

3-1990

## The Constitutionality of an Off-DutySmoking Ban for Public Employees:Should the State Butt Out?

Elizabeth B. Thompson

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### Recommended Citation

Elizabeth B. Thompson, *The Constitutionality of an Off-DutySmoking Ban for Public Employees:Should the State Butt Out?*, 43 *Vanderbilt Law Review* 491 (1990)

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# The Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?

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## I. INTRODUCTION

During the past several years, restrictions imposed by states, cities, and municipalities on smoking in public areas have survived court chal-

lenges and become almost commonplace.<sup>1</sup> Likewise, both public and private employers have limited smoking in the workplace.<sup>2</sup> A further restriction that seems to be emerging, however, is a refusal by both the state and a growing number of private employers to hire or to continue to employ smokers.<sup>3</sup> These restrictions limit the employee's freedom to smoke not only in the workplace, but also after working hours and within the privacy of the worker's home.

This Note will address the constitutionality of such a restriction on public employees. The analysis will be based on a recently passed Massachusetts statute that forbids policemen, firefighters, and certain other public safety employees to smoke on or off the job. Part II describes the Massachusetts statute and the reasons behind its passage. Part III discusses the health and economic costs of smoking to society, smokers, employers, and those unwillingly exposed to smoke. Part IV addresses the background of smoking restrictions in general, focusing on restrictions on smoking in the workplace. Part V analyzes the constitutionality of smoking restrictions in light of the only court decision involving a challenge to a similar restriction and considers other possible constitutional arguments. Part VI considers other possible challenges to the antismoking statute under federal and state statutes. Part VII discusses the enforceability of the statute and possible constitutional challenges against enforcement. Finally, Part VIII concludes that although the statute probably is constitutional, there are serious practical and constitutional problems with enforceability and a broader antismoking restriction probably could be challenged successfully.

## II. THE MASSACHUSETTS STATUTE

In late 1987 the Massachusetts legislature passed and Governor Michael Dukakis signed into law a statute preventing certain public agencies such as the police and fire departments from hiring smokers and dictating the termination of newly hired employees who later begin to smoke.<sup>4</sup> No court challenges to the restriction have been filed since

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1. At least 40 states have passed laws prohibiting smoking in public areas. *See infra* notes 51-54 and accompanying text. Court challenges to such restrictions rarely have been successful. *See, e.g.,* *Rossie v. State Dep't of Revenue*, 133 Wis. 2d 341, 395 N.W.2d 801 (1986) (rejecting a challenge to a state law imposing smoking restrictions in public buildings). *But see* *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987) (holding that the New York Public Health Council overstepped its authority when it promulgated smoking restrictions in public buildings).

2. *See infra* notes 50-68 and accompanying text.

3. *See infra* notes 4-19 & 62 and accompanying text.

4. 1987 Mass. Acts 697, §§ 5, 6, 11, 117, 123 (codified in scattered sections of MASS. GEN. LAWS ANN. chs. 22, 27, 36, 41 (West Supp. 1987)). The largest group of public employees who will be affected by the statute are undoubtedly policemen and firefighters. The portion of the statute that

the statute became effective in October 1988, although the police union has threatened to challenge its constitutionality.<sup>5</sup> The legislation bans smoking for municipal policemen and firefighters;<sup>6</sup> metropolitan, transportation authority, capitol, and public works building police;<sup>7</sup> guards and supervisors for prisoners, delinquents, and the criminally insane;<sup>8</sup> and fire and crash control employees at Boston's Logan Airport.<sup>9</sup> In the same package the legislature instituted a "wellness program" for public employees;<sup>10</sup> "smoking cessation" is a primary goal of the program.<sup>11</sup> Another stated goal of the program is to decrease the mortality and morbidity rates among the general public from accidents and diseases for which risk factors can be identified.<sup>12</sup> These risk factors specifically include smoking. Under the smoking prohibition, current public safety employees who smoke may continue to do so without penalty, although presumably the newly instituted wellness program will encourage them to quit.

The Massachusetts statute is the first smoking ban instituted on a state-wide level,<sup>13</sup> although several municipalities have passed similar restrictions.<sup>14</sup> The statute was passed as a compromise in a dispute be-

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applies to the state police reads:

Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a uniformed member of the division of state police, and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco product; the personnel administrator shall promulgate regulations for the implementation of the provisions of this sentence.

MASS. GEN. LAWS ANN. ch. 22, § 9A (West Supp. 1987).

5. Fox, *Smoking in the Workplace: Who Has What Rights?*, 11 CAMPBELL L. REV. 311, 316-32 (1989) (citing *Police Union Plans Challenge of Smoking Ban*, Boston Globe (Metro), Oct. 7, 1988, at 33); Conversation with Jane Schacter, Assistant Attorney General for the Commonwealth of Massachusetts (Feb. 20, 1989).

6. MASS. GEN. LAWS ANN. ch. 41, § 101A (West Supp. 1987).

7. *Id.* ch. 36, § 64.

8. *Id.* ch. 27, § 2.

9. *Id.* ch. 73, § 3B (West Supp. 1989).

10. *Id.* ch. 111, § 206 (West Supp. 1987).

11. *Id.* The statute specifies that the wellness program be implemented first for policemen and firefighters to enable them to meet the initial health and fitness hiring standards established by statute. *Id.* ch. 31, § 61A. The legislature authorized the initial health and fitness standards for newly hired policemen and firefighters and further allowed the establishment of stricter standards through collective bargaining if such standards are rationally related to the duties of the positions and have the goal of minimizing health and safety risks. *Id.* A specific wellness program for policemen and firefighters, which does not mention smoking, was established in *id.* § 61B.

12. *Id.*

13. See Gold, *Police and Fire Depts. Face Massachusetts Smoking Ban*, N.Y. Times, Oct. 2, 1988, at 20, col. 1 (quoting Steve Weiss, New York Spokesman, Philip Morris U.S.A.).

14. Municipal police and fire departments that refuse to hire smokers include Alexandria, Arlington, and Fairfax Counties, Virginia; and Manteca, California. The fire departments in Janesville, Wisconsin; Midwest City, Norman, and Oklahoma City, Oklahoma; Salem, Oregon; Shaker Heights, Ohio; and Wichita, Kansas similarly reject smokers. See BUREAU OF NAT'L AFFAIRS, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 137

tween the State's municipalities and public safety employee unions.<sup>15</sup> Massachusetts, along with a majority of states,<sup>16</sup> has enacted a statutory presumption that a disease of the lungs or respiratory tract which results in total disability or death to a firefighter is job-related and entitles the sufferer to job-related disability benefits, unless the contrary can be shown by competent evidence.<sup>17</sup> The State wished to restrict or eliminate this presumption to avoid paying expensive job-related disability benefits to firefighters who suffered lung disease through smoking rather than on the job, while the union sought to retain the presumption for the benefit of members.<sup>18</sup> The two parties reached a compromise, retaining the presumption, but prohibiting any new hiring of smokers. The tobacco industry opposed the Massachusetts smoking ban, but declined to lobby against its passage because of the decision to retain the statutory presumption.<sup>19</sup>

### III. THE COSTS OF SMOKING

#### A. Health Consequences

Doubts about the adverse health consequences of tobacco began as early as 1761.<sup>20</sup> The majority of the scientific community, including the Surgeon General, now accepts the conclusion that smoking is harmful to both the smoker and to those forced to breathe air containing smoke. One need only look to the various Surgeon General's Warnings imprinted by law on every cigarette package and advertisement,<sup>21</sup> and to

(1987) [hereinafter *WHERE THERE'S SMOKE*]; see also *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987) (upholding a challenge to an Oklahoma City ordinance prohibiting trainee firefighters from smoking on or off the job).

15. See Gold, *supra* note 13.

16. See Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940, 952 & n.113 (1987).

17. MASS. GEN. LAWS ANN. ch. 32, § 94A (West Supp. 1987). A challenge to the antismoking statute in regard to firefighters might argue that the provision providing for rebuttal of the presumption on competent evidence is sufficient to prevent the payment of unjustified disability benefits without the institution of a broad antismoking provision, especially if the presumption statute were amended to shift the burden of proof back to the disabled employee once a smoking habit were established. See *infra* text accompanying note 221.

18. See Gold, *supra* note 13.

19. See *id.* (quoting Dennis M. Dyer, Regional Vice President, Tobacco Institute (a trade association for the tobacco industry)).

20. Davis, *Tobacco Use and Associated Health Risks*, in *TOBACCO SMOKING AND NICOTINE: A NEUROBIOLOGICAL APPROACH* 15 (W. Martin ed. 1987) [hereinafter *NEUROBIOLOGICAL APPROACH*] (citing studies in 1761 and 1789 on the health risks of tobacco).

21. See 15 U.S.C. § 1333 (1988). The Surgeon General's Warnings read:

- (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.

the numerous scientific studies on the matter to see that this conclusion is inescapable.<sup>22</sup> The Surgeon General in a 1979 Report concluded that "cigarette smoking is the single most important preventable environmental factor contributing to illness, disability, and death in the United States."<sup>23</sup> Smoking has been linked to lung, respiratory, and other cancer; chronic obstructive lung disease; various cardiovascular problems including heart attacks; and low birth weight and premature births.<sup>24</sup> The habit contributes to thirty-two percent of all cancer deaths, thirteen percent of cardiovascular deaths, and eighty-eight percent of deaths attributed to chronic obstructive lung disease.<sup>25</sup> Smoking is estimated to cause or contribute to over three hundred thousand deaths each year in the United States, or fifteen percent of the total mortality.<sup>26</sup> A group of one hundred young smokers will lose one of their number to murder, two to automobile accidents, and twenty-five to the effects of smoking.<sup>27</sup> The most recent report of the Surgeon General warns that tobacco is as equally addictive as heroin or cocaine.<sup>28</sup>

The adverse health consequences of smoking are not limited to smokers alone, but appear also in those exposed to passive or environmental tobacco smoke (ETS) from coworkers, parents, or other smokers present in public areas. The Surgeon General has concluded that involuntary exposure to smoke may cause disease, including lung cancer, in nonsmokers and states further that simple separation of smokers and nonsmokers within the same environment may reduce, but will not eliminate entirely the hazards of exposure.<sup>29</sup> One expert estimates that the risk of lung cancer in nonsmokers exposed to ETS is between 1.3

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(3) SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight.

(4) SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

*Id.*

22. See, e.g., REPORT OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION (1988) [hereinafter NICOTINE ADDICTION]; REPORT OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986) [hereinafter INVOLUNTARY SMOKING]; REPORT OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING: CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE (1985).

23. G. OSTER, G. COLDITZ & N. KELLY, THE ECONOMIC COSTS OF SMOKING AND BENEFITS OF QUITTING 4 (1984) [hereinafter ECONOMIC COSTS] (quoting REPORT OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING (1979)).

24. See INVOLUNTARY SMOKING, *supra* note 22, at 6.

25. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, STAFF MEMO, SMOKING-RELATED DEATHS AND FINANCIAL COSTS 1-3, 43 (1985) [hereinafter FINANCIAL COSTS].

