PARENTAL SMOKING: A FORM OF CHILD ABUSE?

I. INTRODUCTION

Every day is a fight to breathe. I am terrified of catching a cold because it goes to my lungs and I end up in the emergency room. I can’t dance with my husband, run with my children or even call to them because of the strain on my lungs. To be around a smoker is torture for me and makes me ill for days. I am a prisoner in my own body, unable to do the normal things others take for granted. . . . Although I have never smoked, my parents and their friends were all heavy smokers. . . . I now know that my lung problems are the result of 18 years of breathing secondhand smoke.1

This unfortunate account of a thirty-seven-year-old woman who wrote to Ann Landers provides the underlying issue this Comment will address. As the detrimental effects of environmental tobacco smoke (ETS) filter in, one must ask what further legal responses will be demanded by nonsmokers in our society. This Comment is concerned with the negative health effects that occur in children who are the unfortunate bystanders in families where cigarette smoking is prevalent.2 The ultimate suggestion that will be made is that parents who smoke in front of their children, thereby exposing them to the harmful health effects associated with ETS, are committing child abuse. Prior to discussing this issue, Part II of this Comment will describe ETS, its effects on nonsmokers, and how far the United States government has gone in recognizing ETS as a serious health concern. Part III will discuss the particular detrimental health effects that exposure to ETS has on children. Part IV will survey existing case law, mostly in the area of custody disputes, that has taken into account the effects of parental smoking on children. Although these cases do not hold that parental smoking constitutes child abuse, they do

1. Ann Landers, Dad’s Not Only One Getting Shot in Foot, CHI. TRIB., Oct. 4, 1989, § 5, at 3. The exposure of a nonsmoker to cigarette smoke is described by terms other than secondhand smoke, including passive smoking, involuntary smoking, and environmental tobacco smoke (ETS). U.S. ENVTL. PROTECTION AGENCY, INDOOR AIR FACTS No. 5, ENVIRONMENTAL TOBACCO SMOKE 1 (1989) [hereinafter INDOOR AIR FACTS]. This Comment will use these terms interchangeably.

2. The focus of this Comment will be on the health effects to children after they have been born. Thus, prenatal injuries caused by maternal smoking will not be discussed. For further discussion on this point, see Esther M. John et al., Prenatal Exposure to Parents’ Smoking and Childhood Cancer, 133 AM. J. EPIDEMIOLOGY 123 (1991) (providing evidence that prenatal exposure to cigarette smoking may be a risk factor for cancer in children); Julie E. Lippert, Prenatal Injuries from Passive Tobacco Smoke: Establishing a Cause of Action for Negligence, 78 KY. L.J. 865 (1990).
stand for the proposition that society and the courts are recognizing that ETS is a cognizable harm and a societal issue that needs to be addressed. This Comment will finally argue that because exposure to ETS causes serious bodily injury in children, parents who expose their children to ETS should be viewed as committing child abuse.\(^3\)

II. ENVIRONMENTAL TOBACCO SMOKE

When a smoker inhales cigarette smoke, the smoker's lungs are exposed to mainstream tobacco smoke.\(^4\) When a smoker exhales, any non-smoker within the vicinity is exposed to exhaled mainstream tobacco smoke. Nonsmokers are also exposed to sidestream smoke, which is emitted from the tip of a burning cigarette between puffs.\(^5\) ETS is a combination of mainstream smoke (eighty-five percent) and sidestream smoke (fifteen percent), as well as vapor phase components that diffuse through cigarette paper into the environment.\(^6\) ETS contains more than 4000 chemical compounds,\(^7\) of which forty-three are carcinogenic.\(^8\) Moreover, some of these substances are mutagenic and can cause permanent damage to the genetic material of cells.\(^9\) Thus, exposure to ETS

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3. The Wisconsin criminal child abuse statutes, as well as civil statutes under Wisconsin's Children's Code, will be used to demonstrate that the harm caused by ETS may be included in the statutes defining child abuse and the harm constituting child abuse.


5. Involuntary Smoking Report, supra note 4, at 7-8; see Kligman & Narce-Valente, supra note 4, at 263.


7. Not surprisingly, tobacco companies refuse to provide a complete listing of these substances. Bruce A. Epstein, Do You Smoke? So Do Your Kids—and Grandkids, St. Petersburg Times, Sept. 7, 1992, at D5.

8. Indoor Air Facts, supra note 1, at 1; Stanton A. Glantz & Richard A. Daynard, Safeguarding the Workplace: Health Hazards of Secondhand Smoke, Trial, June 1991, at 37, 37. According to then Surgeon General C. Everett Koop, M.D., sidestream smoke contains higher quantities of some toxic chemicals than mainstream smoke. Surgeon General C. Everett Koop, M.D., Address at the Workshop on Tobacco-Free America in Minneapolis, Minnesota (Oct. 16, 1986). Tar, for example, the most carcinogenic chemical, is 70% more concentrated in sidestream smoke than mainstream smoke. Id. Moreover, sidestream smoke contains 2.7 times greater quantities of nicotine, 2.5 times greater quantities of carbon monoxide, and 73 times greater quantities of ammonia. Id; see also Involuntary Smoking Report, supra note 4, at 7-8.

presents a serious and substantial public health concern.

The government has responded to ETS. In 1986, Surgeon General C. Everett Koop, M.D., conducted a comprehensive study titled, *The Health Consequences of Involuntary Smoking.* In the study, the Surgeon General concluded that secondhand smoke "is a cause of disease, including cancer, in healthy nonsmokers." Specifically, the Surgeon General concluded that secondhand smoke causes nonsmokers to develop lung cancer, acute respiratory disease, and chronic respiratory disease. The report reached two other conclusions: (1) that the children of parents who smoke, compared with the children of parents who do not smoke, have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increased lung function as their lungs develop and mature; and (2) that the simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, a nonsmoker's exposure to ETS. While the Surgeon General's report was being conducted, the Committee on Passive Smoking at the National Research Council (NRC) corroborated the Surgeon General's findings in an independent assessment. Both reports concluded that ETS can cause lung cancer in adult nonsmokers and that children of parents who smoke exhibit an increased frequency of respiratory symptoms and acute lower respiratory tract infections, such as bronchitis and pneumonia, as well as reduced lung function.

The Environmental Protection Agency (EPA) released a long-delayed report on January 7, 1993, concluding that ETS is a Group A,
or known human lung, carcinogen under the EPA's carcinogen classification system, and that ETS is responsible for approximately 3000 lung cancer deaths annually in U.S. nonsmokers. The determination that ETS should be classified as a Group A carcinogen was based on conclusive evidence of the dose-related lung carcinogenicity of mainstream tobacco smoke in active smokers and the similarities of mainstream and sidestream smoke. The conclusion was bolstered by statistically significant exposure-related increases in lung cancer among nonsmoking spouses of smokers.

