control & Prevention, *Trends in Cigarette Smoking Among High School Students – United States 1991–2001*, 51 MORBIDITY & MORTALITY WEEKLY REPORT 409, 412 (2002).

18. C. EVERETT KOOP, M.D., SC.D, FINAL REPORT TO THE UNITED STATES CONGRESS OF THE ADVISORY COMMITTEE ON TOBACCO POLICY AND PUBLIC HEALTH (1997), *available at* http://www.tobacco.neu.edu/Extra/hotdocs/kk7-97.htm; Ctr. for Disease Control & Prevention, *Incidence of Initiation of Cigarette Smoking, United States – 1965–1996*, 47 MORBIDITY & MORTALITY WEEKLY REPORT 837 (1998). There are 314,000 children living in Ohio today who will ultimately die prematurely from smoking. Nat'l Ctr. for Tobacco-Free Kids, *The Toll of*

vast majority of smokers begin using tobacco well before age eighteen and nearly 25% try their first cigarette by age ten.[19] The average smoker begins smoking at twelve and one-half years of age.[20] Very few smokers take up the habit as adults.[21]

All smoked tobacco products deliver substantial amounts of carcinogens to their users.[22] One-half of all persistent cigarette smokers are eventually killed by a tobacco-caused disease. Half of those deaths occur in middle age, and those killed by tobacco lose, on average, twenty to twenty-five years of life expectancy compared to their non-smoking counterparts.[23] In 1998, a Master Settlement Agreement between the tobacco industry and forty-six states was signed, enabling states to recover the Medicaid costs expended treating sick smokers. One of the documents released under the settlement was an internal, handwritten memo by a lawyer for Liggett Tobacco Group. That memo provided the proverbial "smoking gun," candidly and succinctly admitting: "Cigarettes kill people beyond a reasonable doubt."[24]

The evidence is overwhelming and irrefutable. Smoking tobacco causes and aggravates serious diseases in smokers, and quite often, leads to death.

Tobacco in Ohio, *at* http://www. tobaccofreekids.org (2003). "Children" are defined as persons under age 18. *Id.*

19. Global Youth Tobacco Survey Collaborative Group, *Tobacco Use Among Youth: A Cross Country Comparison*, 11 TOBACCO CONTROL 252 (2002) (produced by U.S. Centers for Disease Control and Prevention, the World Health Organization, the Canadian Health Association, and the National Cancer Institute, presenting summary of findings of Global Youth Tobacco Survey covering forty-three different countries, showing youth tobacco use and exposure as a global problem).

20. *See* KOOP, *supra* note 18.

21. *Id.*; GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS, *supra* note 15, at 6. *See* NAT'L CLEARINGHOUSE ON TOBACCO & HEALTH, ETS IN HOME ENVIRONMENTS (1996); OFFICE OF SMOKING & HEALTH, U. S. DEP'T OF HEALTH & HUMAN SERV., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994); Karl E. Bauman, *Effect of Parental Smoking Classification on the Association Between Parental and Adolescent Smoking*, 15 ADDICTIVE BEHAV. 413 (1990).

22. INT'L AGENCY FOR RES. ON CANCER, *supra* note 4. Studies estimate the monetary health-care costs from smoking to be between 6% and 14% of all annual personal health-care expenditures in the United States, with a commonly cited figure of $50 billion in annual costs. Am. Med. Student Ass'n, *Medical Student Activism: A Primer on Domestic and International Tobacco Control*, *at* http://www.amsa.org/pdf/tprimer/pdf, *citing* Kenneth E. Warner et al., *Medical Costs of Smoking: Estimates, their Validity, and their Implications*, 8 TOBACCO CONTROL 290 (1999); J. C. Barlett et al., *Medical-Care Expenditures Attributable to Cigarette Smoking – United States 1993*, 43 MORBIDITY & MORTALITY WEEKLY REPORT 469 (1994). It is reported that each pack of cigarettes sold in the United States costs American taxpayers an estimated $7.18 in medical care costs and lost productivity. Ctr. for Disease Control & Prevention, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs – United States 1995–1991*, MORBIDITY & MORTALITY WEEKLY REPORT SYNOPSIS (Apr. 12, 2002).

23. INT'L AGENCY FOR RES. ON CANCER, *supra* note 4.

24. Milo Geyelin, *Lawyers Shielded Tobacco Firms, Papers Show*, WALL ST. J., Aug. 7, 1997, at A3; Dennis Kelly, *Tobacco Lawyers Discussed Hiding Risk*, U.S.A. TODAY, Aug. 7, 1997, at D1; Barry Meier, *Tobacco Lawyers' Papers Are Made Public*, N.Y. TIMES, Aug. 7, 1997, at A18; John Schwartz, *Tobacco Firms Shielded Data on Hazards*, WASH. POST, Aug. 7, 1997, at A1.

B. Secondhand Smoke as a Cause of Serious Disease Among Non-Smokers

While smoking is the first leading cause, secondhand smoke is the *third* leading cause of preventable death in the United States.[25] For every eight smokers killed by active smoking, passive smoking, or exposure to secondhand smoke, kills one non-smoker.[26] Passive smoking kills almost as many Americans each year as died in the Vietnam War.[27] *In other words, every three weeks secondhand cigarette smoke kills about the same number of non-smokers in the United States as were killed in the September 11th terrorist attacks on the World Trade Center*.[28]

A plethora of reports have summarized the findings of scientific studies on passive smoking.[29] The compelling evidence that passive smoking causes disease is

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25. S. A. Glantz & W. W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83 CIRCULATION 1, 1–12 (1991); A. E. Taylor et al., *Environmental Tobacco Smoke and Cardiovascular Disease: A Position Paper from the Council on Cardiopulmonary and Critical Care, American Heart Association*, 86 CIRCULATION 699, 699–702 (1992). Secondhand smoke includes both mainstream smoke, inhaled and exhaled by the smoker, and sidestream smoke, smoke released directly from the end of a burning cigarette. Council for a Tobacco-Free Cmty., *Second-Hand Smoke*, *at* http://info.London.on.ca/Hosted/ctfc/bylawETS.html (last visited Aug. 28, 2003).

26. Taylor et al., *supra* note 25 at 699.

27. Glantz & Parmley, *supra* note 25, at 1–12. *See infra* text accompanying note 49.

28. *See* sources cited *supra* note 12.

29. ENVTL. PROT. AGENCY, FACT SHEET: RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING (1993), *available at* http://www.epa.gov/iaq/pubs/etsfs.html; ENVTL. PROT. AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835; INT'L AGENCY FOR RES. ON CANCER, *supra* note 4; NAT'L CANCER INST., HEALTH EFFECTS OF EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE: A REPORT OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY, SMOKING AND HEALTH MONOGRAPH 10 (1999); NAT'L HEALTH & MED. RES. COUNCIL, THE HEALTH EFFECTS OF PASSIVE SMOKING: A SCIENTIFIC INFORMATION PAPER (1997), *available at* http://www.health.gov.au/nhmrc/advice/nhmrc/foreword.htm; NAT'L RES. COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS (1986); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., WOMEN AND SMOKING: A REPORT OF THE SURGEON GENERAL (2001); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL (2000); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., TOBACCO USE AMONG U.S. RACIAL/ETHNIC MINORITY GROUPS: A REPORT OF THE SURGEON GENERAL (1998); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., SMOKING AND HEALTH IN THE AMERICAS: A REPORT OF THE SURGEON GENERAL (1992); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., REDUCING THE HEALTH CONSEQUENCES OF SMOKING – 25 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL (1989); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., SMOKING AND HEALTH, A NATIONAL STATUS REPORT: A REPORT TO CONGRESS (1986); OFFICE ON SMOKING & HEALTH, *supra* note 10; OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE: A REPORT OF THE SURGEON GENERAL (1985); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – CHRONIC OBSTRUCTIVE LUNG DISEASE: A REPORT OF THE SURGEON GENERAL (1984); OFFICE

not new. The first studies linking passive smoking with breathing problems in children, and lung cancer and heart disease in adults, were issued ten to twenty years ago.[30]