26. INVOLUNTARY SMOKING, *supra* note 22, at ix.

27. See Rothstein, *supra* note 16, at 941-42.

28. See NICOTINE ADDICTION, *supra* note 22, at 9.

29. See INVOLUNTARY SMOKING, *supra* note 22, at 7.

and 3.5 times the risk faced by those who escape exposure.<sup>30</sup> Although lung cancer is the most serious health consequence of exposure to ETS, other possible effects include acute and chronic respiratory disease, and irritations to the eyes, nose, and throat.<sup>31</sup> Between five hundred and five thousand nonsmokers are thought to die each year from exposure to passive smoke.<sup>32</sup> Despite these statistics, some scientists still question the evidence and statistical evaluations of the harmful effects of smoking and secondhand smoke.<sup>33</sup>

### B. Economic Costs

The economic costs of smoking are high for the smoker, the employer, and society. Men under forty-five who smoke over two packs of cigarettes a day face more than 56,000 dollars of additional illness costs over their lifetimes, not including amounts spent to purchase cigarettes.<sup>34</sup> The Office of Technology Assessment places the societal costs of health problems associated with smoking in 1985 at 65 billion dollars.<sup>35</sup> One expert estimates that each smoking employee costs an employer over 1000 dollars each year through higher absentee rates, lower productivity attributed to smoking rituals,<sup>36</sup> and higher health, fire, and life insurance costs.<sup>37</sup> The highest estimate places the cost of smoking to employers at 4500 dollars per year for each smoking employee: 220 dollars for the 2.2 extra days of absence each smoker will take; 995 dollars for reduction in morbidity and premature mortality; 995 dollars for

30. WHERE THERE'S SMOKE, *supra* note 14, at 5 (quoting Steven D. Stellman, Ph.D., Assistant Vice President of Epidemiology, American Cancer Society).

31. *See id.* at 4-5. A link between involuntary ETS exposure and cardiovascular disease has not been established by conclusive evidence. *Id.*

32. *See id.* at 5.

33. *See* Aviado, *Health Issues Relating to "Passive" Smoking*, in SMOKING AND SOCIETY: TOWARD A MORE BALANCED ASSESSMENT 158 (R. Tollison ed. 1986) (finding "no substantial evidence to support the view that exposure to environmental tobacco smoke presents a significant health hazard to the nonsmoker"); Eysenck, *Smoking and Health*, in SMOKING AND SOCIETY: TOWARD A MORE BALANCED ASSESSMENT, *supra*, at 21 (stating that even if smoking were a cause of cancer, it is neither a necessary nor sufficient cause); WHERE THERE'S SMOKE, *supra* note 14, at 5-6 (quoting a George Washington University clinical professor of medicine's testimony to Congress that the claims of hazards from secondhand smoke are "scientifically unsupportable" (*sic*)); *see also* R. TOLLISON & R. WAGNER, SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY 19-22 (1988) (questioning the statistical applications of smoking studies).

34. ECONOMIC COSTS, *supra* note 23, at xvii.

35. *See* FINANCIAL COSTS, *supra* note 25, at 55.

36. Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL. L. 317, 323 (1987). A smoking "ritual" is the act of lighting and smoking a cigarette—"lighting, puffing, and staring." *Id.*

37. *See* WHERE THERE'S SMOKE, *supra* note 14, at 7. The total annual cost to a business per smoker has been estimated at \$336-\$601: \$75-\$150 in health care costs, \$80-\$166 in productivity losses (estimating one minute lost in each working hour for "smoking rituals"), and \$40-\$80 in higher absenteeism, as well as other costs. *Id.*

other extra insurance costs; 1820 dollars for productivity lost to smoking rituals; 500 dollars for damage and depreciation caused by smoke; 500 dollars for extra maintenance costs; and 485 dollars for injuries to nonsmoking employees.<sup>38</sup> Furthermore, employers who fail to protect nonsmoking employees from exposure to passive smoke may face expensive court judgments and settlements in jurisdictions that impose a duty on the employer to provide a smoke-free environment.<sup>39</sup> One cost of smoking to the employer that is particularly relevant to the off-duty smoking prohibition is the deleterious effect of regular smoking on the employee's general physical condition, fitness, and ability to perform strenuous activities without shortness of breath.<sup>40</sup>

Advocates and advisors for the tobacco industry, however, have questioned these statistics. They contend that workplace smoking control measures will raise costs by requiring smokers to leave their work-sites and suspend production while smoking.<sup>41</sup> Likewise, some statistics show that nonsmokers are absent from work more often than smokers.<sup>42</sup> The loss of on-the-job productivity by smokers is also the subject of dispute, with some smokers and supervisors noticing no loss of productivity.<sup>43</sup> Some research even suggests that smoking increases mental efficiency and improves mental performance.<sup>44</sup> Most importantly, some experts claim that a refusal to hire smokers will lead to a substantial and costly reduction in the pool of employable persons, especially in light of the shrinking workforce.<sup>45</sup>

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38. See Daynard, *Smoke Gets in Your Bottom Line*, 5 BOSTON BUS. J. 3 (1985).

39. See, e.g., *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976) (establishing a duty to provide a smoke-free environment); Silver, *Lawyer Warns Companies of Non-Smokers' Rights*, Hartford Courant, Apr. 12, 1987, at A18.

40. See *infra* notes 217-19 and accompanying text. A policeman or firefighter who is a regular smoker on off-duty time almost certainly will be less fit to engage in strenuous activities like fighting fires or pursuing suspects than his or her counterpart who never smokes.

41. See *WHERE THERE'S SMOKE*, *supra* note 14, at 7. Robert D. Tollison of the Center for Public Choice at George Mason University estimates these costs at \$309.5 million per year or \$867 per smoking employee. *Id.*

42. See *id.*; see also R. TOLLISON & R. WAGNER, *supra* note 33, at 26-27 (suggesting that men who currently smoke fewer than 15 cigarettes per day miss less work than men who formerly smoked, and that women who currently smoke up to a pack of cigarettes a day miss less work than women who formerly smoked).

43. See *WHERE THERE'S SMOKE*, *supra* note 14, at 7-8 (citing a self-survey of bank executives in which smokers claimed to use their time 2.5% more efficiently than nonsmokers, and a survey of supervisors in which 66% claimed no decline in performance among smokers).

44. See Wesnes, *Nicotine Increases Mental Efficiency: But How?*, in *NEUROBIOLOGICAL APPROACH*, *supra* note 20, at 63.

45. See Gold, *supra* note 13 (quoting Dennis Dyer, Regional Vice President, Tobacco Institute (a trade association for the tobacco industry)).



## IV. BACKGROUND OF SMOKING RESTRICTIONS

A. *Legislative Response*

Restrictions on smoking began early; tobacco use was a capital offense in fifteenth-century Turkey.<sup>46</sup> Early American legislative smoking bans were based on the perceived social evils and physical maladies caused by cigarettes and were supported by a moral crusade resembling the Prohibition crusade against alcohol.<sup>47</sup> In the late nineteenth and early twentieth centuries twelve states banned cigarettes entirely, but all of these bans were repealed by 1927.<sup>48</sup> Early workplace smoking restrictions were limited to industries such as mining in which the presence of explosives or a similar factor made smoking a direct health hazard.<sup>49</sup>

By the 1960s and 1970s, the growing awareness of the health costs of smoking led to the development of new antismoking legislation, including restrictions on private and public smoking in the workplace, on the federal, state, and local level.<sup>50</sup> One organization estimates that over 400 laws and ordinances nationwide restrict smoking.<sup>51</sup> By 1986 over forty states and many cities and municipalities had enacted laws restricting smoking to some degree.<sup>52</sup> Some of these states limit the restriction to a few public areas,<sup>53</sup> but others impose sweeping restrictions that apply even to the workplace of the private employer.<sup>54</sup> Twenty-two states limit workplace smoking for public employees.<sup>55</sup> Some of these laws merely require employers to adopt a smoking policy, while others mandate specific nonsmoking areas or restrict smoking to private of-

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46. See Davis, *supra* note 20, at 15.

47. See INVOLUNTARY SMOKING, *supra* note 22, at 267.

48. *Id.* Interestingly, one of the first states to ban tobacco use entirely was Tennessee, in 1887. *Id.* Tennessee is a leading tobacco growing state and today remains one of the few states with no smoking restrictions whatsoever. *Id.* at 268.

49. For instance, the Mine Health and Safety Act restricts smoking in mines. See 30 U.S.C. § 820(g) (1982).

50. See INVOLUNTARY SMOKING, *supra* note 22, at 267.

51. WHERE THERE'S SMOKE, *supra* note 14, at 39.

52. See *id.* at xi.

53. See *id.* at 266-67. For a map showing the extent and severity of smoking restrictions in the United States, see Stroud, *When Two "Rights" Make a Wrong: The Protection of Nonsmokers' Rights in the Workplace*, 11 CAMPBELL L. REV. 339, 358-59 n.132 (1989). This map shows the clear connection between the importance of tobacco to a state's economy and the extent to which the state regulates smoking. *Id.*; see also *supra* note 48.

54. Thirteen states now regulate smoking in the private workplace. See Fox & Davison, *Smoking in the Workplace: Accommodating Diversity*, 25 CAL. W.L. REV. 215, 228-30 (1989); see also CONN. GEN. STAT. ANN. §§ 31-40Q (West Supp. 1988); MINN. STAT. ANN. §§ 144.411-.417 (West 1989). But see Fox, *supra* note 5, at 332 (describing attempts in Virginia and several other states to pass legislation prohibiting employment discrimination against smokers).

55. See INVOLUNTARY SMOKING, *supra* note 22, at 270.

ices. None bans smoking from the workplace entirely.<sup>56</sup> The federal government also has limited smoking in certain areas, such as on domestic airline flights<sup>57</sup> and in the federal workplace. Both the Army<sup>58</sup> and the General Services Administration (GSA)<sup>59</sup> have instituted bans. The GSA ban effectively will restrict smoking to private office space in 7500 federal buildings and applies to most federal civilian employees.<sup>60</sup>

The newest and most controversial type of legislative restriction on smoking was passed recently in Massachusetts and a few municipalities: a total ban on smoking for some public employees, either on or off the job.<sup>61</sup> This restriction goes further than any previous smoking ban in forbidding employees to smoke not only in the workplace or on the employer's time, but also during off-duty hours or breaks while in public or in the privacy of the employee's home. Limitations on smoking for both public and private employees while in the workplace are now widely accepted. The controversial aspect of the Massachusetts restriction and similar legislation is the extent of the state's power to regulate the off-duty activities of its employees. A challenge to restrictions that ban smoking in the workplace most likely would fail in light of the cases discussed below. Many possible challenges exist, however, to a restriction on an employee's off-duty and private consumption of tobacco.

### B. Private Restrictions

A growing percentage of private employers are instituting restrictions on smoking in the workplace. A recent survey found that thirty-six percent of responding employers already had enacted smoking restrictions, with another twenty-three percent planning to adopt or considering a policy.<sup>62</sup> Reasons for the adoption of these policies include state or local legislation requiring employers to adopt smoking policies, employee health or comfort, and employee complaints about smoke.<sup>63</sup> Legislation was the single most cited impetus for the implementation of nonsmoking policies; it was the sole motivation for twenty-three per-

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56. For a general discussion of the parameters of private workplace legislation, see Fox & Davison, *supra* note 54, at 228-30.

57. 49 U.S.C.A. app. § 1374(d)(1)(A) (West Supp. 1989).