The EPA report specifically concluded that ETS exposure in children is causally associated with an increased risk of lower respiratory tract infections, such as bronchitis and pneumonia. Furthermore, the report stated that ETS exposure in children with asthma is causally associated with additional episodes and increased severity of symptoms. Finally,

17. The EPA's carcinogen classification system is as follows: (1) Group A consists of known human carcinogens; (2) Group B consists of probable human carcinogens; (3) Group C consists of possible human carcinogens; (4) Group D consists of agents that are unclassifiable as to human carcinogenicity; and (5) Group E consists of agents that have shown evidence of non-carcinogenicity for humans. McKinney v. Anderson, 924 F.2d 1500, 1506-07 (9th Cir. 1991) (citing U.S. ENVTL. PROTECTION AGENCY, METHODOLOGY FOR EVALUATING POTENTIAL CARCINOGENICITY IN SUPPORT OF REPORTABLE QUANTITY ADJUSTMENTS PURSUANT TO CERCLA SECTION 102, 13-16 (1988)), vacated on other grounds, Helling v. McKinney, 112 S. Ct. 291 (1991). Some examples of Group A carcinogens include arsenic, asbestos, benzene, and chromium compounds. Id. at 1507. Although the EPA has the power to classify a substance as a carcinogen, it does not have the power to regulate indoor air. U.S. ENVTL. PROTECTION AGENCY, RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING FACT SHEET (1993) [hereinafter EPA FACT SHEET].

18. EPA REPORT, supra note 15, at 1-1.

19. EPA FACT SHEET, supra note 17, at 3. It should be noted that the tobacco industry filed a lawsuit in district court on June 22, 1993, seeking to reverse the Environmental Protection Agency's classification of ETS as a Class A carcinogen. Tobacco Industry Challenges EPA Report on ETS, TOBACCO-FREE YOUTH REP., Summer 1993, at 2. The tobacco industry challenges the scientific methods used by the EPA researchers, stating that "[t]he EPA's report on environmental tobacco smoke was shot through with abuses of science, data selection, data manipulation, and the EPA's predetermined decision that environmental smoke is harmful." Id. (citation omitted).

20. EPA FACT SHEET, supra note 17, at 3.

21. EPA REPORT, supra note 15, at 1-1. The report estimates that there are between 150,000 and 300,000 cases of bronchitis and pneumonia every year in young children up to 18 months. Id. at 1-1. Between 7500 and 15,000 of these cases result in hospitalization. Id. at 1-5.

22. Id. at 1-1. The report estimates that 200,000 to one million asthmatic children have their condition worsened due to ETS exposure each year. Id. Moreover, the report concludes that ETS exposure is a risk factor for new cases of asthma in children without previous symptoms. Id.
the report stated that ETS exposure in children is causally associated with an increased prevalence of fluid in the middle ear (effusion) that can lead to infection and middle ear disease.\textsuperscript{23} Although the EPA has no regulatory authority to control ETS,\textsuperscript{24} the report is a comprehensive study that is certain to be valuable to health professionals and policymakers in taking appropriate steps to reduce exposure to ETS in indoor environments.\textsuperscript{25}

The effects of ETS in a closed environment, such as the home, exacerbates the problem. ETS remains in a closed environment for a long period of time, and studies have shown that a "single smoker in a home can double the amount of particulate air pollution inhaled by nonsmoking members of the household."\textsuperscript{26} Because most ventilation systems are not designed to improve indoor air quality, but to conserve energy,\textsuperscript{27} ETS usually cannot be completely removed from indoor air unless the source of the smoke is removed.\textsuperscript{28}

Of course, some people still dispute the notion that active smoking, let alone passive smoking, is either dangerous or damaging to one's health. Dr. Tage Voss, a Danish physician, claims, after thirty years of research, that the medical assertions against smoking are based on "distorted facts, biased and dubiously interpreted test results and unscientific generalizations."\textsuperscript{29} However, due to the number of well-documented studies regarding the negative effects of smoking,\textsuperscript{30} Dr. Voss appears to be in the minority.

\begin{itemize}
\item \textsuperscript{23} \textit{Id.} at 1-1, 1-5.
\item \textsuperscript{24} \textit{EPA FACT SHEET, supra} note 17, at 3.
\item \textsuperscript{25} \textit{Id.} at 4. The EPA's findings regarding the effects of ETS in children led Cliff Douglass, tobacco policy director for the Advocacy Institute, a nonprofit group that focuses on consumer, health, and safety issues, to state that the short term effect will "certainly lead to elimination of smoking in all locations where children face exposure." \textit{Noah, supra} note 16, at B1.
\item \textsuperscript{26} \textit{INDOOR AIR FACTS, supra} note 1, at 2. This can ultimately result in levels of indoor air pollution that are higher than outdoor air pollution levels. \textit{KAREN D. KRZANOWSKI ET AL., ON THE AIR} 9 (1988).
\item \textsuperscript{27} \textit{KRZANOWSKI ET AL., supra} note 26, at 9. In order to maintain a nonirritating carbon monoxide level, it is estimated that ventilation in a room with smokers must be two to four times greater than ventilation in a room with nonsmokers. Annetta Weber, \textit{Annoyance and Irritation by Passive Smoking}, \textit{13 PREVENTIVE MED.} 618, 624 (1984).
\item \textsuperscript{28} \textit{INDOOR AIR FACTS, supra} note 1, at 2.
\item \textsuperscript{29} \textit{A Breath of Fresh Air, DAILY TELEGRAPH}, Aug. 22, 1992, at 12.
\end{itemize}
III. Effects of ETS on Children

The American Lung Association noted that children inhale more air than adults and breathe more rapidly. It follows that children are inhaling more ETS when exposed to it. Because children's lungs are not fully developed, they are subjected to an increased risk of damage. It is no wonder that children, as a group, are at high risk from the harmful health effects associated with ETS. Since children spend about two-thirds of their time indoors, a parent who smokes in the home is most likely exposing the child to ETS much of the time. Most experts agree that the effects of ETS exposure in children are dose dependent. This means that the highest risk of health problems are associated with children who live in homes where parents smoke a pack or more a day. Few parents would purposely expose their child to ammonia (a poisonous gas used in insect spray and fertilizer), benzene (a cancer-causing flammable liquid), carbon monoxide (a poisonous oxygen blocker), formaldehyde (a disinfectant and preservative), or hydrogen cyanide (a poison in rat killer). Yet children are exposed to these chemicals when parents smoke in their presence.