Almost two decades ago, a causal relationship was demonstrated between secondhand smoke and disease in healthy non-smokers, including respiratory diseases in children of parents who smoke.[31] More than a decade ago, the United States Environmental Protection Agency classified secondhand smoke as a "Group A"

ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – CARDIOVASCULAR DISEASE: A REPORT OF THE SURGEON GENERAL (1983); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – CANCER: A REPORT OF THE SURGEON GENERAL (1982); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING – THE CHANGING CIGARETTE: A REPORT OF THE SURGEON GENERAL (1981); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN: A REPORT OF THE SURGEON GENERAL (1981); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL (1979); OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL (1978, 1977, 1976, 1975, 1974, 1973, 1972, 1971, 1969, 1968, 1967, and 1964); WELSH OFFICE, DEP'T OF HEALTH, REPORT OF THE SCIENTIFIC COMMITTEE ON TOBACCO AND HEALTH (1998), *available at* www.official-documents.co.uk/document/ doh/tobacco/report.htm; Paul Cameron et al., *The Health of Smokers' and Non-Smokers' Children*, 43 J. ALLERGY 336, 336–41 (1969); J. R. T. Colley et al., *Influence of Passive Smoking and Parental Phlegm on Pneumonia and Bronchitis in Early Childhood*, 2 LANCET 1031 (1974); E. T. Fontham et al., *Environmental Tobacco Smoke and Lung Cancer in Nonsmoking Women: A Mulitcenter Study*, 271 JAMA 1752 (1994); S. A. Glantz & L. R. Smith, *The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales*, 84 AM. J. PUB. HEALTH 1081 (1994); S. A. Glantz & W. W. Parmley, *Passive Smoking and Heart Disease: Epidemiology, Physiology, and Biochemistry*, 83 CIRCULATION 1 (1991); Takeshi Hirayama, *Non-Smoking Wives of Heavy Smokers Have a Higher Risk of Lung Cancer: A Study from Japan*, 282 BRIT. MED. J. 183 (1981); H. S. Klonoff-Cohen et al., *The Effect of Passive Smoking and Tobacco Exposure Through Breast Milk on Sudden Infant Death Syndrome*, 273 JAMA 795 (1995); James L. Repace & Alfred H. Lowrey, *Indoor Air Pollution, Tobacco Smoke, and Public Health*, 208 SCI. 464 (1980); A. Judson Wells, *An Estimate of Adult Mortality in the United States from Passive Smoking*, 14 ENV. INT. 249 (1988). *See also* http://www.google.com, which lists 60,000+ links for "secondhand smoke" and 30,000+ links for "secondhand smoke – children."

30. OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING – CARDIOVASCULAR DISEASE: A REPORT OF THE SURGEON GENERAL, *supra* note 29; OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING – CANCER: A REPORT OF THE SURGEON GENERAL, *supra* note 29; OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING – THE CHANGING CIGARETTE: A REPORT OF THE SURGEON GENERAL, *supra* note 29; OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING FOR WOMEN: A REPORT OF THE SURGEON GENERAL, *supra* note 29; OFFICE ON SMOKING & HEALTH, SMOKING AND HEALTH: A REPORT OF THE SURGEON GENERAL, *supra* note 29; OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL, *supra* note 29; Colley et al., *supra* note 29; Hirayama, *supra* note 29; Repace & Lowrey, *supra* note 29.

31. *See* OFFICE ON SMOKING & HEALTH, *supra* note 10.

carcinogen – a substance that produces cancer in humans.[32] In June 2002, an international team of twenty-nine experts from the twelve countries comprising the International Agency for Research on Cancer[33] issued a meta-analysis summary. This summary analyzed more than 3,000 studies on secondhand smoke, involving millions of people on six continents, emphatically concluding: "Secondhand smoke is carcinogenic to humans."[34]

More than two-thirds of non-smokers recognize that smoking is hazardous to their health. Nearly one-half of all smokers recognize this reality as well.[35] An overwhelming majority of adults, eighty-seven percent, believe that people have a right to be free from breathing other people's secondhand smoke.[36] The tobacco industry's response to public awareness of the dangers of secondhand smoke is contained in a secret study conducted for the U.S. Tobacco Institute in 1978. This study concluded that such public awareness is "the most dangerous development to the viability of the tobacco industry that has yet occurred."[37]

Secondhand smoke is the single most important source of indoor air pollution.[38] Indoor air pollution is a much greater health risk than outdoor air pollution because people spend most of their time indoors, thereby increasing the amount of time they are exposed to indoor air pollutants.[39] Many people are unaware of the indoor air pollution problem,[40] which often is ten times greater than outdoor air pollution.[41] Secondhand smoke, which includes both mainstream smoke inhaled and exhaled by the smoker, and sidestream smoke released directly from the end of a burning cigarette, is a complex "chemical cocktail." Secondhand smoke contains more than 4,000 chemical substances, more than fifty of which are known to cause cancer.[42]

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32. ENVTL. PROT. AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS, *supra* note 29.

33. INT'L AGENCY FOR RES. ON CANCER, *supra* note 4. The International Agency for Research on Cancer is a branch of the World Health Organization. *Id.*

34. *Id.*

35. Tobacco Free Initiative, World Health Org., *Secondhand Smoke*, *available at* http://www.who.int/tobacco/health_impact/secondhand_smoke/en/ (last visited Aug. 28, 2003).

36. EKOS RES. ASSOCIATES, AN ASSESSMENT OF KNOWLEDGE, ATTITUDES AND PRACTICES CONCERNING ENVIRONMENTAL TOBACCO SMOKE 60 (1995). *See* Renee Vintzel Loridas, Annotation, *Secondary Smoke as Battery*, 46 A.L.R. 5th 813 (1997).

37. ROPER ORG., A STUDY OF PUBLIC ATTITUDES TOWARDS CIGARETTE SMOKING AND THE TOBACCO INDUSTRY 5 (1978).

38. K. H. Ginzel, *Hazards Smokers Impose*, 87 N.J. MED. 311–17 (1990).

39. Conservation Found., *The Epidemic of Indoor Air Pollution*, 60 BUS. & SOC'Y REV. 53 (1987).

40. *Id.*; Note, *Legislation for Clean Air: An Indoor Front*, 82 YALE L.J. 1040, 1043 (1973) (reporting that the dangers of smoke to non-smokers, while not well known, are significant).

41. *See* Conservation Found., *supra* note 39 (referencing a five-year study by the EPA).

42. NAT'L CLEARINGHOUSE ON TOBACCO & HEALTH, *supra* note 21; *see also* Dietrich Hoffmann & Ilse Hoffmann, *The Changing Cigarette: 1950–1995*, 50 J. TOXICOLOGY & ENV. HEALTH 307 (1997).