58. See *Army Bans Smoking at Work and in Its Vehicles or Aircrafts*, N.Y. Times, June 12, 1986, at B12, col. 1.

59. 41 C.F.R. § 101-20.105-3(a)(1) (1988). The regulation allows agency heads to designate nonsmoking areas to keep involuntary exposure to smoke to an "absolute minimum" "in recognition of the increased health hazards of passive smoke on the non-smoker" and prohibits smoking altogether in certain areas, including general office space, classrooms, restrooms, corridors, and libraries. *Id.* § 101-20.105-3(b).

60. Rothstein, *supra* note 16, at 950.

61. See *supra* notes 4-19 and accompanying text.

62. WHERE THERE'S SMOKE, *supra* note 14, at 1.

63. *Id.* at 2.

cent of employers answering the survey.<sup>64</sup> Smokers provided opposition to the policies in only ten percent of the firms, and very few employers reported any noticeable effects on costs or productivity.<sup>65</sup> The actual policies range from a total ban on smoking in all workplace premises in only six percent of responding companies, to a ban only if all employees agree in three percent. The most widely used policy, adopted by forty-one percent of the companies surveyed, prohibits smoking in all open work areas.<sup>66</sup> Half of the responding companies also had instituted programs designed to encourage and aid their employees to quit smoking.<sup>67</sup> Only twenty-three percent specifically set penalties for employees who violated the rules.<sup>68</sup>

A few private employers, in an action analogous to the Massachusetts statute, refuse to employ smokers at all. Only one percent of the organizations surveyed hire only nonsmokers, while five percent give preference to nonsmokers.<sup>69</sup> This Note does not address possible challenges to these policies, as private employers traditionally have wide latitude in hiring criteria and the constitutional challenges available to those challenging the hiring policies of public employers are not available in this context because state action is necessary for a constitutionally based challenge.<sup>70</sup> Some of the statutory arguments discussed below in respect to public off-duty smoking bans, however, also might be applied by private employees challenging similar bans.<sup>71</sup>

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64. *Id.*

65. *Id.*

66. *Id.* at 13-14.

67. *Id.* at 18.

68. *Id.* at 14.

69. *Id.* at 17-18. For a complete list of companies that hire or give preference in hiring to nonsmokers, see *id.* at 137. For a discussion of the factors employers should consider in drafting a smoking policy, see Fox, *supra* note 5, at 334-37.

70. It is arguable that, because the state in its capacity as an employer is acting not as the state but as a private party, the state also should not be subject to constitutional challenge for its employment practices. A well-established line of cases now rejects this argument and establishes that the state as employer constitutionally may not condition public employment on the interference with a life, liberty, or property interest. See *infra* notes 145-50 and accompanying text.

71. See *infra* notes 228-36 and accompanying text (discussing possible handicap and Title VII challenges). See generally Fox & Davison, *supra* note 54, at 221-23; Rothstein, *supra* note 16, at 956-60. Another factor that may either limit or cause the imposition of smoking policies in both public and private workplaces is the presence of a union. Generally, employers seeking to adopt smoking policies in a unionized workplace may not impose such policies without first bargaining with the union representing affected employees. See, e.g., *In re Parker Pen U.S.A.*, 90 Lab. Arb. (BNA) 489 (1987) (Fleischli, Arb.) (invalidating a smoking ban imposed without collective bargaining); Fox & Davison, *supra* note 54, at 232-34; see also Hames, *Key Concerns in Shaping a Company Smoking Policy*, 14 EMPLOYEE REL. L.J. 223 (1988) (outlining several key arbitration decisions on smoking rules and offering guidance for employers seeking to set a reasonable policy). These concerns are beyond the scope of this Note and will not be discussed further.

### C. Judicial Background

#### 1. The Common-Law Duty to Provide a Smoke-Free Workplace

One line of cases holds that an employer may have a common-law duty to provide a smoke-free environment to protect the safety and comfort of nonsmoking employees.<sup>72</sup> These cases, though not directly relevant to the ban imposed by the Massachusetts statute, provide indirect support for the argument that a public employer constitutionally can forbid its employees from smoking. The first case holding that an employer has a common-law duty to provide a smoke-free workplace was *Shimp v. New Jersey Bell Telephone Co.*<sup>73</sup> The plaintiff in *Shimp*, a secretary who was sensitive to cigarette smoke, sought an injunction forcing her employer to restrict smoking in her work area.<sup>74</sup> The company had allowed other employees to smoke in the same area, which had aggravated the plaintiff's allergy to smoke. The court took judicial notice of the dangers of smoking and passive smoke<sup>75</sup> and recognized that individuals have a right to risk their own health by smoking, but declined to extend that right to risk the health of the smokers' fellow employees.<sup>76</sup> The court finally found that the risk of certain individuals being particularly sensitive to smoke was great enough that an employer should foresee the health consequences to such an individual and provide a smoke-free environment.<sup>77</sup> The *Shimp* court emphasized, however, that individuals who wished to smoke on their own time should be allowed to do so if their smoking did not intrude on the rights of other employees.<sup>78</sup>

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72. See, e.g., *Shimp v. New Jersey Bell Tel. Co.*, 145 N.J. Super. 516, 368 A.2d 408 (Ch. Div. 1976). But see *Gordon v. Raven Sys. & Research, Inc.*, 462 A.2d 10 (D.C. 1983).

73. *Shimp*, 145 N.J. Super. at 516, 368 A.2d at 408; see also *Smith v. Western Elec. Co.* 643 S.W.2d 10 (Mo. Ct. App. 1982) (issuing an injunction banning workplace smoking and finding a common-law duty to provide a smoke-free workplace for an employee who suffered a severe allergic reaction to cigarette smoke).

74. *Shimp*, 145 N.J. Super. at 520, 368 A.2d at 409.

75. *Id.* at 527, 368 A.2d at 414 (stating that these dangers were "generally accepted by mankind as true and . . . capable of ready demonstration by means commonly recognized as authoritative").

76. *Id.* at 530, 368 A.2d at 415. The court stated:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.

*Id.*

77. *Id.* at 531, 368 A.2d at 415-16.

78. The *Shimp* court stated:

In determining the extent to which smoking must be restricted the rights and interests of smoking and nonsmoking employees alike must be considered. . . . *The employee who desires to smoke on his own time, during coffee breaks and lunch hours, should have a rea-*

At least one court has extended *Shimp's* reasoning to allow an action for damages against an employer whose negligence in forcing an employee to work in a smoky environment proximately caused injury to the employee. In *McCarthy v. Department of Social & Health Services*<sup>79</sup> the Washington Supreme Court accepted the *Shimp* view of a common-law duty to provide a smoke-free environment in the workplace and allowed an employee to pursue an action for negligence against an employer whose failure to provide such an environment had caused her lung disease.<sup>80</sup> The court relied on the scientific literature on the dangers of smoking and the well-established common-law duty to provide employees with a reasonably safe workplace to find that a reasonably safe workplace means a workplace free of smoke.<sup>81</sup> Only employers who knew or reasonably should have known of the dangers of cigarette smoke have this duty, and the protesting employee has the burden of establishing the employer's knowledge. Likewise, reasonableness will be judged only on the sensitivities of a typical employee, not one who is especially sensitive to smoke.<sup>82</sup>

Other courts, however, have rejected the *Shimp* court's reasoning, holding that employers do not have an affirmative duty to provide a smoke-free workplace. A District of Columbia court in *Gordon v. Raven Systems & Research, Inc.*<sup>83</sup> found that the common-law duty to provide a reasonably safe workplace does not include a duty to cater to the sensitivities of an employee who is particularly susceptible to smoke. The employee in *Raven* informed her employer of her sensitivity to tobacco smoke when she was hired. The employer placed her apart from her work group in an area with other nonsmokers to accommodate this sensitivity, but notified her that she would have to rejoin the work group, which contained one smoker, after the company discovered that the existing policy impaired operational efficiency.<sup>84</sup> After the employee refused to work in an area containing smokers, the company obtained the agreement of the smoking member of the work group not to smoke

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sonably accessible area in which to smoke.

*Id.* at 531, 368 A.2d at 416 (emphasis added).

79. 110 Wash. 2d 812, 759 P.2d 351 (1988).

80. *Id.* Ms. McCarthy, who had been employed by the defendant for 10 years, was continuously exposed to smoke throughout her employment despite her complaints to her employer. She claimed that because of this exposure to smoke, she developed a chronic pulmonary obstructive condition, which eventually led to complete disability and termination of her employment. *Id.* at 814, 759 P.2d at 352.

81. *Id.* at 818-22, 759 P.2d at 354-56.

82. *Id.* at 821, 759 P.2d at 356. The employer must make a reasonable effort to accommodate the sensitive employee if the employer is aware of the special sensitivity. *Id.* The employer is not, however, bound to provide a smoke-free environment regardless of cost. *Id.* at 822, 759 P.2d at 356.

83. 462 A.2d 10 (D.C. 1983).

84. *Id.* at 11.

when the plaintiff was present.<sup>85</sup> The work space, however, adjoined an office in which another smoker was stationed, and cigarette smoke reached the plaintiff and caused headaches, nausea, and eye irritation.<sup>86</sup> The plaintiff notified her employers of the situation and moved back to her original work station among the nonsmokers. After receiving a warning, the plaintiff was terminated for refusal to remain in her assigned work station.<sup>87</sup>

The *Raven* court based its holding on cases refusing to limit the right to smoke on constitutional grounds<sup>88</sup> and cases holding specifically that no constitutional right to a healthy environment exists.<sup>89</sup> The court found that the issue of a healthy environment is better left to the legislature than the courts.<sup>90</sup> The court distinguished its holding from *Shimp*, because the instant plaintiff, unlike the *Shimp* plaintiff, had presented no evidence of the dangers of smoking in general, but simply claimed that the employer owed a duty to her as a particularly sensitive employee.<sup>91</sup> The court declined to take judicial notice of the dangers of smoking or to impose a duty to provide a smoke-free environment absent a specific showing of danger to all employees.<sup>92</sup>

In light of the cases holding that an employer actually may have a duty to keep the workplace free of smoke, a constitutional challenge to the Massachusetts statute or a similar statute based on a restriction on smoking within the workplace or on the employer's time probably would be unsuccessful. Not only may an employer protect other em-

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85. *Id.*

86. *Id.*

87. *Id.* at 11-12.

88. See *infra* notes 93-115 and accompanying text.

89. See *Ely v. Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928, 934 (E.D.N.Y. 1979); *Tanner v. Armco Steel Co.*, 340 F. Supp. 532, 537 (S.D. Tex. 1972).

90. *Raven*, 462 A.2d at 14. The court stated:

[T]he judicial process . . . is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political and which is far too serious to relegate to the ad hoc process of "government by lawsuit". . . .

*Id.* (quoting *Tanner*, 340 F. Supp. at 536).

91. *Id.* at 15.

92. *Id.* Other nonsmoker challenges to smoking in the workplace have been based on various statutory and common-law claims that are beyond the scope of this Note. See, e.g., *Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982) (holding that a nonsmoker who was hypersensitive to smoke was handicapped for the purposes of the federal Rehabilitation Act); *Hentzel v. Singer Co.*, 138 Cal. App. 290, 188 Cal. Rptr. 159 (1982) (recognizing the common-law tort of wrongful discharge and intentional infliction of emotional distress for an employee fired because he had complained about workplace smoking).

ployees through a workplace smoking ban, it may have a positive common-law duty to institute such protection. This common-law duty provides support for the conclusion that the state as an employer constitutionally may restrict smoking on the job.