As stated earlier, the EPA has concluded that ETS exposure in children is causally associated with an increased risk of bronchitis and pneumonia, asthma, and disturbances in the middle ear. A child's

32. It is difficult to quantify a child's exposure to ETS since exposure depends on a variety of factors, such as how close the child is to the smoker, the frequency of smoking, the type of cigarettes smoked, and the ventilation system in the indoor environment. Kligman & Narce-Valente, supra note 4, at 263.
35. Cf id. (reporting that 70% of all children in the United States are exposed to the hazards of cigarette smoke for much of their developmental years).
37. Epstein, supra note 7, at 5D.
38. Bronchitis is defined as "[i]nflammation of the mucous membrane of the bronchial tubes." STEDMAN'S MEDICAL DICTIONARY 213 (25th ed. 1990). Pneumonia is defined as "[i]nflammation of the lung parenchyma. . . . Most cases are due to infection by bacteria or viruses, a few to inhalation of chemicals . . . ." Id. at 1225. For additional medical studies, see Susan Harlap & A. Michael Davies, Infant Admissions to Hospital and Maternal Smoking, 1 LANCAST 529 (1974). This study concluded that there were 9.5 hospitalizations per 100 children for bronchitis and pneumonia for infants with nonsmoking mothers compared to 13.1 hospitalizations per 100 for infants with smoking mothers. Id. at 530. Among infants whose mothers smoked more than a pack a day, there was an admission rate of 31.7%. Id.; see also Yue Chen et al., Influence of Passive Smoking on Admissions for Respiratory Illness in Early Childhood,
exposure to ETS has also been linked to reduced lung function,\textsuperscript{41} sudden
infant death syndrome (SIDS), inflammatory bowel disease, and esophageal illness. Less serious effects to the "smoking child" include eye irritation and headaches, wheezing, frequent coughing, sore throats, and snoring.

42. SIDS is an "abrupt and inexplicable death of an apparently healthy infant." Stedman's Medical Dictionary 1538 (25th ed. 1990). The EPA recognized the medical studies that suggest infants exposed to ETS are at an increased risk of dying from SIDS. EPA Report, supra note 15, at 1-6. The EPA concluded, however, that the available studies do not allow differentiation between whether and to what extent the increased risk is related to in utero versus postnatal exposure to ETS. Id. Consequently, the EPA was unable to conclude whether ETS exposure alone is a risk factor for SIDS independent of smoking during pregnancy. Id. For an additional study relating SIDS to ETS exposure, see Kenneth C. Schoendorf & John L. Kiely, Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy, 90 Pediatrics 905 (1992). This study concluded that the risk factor for SIDS increased by three times for babies of mothers who continued to smoke throughout pregnancy and after the child was born. Id. The study analyzed data from 10,000 infants and 6000 cases of infant death. Id.; see also Bengt Haglund & Sven Cnattingius, Cigarette Smoking as a Risk Factor for Sudden Infant Death Syndrome: A Population-Based Study, 80 Am. J. Pub. Health 29 (1990).


44. The results of a five-year study reported in the Chicago Tribune indicated that children with parents who smoke are up to seven times more likely to suffer esophagitis if both parents smoke, and six times more likely if one parent smokes. Smoker's Children Prone to Esophagus Illness, Chi. Trib., May 4, 1993, § 1, at 12.


Children of parents who smoke also suffer emotional consequences, mostly in the form of added worry. It has been estimated that eighty-six percent of children who have smoking parents are scared that their parents might die because of their habit.\textsuperscript{50} Other studies have shown that children of smoking parents are twice as likely as children of nonsmoking parents to become smokers themselves, which further jeopardizes their health.\textsuperscript{51}

One especially troubling study found that children of smoking parents are at an increased risk of developing lung cancer when they become adults.\textsuperscript{52} In the study, the authors determined that household exposure to twenty-five or more smoker-years\textsuperscript{53} during childhood and adolescence doubled the risk of developing lung cancer as an adult.\textsuperscript{54} The authors' results led to the conclusion that approximately seventeen percent of all adult nonsmoker lung cancer is attributable to ETS exposure in the household during childhood and adolescence.\textsuperscript{55}

Although not directly related to a child's physical health, a recent study has suggested that exposure to ETS may adversely affect a child's behavior.\textsuperscript{56} Increased rates of behavior problems, measured by a Behavior Problem Index (BPI),\textsuperscript{57} were independently associated with a child's

\textsuperscript{49} Giuseppe M. Corbo et al., Snoring in Children: Association with Respiratory Symptoms and Passive Smoking, 299 BRR J. 1491 (1989). The study concluded that the percentage of child habitual snorers was 5.5% when parental smoking was moderate. \textit{Id.} at 1491. When parental smoking was heavy, the rate was 8.8%. \textit{Id.} Although snoring may be regarded as trivial, it has been associated with hypertension, heart disease, and stroke. \textit{Id.}

\textsuperscript{50} Epstein, \textit{supra} note 7, at 5D. According to psychologist Lee Salk, "[w]hen a parent smokes, it leaves kids in a state of anguish . . . . They think, here's the parent I love doing something destructive. I may lose this parent." \textit{Id.} Consequently, more than 70% of these children have encouraged their parents to quit smoking. \textit{Id.}

\textsuperscript{51} Meltzer & Meltzer, \textit{supra} note 34, at 457.

\textsuperscript{52} Dwight T. Janerich et al., Lung Cancer and Exposure to Tobacco Smoke in the Household, 323 NEW ENG. J. MED. 632 (1990).

\textsuperscript{53} Smoker-years is a measurement of one's exposure to ETS and is determined by multiplying the number of years one has lived in a particular residence by the number of smokers in the household. \textit{Id.} at 632.

\textsuperscript{54} \textit{Id.} at 634.


\textsuperscript{57} The 32 item index asked parents to indicate, for example, whether their child "[e]heats or tells lies," "[b]ullies or is cruel or mean to others," "[f]eels worthless or inferior," "[a]rgues too much," "[i]s restless or overly active," "[h]as trouble getting along with other children," and "[d]emands a lot of attention." \textit{Id.} at 343.
exposure to maternal cigarette smoke. The study did not find evidence of increased behavior problems in mothers who smoked during pregnancy but not after delivery. This would seem to suggest that ETS exposure in an infant and child (as opposed to an unborn fetus) poses a greater likelihood of harm when considering the prevalence of behavior problems.