Secondhand smoke, or environmental tobacco smoke, inevitably results in involuntary or passive smoking by non-smokers. Two-thirds of the smoke from a burning cigarette is not inhaled by the smoker, but instead contaminates the surrounding environment.[43] Studies indicate that the average "passive smoker" inhales the equivalent of six to eleven cigarettes a day.[44] Exposure to as little as eight to twenty minutes of passive smoke causes physical reactions linked to heart disease and strokes.[45]

Sidestream smoke, the smoke released directly from the end of a burning cigarette, contains significantly higher amounts of toxic compounds than those found in mainstream smoke, and is therefore much more dangerous to the passive smoker.[46] One study indicates that sidestream smoke may contain up to fifty times as many carcinogens as the mainstream smoke inhaled by an active smoker.[47] The dangers of secondhand smoke are so grave that the non-smoking spouse of a smoker faces twice the risk of developing lung and heart disease than is faced by a non-smoking spouse of a non-smoker.[48]

The United States Environmental Protection Agency ("EPA") estimates that the risk of developing cancer from exposure to secondhand smoke is nearly fifty-seven times greater than the combined risk posed by all outdoor air contaminants regulated under federal environmental law.[49] While the emphasis on passive smoking has been on lung cancer and breathing problems, the effects on heart disease are even more severe. The chemicals in secondhand smoke injure the heart muscle, interfere with the ability of blood vessels to control blood pressure and flow, increase the blockages of blood vessels (which leads to heart attacks), and make blood stickier. The net effect is that passive smoking causes about fifteen times more deaths from

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43. Am. Acad. of Pediatrics, *Involuntary Smoke: A Hazard to Children*, 99 PEDIATRICS 639 (1997).

44. *Indoor Air Quality Research: Hearings Before the Subcommittee on Energy Development and Applications and the Subcommittee on Natural Resources, Agriculture Research and Environment, of the House Committee on Science and Technology*, 98th Cong., 451 (1983) (additional material submitted for the record, James L. Repace, *Tobacco Smoke and the Non-Smoker* (1983)).

45. Council for a Tobacco-Free Cmty., *Second-Hand Smoke*, *at* http://info.london.on.ca/Hosted/ctfc/bylawETS.html (last visited August 19, 2003), *citing* J. A. Wells, *Passive Smoking as a Cause of Heart Disease*, 24 J. AM. C. OF CARDIOLOGY 546 (1994). One writer calculates that a non-smoker in a smoky room inhales the equivalent of thirty-five cigarettes an hour. Council for a Tobacco-Free Cmty., *Second-Hand Smoke*, *at* http://info.london.on.ca/Hosted/ctfc/bylawETS.html (last visited August 19, 2003), *citing* ROB CUNNINGHAM, SMOKE & MIRRORS: THE CANADIAN TOBACCO WAR (1996).

46. Int'l Programme on Chemical Safety, *Environmental Health Criteria, No. 211: Health Effects of Interactions Arising from Tobacco Use and Exposure to Chemical, Physical or Biological Agents*, *available at* http://www.who.int/pcs/ ehc/summaries/ehc_211.html (last visited Aug. 28, 2003).

47. Peter P. Morgan, *Time for Action on Passive Smoking*, 127 CANADIAN MED. ASS'N J. 810, 810 (1982).

48. *See* OFFICE ON SMOKING & HEALTH, *supra* note 10.

49. *See* Am. Acad. of Pediatrics, *supra* note 43.

heart disease than from lung cancer.[50] The National Cancer Institute estimates that secondhand smoke causes approximately 3,000 lung disease deaths and 48,500 heart disease deaths in non-smokers each year in the United States.[51]

The evidence is overwhelming and irrefutable. Secondhand smoke causes and aggravates serious diseases in non-smoking adults and children.

C. Susceptibility of Children to Diseases Caused by Secondhand Smoke

The adverse health effects from breathing smoke are manifest, whether you are actively smoking or you are involuntarily exposed to passive smoke because you are held captive in a highchair.[52] Every independent authoritative scientific body that has examined the evidence has concluded that secondhand smoke causes diseases affecting children, including low fetal birth weight, bronchitis, pneumonia, asthma induction, asthma exacerbation, chronic respiratory problems, middle ear infections, and Sudden Infant Death Syndrome ("SIDS").[53] Because the bodily tissues and organs of children are still developing, secondhand smoke has a much greater detrimental effect on children than on adults, resulting in reduced growth and development.[54]

Children raised in homes with smokers are particularly susceptible to health problems, predominantly respiratory disorders, linked to secondhand smoke.[55]

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50. Tobacco Free Initiative, World Health Org., *Secondhand Smoke*, *available at* http://www.who.int/tobacco (last visited Aug. 28, 2003); C. Pitsavos et al., *Association Between Exposure to Environmental Tobacco Smoke and the Development of Acute Coronary Syndromes: The Cardio2000 Case-Control Study*, 11 TOBACCO CONTROL 220 (2002).

51. NAT'L CANCER INST., *supra* note 29, at ES3–ES4 (1999) (53,800 secondhand smoke deaths annually, based upon midpoints for heart disease (48,500), lung cancer (3,000), and SIDS deaths (2,300)).

52. *See* text and supporting notes 3–12, 22–34, 42–68, 72–75.

53. NAT'L CANCER INST., *supra* note 29, at 119–20, 162–63, 253–55. For more information, background papers relating to secondhand smoke and child health prepared for the Int'l Consultation on Envtl. Tobacco Smoke & Child Health can be accessed online at http://www.who.int/tobacco/fctc/consultation/ets2/en/print.html (last visited Aug. 28, 2003), including E. Kathleen Adams et al., *The Costs of Environmental Tobacco Smoke (ETS): An International Review*; P. Boffetta et al., *Parental Tobacco Smoke and Childhood Cancer*; Ron Borland, *Theories of Behavior Change in Relation to Environmental Tobacco Smoke Control to Protect Children*; D. G. Cook & D. P. Strachan, *Effects of Maternal and Paternal Smoking on Children's Respiratory Health*; Vincent T. Covello, *Risk Communication, Children's Health, and Environmental Tobacco Smoke*; B. Eskenazi & R. Castorina, *Association of In Utero or Postnatal Environmental Tobacco Smoke Exposure and Neurodevelopmental and Behavioral Problems in Children*; S. S. Gidding, *Effects of Passive Smoking on the Cardiovascular System in Children and Adolescents*; M. Jarvis, *Children's Exposure to Passive Smoking: Survey Methodology and Monitoring Trends*; William Leiss, *Risk Perception and Communication: Environmental Tobacco Smoke and Child Health*; W. Long, *Environmental Tobacco Smoke, Public Policies, and Interventions: Using Communication and Outreach to Reduce Childhood Exposure to ETS*; E. A. Mitchell & J. Milerad, *Smoking and Sudden Infant Death Syndrome*; J. M. Samet, *Synthesis: The Health Effects of Tobacco Smoke Exposure on Children*.