## 2. Constitutional Approaches

Nonsmokers and smokers have tried several different constitutional challenges, both to forced exposure to smoke and to smoking restrictions. Nonsmokers have argued that unwilling exposure to smoke deprives them of life, liberty, and property without due process, invades their right to privacy, chills first amendment speech rights, and constitutes cruel and unusual punishment. Smokers, on the other hand, have argued that smoking restrictions violate their rights to privacy, invade their liberty and property interests without due process, and violate the equal protection clause. Courts generally have been hostile to these constitutional arguments, both from smokers and nonsmokers.

Courts consistently have refused to recognize a constitutional right to breathe air free of tobacco smoke. The decision in *Gasper v. Louisiana Stadium & Exposition District*<sup>93</sup> was one of the first to consider and reject constitutional arguments by nonsmokers. The plaintiffs in *Gasper* asked the court to enjoin smoking in the Louisiana Superdome during scheduled events,<sup>94</sup> arguing that the Dome's policy of allowing smoking during events that they had attended or planned to attend violated the first, fifth, ninth, and fourteenth amendments.<sup>95</sup> The plaintiffs' first amendment claim rested on the alleged chilling effect of smoking in the Superdome; because they must breathe harmful air as a precondition to attendance at events in the Dome, they were less likely to attend these events, and their first amendment right freely to receive the thoughts and ideas of others was violated.<sup>96</sup> The court rejected this argument, stating that allowing smoking in the stadium was no more a violation of first amendment rights than charging admission for the events or allowing the selling of beer.<sup>97</sup> Because the permissive attitude

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93. 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

94. *Id.* at 716. The Dome was owned and operated by a political subdivision of the State of Louisiana. *Id.*

95. *Id.* at 717. The court declined to decide the issue of whether the necessary state action for the plaintiffs' claim existed because it found no validity in the constitutional claims. The plaintiffs had filed under 42 U.S.C. § 1983 (1982), alleging a constitutional violation by a person acting under color of state law.

96. *Id.* at 717-18. The plaintiffs argued that the right to receive the thoughts and ideas of others was peripheral to the first amendment right of free expression.

97. *Id.* at 718. The court stated:

To say that allowing smoking in the Louisiana Superdome creates a chilling effect upon the exercise of one's First Amendment rights has no more merit than an argument alleging

toward smoking protected sufficiently the delicate balance of individual rights without intervening in purely private affairs, no first amendment violation existed.<sup>98</sup>

The plaintiffs also argued that the state, by allowing other patrons to smoke in the Superdome and involuntarily exposing nonsmokers to smoke, was depriving nonsmoking patrons of life, liberty, and property without due process of law.<sup>99</sup> They relied on *Pollak v. Public Utilities Commission*<sup>100</sup> to assert a violation of the fifth and fourteenth amendments. The court distinguished the instant case from *Pollak* and stated that the balancing process necessary to determine an individual's right to be left alone is the province of the legislative rather than the judicial branch.<sup>101</sup> Relying on *Tanner v. Armco Steel Co.*,<sup>102</sup> a case in which the court rejected the plaintiffs' damage suit for injuries sustained as a result of pollutants emitted by the defendant's refineries, the court in *Gasper* specifically found that there was no constitutional right to a clean environment under the fifth and fourteenth amendments.<sup>103</sup> The court emphasized that the Constitution permits some social and economic ills to go unremedied<sup>104</sup> and refused to provide another means by which an individual could resort to the courts to police the social habits of others.

The *Gasper* plaintiffs' final constitutional argument was based on the right to privacy derived from the ninth amendment and developed in *Griswold v. Connecticut*.<sup>105</sup> They contended that the right to be free of the hazards of smoke was equally as fundamental as the right to privacy within the marital relationship recognized in *Griswold*.<sup>106</sup> The

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that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold.

*Id.*

98. *Id.*

99. *Id.* at 718.

100. 191 F.2d 450 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952). *Pollak* concerned the continual programming of a radio broadcast on streetcars. The D.C. Circuit found that forcing the riders to listen to broadcasts against their will violated the fifth amendment interest in liberty. The Supreme Court reversed, stating that "[t]he liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others." *Public Utils. Comm'n v. Pollak*, 343 U.S. 451, 465 (1952). The court in *Gasper* found that even if it accepted the appellate court's interpretation, the facts were distinguishable because the audience in *Gasper*, unlike the streetcar riders in *Pollak*, were not a captive audience but instead chose to attend Dome events. *Gasper*, 418 F. Supp. at 720.

101. *Gasper*, 418 F. Supp. at 720.

102. 340 F. Supp. 532 (S.D. Tex. 1972).

103. *Gasper*, 418 F. Supp. at 720-21.

104. *Id.* at 721.

105. 381 U.S. 479 (1965).

106. *Gasper*, 418 F. Supp. at 721.



court disagreed, stating that to hold that the right to privacy extends to the right to a smoke-free environment would mock the noble purposes of the first, fifth, ninth, and fourteenth amendments.<sup>107</sup>

*Gasper* involved constitutional arguments raised by nonsmokers exposed to smoke in a public place. Courts also have refused to accept constitutional claims against public employers raised by those unwillingly exposed to smoke in the workplace, although courts will stop workplace smoking under the common-law claims discussed above.<sup>108</sup> In *Federal Employees for Non-Smokers Rights (FENSR) v. United States*<sup>109</sup> the court rejected claims of first and fifth amendment violations brought by nonsmoking federal employees seeking to restrict smoking in federal buildings. The plaintiffs contended that exposure to smoke in the workplace violated their first amendment right to petition the government for redress of grievances and that they had been deprived of life, liberty, and property without due process.<sup>110</sup> The court found that the facts were indistinguishable from *Gasper* and refused to hear the constitutional claims, although it left open the possibility of a common-law action based on the *Shimp* duty to provide a smoke-free workplace.<sup>111</sup> It also stated that the legislature, not the court, was the proper forum for the nonsmokers' concerns.<sup>112</sup>

The Tenth Circuit in *Kensell v. Oklahoma*<sup>113</sup> also rejected first, fifth, ninth, and fourteenth amendment claims brought by a nonsmoker seeking the elimination of smoking from the workplace. The plaintiff, an employee of the State of Oklahoma, claimed that exposure to smoke at work violated his first amendment rights by impairing his ability to think, assaulted him, and deprived him of a property right in his job because he was forced to choose between quitting or continued exposure to smoke.<sup>114</sup> The court found no merit in these claims, stating that the role of the federal judiciary was not to act as a superlegislature promulgating social change under the pretense of protecting constitutional rights.<sup>115</sup>

The only constitutional claim by a nonsmoker that has met with any success is a claim that involuntary exposure to smoke while in prison is cruel and unusual punishment under the eighth amendment.

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107. *Id.*

108. *See supra* notes 72-92 and accompanying text.

109. 446 F. Supp. 181 (D.D.C. 1978).

110. *Id.* at 183-84.

111. *Id.* at 185.

112. *Id.*

113. 716 F.2d 1350 (10th Cir. 1983).

114. *Id.* at 1351.

115. *Id.*

The court in *Avery v. Powell*<sup>116</sup> accepted an inmate's *pro se* complaint that his exposure to environmental tobacco smoke while in prison constituted cruel and unusual punishment and was a denial of a liberty interest without due process. The court reasoned that the evolving standards of decency in society provide the standards by which the conditions of confinement must be judged under the eighth amendment and found that the modern realization of the hazards of tobacco smoke leads to the conclusion that involuntary exposure while in prison violates the standards of decency that define fair punishment.<sup>117</sup> The court also found that involuntary exposure to smoke threatened the plaintiff's liberty interest in his own health. The decision by the authorities to confine the plaintiff in a cell in which his health was threatened by smoke was a deliberate decision not reasonably related to any proper governmental interest and thus, deprived him of his liberty interest in his health without due process.<sup>118</sup>

The *Avery* decision, which is a rare example of judicial acceptance of a constitutional argument in a smoking context, provides further support for the proposition that a successful challenge to that portion of the Massachusetts statute that prohibits smoking while public employees are actually on duty is unlikely. Parts of the statute apply specifically to prison guards and policemen, who presumably are exposed regularly to convicted criminals. Smoking by these public employees while on the job might not only threaten the health and comfort of other employees, but also may violate the constitutional rights of any nonsmoking prisoners exposed to smoke.

Constitutional challenges brought by smokers to smoking restrictions have met with similar hostility from courts. For instance, the court in *Rossie v. Wisconsin Department of Revenue*<sup>119</sup> rejected a state employee's claims that the smoking restrictions instituted by the state Department of Revenue (DOR) violated the equal protection clause of the fourteenth amendment and impaired the obligation of contract under either the state or federal constitution.<sup>120</sup> The State of Wisconsin

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116. 695 F. Supp. 632 (D.N.H. 1988). For a complete discussion of *Avery*, see Note, *Constitutional Law—Prisoners' Rights—Recognition That Involuntary Exposure to Environmental Tobacco Smoke May Constitute Cruel and Unusual Punishment—Avery v. Powell*, 11 CAMPBELL L. REV. 363 (1989).

117. *Id.* at 636-40.

118. *Id.* at 640-41.

119. 133 Wis. 2d 341, 395 N.W.2d 801 (Ct. App. 1986).

120. *Id.* The court first rejected the employee's contention that the restrictions were "rules" that had to be promulgated pursuant to statutory authority. On the contrary, the court found that the restrictions did not affect private rights or interests and were concerned with the private workings of the agency. They were, therefore, properly promulgated and reasonably related to a statute giving the state the power to manage the employees of the agency and establish reasonable work rules. *Id.* at 348-50, 395 N.W.2d at 804-05.

had passed a Clean Indoor Air Act, forbidding smoking in any enclosed area of a state building, but permitting the person in charge to designate smoking areas.<sup>121</sup> The DOR in response instituted a nonsmoking policy, forbidding smoking in most areas of its buildings, including private offices.<sup>122</sup> The plaintiff, a pipe smoker who had been employed by the DOR for eighteen years, sued for declaratory and injunctive relief from disciplinary action under the directives.<sup>123</sup>

The plaintiff first argued that the Clean Indoor Air Act provided unequal protection of the laws under the fourteenth amendment because it prohibited him and other smokers employed at the DOR from smoking, while allowing smoking in many other places. The court reviewed the law under a reasonable basis standard, stating that the statute had a presumption of validity that could only be overcome by a showing that the classification made by the legislature was irrational or arbitrary. The court considered whether any reasonable basis to justify the classification existed, not whether some inequality resulted from the classification.<sup>124</sup> The court found that treating smokers in public buildings differently than smokers in other areas was not arbitrary or capricious, but rather a rational distinction that presented no equal protection problem. The court recognized that the legislature had heard testimony on the risks of smoking and had banned smoking only in areas in which nonsmoking government employees and members of the public could not easily avoid smoke. It emphasized that the statute did not ban smoking in most private areas that nonsmokers could avoid easily.<sup>125</sup>

The *Rossie* plaintiff's second constitutional argument rested on the contract clause of both the federal and state constitutions.<sup>126</sup> A 1976

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121. See WIS. STAT. ANN. § 101.123(2)(10), (3), (4) (West 1988). This statute is similar to the federal regulation forbidding smoking in federal buildings and allowing the agency head to designate smoking areas. See *supra* notes 59-60 and accompanying text.

122. *Rossie*, 133 Wis. 2d at 347-48, 395 N.W.2d at 804.