IV. THE COURTS RESPOND

In light of the well-documented detrimental effects of ETS exposure in children, the courts are beginning to take notice. Parental smoking is increasingly becoming an issue in child custody cases.

On October 14, 1990, a trial court judge for the first time included a parent’s smoking habit as a factor in his deliberations on which parent would retain custody of their child. In Satalino v. Satalino, the court awarded custody to the mother, despite the fact that she was a smoker. Nevertheless, the court endorsed the notion that a parent’s smoking was a legitimate factor, along with more traditional factors such as alcohol or drug abuse, for a judge to consider in a custody dispute. Although parental smoking is but one issue for a judge to consider, it could provide a deciding factor if all else is equal.

58. Id. at 342. The authors pointed out that cigarette smoke contains thousands of compounds and that some of these compounds might affect the developing brain. Id. at 346-47.
59. Id. at 344.
60. The study is not without limitations. The authors were careful to point out that a lack of information on changes in the mothers’ smoking habits as well as a lack of unbiased assessments of the children’s behavior were potential weaknesses. Id. at 347.
61. No. 11440/86 (N.Y., Sup. Ct. Oct. 10, 1990) (unpublished trial court opinion), cited in Julie G. Shoop, Smoking Parents Lose Points in Child-Custody Case, TRIAL, Feb. 1991, at 82, 82. After the Satalinos separated, Ms. Satalino, a smoker, moved in with her parents, who were also smokers. Court Can Consider the Smoking Environment of a Home in Awarding Child Custody, LAW REP., Feb. 1991, at 16, 16. Mr. Satalino argued that he could provide a healthier environment for the child which was free from smoke. Id. Ms. Satalino argued that the court could not consider parental smoking in the home as a factor in awarding custody. Id.
62. Other cases where parental smoking has been a factor in child custody cases include Pizzitola v. Pizzitola, 748 S.W.2d 568 (Tex. Ct. App. 1988), where a mother appealed a jury decision that gave custody of her four-year-old daughter to the child’s father. Id. at 569. The jury’s decision was based in part upon evidence that the child was allergic to smoke and that the mother smoked in the child’s presence. Id. at 569-70. In Mitchell v. Mitchell, No. 01-A-01-9012-CV-00442, 1991 WL 63674 (Tenn. Ct. App. Apr. 26, 1991) (unpublished opinion), the Tennessee Court of Appeals affirmed a trial court’s decision to award custody of a six-year-old asthmatic boy to his nonsmoking father. Id. The mother and grandmother smoked in the child’s presence despite the advice of a physician not to smoke since it would aggravate the child’s asthmatic condition. Id. The mother argued that the trial court erred by not considering her claim that she had quit smoking. Id. at *4. The appellate court found the mother’s appeal to be frivolous, stating that her previous smoking “was strong evidence of a lack of
In addition to considering parental smoking as a factor in determining custody, a few courts have addressed the issue with respect to parties wishing to change the terms of an existing custody arrangement. In *Smith v. Smith*, the appellate court affirmed a lower court's change in custody from the mother to the father. The lower court based its decision, in part, on the impaired physical condition of one of the two children as a result of asthma. The lower court noted the continual smoking in the mother's home, as opposed to the smoke-free environment in the father's home.

Parental smoking has also been addressed as a factor in limiting the visitation rights of a smoking parent. In *Badeaux v. Badeaux*, the court limited a smoking father's visitation rights with respect to his son who had contracted bronchial asthma and suffered repeated upper respiratory infections. The court's decision was based in part upon the harmful effect that the father's cigarette smoking had on the child's health.

In addition to recognizing parental smoking as a factor in determining child custody, some courts have ordered a parent to refrain from smoking in the presence of a child. In *De Beni Souza v. Kallweit*, a California trial court judge ordered a mother not to smoke in the presence of her child. The court granted the father's request that the child be protected from the detrimental effects of the mother's smoking habit. The court issued a directive from the bench banning "smoking by petitioner [the mother] in the direct presence of [the] child within the home."

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proper concern for the welfare of the child. A belated cessation of smoking might evidence a desire for the custody of the child rather than concern for the welfare of the child." *Id.* at *8-9. Finally, in *Harrell v. Harrell*, No. 1084, 1987 WL 6716 (Tenn. Ct. App. Feb. 19, 1987) (unpublished opinion), the appellate court, citing to the trial court that awarded custody of a 10-month-old baby to the father, noted evidence that showed the mother had taken the baby into a smoke-filled environment after a mandatory injunction not to. *Id.* at *2. The baby suffered from respiratory problems. *Id.*

64. *Id.* at *1.
66. *Id.* at 302-03.
67. *Id.*
69. *Id.* For additional cases when a parent has been ordered not to smoke or allow smoke in the presence of a child, see Roofeh v. Roofeh, 525 N.Y.S.2d 765 (1988). The court entered an order prohibiting a mother from smoking in close proximity to her children and husband. The mother was ordered to confine her smoking to one room of the house, provided that her children were not present in the room at the time. *Id.* at 769. Apparently the children had
The effects of ETS exposure in children have also been considered in cases involving the termination of parental rights. In *In re D.T.*, the court affirmed the trial court's decision to terminate the parent-child relationship between a mother and her four children. The mother was sexually abusive and was unable to provide her children with the care and necessities they needed. Moreover, her two youngest daughters were discomforted when she smoked cigarettes. The court stated: "While certain of the factors alone—Lola's smoking, inadequate housing, low income—would not justify termination of parental rights, all the factors together are substantial evidence justifying termination."

Although parental rights have never been terminated solely on the basis of childhood exposure to ETS, exposure clearly can be a factor that courts may consider.

respiratory problems, although it is unclear what they were. See *id.* at 766. In *Black v. Weis*, 837 P.2d 407 (Mont. 1992), a lower court, in awarding joint legal custody in a divorce proceeding, "ordered the parents not to allow anyone to smoke in [their asthmatic daughter's] presence or in the house where she was residing or visiting." *Id.* at 408. Finally, in *Baggett v. Sutherland*, No. CA 88-224, 1989 WL 5399 (Ark. Ct. App. Jan. 25, 1989) (unpublished opinion), the father appealed from an order that denied his petition for an order to change custody of his two minor children. *Id.* at *1. The father contended, in part, that the children's living conditions were harmful because the mother smoked in the home, which contributed to their upper-respiratory problems. Although the court did not reverse the order, it noted that the lower court found the cigarette smoke to be harmful to the children's allergies and directed the mother not to smoke in the house where the children lived. *Id.* at *2. This ruling may have been influenced by the fact that the father was held in contempt for failing to pay court ordered child support. *Id.* at *1.