54. NAT'L RES. COUNCIL, *supra* note 29.

55. *See* INT'L AGENCY FOR RES. ON CANCER, *supra* note 4; J. R. T. Colley, *Respiratory Symptoms in Children and Parental Smoking and Phlegm Production*, 2 BRIT. MED. J. 201 (1974); Fernando D. Martinez et al., *Increased Incidence of Asthma in Children of*

Children's bodies simply are more vulnerable because they are developing.[56] These health problems extend beyond childhood and include an increased risk of lung cancer later in life.[57] In the United States, about 43% of children age two months to eleven years live in homes with at least one smoker.[58] Simple separation of smokers and non-smokers, if they remain within the same building reduces, but does not eliminate, the non-smokers' exposure to environmental tobacco smoke.[59] It takes more than three hours to remove 95% of the smoke from just one cigarette from a room once smoking has ceased.[60]

Asthma is the most common long-term childhood disease. Asthma affects about one in thirteen school-aged children in the United States, resulting in 10 million missed school days each year.[61] Between 1980 and 1994, the incidence of asthma increased 160% in children under age five.[62] The EPA found that secondhand smoke causes between 8,000 and 26,000 new cases of childhood asthma each year. Additionally, secondhand smoke aggravates the condition in 200,000 to 1,000,000 asthmatic children each year.[63] Children exposed to secondhand smoke are twice as likely to develop asthma,[64] making the motto of the American Lung Association, *"When You Can't Breathe, Nothing Else Matters*," especially relevant to children.

Infants of women who smoke during pregnancy are at greater risk of spontaneous abortion, premature birth, and SIDS.[65] There is a strong link between parental smoking, including maternal smoking during pregnancy and parental (especially maternal) smoking after birth, and SIDS. Typical study results find a two-

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Smoking Mothers, 89 PEDIATRICS 21 (1992); Daniel R. Neuspiel et al., *Parental Smoking and Post-Infancy Wheezing in Children: A Prospective Study*, 79 AM. J. PUB. HEALTH 168 (1989); Frank A. Pedreira et al., *Involuntary Smoking and Incidence of Respiratory Illness During the First Year of Life*, 75 PEDIATRICS 594 (1985).

56. Julie Gannon Shoop, *Smoking Parents Lose Points in Child-Custody Case*, 27 TRIAL 82 (Feb. 1991).

57. LYNN MITCHELL, GROWING UP IN SMOKE 127 (1990).

58. James A. Pirkle et al., *Exposure of the US Population to Environmental Tobacco Smoke: The Third National Health and Nutrition Examination Survey, 1988 to 1991*, 275 JAMA 1233 (1991).

59. *See* OFFICE ON SMOKING AND HEALTH, *supra* note 10.

60. James L. Repace, *Risk Management of Passive Smoking at Work and at Home*, 13 ST. LOUIS U. PUB. L. REV. 763, 778 (1994).

61. PRESIDENT'S TASK FORCE ON ENV. HEALTH RISKS & SAFETY RISKS TO CHILDREN, ASTHMA AND THE ENVIRONMENT: A STRATEGY TO PROTECT CHILDREN (1999), *available at* http://www.epa.gov/children/whatwe/fin.pdf; William R. Taylor, *Impact of Childhood Asthma on Health*, 90 PEDIATRICS 657 (1992).

62. NAT'L HEART, LUNG, & BLOOD INST., DATA FACT SHEET: ASTHMA STATISTICS (1999).

63. U.S. ENV. PROT. AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992), *available at* http://epa.gov/iaq/pubs/etsfs.html (peer-reviewed by eighteen eminent independent scientists).

64. Ind. State Dep't of Health, *Public Health Aspects of Tobacco Use*, *at* http://www.in.gov/isdh/programs/tobacco/ets.htm (last visited August 19, 2003), *citing* CTR. FOR DISEASE CONTROL AND PREVENTION, FACTS ABOUT SECONDHAND SMOKE (1997).

65. Natural Res. Def. Council, *Environmental Tobacco Smoke*, *at* http://www.nrdc.org/health/kids/ocar/chap6.asp (last visited August 19, 2003).

to-three fold increase in risk of SIDS for children of smokers.[66] The risk of SIDS for smoker's children doubled when the comparison was restricted to adult smoking in the

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66. J. KNOWELDEN ET AL., POST NEONATAL MORTALITY: A MULTICENTRE STUDY UNDERTAKEN BY THE MEDICAL CARE RESEARCH UNIT, UNIVERSITY OF SHEFFIELD (1985); Jon Nicholl & Alicia O'Cathain, *Antenatal Smoking, Postnatal Passive Smoking, and the Sudden Infant Death Syndrome*, *in* EFFECTS OF SMOKING ON THE FETUS, NEONATE AND CHILD (David Poswillo & Eva Alberman eds., 1992); H. R. Anderson & D. G. Cook, *Passive Smoking and Sudden Infant Death Syndrome: Review of the Epidemiological Evidence*, 52 THORAX 1003 (1997) (concluding maternal smoking doubles the risk of Sudden Infant Death Syndrome); Abraham B. Bergman & Lisa A. Wiesner, *Relationship of Passive Cigarette-Smoking to Sudden Infant Death Syndrome*, 58 PEDIATRICS 665 (1976); Peter S. Blair et al., *Smoking and the Sudden Infant Death Syndrome: Results from 1993–95 Case-Control Study for Confidential Inquiry into Stillbirths and Deaths in Infancy*, 313 BRIT. MED. J. 195 (1996); Marc G. Bulterys et al., *Chronic Fetal Hypoxia and Sudden Infant Death Syndrome: Interaction Between Maternal Smoking and Low Hematocrit During Pregnancy*, 86 PEDIATRICS 535 (1990); Joseph R. DiFranza & Robert A. Lew, *Effect of Maternal Cigarette Smoking on Pregnancy Complications and Sudden Death Syndrome*, 40 J. FAM. PRAC. 385 (1995) (smoking during pregnancy increases a woman's risk of miscarrying by 24%; maternal smoking is responsible for 35% of all SIDS deaths in the U.S. and 66% of all SIDS deaths among the infants of women who smoked during their pregnancy; smoking during pregnancy triples the risk of SIDS); P. Gilles et al., *Smoking Cessation in Pregnancy: A Controlled Trial of the Impact of New Technology and Friendly Encouragement*, *in* SMOKING AND HEALTH 531 (Aoki et al., eds., 1987); Robert A. Greenberg et al., *Passive Smoking During the First Year of Life*, 81 AM. J. PUB. HEALTH 850 (1991); Bengt Haglund et al., *Cigarette Smoking as a Risk Factor for Sudden Infant Death Syndrome: A Population-Based Study*, 80 AM. J. PUB. HEALTH 29 (1990); B. Haglund et al., *Sudden Infant Death Syndrome in Sweden, 1983—1990: Season at Death, Age at Death, and Maternal Smoking*, 142 AM. J. EPIDEMIOLOGY 69 (1995); D. U. Himmelberger, *Cigarette Smoking During Pregnancy and The Occurrence of Spontaneous Abortion and Congenital Abnormality*, 108 AM. J. EPIDEMIOLOGY 470 (1978); H. J. Hoffman et al., *Risk Factors for SIDS: Results of the National Institute of Child Health and Human Development SIDS Cooperative Epidemiological Study*, 533 N.Y. ACAD. SCI. 13 (1988); J. Kline et al., *Smoking: A Risk Factor for Spontaneous Abortion*, 297 NEW ENG. J. MED. 793 (1977); Klonoff-Cohen et al., *supra* note 29 (Sudden Infant Death Syndrome is the most common cause of death of infants between one month and one year of age, and accounts for about 50% of deaths of infants between two and four months of age; breast-feeding was protective for SIDS among non-smokers but not smokers); J. F. Kraus et al., *Risk Factors for Sudden Infant Death Syndrome in the U.S. Collaborative Perinatal Project*, 18 INT. J. EPIDEMIOLOGY 113 (1989); Stig Kullander & Bengt Kallen, A Prospective Study of Smoking and Pregnancy, 50 ACTA OBSTETRICIA & GYNECOLOGICA SCANDINAVIA 83 (1971); Norman Lewak et al., *Sudden Infant Death Syndrome Risk Factors: Prospective Data Review*, 18 CLINICAL PEDIATRICS 404 (1979); D. K. Li & J. R. Daling, *Maternal Smoking, Low Birth Weight and Ethnicity in Relation to Sudden Infant Syndrome*, 134 AM. J. EPIDEMIOLOGY 958 (1991); M. F. MacDorman et al., *Sudden Infant Death Syndrome and Smoking in the United States and Sweden*, 146 AM. J. EPIDEMIOLOGY 249 (1997) (smoking is one of the most important preventable risk factors for SIDS; adjusted SIDS odds ratios for infants of women who smoked ten or more cigarettes per day during pregnancy were 2.3 to 3.8, compared with infants of nonsmoking women); M. H. Malloy et al., *The Association of Maternal Smoking with Age and Cause of Infant Death*, 128 AM. J. EPIDEMIOLOGY 46 (1988); Neil D. McGlashan, *Sudden Infant Deaths in Tasmania, 1980–1986: A Seven Year Prospective Study*, 29 SOC. SCI. MED. 1015 (1989); Joseph Milerad et al., *Objective Measurements of Nicotine Exposure in Victims of Sudden Infant Death Syndrome and in Other Unexpected Child Deaths*, 133 J. PEDIATRICS 232 (1998) (increased risk