123. *Id.*

124. *Id.* at 353, 395 N.W.2d at 806. The court applied five tests:

(1) All classification must be based upon substantial distinctions; (2) the classification must be germane to the purpose of the law; (3) the classification must not be based on existing circumstances only; (4) the law must apply equally to each member of the class; and (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of substantially different legislation.

*Id.* (quoting *Omernik v. State*, 64 Wis. 2d 6, 18-19, 218 N.W.2d 734, 742 (1974)).

125. The court stated that "[the statute] prohibits smoking in many public places where people must go, and does not prohibit it in many places where people need not go." *Id.* at 355-56, 395 N.W.2d at 807. This distinction between public and private places in the equal protection context provides a possible argument for an equal protection challenge to the off-duty smoking ban: the state prohibits public employees from smoking at home, but allows all other smokers to smoke freely. See *infra* notes 226-27 and accompanying text.

126. *Rossie*, 133 Wis. 2d at 356, 395 N.W.2d at 807-08; see also U.S. CONST. art. I, § 10; WIS.

directive of the DOR had allowed the plaintiff to smoke at his desk.<sup>127</sup> He asserted that this directive was part of his implied contract of employment and that the state had impaired the DOR's obligation of contract by passing the Clean Indoor Air Act. The court found that even if Rossie had a contractual right to smoke within the privacy of his office, the Act had not impaired that right. The Act left the DOR free to designate smoking areas in buildings under its control, and it could easily have so designated Rossie's desk. The DOR's choice not to allow smoking was not mandated by the Act and, thus, any impairment of contract was the DOR's responsibility.<sup>128</sup>

The off-duty smoking ban at issue in the Massachusetts statute applies only to newly hired employees, who obviously have no existing employment contracts to violate. Any future similar statutory ban, however, which also applies to smokers already employed, might be successfully challenged by an argument similar to Rossie's. The employee could argue that smoking while off duty and at home is an implied part of the employment contract, and the statute banning off-duty smoking impairs that contractual obligation.

## V. THE CONSTITUTIONALITY OF AN OFF-DUTY SMOKING RESTRICTION.

### A. *Substantive Due Process Guarantees of Liberty and Privacy*

#### 1. General Background

The fifth and the fourteenth amendments to the Constitution guarantee that the state cannot deprive a citizen of life, liberty, or property without due process of law.<sup>129</sup> The state may, however, deprive an individual of life, liberty, or property if it has a sufficiently important interest that outweighs the importance of these constitutionally guaranteed rights. If the right is fundamental, which generally means it is specifically listed in the Constitution, the state must have a compelling interest to constitutionally restrict the right, and the means employed must be the least restrictive possible.<sup>130</sup> If the right is not fundamental, the state need only have a rational basis for the restriction, and the means must be reasonably related to that basis.<sup>131</sup> To determine the constitutionality of a restriction, the court engages in a balancing process: does

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CONST. art I, § 12.

127. *Rossie*, 133 Wis. 2d at 355, 395 N.W.2d at 807.

128. *Id.* at 356-67, 395 N.W.2d at 808.

129. U.S. CONST. amends. V, XIV. The fifth amendment states "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The fourteenth amendment reads "nor shall the state deprive any person of life, liberty, or property, without due process of law."

130. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

131. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

the state interest in the restriction outweigh the individual interest in autonomy under the appropriate standard?

The due process guarantees of the fifth and fourteenth amendments also protect the individual's privacy interest, or "right to be let alone."<sup>132</sup> The right of privacy is not specifically listed in the Constitution, but is drawn from the penumbras of several of its provisions.<sup>133</sup> This right is the right of personal autonomy and freedom from state interference in decisions and actions that should be purely private.<sup>134</sup> The privacy right, like the rights of liberty and property, cannot be restricted without due process of law and stems in part from the due process guarantees.<sup>135</sup> Other constitutional sources for the right of privacy include first amendment guarantees of freedom of expression and association,<sup>136</sup> the third amendment guarantee of freedom from having soldiers quartered in private homes,<sup>137</sup> the fourth amendment freedom from unreasonable search and seizure,<sup>138</sup> and the ninth amendment guarantee that the naming of specific rights in the Constitution will not abridge the other rights retained by the people.<sup>139</sup> The right of privacy, like the other life, liberty, and property interests, may be abridged or restricted by the state if the state has a sufficiently important reason.<sup>140</sup> Again, fundamental privacy interests require a compelling state interest for invasion, while others require only a rational basis.<sup>141</sup> Courts engage in the same balancing process and have been reluctant to find privacy interests fundamental; to date, only those interests relating to marriage, procreation, contraception, family relationships, and the rearing and

132. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 720 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978).

133. See generally Classen, *Restricting the Right to Smoke in Public Areas: Whose Rights Should Be Protected?*, 38 SYRACUSE L. REV. 831, 833-40, (1987); Note, *Public Employees or Private Citizens: The Off-Duty Sexual Activities of Police Officers and the Constitutional Right of Privacy*, 18 U. MICH. J.L. REF. 195, 197-206 (1984).

134. See *Roe v. Wade*, 419 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

135. See *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (stating that the right of privacy is implicit within fourteenth amendment substantive guarantees that are "fundamental" or "implicit in the concept of ordered liberty") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Roe*, 410 U.S. at 152.

136. See, e.g., *Katz v. United States*, 389 U.S. 347, 350 n.5 (1967) (dictum); *DeGregory v. Attorney Gen.*, 383 U.S. 825 (1966).

137. See *Griswold*, 381 U.S. at 484.

138. See *Katz*, 389 U.S. at 353.

139. See *Roe*, 410 U.S. at 153.

140. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

141. In *Roe v. Wade* the state's interest in preventing abortions could not outweigh a woman's fundamental privacy interest in her own body for the first two trimesters, but became sufficiently compelling in the third trimester of pregnancy. *Roe*, 410 U.S. at 163-34. *But see Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (plurality decision) (refusing to overrule *Roe's* privacy analysis, but allowing increased state regulation of abortions).

education of children rise to the level of fundamental privacy rights.<sup>142</sup>

Although the Supreme Court previously has stated that the outer limits of the privacy right have not yet been determined,<sup>143</sup> it recently refused, in *Bowers v. Hardwick*,<sup>144</sup> to extend the right of privacy to consensual homosexual acts between adults within the privacy of the home. The *Bowers* decision narrows the right of privacy considerably. After *Bowers*, it seems unlikely that the courts will extend fundamental privacy right analysis to the right of an individual to smoke within the privacy of the home and while off duty.

It is well established that the state cannot condition employment on the requirement that the prospective employee give up a constitutional right.<sup>145</sup> The Supreme Court of Massachusetts has applied this precept directly to policemen in *Broderick v. Police Commissioner*,<sup>146</sup> stating in dictum that public employment may not be conditioned upon the surrender of constitutional rights that could not be abridged directly by the state.<sup>147</sup> The government may use its police power to condition public employment on the abridgement of constitutional rights, however, so long as the state interest in the prohibition is either compelling, in the case of a fundamental right,<sup>148</sup> or rationally related to the accomplishment of the state objective, if the right is not fundamental.<sup>149</sup> Furthermore, the state has a much easier task in establishing a sufficient interest to invade the rights of its employees than it does when restricting a private citizen. The state regulation of a public employee carries a presumption of correctness, and the employee challenging the regulation has the burden of proof in establishing that it is not rationally connected to the state end.<sup>150</sup>

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142. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684-85 (1977).

143. *Id.* at 684.

144. 478 U.S. 186 (1986).

145. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Regents of the Univ. of N.Y.*, 385 U.S. 589, 605 (1967) (rejecting the premise that "public employment . . . may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action").

146. 368 Mass. 33, 330 N.E.2d 199, *cert. denied*, 423 U.S. 1048 (1975).

147. *Id.* at 37, 330 N.E.2d at 202 (quoting *Keyishian*, 385 U.S. at 605).

148. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 554-56 (1973).

149. *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976). As Justice Oliver Wendell Holmes stated, a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor & Aldermen*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

150. See *Kelley*, 425 U.S. at 245. The Court stated:

[W]e have sustained comprehensive and substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment . . . [T]here is surely even more room for restrictive regulations . . . where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.

A public employee challenging an off-duty smoking prohibition like the Massachusetts statute could argue that the state has wrongfully conditioned public employment on an agreement to give up the liberty to smoke while off duty and has violated the substantive due process guarantee of the fifth and fourteenth amendments by invading a liberty and privacy interest without due process of law. The preliminary question is whether smoking off duty is the kind of liberty or privacy that is constitutionally protected at all. If such a right exists and is fundamental, the state must justify the invasion of liberty with a compelling state interest and also must prove that the restriction is the least intrusive means possible to achieve that end.<sup>151</sup> If the right to smoke is less than fundamental, the employee must prove that the state interest is not rational, or that the restriction is not reasonably and rationally related to that interest.<sup>152</sup>

## 2. The *Grusendorf* Decision

The court in *Grusendorf v. City of Oklahoma City*,<sup>153</sup> the only case yet to examine an off-duty smoking restriction on a public employee, held that the restriction was a reasonable exercise of the state's police power and thus constitutional. *Grusendorf* involved a policy of the Oklahoma City fire department forbidding trainee firefighters to smoke at any time, on or off duty. The plaintiff, a trainee who had signed an agreement not to smoke for one year as a condition to accepting employment with the department, had been fired when, after an especially stressful day, he took three puffs of a cigarette while on an unpaid lunch break.<sup>154</sup> *Grusendorf* previously had applied for a firefighter position and been denied. Subsequently, he studied firefighting manuals, got himself into good physical condition, and quit smoking.<sup>155</sup> When hired, he was fifth highest on a list of four hundred applicants. He claimed that his constitutional rights of liberty, property, and privacy had been violated without due process.<sup>156</sup> The *Grusendorf* court used a four-step test to analyze the off-duty smoking ban: (1) was a liberty or privacy interest violated?; (2) was this interest fundamental?; (3) if not, did the state have a prima facie case establishing the rational basis of

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*Id.*

151. See *supra* note 130 and accompanying text.

152. See *supra* note 131 and accompanying text.

153. 816 F.2d 539 (10th Cir. 1987).

154. *Id.* at 540.

155. *Id.*

156. The court considered *Grusendorf's* privacy and liberty claims at length, but did not consider the deprivation of property argument because oral argument had established that as a trainee, *Grusendorf's* property interest in retaining his job was not sufficient to support his argument. *Id.* at 540 n.1.

the interference with the liberty?; and (4) if so, did the plaintiff demonstrate that the interference was arbitrary or irrational?<sup>157</sup>

The preliminary question of whether the right to smoke while off duty is a liberty that is constitutionally protected by the substantive due process guarantees of the fifth and fourteenth amendments is easily answered in the affirmative. The *Grusendorf* court assumed without deciding that the fourteenth amendment protected the liberty interest of firefighter trainees in smoking when off duty. The city had argued that because the privacy was not fundamental, no balancing test or rationale of any kind was needed to justify the restriction,<sup>158</sup> but the court rejected this argument.<sup>159</sup>

Likewise, courts in previous smoking cases have implicitly considered that the right to smoke is protected to some degree, which requires a balancing of the rights of smokers against nonsmokers. In *Gasper v. Louisiana Stadium & Exposition District*,<sup>160</sup> for instance, the court termed its analysis of nonsmokers' due process claims as the process of balancing an individual's right to be left alone against other individuals' alleged rights under the fifth and fourteenth amendments.<sup>161</sup> The right to be left alone in *Gasper* is the right to be free of interference in the choice to smoke. *Gasper* involved a situation in which others necessarily were exposed to smoke. The right to be left alone in a choice to smoke is much stronger when an individual chooses to smoke while off duty and at home. Similarly, the court in *Rossie v. Wisconsin Department of Revenue*,<sup>162</sup> in its consideration of constitutional challenges by a nonsmoker to workplace smoking restrictions, drew a distinction between the liberty to smoke at work and while off duty.<sup>163</sup> The existence of a liberty interest in the right to smoke also follows from cases like *Kelley v. Johnson*,<sup>164</sup> which assumed without deciding that a police officer had a liberty interest in the length of his hair,<sup>165</sup> and *Hander v. San Jacinto Junior College*,<sup>166</sup> which specifically held that an adult has a constitutional right to wear his hair as he chooses.