71. *Id.* at 286.
72. *Id.* at 284.
73. *Id.* at 285.
74. *Id.* at 286.
75. Other cases that involve the termination of parental rights include *In re Walter P.*, 278 Cal. Rptr. 602 (Ct. App. 1991), where the appellate court concluded that there was substantial and credible evidence upon which the trial court could have found that termination of parental rights was appropriate. *Id.* at 611. Among the factors considered were the child's susceptibility to wheezing, pneumonia, and asthma, coupled with the parents failure to protect the child from cigarette smoke. *Id.* at 604-05. In *re Markham v. Buck*, 795 S.W.2d 931 (Ark. Ct. App. 1990), upheld a lower court's refusal to terminate a guardianship on petition by the natural parents. The court held that it was in the best interest of the child to remain in the guardian's home. *Id.* at 933. Medical evidence presented indicated that the parents' smoking could harm the child. *Id.* at 932. In *In re Lawrence*, No. 90AP020007, 1990 WL 139717 (Ohio Ct. App. Sept. 4, 1990) (unpublished opinion), the court terminated a single mother's parental rights. *Id.* at *7. One factor considered by the court was the child's ongoing asthmatic problems that prohibited his exposure to cigarette smoke. *Id.* at *4. Despite the child's condition, the mother continued to smoke. *Id.* In *In re Tackett*, No. CA 496, 1990 WL 34369 (Ohio Ct. App. Mar. 7, 1990) (unpublished opinion), parental rights were terminated from two children for a variety of factors. *Id.* at *7. One factor was the father's smoking habit. *Id.* at *2. One child required a smoke-free environment because she suffered from chronic asthma. *Id.*
The previous cases have certain similarities. First, a large majority involve children who have some kind of medical condition that makes them especially sensitive to cigarette smoke. Cases that involve a perfectly healthy child whose best interests would be served by eliminating ETS exposure from the home are rare.

Second, courts have not considered the harmful health effects of ETS exposure as an independent and sole factor when determining custody issues. Although the effects of ETS are only recently becoming known compared to the risks of direct smoking, the courts are taking ETS exposure into account in some decisions. The present and future detrimental consequences of ETS exposure in children are well-documented. Courts should not be satisfied with a remedy for ETS exposure that is dependent upon other factors. The harm exists and is so severe that it deserves independent recognition in every instance.

It is important to note at this point that linking child abuse to parental smoking is not dependent upon precedents set forth in child custody proceedings. Rather, these cases illustrate that courts are beginning to recognize the harmful effects of ETS exposure in children, and that parents who smoke are causing these harmful effects. Viewing parental smoking as child abuse is independent and mutually exclusive from the foregoing cases. However, if the foregoing cases constitute a trend in the law, that trend may very well make its way into child abuse statutes and proceedings.

V. CHILD ABUSE?

A. Role of the Family and Child Abuse

The parent-child relationship forms the basis of the constitutional notion of "family" to which courts have extended procedural due process protection. It is the collective body of persons who live in the same house, under one head or management, who have reciprocal, natural, or moral duties to support and care for each other. Both parents and

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The other child suffered from severe recurrent ear infections. Id. In In re Neer, No. 413, 1989 WL 97487 (Ohio Ct. App. Aug. 23, 1989) (unpublished opinion), the appellate court affirmed an order of the lower court that gave permanent custody of a child to the State, thereby terminating the mother's parental rights. Id. at *1. One factor considered was the mother's violation of an order not to smoke in the home due to the child's allergies. Id. at *1-*2.

76. See supra part III.
77. Rivera v. Marcus, 696 F.2d 1016, 1022 (2d Cir. 1982).
children have an interest in the family, although their roles and rights with respect to the family differ.

A parent's right to care for and raise a child has been consistently recognized by the Supreme Court: "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Children, on the other hand, have an interest in "an environment which serves their numerous physical and mental needs during immaturity." Unfortunately, child abuse does occur, leaving both the parents' and child's interest in the family unfulfilled. Abuse of a child would seem to represent the most serious failure of the parent-child relationship.

Modern child abuse prevention statutes, most notably reporting laws, were enacted in response to medical studies that established child abuse as a problem of national importance. Today, every state in the nation has such a law. These reporting laws establish a mandatory duty to report known or suspected child abuse.

Wisconsin's statute requires reporting by certain professionals

80. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). Parental rights have also been characterized as a property right, as deference to parental preference, as a practice legitimated by its accomplishment of important functions, and as a validation of each person's right to intimate relationships. Ferdinand Schoeman, Rights of Children, Rights of Parents, and the Moral Basis of the Family, 91 ETHICS 6, 12-16 (1980).

81. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 13-14 (1979). Moreover, the child's body needs to be tended, nourished, and protected. His intellect needs to be stimulated and alerted to the happenings in his environment. He needs help in understanding and organizing his sensations and perceptions. He needs people to love, receive affection from, and to serve as safe targets for his infantile anger and aggression. He needs assistance from the adults in curbing and modifying his primitive drives (sex and aggression). He needs patterns for identification provided by the parents, to build up a functioning moral conscience. As much as anything else, he needs to be accepted, valued, and wanted as a member of the family unit consisting of adults as well as other children.

Id. at 13-14.


84. Wis. Stat. § 48.981(2) (1991-92). The penalty for intentionally failing to report suspected child abuse may include a fine not to exceed $1000 and/or imprisonment of not more than six months. See id. § 48.981(6).

85. The statute applies to the following professionals:
A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist,
who have "reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur."86 A specific definition of "abuse" is provided in the reporting statute: "Physical injury inflicted on a child by other than accidental means."87 Physical injury "includes but is not limited to lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm as defined under s. 939.22(14)."88

The harmful effects of ETS exposure on children fall within this definition of abuse. Most of the effects of tobacco smoke are internal and physical in nature. For example, the most serious consequences are seen in a child's lungs and ears.89 Moreover, an application of the great bodily harm standard, as will be discussed in the Wisconsin criminal child abuse statute,90 could be applied.