same room as the infant.[67] Three times as many infants die of SIDS caused by maternal smoking as are killed as a result of homicide or child abuse.[68]

In response to the 1997 Declaration on Children's Environmental Health,[69] in 1999 the World Health Organization convened the International Consultation on Environmental Tobacco Smoke and Child Health ("ETS Consultation") in Switzerland. Experts from developing and developed countries gathered to examine the effects of exposure to tobacco smoke on child health and to develop plans to eliminate this exposure.[70] The ETS Consultation found that the vast majority of children exposed to tobacco smoke do not choose to be exposed. Children's exposure is involuntary, primarily arising from smoking by adults in the places where children live, work, and play. The major source of exposure to tobacco smoke for young children is smoking by their parents and other household members. "Given that more than a thousand million adults smoke worldwide, WHO [the World Health Organization] estimates that around 700 million, or *almost half of the world's children, breathe air polluted by tobacco smoke, particularly at home*. The large number of exposed children, coupled with the evidence that ETS [environmental

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of SIDS probably predominantly due to in-utero effect of tobacco smoke rather than postnatal secondhand smoke); Edwin A. Mitchell et al., *Risk Factors for Sudden Infant Death Syndrome Following the Prevention Campaign in New Zealand: A Prospective Study*, 100 PEDIATRICS 835 (1997) (adjusted SIDS odds ratio for infants of mothers who smoked was 5.01); E. A. Mitchell et al., *Smoking and the Sudden Infant Death Syndrome*, 91 PEDIATRICS 893 (1993) ("Passive tobacco smoking is causally related to SIDS."); J. P. Nicholl & A. O'Caithan, *Epidemiology of Babies Dying at Different Ages from the Sudden Infant Death Syndrome*, 43 J. EPIDEMIOLOGY & CMTY. HEALTH 133 (1989); John M. O'Lane, *Some Fetal Effects of Maternal Cigaret Smoking*, 22 OBSTETRICS & GYNECOLOGY 181 (1963); D. K. Peterson, *The Sudden Infant Death Syndrome – Reassessment of Growth Retardation in Relation to Maternal Smoking and the Hypoxia Hypothesis*, 113 AM. J. EPIDEMIOLOGY 583 (1981); Pirkle et al., *supra* note 58; Kenneth C. Schoendorf & John L. Kiely, *Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy*, 90 PEDIATRICS 905 (1992); Robert Steele & Jane T. Langworth, *The Relationship of Antenatal and Postnatal Factors to Sudden Unexpected Death in Infancy*, 94 CANADIAN MED. ASS'N J. 1165 (1966); Marjorie VandenBerg, *Smoking During Pregnancy and Post-neonatal Death*, 98 N.Z. MED. J. 1075 (1985); Kirsten Waller, *Smoking and Sudden Infant Death Syndrome*, ASS'N REPROD. HEALTH PROF'LS CLINICAL PROCEEDINGS (Oct. 1, 1996), *at* www.arhp.org/healthcareproviders/onlinepublications/clinicalproceedings.cfm; G. C. Windham et al., *Parental Cigarette Smoking and the Risk of Spontaneous Abortion*, 135 AM. J. EPIDEMIOLOGY 1394 (1992); Jay R. Zabriskie, *Effect of Cigaret Smoking During Pregnancy: Study of 2000 Cases*, 21 OBSTETRICS & GYNECOLOGY 405 (1963).

67. Waller, *supra* note 66.

68. DiFranza & Lew, *supra* note 66.

69. This declaration was adopted by the Environment Leaders of the Eight, the "eight" being Canada, France, Germany, Italy, Japan, Russian Federation, United Kingdom of Great Britain and Northern Ireland, and the United States of America. *1997 Declaration of the Environment Leaders of the Eight on Children's Environmental Health*, *at* http://www.who.int/peh/ceh/1997declaration.htm.

70. WORLD HEALTH ORG., INTERNATIONAL CONSULTATION ON ENVIRONMENTAL TOBACCO SMOKE AND CHILD HEALTH (1999) *at* http://www.ash.org/who-ets-rpt.html.

tobacco smoke] causes illness and disease in children, constitutes a substantial public health threat."[71]

The ETS Consultation concluded that environmental tobacco smoke is a real and substantial danger to child health, causing death and suffering throughout the world. Environmental tobacco smoke exposure causes a wide variety of detrimental health effects in children, including lower respiratory tract infections such as pneumonia, bronchitis, coughing, wheezing, asthma, and middle-ear disease. Children's exposure to environmental tobacco smoke may also contribute to cardiovascular disease and neurobehavioral impairment in adulthood. The ETS Consultation further concluded that maternal smoking during pregnancy is a major cause of SIDS and other well-documented health effects, including reduced birth weight and decreased lung function. Finally, the ETS Consultation noted that environmental tobacco smoke exposure among non-smoking pregnant women can lead to decreased birth weight, and that infant exposure to secondhand smoke increases the risk of SIDS.

The evidence is overwhelming and irrefutable. Children are especially susceptible to diseases caused by secondhand smoke.

D. Secondhand Smoke is a Real and Substantial Danger to the Health of Children

Overwhelmingly, children are captive, involuntary, passive smokers.[72] The involuntary nature of children's exposure to secondhand smoke crystallizes the harm as egregious. The 1989 United Nations Convention on the Rights of the Child, ratified by almost 200 countries, including the United States, is the most universally accepted human rights document in the history of the world. The Convention provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[73] Because the Convention creates obligations for signatory governments to ensure children's rights to the highest attainable standard of health, the involuntary harmful exposure of children to secondhand smoke can be seen as a human rights violation.[74] Family courts must, therefore, take judicial notice of the superabundance of authoritative scientific evidence irrefutably demonstrating that secondhand smoke is a real and substantial danger to the health of children, causing and aggravating serious diseases in children.[75]

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71. *Id.* (emphasis added).