157. *Id.* at 542-43.

158. *Id.* at 541.

159. The court stated that "[i]t can hardly be disputed that the [department's] non-smoking regulation infringes upon the liberty and privacy of the firefighter trainees." *Id.*

160. 418 F. Supp. 716 (E.D. La. 1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978); *see supra* notes 93-107 and accompanying text.

161. *Gasper*, 418 F. Supp. at 720.

162. 133 Wis. 2d 341, 395 N.W.2d 801 (Ct. App. 1986).

163. The *Rossie* court stated that "[t]he smoking ban does not apply, in contrast, to areas that nonsmokers may easily avoid, such as privately owned and occupied offices, [and] private balls." *Id.* at 355, 395 N.W.2d at 807.

164. 425 U.S. 238 (1976); *see infra* notes 177-82 and accompanying text.

165. *Kelley*, 425 U.S. at 244.

166. 519 F.2d 273, 276 (5th Cir. 1975); *see infra* notes 183-87 and accompanying text.



The second issue, whether the right to smoke off duty is fundamental, is somewhat more problematic, although the *Grusendorf* court seemed to reach its conclusion easily. The plaintiff in *Grusendorf* did not argue that the right to smoke off duty was fundamental, and the court held that the liberty was an ordinary rather than a fundamental right.<sup>167</sup> The court first rejected the state's contention that because the right to smoke was not fundamental, no balancing test or rationale whatsoever for the restriction was needed,<sup>168</sup> stating that the acceptance of this rationale would free the state to condition employment arbitrarily upon an agreement to refrain from many innocent, private, and personal activities.<sup>169</sup>

The court in *Grusendorf* was correct in deciding that the right to smoke off duty is not fundamental. In light of *Grusendorf*, a plaintiff challenging the Massachusetts or a similar statute would find it difficult or impossible to argue that the right to smoke is fundamental. Furthermore, the Supreme Court's decision in *Bowers v. Hardwick*<sup>170</sup> shows its hostility to extending the list of fundamental rights.<sup>171</sup>

Therefore, any substantive due process argument against a smoking restriction statute must allege that the statute is not rationally related to a legitimate state objective. The *Grusendorf* court found, however, that the state has a heightened interest in regulating its employees simply by virtue of being their employer and may apply comprehensive and substantial restrictions upon the freedoms of state employees that go beyond the restrictions imposed on other citizens.<sup>172</sup> The court extended a presumption of validity to the regulation in question.<sup>173</sup>

The court first found that the off-duty smoking prohibition was reasonably related to a legitimate purpose. The court apparently took judicial notice of the dangers of smoking to find a legitimate purpose for the regulation, noting that the Surgeon General's Warning on the

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167. *Grusendorf*, 816 F.2d at 541.

168. *Id.*

169. *Id.* at 542.

170. 478 U.S. 186 (1986); see also *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976) (holding that the right to breathe air free of tobacco smoke was not a fundamental privacy right), *aff'd*, 577 F.2d 897 (5th Cir. 1978); *supra* notes 105-07 and accompanying text.

171. The *Bowers* Court stated:

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

*Bowers*, 478 U.S. at 194.

172. *Grusendorf*, 816 F.2d at 542.

173. *Id.* at 543; see *supra* note 150 and accompanying text.

side of every box of cigarettes evidenced a legitimate purpose and rational connection.<sup>174</sup> The court also took notice of the fact that good health and physical fitness are vital for firefighters, and that firefighters who are frequently exposed to smoke inhalation might be rendered more susceptible to physical damage if their lungs were already damaged by smoking.<sup>175</sup> From these bases, the court concluded that a prima facie case for the rationality of the regulation had been established. The burden to defeat this prima facie rationality shifted to the plaintiff, who failed to demonstrate that the regulation was irrational and arbitrary.<sup>176</sup> The regulation was, therefore, constitutional.

### 3. Other Off-Duty Restrictions

Although only *Grusendorf* has addressed the state's power to regulate off-duty smoking, a survey of decisions on the state's power to restrict other types of off-duty activities of its employees is helpful in this analysis. Challenges to state interference in the private, off-duty conduct of public employees have focused on three areas: personal appearance, political activities, and private sexual conduct.

Restrictions on personal appearance have been upheld for police and firefighters, though not in other contexts. The *Grusendorf* court's opinion relied heavily on the Supreme Court's decision in *Kelley v. Johnson*.<sup>177</sup> *Kelley* involved a challenge by a policeman to regulations established by the Suffolk County, New York, Police Department prohibiting beards and governing the length of male police officers' hair, sideburns, and mustaches.<sup>178</sup> The plaintiff challenged the regulation on both first and fourteenth amendment grounds, stating that it violated his right of free expression and deprived him of the liberty to wear his hair as he wished without due process.<sup>179</sup> The Court assumed the existence of a liberty interest in personal appearance, but distinguished that right from the fundamental rights protected in *Griswold* and *Roe*.<sup>180</sup> It found that the hair-length regulation was a legitimate exercise of police power, as the state has substantial leeway in its control of state employees. The Court emphasized that just as the police department could require employees to wear a uniform, salute the flag, refrain

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174. *Grusendorf*, 816 F.2d at 543.

175. *Id.* The statutory presumption of job-related disability and the Massachusetts response show a similar concern that smoking might increase the risk of damage from smoke inhalation, and that the state might be forced to pay disability benefits to smokers who have damaged their own lungs. See *supra* note 17 and accompanying text.

176. *Grusendorf*, 816 F.2d at 543.

177. 425 U.S. 238 (1976).

178. *Id.* at 239-40.

179. *Id.* at 240-41.

180. *Id.* at 244.

from politically partisan activities, and refrain from smoking *in public*,<sup>181</sup> so the department could dictate how its employees should wear their hair. Such a restriction could be rationally based on either a need for police to be easily identifiable by the public or a desire to foster an esprit de corps within the department.<sup>182</sup>

*Hander v. San Jacinto Junior College*<sup>183</sup> was decided on facts similar to *Kelley*, but came to an entirely different conclusion. In *Hander*, which the plaintiff relied on heavily in *Grusendorf*,<sup>184</sup> the plaintiff was a junior college teacher who had been discharged for failing to follow a policy requiring all faculty members to be clean-shaven, keep reasonably short hair, and have no excessively long sideburns.<sup>185</sup> The plaintiff based his suit on claims of due process and equal protection and did not argue a violation of privacy or freedom of expression.<sup>186</sup> The court found no legitimate educational justification for the restrictions and held them unconstitutional. It distinguished the facts from cases like *Kelley*, stating that the college, unlike the police department, has no need to maintain the public's confidence in sensitive and highly visible employees.<sup>187</sup>

Restrictions on political activities also have been found constitutional for police, although not for some other public employees.<sup>188</sup> The Eighth Circuit in *Reeder v. Kansas City Board of Police Commissioners*<sup>189</sup> upheld the discharge of a police officer for violating a state law that forbade political contributions by the police.<sup>190</sup> The court found that public employees, especially police officers, may be restricted much more severely than the general public because police officers must avoid even the appearance of impropriety.<sup>191</sup> In *Otten v. Schicker*<sup>192</sup> the

181. *Id.* at 246 (emphasis added).

182. *Id.* at 248; *see also* *Stradley v. Andersen*, 478 F.2d 188 (8th Cir. 1973) (upholding grooming restrictions for policemen); *Yarrough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D. Fla. 1973) (upholding beard and hair length restrictions for firefighters because hair might interfere with the safe wearing of oxygen masks), *aff'd mem.*, 504 F.2d 759 (5th Cir. 1974).

183. 519 F.2d 273 (5th Cir. 1975).

184. *Grusendorf*, 816 F.2d at 541.

185. *Hander*, 519 F.2d at 275.

186. *Id.*

187. *Id.* at 276-77.

188. *See, e.g.*, *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (restricting political activities for a wide variety of federal employees). *But see* *Pickering v. Board of Educ. of Township High School Dist. 205*, 391 U.S. 563 (1968) (finding the discharge of a teacher for publishing a letter criticizing the School Board unconstitutional).

189. 733 F.2d 543 (8th Cir. 1984); *see also* *Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333 (Mo. 1984) (en banc) (holding a similar firing for political contribution consistent with the first amendment).

190. *Reeder*, 733 F.2d at 545.

191. The court stated that "[i]t is proper for a state to insist that the police be, and appear to be, above reproach, like Caesar's wife." *Id.* at 547.

Eighth Circuit found that a police officer could not become a candidate for the state senate. In these cases the state could condition public employment on the employee giving up even the fundamental, specifically listed first amendment right of political expression.<sup>193</sup>

The state as an employer has met with mixed judicial response for attempts to regulate the off-duty sexual conduct of public employees.<sup>194</sup> Police departments generally cannot regulate off-duty conduct unless the conduct can be shown to have a connection with the officer's duties and performance. In *Shuman v. City of Philadelphia*<sup>195</sup> the court found that inquiry into, and subsequent discharge based on, a police officer's living with an unmarried woman violated his right of privacy. The right in *Shuman* was not fundamental, but was private simply because it was an area where the government had no legitimate interest.<sup>196</sup> The court conceded that the state could regulate some off-duty sexual activity, but held that the activity at issue had too tenuous a connection with job performance to justify the interference with privacy.<sup>197</sup> Likewise, the Ninth Circuit in *Thorne v. City of El Segundo*<sup>198</sup> found that a police department could not refuse to hire a qualified officer because she had aborted a child whose father was a married police officer.<sup>199</sup>

Some restrictions on off-duty sexual conduct have been upheld, however, when the conduct interfered with the employee's job performance. The Fifth Circuit in *Shawgo v. Spradlin*<sup>200</sup> found that a police department could constitutionally institute disciplinary procedures against two police officers who dated off duty and were shown to have spent several nights together.<sup>201</sup> The court found that the off-duty sex-

192. 655 F.2d 142 (8th Cir. 1981).

193. The *Reeder* court stated:

People who become public employees receive certain benefits and undertake certain duties. One of those duties may require the surrender of rights that would otherwise be beyond the reach of governmental power. This is especially true in the case of the police, whose duty it is to keep the peace by force of arms if necessary.

*Reeder*, 733 F.2d at 547.

194. See generally Note, *supra* note 133.

195. 470 F. Supp. 449 (E.D. Pa. 1979).

196. *Id.* at 458-59.

197. *Id.* at 459. The court suggested that the kinds of activity which could be regulated included those that were "open and notorious," or took place in a small town. *Id.*

198. 726 F.2d 459 (9th Cir. 1983).