Detrimental health effects resulting from ETS exposure could not be considered accidental, as the statute requires.91 Although the term "accidental" is not defined by statute, Wisconsin Statutes section 990.01(1) provides that "[a]ll words and phrases [of Wisconsin laws] shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning."92 The common and approved usage of a word may be established by reference to a recognized dictionary.93

The American Heritage Dictionary defines "accidental" as "[o]ccurring unexpectedly, unintentionally, or by chance."94 The harm-

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86. Id.
87. Id. § 48.981(1)(a)(1).
88. Id. § 48.981(1)(e).
89. See supra notes 38-41 and accompanying text.
90. See infra notes 105-07 and accompanying text.
91. See infra notes 108-16 and accompanying text (arguing that parents who expose their children to ETS could have a state of mind of recklessness or even intent for a finding of criminal child abuse).
ful effects of ETS exposure on children do not occur "accidentally" because it cannot be maintained that ETS exposure causes physical injuries that are unexpected, unintentional, or by chance. Major studies such as the EPA report acknowledge the causal association between exposure to ETS and the resulting harm in children. Thus, the detrimental health effects occurring in children exposed to ETS cannot, and should not, be viewed as "accidental" under the common usage of the word.

Given the detrimental effects of ETS exposure on children, a number of distinguished professionals, both in the legal and medical fields, have maintained that parental conduct resulting in such exposure constitutes child abuse. Judge Bill Swann, a Fourth Circuit court judge in Tennessee, stated, "Exposing a child whose lungs are still growing to passive smoke is another form of child abuse." Dr. William G. Cahan, an anti-smoking activist and attending surgeon at Memorial Sloan-Kettering Cancer Center in New York, has similar views: "How can parents smoke around their child when they must know by now that their secondhand smoke is so injurious, so hazardous to that child's health? This is a form of child abuse." John F. Banzhaf, law professor and executive director of Action on Smoking and Health, a Washington antismoking group, stated that "parents who smoke around their children who suffer from respiratory ailments, such as asthma, sinusitis and allergies, could be cited for child abuse or neglect."

Although these prominent professionals do not specify, child abuse may form the basis for a civil action, including removal of the child from

95. Divorced Mother Ordered to Limit Smoking Habit, L.A. TIMES, June 5, 1988, § 1, at 25. Judge Swann was quoted after his decision, which enjoined a woman from smoking around her four-year-old child when the child was in confined spaces. Id.

96. World News Tonight with Peter Jennings (ABC television broadcast, May 13, 1992), available in LEXIS, News Library, ABCNEW File. In reply to this statement, Dr. Fernando Martinez stated: "I think that we cannot consider this a form of child abuse if the parents are not informed that this is wrong." Id. For additional sources that quote Dr. Cahan, see David Reuben, Mind If I Give You Cancer?, READER'S DIG., May 1991, at 119, 121 ("Parents who smoke in the presence of their children are committing child abuse."); William G. Cahan, Abusing Children by Smoking, N.Y. TIMES, Mar. 9, 1985, at 23 ("Because more than 50 million Americans smoke, this form of child abuse may be the most pervasive of all."); 20/20 (ABC television broadcast, Jan. 8, 1993) ("How can you do this to your child? I mean, child abuse doesn't have to be black-and-blue marks. It can be inhaled secondhand smoke."). available in LEXIS, News Library, ABCNEW File.

97. Report Could Light Fire Under Lawmakers, LEXINGTON HERALD-LEADER, Jan. 7, 1993, at A3. Referring to the EPA's report released on January 7, 1993, Banzhaf stated that it would "accelerate a trend already under way" that affects smoking parents. Id. For example, a smoking parent could lose out to a nonsmoking parent in a custody dispute in light of the evidence marshaled in the EPA report. Id. An interesting note to Mr. Banzhaf's career is that his complaint in 1971 led to the removal of cigarette commercials from television. Id.
the parent’s custody, or a criminal action against the alleged abuser, or both. In the former, the emphasis is on protecting the child, while in the latter, the emphasis is on punishing the offender. The distinction between the two is one of degree, rather than substance. No court has specifically found that the effects of parental smoking in children constitute child abuse in either type of proceeding. However, in light of clear evidence that establishes the harm resulting from ETS exposure in children, the courts should broaden their interpretation of child abuse statutes to include such harm, or legislatures should amend the statutes to include such a provision.

B. Criminal Child Abuse

The courts should broaden their interpretation of child abuse statutes to include the harm resulting from ETS exposure on children. For example, Wisconsin’s criminal child abuse statute could be interpreted in the following manner. Wisconsin Statutes section 948.03(3) states:

(3) Reckless causation of bodily harm. (a) Whoever recklessly causes great bodily harm to a child is guilty of a Class D felony. (b) Whoever recklessly causes bodily harm to a child is guilty of a Class E felony. (c) Whoever recklessly causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class D felony.

Although the reckless criminal child abuse statute does not contain a specific definition of “abuse,” the section supplies different penalties for the type of bodily harm inflicted. Thus, child abuse under this section is defined by the type of harm recklessly inflicted, and not by the definition that appears in the reporting statute. For example, “great bodily harm” is defined as “bodily injury which causes a substantial risk of death, or which causes serious permanent disfigurement, or which causes

99. Id.
101. See supra part III.
102. Wisconsin became the first state to adopt a special criminal code chapter on crimes against children which took effect on July 1, 1989. For further discussion, see Legislative Report: Revising Wisconsin's Criminal Code to Recognize Child Victims, 8 JUV. & CHILD WELFARE L. REP. 49, 60 (1989).
103. Wis. STAT. § 948.03(3) (1991-92).
104. See supra notes 87-88 and accompanying text.
a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." 105 "Bodily harm," on the other hand, is defined as "physical pain or injury, illness, or any impairment of physical condition." 106

The effects of parental smoking on their children could readily fit the definition of reckless causation of bodily harm. The statute delineates that physical injuries to children, coupled with the appropriate state of mind, constitute child abuse. The detrimental health effects of ETS exposure on children are mostly physical in nature. 107 In addition, the effects of passive smoke on children are evidenced through important bodily organs such as the lungs and ears. This type of damage could certainly be considered "impairment of the function of any bodily member or organ," or "any impairment of physical condition." Thus, the definitions of "great bodily harm" and "bodily harm" could include the effects of ETS exposure in children.

The state of mind "recklessly," likewise, is met. "Recklessly" is defined by statute as "conduct which creates a situation of unreasonable risk of harm to and demonstrates a conscious disregard for the safety of the child." 108 It appears that, in light of the documented studies and news regarding the harmful effects of ETS on nonsmokers, anyone smoking in the presence of a nonsmoker is consciously disregarding that nonsmoker's health in an unreasonable manner. It is more apparent in a parent-child relationship because parents are primarily responsible for their child's health. Because ETS exposure in children is causally associated with an increased risk of bronchitis, pneumonia, asthma, and disturbances in the middle ear, 109 it is an unreasonable risk of harm to important bodily organs. Thus, the definition of recklessness is met and parents who smoke in the presence of their children can be considered reckless.