72. *See Id.*

73. Convention on the Rights of the Child, Nov. 20, 1989, art. 3, *at* www.unhchr.ch (emphasis added).

74. Global concern about tobacco's harmful effects continues. In August 2003, the 12th World Conference on Tobacco or Health was held in Helsinki, Finland. This conference brought together thousands of professionals dedicated to counteracting the global tobacco epidemic in favour of a smoke-free world. *See* Am. Pub. Health Ass'n, *Upcoming Meetings, Conferences and Courses*, *at* http://www.apha.org/wfpha/upcom_meet.htm.

75. *See* text and supporting notes 3–12, 22–34, 42–68, 72–75.

III. AUTHORITY AND DUTY OF FAMILY COURTS TO PREVENT SERIOUS HARM TO CHILDREN BY RESTRAINING SMOKING IN THEIR PRESENCE

Children comprise the most abused segment of society in the world. Fortunately, the children of America are protected by our unrivalled, centuries-old system of juvenile justice. *In re Julie Anne*, [76] a case of first impression in the United States, provides ample precedent for a family court on its own initiative and regardless of the health of the child to restrict smoking around children in (1) the doctrine of *parens patriae*; (2) the state's "best interests of the child" statutes; and (3) precedents of the United States Supreme Court.

A. Doctrine of Parens Patriae – Fundamental Rule of Family Courts and Juvenile Justice

The doctrine of *parens patriae* (the state as parent) is the fundamental rule of law that underlies our system of family courts and juvenile justice, providing that the state is "the ultimate parent" of children within the care of juvenile court.[77] Under the doctrine of *parens patriae*, the state has an "urgent interest" in the welfare of the child,[78] and a "duty of the highest order" to protect the child.[79]

B. "Best Interests of the Child" Standard

For at least a century and a half, the "best interests of the child" standard has been the polestar for family courts throughout the United States in determining matters involving children.[80] All family courts consider the health of the parties involved in determining what is in the child's best interests.[81] The Uniform Marriage and Divorce Act makes it mandatory for courts to consider "all relevant factors," including "health" factors, in determining the "best interests of the child."[82] In crystal-clear language, the Act directs that "the court shall consider all relevant factors" and

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76. 780 N.E.2d 635 (Ohio Ct. Common Pleas 2002).

77. *See* Meyer v. Neb., 262 U.S. 390 (1923); Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913); Muller v. Or., 208 U.S. 412 (1908); Interstate Consol. St. Ry. Co. v. Mass., 207 U.S. 79 (1907); Steven L. Schlossman, *Juvenile Justice: History and Philosophy*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 961, 962 (Sanford H. Kadish ed., 1983); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). *See infra* text and supporting notes 97–100.

78. Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 27 (1981). *See* text *infra* note 98.

79. Palmore v. Sidoti, 466 U.S. 429, 433 (1984). *See* text *infra* note 99.

80. *See* Gishwiler v. Dodez, 4 Ohio St. 615 (1855); *In re* Contemnor Caron, 744 N.E.2d 787 (Ohio Ct. Common Pleas 2000); JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-2 (2d ed. 2000); DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 28.01 (1998).

81. OHIO REV. CODE ANN. § 3109.04(F)(1) (West 2003); KRAMER, *supra* note 80, at § 28.01.

82. UNIF. MARRIAGE & DIVORCE ACT § 402 (West 2003).

"physical health" factors in determining the "best interests of the child" in visitation and custody matters.[83]

An avalanche of authoritative scientific studies provides compelling evidence that secondhand smoke constitutes a real and substantial danger to children. Secondhand smoke causes and aggravates serious diseases in children, and is a danger, as both a "relevant factor" and a "physical health factor," that a family court must consider under the Uniform Marriage and Divorce Act. Under the states' mandatory "best interests of the child" standard, the clear and convincing evidence that secondhand smoke causes and aggravates serious diseases in children cannot be ignored by the court simply because a parent fails to raise it. Many people simply are unaware of the danger,[84] but the danger exists regardless of whether a parent is aware of it, acknowledges it, or complains to the court about it. The duty of the court to consider the danger of secondhand smoke to children is not conditioned upon a complaint by a parent. To hold otherwise would be contrary to the unequivocal mandatory language and manifest intent of the statutes.[85]

Family courts, on their own initiative and as standard practice in exercising their judicial duties, consider other serious risks of harm to children. Risks such as the use of alcohol and drugs by persons living in the home of a child are currently considered as factors in determining "best interests of the child" issues.[86] A family court has a statutory duty to similarly consider, on its own initiative, the serious risk of harm to children posed by secondhand smoke. A superabundance of judicially-noticed authoritative studies demonstrate by clear and convincing evidence that because secondhand smoke causes and aggravates serious diseases in children, it is a real and substantial danger to the health of children. Both general ("all relevant factors") and specific ("physical health factors") provisions of states' "best interests of the child" statutes impose a mandatory duty upon family courts to consider the danger of secondhand smoke to all children within their care in determining matters of visitation and custody.[87]

C. United States Supreme Court Case Law

The United States Supreme Court has ruled that the harm to be considered from secondhand smoke includes both present harm and possible future harm.[88] Accordingly, family courts have an unqualified duty to consider the dangers of secondhand smoke to all children within their care, regardless of the condition of their health. In *Helling v. McKinney*, the high Court ruled that a state prisoner's complaint stated a justiciable cause of action. The prisoner alleged that the secondhand smoke of other inmates constituted an unreasonable risk to his health, involuntarily subjecting

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83. *Id.*

84. *See* Conservation Found., *supra* note 39; *Legislation for Clean Air: An Indoor Front*, *supra* note 40.

85. *See* Ohio Dep't of Liquor Control v. Sons of Italy Lodge 0917, 605 N.E.2d 368 (Ohio 1992); Dorrian v. Scioto Conservancy Dist., 271 N.E.2d 834 (Ohio 1971).

86. ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES § 4.01 (1993).

87. *See supra* notes 52 and 75 and accompanying text.

88. Helling v. McKinney, 509 U.S. 25 (1993).

him to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Court held that the prisoner's claim was properly based upon *possible future harm* to health as well as present harm.[89]

Because children are like prisoners to the extent they are "captive" within the homes of their parents, secondhand smoke is a danger to those children, *regardless of the condition of their health*.[90] Because of the irrefutable proof of the health dangers of secondhand smoke to children, it would be inherently contradictory for a family court to fail to grant any child under its care effective legal protection against being compelled to breathe secondhand smoke. To be meaningful, this protection cannot wait until *after* the child has suffered the health-destructive diseases the protection is intended to *prevent*. The court's duty of protection applies regardless of the condition of the child's health.

Since the Supreme Court's holding in *Helling*, constitutional challenges (i.e., due process, equal protection, and freedom of expression) by prison inmates attempting to strike down smoking restrictions have uniformly been held to be without merit. These holdings are premised upon the basis that smoking is not a fundamental right, and secondhand smoke cannot be imposed involuntarily upon other people because it is detrimental to their health.[91] Smoking restrictions automatically protect prison inmates across the United States from the real and present danger of being compelled to breathe secondhand smoke in places where they live. Are not the children of America, who can neither choose where they live nor speak for themselves, entitled to the same protection afforded to prison inmates under the law?

Over a century ago, the United States Supreme Court affirmed a state supreme court decision that took judicial notice that cigarettes are "wholly noxious and deleterious to health."[92] A number of courts have definitively ruled that (1) smoking is not a fundamental right;[93] (2) judicial notice is taken of the health-destructive effects of cigarettes and secondhand smoke;[94] (3) both present harm and possible future harm from secondhand smoke is a real and substantial danger to non-smokers;[95] and (4) secondhand smoke cannot be imposed involuntarily upon people

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89. *Id.*

90. *See supra* notes 52 and 75 and accompanying text.