199. *Id.* at 462; see also *Battle v. Mulholland*, 439 F.2d 321 (5th Cir. 1971) (prohibiting the dismissal of a black police officer who had allowed two white single women to board with him and his wife); *Bruns v. Pomerleau*, 319 F. Supp. 58 (D. Md. 1970) (holding that a police department could not refuse to hire a nudist).

200. 701 F.2d 470 (5th Cir.), *cert. denied*, 464 U.S. 965 (1983).

201. The officers in *Shawgo* were disciplined under a regulation forbidding members of the department from engaging in conduct that "if brought to the attention of the public, could result in justified unfavorable criticism of that member of the department" and also under catchall provisions requiring "diligent and competent" adherence to duties not "otherwise specifically pre-

ual conduct of police officers could be regulated if a rational basis for the restriction existed.<sup>202</sup> The court asserted that a rational connection between departmental discipline and preventing cohabitation between officers of different rank did exist.<sup>203</sup> Likewise, in *In re Raynes*<sup>204</sup> the Montana Supreme Court held that a police department could constitutionally terminate an officer who had used his hypnosis business to manipulate several women into having sex, because the state's compelling interest in protecting both the public and the integrity of the police department outweighed the officer's right of privacy. Similarly, the California Supreme Court in *Pettit v. State Board of Education*<sup>205</sup> found that the state could discharge an elementary school teacher who had participated in a "swinger's club" and appeared disguised on a television talk show to discuss the experience.

#### 4. Status Crimes

Another line of cases, though decided under the eighth amendment and thus not expressly applicable to substantive due process analysis, also is helpful in analyzing the smoking prohibition on public employees. In the seminal case on status crimes, *Robinson v. California*,<sup>206</sup> the Supreme Court invalidated a California statute imposing jail time for the crime of being "addicted to the use of narcotics."<sup>207</sup> The Court

scribed" and prohibiting "conduct prejudicial to good order." *Id.* at 473 & n.1. No prior incident of intraforce dating or cohabitation had been punished under the regulation. *Id.* at 473. The two officers were different in rank, but did not work directly together. *Id.* at 472. They had informed a superior officer of their relationship and had been informed that "spending the night together" was acceptable, but "setting up housekeeping" was not. Although the two maintained separate residences, undercover surveillance from an apartment across the street lasting 17 days revealed that they had spent several nights together. *Id.* The court rejected the argument that this undercover surveillance violated plaintiffs' right to privacy: "police officers enjoy no constitutionally protected right to privacy against undercover and other investigations of their violations of department regulations or . . . law." *Id.* at 483. The two officers later left the department and were married. *Shawgo*, 464 U.S. at 966 n.2, 968 (Brennan, J., dissenting).

202. The Fifth Circuit first rejected the argument that the officers had not received fair notice or hearing before disciplinary action was taken. *Shawgo*, 701 F.2d at 474-81.

203. *Id.* at 483. *But see Shawgo*, 464 U.S. at 971-72 (Brennan, J., dissenting). Justice William Brennan argued that the behavior in *Shawgo* was a constitutionally protected fundamental privacy right that could not be restricted absent "strong, clearly articulated state interests." *Id.* at 971. He rejected the Fifth Circuit's "hypothesized" legitimate state interest, although he recognized that "[p]ublic employers in general, and police departments in particular, may well deserve considerable latitude in enforcing codes of conduct." *Id.* at 972.

204. 215 Mont. 484, 698 P.2d 856 (1985).

205. 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (en banc).

206. 370 U.S. 660 (1962).

207. *Id.* at 660 n.1. The defendant in *Robinson* was arrested by an officer who observed injection marks and scabs on his inner arm. Although the defendant allegedly admitted occasional past use of narcotics, he was "neither under the influence of narcotics nor suffering withdrawal symptoms" when arrested. *Id.* at 661-62. The defendant later denied that he had ever used drugs or been an addict. *Id.*

found that because addiction was a disease over which the addict had little or no control, the imposition of criminal penalties merely for the status or condition of being an addict violated the eighth amendment prohibition against cruel and unusual punishment.<sup>208</sup> Addiction to nicotine now is recognized as a serious and uncontrollable condition analogous to addiction to narcotics;<sup>209</sup> indeed, the *Robinson* Court stated that the first step toward narcotics addiction may be as innocent as a boy's first puff on a cigarette.<sup>210</sup> It is certainly arguable by analogy that the state should not fire a public employee simply because that employee develops a disease beyond his control, especially if that disease does not prevent the employee from performing his or her duties. On the other hand, regardless of whether criminal sanctions for addictions are impermissible punishments for status crimes, the state most definitely would not be required to continue to employ a crack addict who has become unable to perform his designated duties. In the same manner, the state could not impose criminal sanctions for the disease of being addicted to cigarettes, but could impose criminal penalties for the act of smoking where prohibited.<sup>211</sup> The state could argue that the physiological effects of an active addiction to nicotine might make the public employee unable to perform his duties effectively.

### 5. Possible Challenges

The cases discussed above clarify what *Grusendorf* suggested: a successful privacy or liberty due process challenge to a state restriction of the off-duty smoking of state employees is unlikely. If the state can regulate fundamental rights like political activity, it can easily interfere with the nonfundamental liberty to smoke in private. Some possible challenges, however, do exist.

Perhaps the best argument for a challenge to the Massachusetts

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208. The Court stated:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . .

We cannot but consider the statute before us as of the same category. . . . [N]arcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

*Id.* at 666-67.

209. See NICKOTINE ADDICTION, *supra* note 22, at 4.

210. *Robinson*, 370 U.S. at 670 (Douglas, J., concurring).

211. See *Powell v. Texas*, 392 U.S. 514 (1968) (holding that although criminal penalties for the state of alcoholism are inappropriate, the state may punish an offender for the act of public drunkenness).

statute is based on the difference between smoking in public and smoking in the privacy of the employee's home.<sup>212</sup> The plaintiff in *Grusendorf* was terminated for smoking in a public restaurant on his lunch break and presumably while he was in uniform, even though he was off duty at the time.<sup>213</sup> Dicta in *Kelley* suggested that a police prohibition on smoking in public while in uniform was justified for the same reasons as the hair length restriction: fostering respect for the police and esprit de corps.<sup>214</sup> These rationales are not implicated by smoking at home. Smoking in public may injure innocent bystanders,<sup>215</sup> but smoking at home is legal conduct that injures only the smoker. The same reasons do not rationally support a restriction that applies to smoking where no members of the public are exposed to the conduct and its dangers. A plaintiff challenging the restriction could contend that, like restricting private sexual activities,<sup>216</sup> restricting smoking within the home bears no rational relation to the performance of the officer's duties and invades his rights of liberty and privacy.

This argument could be countered, however, by the fact that smoking within the privacy of the home would still impair the physical fitness of the smoker appreciably.<sup>217</sup> The state has a strong interest in the fitness of public safety employees to ensure their competence at the dangerous jobs they perform. It tests them before hiring and requires them to maintain a certain level of fitness to remain employed. This interest probably would provide a rational basis for a smoking prohibition which, as the *Grusendorf* court states, "burdens [employees] after their shift has ended, restricts them on weekends and vacations, in their automobiles and backyards and even, with the doors closed and the shades drawn, in the private sanctuary of their own homes."<sup>218</sup> The state interest in physical fitness does not, however, extend beyond public safety employees, and any statute that extends the smoking prohibition beyond these employees might be challenged successfully on the distinction between public and private smoking. The physical fitness rationale for a restriction on public safety employees also might, however, be extended to absurdity; as one disgruntled smoker stated, beer drinking or eating eggs could be banned because of the health risk involved in those activities.<sup>219</sup> Furthermore, the state might move beyond

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212. See Rothstein, *supra* note 16, at 955.

213. *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987).

214. *Kelley v. Johnson*, 425 U.S. 238, 246 (1976).

215. See *supra* notes 29-33 and accompanying text.

216. See *supra* notes 194-205 and accompanying text.

217. See *supra* notes 20-28 and accompanying text.

218. *Grusendorf*, 816 F.2d at 541.

219. WHERE THERE'S SMOKE, *supra* note 14, at 28 (quoting a disgruntled smoker who quit the Holden, Mass. police department when a municipal policy that preceded the state-wide ban was

banning conduct and begin to compel conduct designed to increase health and fitness, such as an affirmative regulation that employees exercise regularly.

Another possible challenge to the Massachusetts statute might arise in the discharge of an officer, hired after the restriction, who later began to smoke. The smoking ban in *Grusendorf* applied only to trainees whose property interest in keeping their jobs was not sufficient to support a claim for deprivation of property without due process.<sup>220</sup> A smoker fired after becoming a regular employee of long-standing in the department has a much stronger claim under the fourteenth amendment property interest analysis than the trainee in *Grusendorf*.

Finally, a plaintiff challenging the Massachusetts statute or a similar statute might argue that the stated purpose of the legislation, to achieve a bargaining goal with a union that would retain the presumption that respiratory disorders are job-related while minimizing the payment of benefits to smokers whose injuries were not caused by their jobs,<sup>221</sup> was not rationally related to the broadness of the off-duty smoking restriction. The purpose of the antismoking statute might be served with much less intrusion into the private lives of state employees by simply amending the presumption statute to eliminate the benefit of the presumption in cases of respiratory disease in smokers.

One argument not raised by the state in *Grusendorf* that may preclude due process challenges rests on the rule that public employment may not be conditioned on the restriction or invasion of constitutional liberties that could not be abridged by direct state action.<sup>222</sup> The state banned alcohol for the general public during the Prohibition years and it now outlaws the use of illegal substances such as marijuana. The proven health hazards for smokers and those exposed to smoke would provide a rational public health justification for banning the use of tobacco for the general public, especially because the right to smoke probably is not fundamental. If the state could ban smoking by direct action, presumably it could also condition public employment on employees giving up their freedom to smoke.<sup>223</sup>

### B. Equal Protection

The court in *Grusendorf* stated that the only aspect of the off-duty smoking prohibition that was not entirely rational was the fact that it

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announced).

220. *Grusendorf*, 816 F.2d at 540 n.1.

221. See *supra* notes 16-19 and accompanying text.

222. See *supra* notes 147-48 and accompanying text.

223. Cf. *Classen*, *supra* note 133, at 853.



applied only to trainee firefighters and not to the established members of the force, who presumably were equally susceptible to the dangers of smoking and whose need for physical fitness was as great. The court declined to consider this equal protection problem, however, as it was not briefed or argued.<sup>224</sup> A challenge to the Massachusetts statute could make a similar equal protection argument. The statute applies only to public safety employees hired after the institution of the ban, although again the link between smoking, health, fitness, and job-related disability benefits is presumably just as strong for previously hired smokers. Newly hired smokers are not a protected class for the purposes of equal protection, so any inequality of treatment by the law is reviewed under the rational basis test, rather than heightened scrutiny.<sup>225</sup> It is uncertain, however, whether a collective bargaining agreement will constitute a rational basis. The health and fitness justifications do not seem to provide reasonable justification for the unequal treatment of the law.

The court in *Rossie v. Wisconsin Department of Revenue*<sup>226</sup> rejected an equal protection argument based on the different treatment of smokers in public buildings and smokers elsewhere.<sup>227</sup> A rational basis for the inequality existed because nonsmokers could not avoid smoke in public buildings, but easily could avoid those places where smoking was permitted. This justification will not support the unequal treatment in the off-duty smoking ban, as it prohibits smoking everywhere and does not exist to protect nonsmokers, but rather to benefit the employees themselves.