In addition to reckless child abuse, it may not be unrealistic to consider smoking parents as intentionally harming their children when exposing them to ETS. Wisconsin Statutes section 948.03(2) encompasses this situation:

(2) Intentional causation of bodily harm.

106. Id. § 939.22(4) (emphasis added).
107. See supra notes 38-49, 52-55 and accompanying text.
109. See supra notes 21-23, 38-40 and accompanying text.
(a) Whoever intentionally causes great bodily harm to a child is guilty of a Class C felony.
(b) Whoever intentionally causes bodily harm to a child is guilty of a Class D felony.
(c) Whoever intentionally causes bodily harm to a child by conduct which creates a high probability of great bodily harm is guilty of a Class C felony.\textsuperscript{110}

"Intentionally" means that the actor "either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result."\textsuperscript{111} The penalties increase when child abuse is considered intentional, a recognition of the more culpable conduct.

One may argue that in most family relationships where one or both parents smoke, the parents do not intend to harm their child. While this may be true, there could be situations where the element of intent may be found. Take for instance the child who has asthma and simply cannot stand tobacco smoke. Assume further that the child has an asthma attack while in a smoke-filled room, and the attack necessitates immediate hospitalization. In this situation, the parent knows of the child’s respiratory problem. If an asthma attack occurs, it would not be unreasonable for the parent to know that exposure to ETS had an immediate and direct impact upon the child’s health and safety. A finding of intent need not require that the parent purposely caused the child to have an asthma attack, only that the parent is aware that his or her smoking is practically certain to cause that result. If the parent continues to smoke, at what point could intent be found or inferred? Surely there is some point when the parent’s conduct intentionally damages the child’s health and safety. The foregoing scenario presents the strongest hypothetical in which intent could be found.

The important question now is: What role does the physician play when he or she knows that a parent is smoking in the home and in front of a child? Because the family physician maintains a relationship with both children and their parents, the family physician would appear to be an ideal intervenor when children are victims of household ETS. Moreover, if the physician has informed the parents of the serious consequences that will result from their conduct, it may not be so difficult to show the element of intent. Unfortunately, it appears that many physicians are not intervening in a smoking household.\textsuperscript{112}

\textsuperscript{110} Wis. Stat. § 948.03(2) (1991-92).
\textsuperscript{111} Id. § 939.23(3).
\textsuperscript{112} Kligman & Narce-Valente, supra note 4, at 264 (reporting the unpublished results of
Specifically, one study of children's acute illness visits found low rates of ETS screening and counseling of parents by physicians. The study begins by noting the adverse health effects ETS exposure causes in children and maintains that a child's visit to the physician on account of such exposure would represent a "teachable moment," enabling physicians to screen for household smokers and to counsel parents regarding the health effects of ETS. The study concluded that counseling and screening activities increased from their initial low rates through a two-part intervention program. The study did not report the effect that such screening and counseling had on parental cessation of smoking in the presence of their children. Nonetheless, the role of the physician should not be discounted in informing smoking parents of the effect of their conduct on their children.

The Wisconsin criminal child abuse statutes could include parental smoking as a criminal offense. However, important policy considerations arguably outweigh such a course of action and would provide the greatest resistance to such implementation. In a criminal action, the emphasis is on punishing the alleged offender. Therefore, the main concern of protecting the health of the child is not met. Important questions will have to be resolved either in the legislature or the courts: Should

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a recent study indicating a negligible incidence of screening and counseling by physicians and a virtual absence of documentation in those instances when parents reported that they had been screened or counseled).


114. Id.

115. Id. Chart audits and postvisit parental surveys were used to assess the preintervention and postintervention screening and counseling activities of physicians. Id. at 723-24. The two-part intervention consisted of a two-hour educational seminar for the physicians and a passive smoking chart reminder and documentation system. Id. at 723. The authors were unsure how long the increased screening efforts would continue, and were also unsure if the increased screening efforts were successful in decreasing passive exposure of children to tobacco smoke in the home. Id. at 727.

116. One article offered helpful advice for physicians encountering such a role. See Kligman & Narce-Valente, supra note 4. Paramount to such counseling is using a positive, gentle, and nonthreatening approach. Id. at 265. The physician should tell parents that the effects of ETS extend to other rooms if ventilation is inadequate, or that their children may be exposed to ETS at many places outside of the home. Id. at 264. The physician should also inform parents that options other than smoking cessation are available, such as smoking outside, keeping the child in close proximity to an open window, or obtaining an air purifier for the child's room. Id. at 265.

117. See supra notes 98-99 and accompanying text. See generally 22 C.J.S. Criminal Law § 3 (1989) (defining a crime as "a wrong directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a criminal proceeding").
the law punish a smoking parent who is otherwise fulfilling the needs of his or her child, and should the role of the law in such cases be directed solely at eliminating the source of the hazard to the child? Family integrity and autonomy are vital interests, but these interests are subject to limitations due to the state’s interest in punishing criminal offenders. A multi-faceted balancing test must be applied. That test cannot discount one crucial fact: Parental smoking seriously harms the health of children. Until this fact is removed from the equation, the state should be able to intervene and punish those parents who subject their children to the harmful effects of ETS.

Children are particularly vulnerable to household ETS exposure because they are unable to leave the structured foundation their parents have built for child rearing. Children facing ETS inhalation are trapped in an unhealthy environment without the ability to change it. Smoking parents must get the message that exposing their children to ETS is wrong and severely harms their children. Parents who refuse to get the message should suffer criminal sanctions. These parents should not be permitted to hide behind only certain aspects of the constitutional notion of “family.”

C. Civil Statutes

Civil action against a parent would focus on protecting a child from ETS exposure by removing the hazard from the child’s environment. These statutes are also referred to as child abuse intervention statutes or child protection statutes. They are concerned with child welfare as well as family autonomy. The civil statutes attempt to balance a parent’s interest in family autonomy against the state’s interest in protecting a child’s health and welfare.

In Wisconsin, Chapter 48 of the Wisconsin Statutes, officially titled “The Children’s Code,” provides several alternatives that the legislature intended to “provide for the care, protection and wholesome mental and physical development of children, preserving the unity of the family whenever possible” and “in cases of child abuse or neglect, to keep

118. See Joseph Goldstein et al., Before the Best Interests of the Child 9 (1979).
119. See supra notes 98-99 and accompanying text.
120. See, e.g., infra text accompanying notes 140-41.
121. The Children’s Code was substantially revised by the 1955 legislative session and went into effect on July 1, 1956. For discussion of the legislative process and substantive changes, see Marygold S. Melli, The Children’s Code, 1956 Wis. L. Rev. 431.
children in their homes when it is consistent with the child's best interest
in terms of physical safety and physical health for them to remain at
home."  