91. *See* Seena K. Foster, Annotation, *Validity, Construction, and Application of Restrictions on Use or Possession of Tobacco Products in Correctional Facilities,* 66 A.L.R. 5th 237 (1999).

92. In *Austin v. State*, the Supreme Court of Tennessee upheld a total ban on the sale of cigarettes based upon judicial notice that they are "wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward impairment of physical health and mental vigor." 48 S.W. 305, 306 (Tenn. 1898). The Supreme Court of the United States affirmed on the issue of interstate commerce, with the concurring opinion endorsing the judicial notice taken by the state supreme court regarding cigarettes' "impairment of physical health." Austin v. State, 179 U.S. 343, 367 (1900).

93. *See* Foster, *supra* note 91.

94. *Id.*

95. *See* Helling v. McKinney, 509 U.S. at 33–36.

because it is detrimental to their health.[96] How then could it be reasonably contended that any possible future harm to the health of a child resulting from that child's involuntary exposure to secondhand smoke is not a "best interests" factor a family court must consider when deciding visitation and custody matters?

The United States Supreme Court has ruled that (1) the constitutional right to privacy is not absolute;[97] (2) the state has an "urgent interest" in the welfare of the child;[98] and a "duty of the highest order" to protect the child;[99] (3) parental rights come along with reciprocal responsibilities;[100] and (4) the state has an obligation to protect the welfare of the child when the interests of the parent and the child conflict to the point where the child is threatened with harm.[101]

Based upon these unequivocal pronouncements, a smoker has a right of privacy to treat his health in whatever manner he chooses. But this right does not include the right to inflict health-destructive secondhand smoke upon other persons, especially children, who have no choice in the matter.

A man's home is his castle, but no one is allowed to hurt little children – even in his castle.

D. Duty of Family Courts, Legislatures, and Administrative Agencies

The clear and convincing evidence of manifold harm from secondhand smoke to children is consistent, robust, and irrefutable. This evidence gives rise to a duty upon family courts, the legislature,[102] and administrative agencies to take action

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96. *Id.*

97. Roe v. Wade, 410 U.S. 113, 154 (1973) ("The privacy right . . . cannot be said to be absolute.").

98. Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 27 (1981) ("[T]he State has an urgent interest in the welfare of the child.").

99. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children.").

100. Lehr v. Robertson, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart of the responsibilities they have assumed.").

101. Prince v. Mass., 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."); *Id.* at 170 ("Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."); Michael S. Wald, *State Intervention on Behalf of 'Neglected' Children*, 28 STAN. L. REV. 625, 638 (1976) ("[Where there is a conflict of interests between parent and child] the legal system should protect the child's interests. Not only is the child a helpless party but the parents should suffer the consequences of their inadequacy rather than the child.").

102. Ohio's "Endangering Children" statute provides that "[n]o person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child . . . shall create a substantial risk to the health and safety of the child, by violating a duty of care, protection, or support." OHIO REV. CODE ANN. § 2919.22(A) (West 2003). Some medical authorities consider exposing children to secondhand smoke as a form of child endangering and/or child abuse. CIGNA HealthCare Report & Rose Resource, *Myths and*

to reduce children's compelled exposure to tobacco smoke. Under the 1989 United Nations Convention on the Rights of the Child, ratified by the United States, courts of law, state legislatures, and administrative agencies have a duty, as a matter of human rights, to reduce children's compelled exposure to tobacco smoke.[103]

● *Family courts* can protect our children by issuing court orders as standard practice restraining persons from smoking in the presence of children within their care.

● *Legislatures* can protect our children in three ways: first, by enacting statutes prohibiting persons from smoking in the presence of children; second, by enacting more specific legislation directing family courts to consider the danger of secondhand smoke in determining best-interests-of-the-child matters; finally, by enacting statutes directing administrative agencies to establish regulations restraining smoking around children in their care.

● *Administrative agencies* can protect our children by enacting regulations and issuing directives that foster parents and other persons in close contact with children in their care shall not smoke around them.

E. Causal Relation Between Parental Smoking and Addictions in Children

A causal relation exists between parental smoking and their children becoming addicted to nicotine as active smokers, thereby exposing them to the serious diseases of smokers. Children of smokers are almost twice as likely to smoke as children of nonsmoking parents. Very few people begin using tobacco as adults.[104] More than 90% of smokers begin using tobacco before age nineteen, and the average age at which they begin smoking is twelve and a half years old.[105]

Numerous studies have found tobacco products to be as addictive as heroin, cocaine, and alcohol.[106] Fifteen years ago, the United States Surgeon General concluded that nicotine in tobacco is addictive, and that nicotine addiction is similar to heroin or cocaine addiction.[107] In 2000, the Royal College of Physicians' Report on Nicotine Addiction concluded that nicotine is a powerful addictive substance on par

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Truths of Secondhand Smoke, *available at* http://medicalreporter.health.org/tmr0895/smokemyth0895.html (last visited Aug. 28, 2003).

103. *See* Convention on the Rights of the Child, *supra* note 73.

104. *See* Bauman, *supra* note 21.

105. *See* KOOP, *supra* note 18.

106. *Id.*; OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING – NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL, *supra* note 29; *see* Symposium, *Special Communications*, 274 JAMA 219 (1995). A 1963 tobacco industry internal memo freely admitted "we are . . . in the business of selling nicotine, an addictive drug." Memorandum from Addison Yeaman, *Implications of Battelle Hippo I & II and the Griffith Filter* (July 17, 1963), *cited in* STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 74 (1996); *See infra* note 115.

107. OFFICE ON SMOKING & HEALTH, THE HEALTH CONSEQUENCES OF SMOKING – NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL, *supra* note 29; GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS, *supra* note 15, at 40–43.

with heroin and cocaine.[108] The extremely addictive nature of nicotine is demonstrated by the fact that although almost three-quarters of smokers want to stop smoking,[109] and although one-third of them attempt to quit each year, only one-third of smokers who try to quit smoking actually succeed long-term.[110] Approximately 1,000 of the 3,000 children who become regular smokers each day will eventually die as a result of their smoking addiction.[111] Further, an astonishing 50% of lung cancer patients resume smoking after undergoing surgery.[112]

The causal relation between parent-child smoking supports the fact that children are the chief source of new consumers of the tobacco industry. Each year the tobacco industry strives to replace the many consumers who either quit smoking or die from smoking-related diseases.[113] The synthesis of active smoking by parents,[114] the glamorization of smoking by the film industry,[115] and the targeted marketing of tobacco products to children by the tobacco industry[116] is a deadly combination for

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108. ROYAL COLLEGE OF PHYSICIANS, NICOTINE ADDICTION IN BRITAIN (2000).

109. *See* HOWARD MELTZER, SMOKING RELATED BEHAVIOUR AND ATTITUDES (2002), *at* http://www.statistics.gov.uk.

110. PRABHAT JHA & FRANK J. CHALOUPKA, CURBING THE EPIDEMIC: GOVERNMENTS AND THE ECONOMICS OF TOBACCO CONTROL (1999) (fewer than two out of five U.S. senior high-school smokers who believe they will quit within five years actually do quit); Am. Med. Student Ass'n, *supra* note 22 (Successful quit rates are about 30% in high-income countries such as United States and United Kingdom, and 5–10% in low-income countries such as China, India, and Vietnam. Nine out of every ten smokers in the United States try to quit using will power alone, resulting in a long-term success rate of only 5%.); Martin Raw, et al., *Smoking Cessation Guidelines for Health Professionals: A Guide to Effective Smoking Cessation Interventions for the Health Care System*, 53 (Supp. 5) THORAX S2, S13 (successful quit rates between 3% (will power alone) and 20% (nicotine replacement therapies such as patches, chewing gum, tablets, inhalers, nasal sprays, etc.)).