## VI. NONCONSTITUTIONAL CHALLENGES

### A. Handicap Discrimination

Both federal<sup>228</sup> and state laws prohibit discrimination against handicapped employees. Although sensitivity to smoke has been accepted by some courts as a handicap under these laws,<sup>229</sup> no smoker has yet argued that the addiction to cigarettes also constitutes a protected handicap. The 1978 Amendments to the Rehabilitation Act specifically

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224. *Grusendorf*, 816 F.2d at 543. At oral argument counsel alluded to a collective bargaining agreement that apparently precluded the application of the smoking ban to union employees. *Id.* at 543 n.4.

225. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471 (1970) (applying a rational basis test to an equal protection issue); *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959).

226. 133 Wis. 2d 341, 395 N.W.2d 801 (Ct. App. 1986).

227. *See supra* notes 119-25 and accompanying text.

228. The Rehabilitation Act, 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985).

229. *See Vickers v. Veterans Admin.*, 549 F. Supp. 85 (W.D. Wash. 1982) (holding that an employee who was "hypersensitive" to tobacco smoke was handicapped under the Federal Rehabilitation Act of 1973).

exclude alcoholics and drug abusers whose use of these substances is a threat to the property or safety of others from the definition of handicapped persons.<sup>230</sup> A successful challenge to a smoking restriction under the handicap discrimination laws must prove that nicotine addiction is not drug abuse under this statute. The effect of the 1988 Surgeon General's Report on nicotine addiction, which found scientific evidence that tobacco is as addictive as most illegal drugs,<sup>231</sup> is uncertain. Although the Report reinforces the conclusion that nicotine is indeed a drug whose abuse is not a handicap under the statute, it also provides a compelling argument that addiction to nicotine may impair major life activities and constitute a real, if not statutory, handicap.

### B. Title VII, Civil Rights, and Employment Discrimination

Statistical studies of smokers show that more blacks and Hispanics smoke than whites,<sup>232</sup> more older people smoke than younger, and more men than women smoke.<sup>233</sup> A public employer's refusal to hire smokers could lead to disparate impact on these groups, which could constitute illegal employment discrimination under Title VII of the Civil Rights Act of 1964.<sup>234</sup> No challenge to an antismoking prohibition using this argument has yet been filed. The Supreme Court has, however, rejected the use of statistical evidence to prove the disparate impact of a public employer's policy of refusing to hire methadone users.<sup>235</sup> The Court rejected statistical evidence that eighty-one percent of the employees suspected of violating the drug policy were black or Hispanic and that approximately sixty-three percent of those receiving methadone maintenance in public programs in New York were black or Hispanic, find-

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230. 29 U.S.C. § 706(7)(B) (1982). For a thorough discussion of the handicap discrimination statutes and their application to both public and private employees, see Fox, *supra* note 5, at 318-21; Paoella, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 615-23 (1987); and Rothstein, *supra* note 16, at 956-57.

231. See NICOTINE ADDICTION, *supra* note 22, at 4.

232. See WHERE THERE'S SMOKE, *supra* note 14, at 8 (noting that 47.7% of black men smoked in 1980, compared with 40.2% of white men); Rothstein, *supra* note 16, at 958.

233. See WHERE THERE'S SMOKE, *supra* note 14, at 8 (reporting that 33% of men and 28% of women smoke).

234. 42 U.S.C. § 2000e (1982); see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing the disparate impact argument). *But see Lorance v. AT&T Technologies, Inc.*, 109 S. Ct. 777 (1989) (finding that proof of discriminatory intent must be proven in a disparate impact case involving a seniority system). For a full discussion of this argument, see Fox, *supra* note 5, at 324-26; and Rothstein, *supra* note 16, at 957-58.

235. *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979). Methadone treatment is used as a cure for heroin addiction. Methadone substitutes for heroin, but "does not produce euphoria or any pleasurable effects associated with heroin; on the contrary, it prevents users from experiencing those effects when they inject heroin, and also alleviates the severe and prolonged discomfort otherwise associated with an addict's discontinuance of the use of heroin." *Id.* at 573-74.

ing that the plaintiffs did not establish a prima facie case of disparate impact leading to racial discrimination.<sup>236</sup>

## VII. CONSTITUTIONAL CHALLENGES TO ENFORCEMENT

Perhaps the greatest difficulty raised by the Massachusetts statute is the question of enforcing its provisions. The statute itself specifies no means to enforce the antismoking rule. The State is leaving enforcement up to local authorities.<sup>237</sup>

Viable means of enforcing the law include relying on reports of other employees who catch smokers, forcing suspected smokers to turn themselves in, or testing the urine of suspected smokers for traces of tobacco use.<sup>238</sup> The first method was used in *Grusendorf* to catch the trainee who smoked. When a city employee reported to the fire chief that he had observed one trainee smoking, the chief questioned all the trainees and threatened to discharge them unless the smoker was identified. Grusendorf then turned himself in.<sup>239</sup> This method is constitutional, provided the requirements of procedural due process for a hearing are followed. It is not, however, consistently reliable or effective, and the number of employees who will report on the off-duty activities of their fellow employees probably is limited.

The second method of enforcement, forcing self-admission, probably also is constitutional, although it raises questions under the fifth amendment protection against self-incrimination. The Massachusetts Supreme Court, in a case that governs the application of this statute, has found that requiring police officers to answer questions that might lead to loss of employment will not violate the fifth amendment. In *Broderick v. Police Commissioner*<sup>240</sup> the officers had attended a political rally and parade, at which they had roamed nude through their hotel and had been loud and obnoxious.<sup>241</sup> The police chief, hearing rumors of the debauchery, had distributed a questionnaire to the culprits. The court relied on the Supreme Court decision in *Gardner v. Broderick*,<sup>242</sup> that held that a policeman may be required to answer

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236. *Id.* at 584-87.

237. A State Representative who was a leading supporter of the bill stated "[t]he interest here is not to be big brother . . . [W]e mean[] business on this thing." Gold, *supra* note 13 (quoting State Rep. Kevin P. Blanchette). The Executive Director of the Massachusetts ACLU expressed doubts about the law's enforceability. *Id.*

238. Professor Mark Rothstein suggests that monitoring health insurance claims and administering polygraphs might also be used to enforce an antismoking policy. Rothstein, *supra* note 16, at 961-62.

239. *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 540 (10th Cir. 1987).

240. 368 Mass. 33, 330 N.E.2d 199, *cert. denied*, 423 U.S. 1048 (1975).

241. *Id.* at 34-35, 330 N.E.2d at 201.

242. 392 U.S. 273 (1968).

questions which specifically, directly, and narrowly relate to the performance of duties.<sup>243</sup> The *Broderick* court found that the range of permissible questions was not limited to actions that occurred while an officer was on duty, but extended to off-duty and purely private activities if answers to such questions would unqualifiedly be grounds for termination, or would authorize other disciplinary action.<sup>244</sup> A permissible inquiry into private conduct must be rationally related to the performance of police duties.<sup>245</sup> As private smoking is already forbidden by statute, a direct question to a suspected smoker that would lead to dismissal is a constitutional means of enforcing the statute. This method provides the least intrusion of privacy and disruption of employee relations. The accuracy and effectiveness of the method, however, could be affected by untruthful employees.

The third method of enforcing the proscription, urine tests, is undoubtedly the most accurate means,<sup>246</sup> but also raises the most troubling constitutional implications.<sup>247</sup> The fourth amendment protects citizens against unreasonable search and seizure, and urine testing for illegal drugs has been held to be a search for fourth amendment purposes.<sup>248</sup> Public employees are protected by the fourth amendment against unreasonable searches even when the government is searching in its capacity as employer.<sup>249</sup> No court has decided the question of the constitutionality of a urine test for the legal substance tobacco. The Supreme Court recently, however, has permitted uniform testing for illegal drugs without probable cause or individualized suspicion for some types of public employees. In *National Treasury Employees Union v. Von Raab*<sup>250</sup> the Court allowed mass testing of customs employees who sought promotions to jobs that required them to carry firearms or participate directly in drug interdiction efforts. The Court reasoned that the compelling governmental interest in the fitness and integrity of drug enforcement personnel and in protecting the public from drug

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243. *Id.* at 278.

244. *Broderick*, 368 Mass. at 41, 330 N.E.2d at 204-05.

245. *Id.* at 42-43, 330 N.E.2d at 205.

246. Accurate urine tests for traces of tobacco components exist and cost approximately \$25 per test. See Rothstein, *supra* note 16, at 962 n.181. Some private companies are reportedly already using such tests to screen out smokers. *Id.* at 962.

247. See generally Note, *Drug Testing of Government Employees and the Fourth Amendment: The Need for a Reasonable Suspicion Standard*, 62 NOTRE DAME L. REV. 1063 (1987); Note, *"Jar Wars" in the Workplace: The Constitutionality of Urinalysis Programs Designed to Eliminate Substance Abuse Among Federal Employees*, 38 SYRACUSE L. REV. 937 (1987).

248. *Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1412-13 (1989); *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1390 (1989).

249. *Von Raab*, 109 S. Ct. at 1390; *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion).

250. *Von Raab*, 109 S. Ct. at 1394-96.

users with firearms outweighed the diminished privacy interests of the employees, considering the special demands of their positions.<sup>251</sup>

Although the Court's response to random testing of the general mass of public employees remains unclear,<sup>252</sup> the *Von Raab* reasoning probably will extend to random testing of the types of public safety employees covered by the Massachusetts smoking ban. Indeed, the Court has recently denied certiorari to two cases addressing the issue of random drug testing of police officers. The First Circuit, in *Guiney v. Roache*,<sup>253</sup> and the Third Circuit, in *Policeman's Benevolent Association of New Jersey, Local 318 v. Township of Washington*,<sup>254</sup> both allowed the random testing of officers without individualized suspicion for illegal substances.

Two issues on the legality of urine testing for tobacco remain. First, the Court's position on testing public employees who are not in positions concerned with public safety is uncertain. Second, the essential distinction remains that tobacco is a completely legal substance. Thus, a testing program based on a reasonable suspicion of smoking might meet with acceptance by courts, but the intrusiveness of the search and the relative innocence of tobacco in comparison with illegal drugs still raises serious fourth amendment questions.

#### VIII. CONCLUSION

An off-duty smoking ban for public safety employees, although intrusive, is probably rationally based on the need for physical fitness and thus constitutional. An extension of this ban to other public employees, however, is vulnerable to a constitutional challenge. The greatest diffi-

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251. *Id.* at 1392-95. The Court stated:

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. *Unlike most private citizens and government employees in general*, [these] employees . . . reasonably should expect effective inquiry into their fitness and probity . . . . Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

*Id.* at 1394 (citations omitted) (emphasis added); see also *Skinner*, 109 S. Ct. at 1402 (holding that blood and urine testing for railroad employees involved in accidents was reasonable without probable cause or individualized suspicion).

252. See *supra* note 251 (emphasized language).

253. 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989). The named plaintiff, reacting to the denial of certiorari, commented: "[P]olice officers . . . have different constitutional rights than other citizens." *Random Drug Tests for Police Allowed*, *Tennessean*, Nov. 14, 1989, at 6A (quoting Robert Guiney, President, Boston Police Patrolman's Association).

254. 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989).

culty with the current antismoking regulation lies in the possible means of enforcement, which are either inaccurate and inefficient or greatly intrusive and subject to constitutional challenge.

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