The focus of The Children's Code is the best interests of the
child, and its entire philosophy is the antithesis of criminal
prosecution.

Under section 48.13 of the Wisconsin Statutes, "[t]he court has exclu-
sive original jurisdiction over a child alleged to be in need of protection
or services which can be ordered by the court . . . ." A proceeding
under this section is called a CHIPS proceeding (child in need of protec-
tive services) and is a civil action.

Jurisdiction in a CHIPS proceeding can be obtained when the child
"has been the victim of . . . physical abuse including injury which is self-
inflicted or inflicted by another by other than accidental means." As
defined and argued above, the detrimental effects of ETS exposure on
children could be interpreted to fit these statutory requirements and,
thus, the application of this section would appear to follow.

Jurisdiction in a CHIPS proceeding can also be obtained to protect a
child when a "parent, guardian or legal custodian neglects, refuses or is
unable for reasons other than poverty to provide necessary care, . . .
medical or dental care or shelter so as to seriously endanger the physical
health of the child." "Seriously endanger" is a broad term that does
not require actual physical injury to the child. The Wisconsin jury in-
structions state that the term seriously endanger "means potential harm
to the child. Actual physical injury need not occur for the child to be
seriously endangered; it is sufficient that such harm could happen except
for the intervention of others." Thus, early intervention into a smok-
ing household would be warranted, before the harmful effects of ETS
exposure become severe.

Another civil proceeding would include the involuntary termination
of parental rights pursuant to section 48.415 of the Wisconsin Statutes. In order to terminate parental rights, the state must show the parent caused death or injury to their child that resulted in a felony child abuse conviction,\textsuperscript{132} or that on more than one occasion the child has been removed from the parent's home under Wisconsin Statutes section 48.345 after an adjudication that the child is in need of protection or services and a finding by the court that the child was physically abused.\textsuperscript{133}

Application of these statutes will be resisted, just as application of criminal statutes would be, on policy grounds. Our society supports the notion that parents have the primary right and responsibility to raise their children.\textsuperscript{134} This preference for parental autonomy is based on the notion that children develop best when raised by their parents.\textsuperscript{135} Moreover, parental autonomy is often justified by our political commitment to a diversity of views extending to the family and the wide latitude accorded childrearing patterns.\textsuperscript{136}

Commentators opposing the foregoing civil actions will argue that even slight government intervention can be harmful to family autonomy because the child may no longer see her parents as the same authority figure they were before the intervention. Moreover, "[b]y its intrusion the state may make a bad situation worse; indeed, it may turn a tolerable or even a good situation into a bad one."\textsuperscript{137} The Supreme Court has recognized that terminating parental rights might place a child in a situation more detrimental than if parental rights had not been terminated.\textsuperscript{138} Accordingly, certain commentators advocate the most restrictive grounds for state intervention into the family.\textsuperscript{139} The legislative purpose behind Wisconsin's Children's Code is "to preserv[e] the unity of the family whenever possible."\textsuperscript{140} Although the interests of the child are of

\begin{itemize}
\item \textsuperscript{132} See Wis. Stat. § 48.415(5)(a) (1991-92).
\item \textsuperscript{133} Id. § 48.415(5)(b).
\item \textsuperscript{134} Michael S. Wald, Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child, 78 Mich. L. Rev. 645, 645 (1980).
\item \textsuperscript{135} Id.
\item \textsuperscript{137} Goldstein et al., supra note 118, at 13.
\item \textsuperscript{138} Santosky v. Kramer, 455 U.S. 745, 765 n.15 (1982).
\item \textsuperscript{139} See generally Goldstein et al., supra note 118, at 4. These authors specifically advocate the value of continuity, or the notion that the deepest need children have is the need for continuing psychological relationships with an adult who is to be considered the child's psychological parent. Id. at 8-10. The authors assert that breaking this continuous relationship through state intervention should only occur when the child is suffering from the most extreme dangers. See id. at 11-14.
\item \textsuperscript{140} Wis. Stat. § 48.01(1)(b) (1991-92).
\end{itemize}
paramount consideration, the interests of the parents must be considered as well. Until parental conduct falls below a minimum societal standard, resistance will meet state attempts to intervene and prevent parental smoking in the home.

On the other hand, a state has a legitimate interest in ensuring the welfare of each child. The state has wide latitude to intervene, as *parens patriae*, into the family unit to limit parental freedom and authority if the child's welfare is negatively affected. The child's welfare is affected directly when the child is exposed to ETS. The proper resolution of these competing concerns will involve society's perceptions of the dangers of ETS. As the cases in the previous section illustrate, parental smoking is increasingly being recognized as an unacceptable form of conduct. The 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.

VI. Conclusion

The gravity of child abuse and the urgent need for protecting its victims cannot be overstated. Children are our legacy and our hope, as valuable to us as they themselves are vulnerable. The centrality of children in our lives and the growing recognition of their sanctity as individuals have mandated that governments shield children from the exploitation of their vulnerability. At the same time that our law and society recognize a child's right to and need for protection, our law and society value family autonomy and privacy and the sanctum of the home. The family is the primary unit of social organization, the source of the individual's physical and emotional security. This Comment argues that children need to be protected from the detrimental health effects of ETS when exposure is a result of parental smoking. ETS not only affects children, but all of society. In light of the recent EPA report and numerous other studies, smoking in public places

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141. Id. § 48.01(2).

142. *Parens patriae* literally means parent of the country and refers to the principle that the state must take care of individuals who cannot take care of themselves, such as minors who lack proper care and custody from their parents. *Black's Law Dictionary* 1114 (6th ed. 1990). For further discussion of *parens patriae*, see Note, *Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207-22 (1974).

143. See also *In re Gault*, 387 U.S. 1, 16-17 (1967).

will surely be limited, and lawsuits arising out of ETS-related injuries will likely increase. As society is contemplating its responses to ETS, we should not forget about children who may not have the strongest voice. This is particularly evident when recognizing that all exposure of young children to ETS is involuntary. The problem becomes more acute when recognizing that many children are exposed to ETS by the choices of adults responsible for their care and protection. Our society is now composed of a nonsmoking majority whose interests must be weighed above and against a smoking minority. Parental smoking is not legally considered a form of child abuse at this time. Although there are problems associated with such a classification, society should not remain complacent about ETS exposure due to cigarette smoke in any situation. A logical place to eliminate ETS exposure is in the home, where children should be the most protected. Unfortunately, in smoking households, a legal form of child abuse is occurring, and an innocent child is left unprotected.

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