111. *See* Ctr. For Disease Control & Prevention, *Projected Smoking-Related Deaths Among Youth – United States*, 45 MORBIDITY AND MORTALITY WEEKLY REPORT 971 (1996).

112. I. P. Stolerman & M. J. Jarvis, *The Scientific Case that Nicotine Is Addictive*, 117 PSYCHOPHARMACOLOGY 2 (1995).

113. See Ross Hammond & Andy Rowell, *Trust Us: We're the Tobacco Industry*, *available at* http://www.ash.org.uk/html/conduct/html/trustus.html (last visited Aug. 28, 2003).

114. *See supra* note 18; *infra* note 115.

115. The American Lung Association points out that the recruitment of children as smokers is to a large extent effectuated by the film industry glamorizing smoking in movies, highlighting the use of tobacco in over two-thirds of the 25 movie hits of 2001, including eleven PG-13 movies. B&W NewsReal, *Students Light Up Movies: Colorado Teens Rip Constant Smoking in Films* (Mar. 21, 2002), *at* http://www.tobacco.org/news/88992.html. *See* C. Mekemson and S. A. Glantz, *How the Tobacco Industry Built Its Relationship with Hollywood*, 11 TOBACCO CONTROL i81, i81–i91 (2002) (review of 1,500 previously secret tobacco industry documents obtained under Master Settlement Agreement showing collusion between tobacco industry and film industry to obtain maximum exposure of tobacco in movies, including PG (Parental Guidance) movies) (although a multi-state settlement in 1998 banned tobacco companies from displaying their products in films, tobacco use in top-grossing PG-13 rated movies increased by 50% between 1999 and 2000).

116. The tobacco industry's claim it does not actively market its products to children has recently been debunked through the discovery of its internal documents showing that (a) cigarette manufacturers closely monitored the smoking habits of teenagers over the past several decades; (b) tobacco industry executives refer to youth as a source of sales and as fundamental

children. Once children become addicted to nicotine, usually within a year or less of beginning to smoke cigarettes,[117] they are likely to suffer the detrimental health consequences of active smokers since only a small percentage of all cigarette smokers succeed in their efforts to quit smoking.[118]

Parental smoking is a key factor in children becoming active smokers, which not only constitutes a serious health danger, but also is a risk factor for substance and drug abuse.[119] Studies show that nicotine use increases alcohol consumption.[120] Teens who smoke are three times more likely than non-smokers to use alcohol, eight times more likely to use marijuana, and twenty-two times more likely to use cocaine.[121]

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to the survival of the tobacco industry; and (c) the features of cigarette brands (i.e., filter, taste, etc.), packaging (size, color, and design), and advertising (media placements, themes, and imagery) were developed specifically to appeal to teenagers. There is also evidence that youth-oriented marketing documents have been destroyed and the language of more recent documents sanitized to cover up efforts to market tobacco to youths. K. M. Cummings & R. W. Pollay, *Exposing Mr. Butts' Tricks of the Trade*, 11 TOBACCO CONTROL i1, i1–i4 (2002); K. M. Cummings et al., *Marketing to America's Youth: Evidence from Corporate Documents*, 11 TOBACCO CONTROL i5, i5–i17 (2002); Anne Landman et al., *Tobacco Industry Youth Smoking Prevention Programs: Protecting the Industry and Hurting Tobacco Control*, 92 AM. J. PUB. HEALTH 917, 917–30 (2002); Pamela M. Ling & Stanton A. Glantz, *Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents*, 92 AM. J. PUB. HEALTH 908, 098–16 (2002); *See* STANTON A. GLANTZ, ET AL., THE CIGARETTE PAPERS (1996), of which Jonathan Franzen of the THE NEW YORKER exclaimed: "Makes it clear that Big Tobacco has known for decades that cigarettes are lethal and addictive and has done everything in its power to suppress and deny that knowledge . . . A *shocking* collection of secret industry documents." A decade ago, approximately 30% of three-year-olds and 91% of six-year-olds in the United States could identify "Joe Camel" as a symbol of smoking. *Id. See also* Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145 (1991). In 1984, one tobacco industry researcher cautioned his employer: "Younger adult smokers are critical to [the tobacco industry's] long term performance and profitability. Therefore, [the tobacco industry] should make a substantial long term commitment of manpower and money dedicated to younger adult smoker programs . . . If younger adults turn away from smoking, the industry must decline, just as a population which does not give birth will eventually dwindle." Strategic Research Report from Diane S. Burrows, to R.J. Reynolds Tobacco Company Management, *Younger Adult Smokers: Strategies and Opportunities* (Feb. 29, 1984) *at* http://tobaccodocuments.org/ftc_rjr/documents.php.

117. ROYAL COLLEGE OF PHYSICIANS, *supra* note 108. *See* J. R. DiFranza et al., *Development of Symptoms of Tobacco Dependence in Youths: 30 Month Follow Up Data from the DANDY Study*, 11 TOBACCO CONTROL 228 (2002) (seventh grade students' loss of autonomy over tobacco use began with first symptom of dependence upon use of two cigarettes one day a week).

118. *See supra* note 110 and accompanying text.

119. Mohammad R. Torabi et al., *Cigarette Smoking as a Predictor of Alcohol and Other Drug Use by Children and Adolescents: Evidence of the "Gateway Drug Effect*," 63 J. SCH. HEALTH 302 (1993).

120. *Nicotine Induces Alcohol Craving* (Feb. 15, 2000), *at* http://news.bbc.co.uk/1/low/health/643397.stm; Press Release, National Institute on Drug Abuse, *Nicotine Craving and Heavy Smoking May Contribute to Increased Use of Cocaine and Heroin* (Feb. 20, 2000) *at* http://www.drugabuse.gov/MedAdv/00/NR2-20.html.

121. U. S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 21.

High school seniors who are regular smokers and began smoking by grade nine are 2.4 times more likely than their nonsmoking peers to report poorer overall health, 2.4 times more likely to report cough with phlegm or blood, 2.7 times more likely to report shortness of breath when not exercising, and 3.0 times more likely to have seen a physician for an emotional or psychological complaint.[122]

IV. CONCLUSION

A considered analysis of the law, including the *parens patriae* (the state as parent) doctrine, the states' "best interests of the child" statutes, United States Supreme Court case law, as well as the irrefutable judicially-noticed authoritative scientific evidence demonstrating that secondhand smoke constitutes a real and substantial danger to the health of children, leads to one inescapable conclusion: a family court that does not issue court orders restraining persons from smoking in the presence of children within its care fails those children whom the law has entrusted to its care.

Existing American law requires a family court, *on its own initiative and regardless of the health of the child*, to consider the danger of secondhand smoke to children as a significant, and possibly determinative (where child has health problems), factor in determining issues of visitation and custody. Family courts have a further duty to protect all children under their care by issuing court orders restraining anyone from smoking in their presence as a matter of standard practice.

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122. David R. Arday et al., *Cigarette Smoking and Self-Reported Health Problems Among U.S. High School Seniors, 1982—1989*, 10 AM. J. OF HEALTH PROMOTION 111, 111 (1995).