V. Conclusion

At the start of smoking behavior and through its continuation, tobacco dependency and various outreach strategies on the part of tobacco companies mean that the question of whether to smoke cannot be said to be merely a question of the free choice of individuals. Smokers do not necessarily smoke cigarettes by their own volition, but they may be the unfortunate captives of nicotine dependency. Tobacco companies like JT make money on the backs of smokers who are addicted to nicotine. Such an image resembles how gangsters get people addicted to injected stimulants, which they then sell at a premium to those who struggle to satisfy their need for stimulants.

In particular, a specific property of tobacco addiction is that once consumption has reached a certain level, it becomes extremely difficult to quit. Moreover, for smokers to exercise their own control and make a choice based on their own free will is considerably difficult.

In light of the preceding information, we could say that rather than the "freedom to smoke[44]," it is more valid to consider that "there is no such thing as the 'freedom' to smoke." Hence, reaching the consensus of rejecting the freedom to smoke may be necessary[45].

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44) *See* Takao Tanase. "U.S. Tobacco Litigation and Tobacco Policy: The Gap between the Right to Smoke and Smoking Prohibition (Beikoku Tabako Sosho no Tenkai to Tabako Seisaku: Kitsuen Jiyu to Kitsuen Kinshi to no Hazama)", Tanase ed., *supra* note 19, p.3ff.

45) Incidentally, although smoking cessation treatment was to be covered by insurance subject to certain conditions from April 2006, this was not out of consideration for mere lifestyle or preference, rather it was an approach to conducting necessary treatment with the understanding of nicotine dependency as a disease. In addition, nine medical professional societies (The Japan Oral Health Society, the Japan Oral Surgery Society, the Japan Public Health Association, the Japanese Respiratory Society, the Japan Society of Obstetrics and Gynecology, the Japanese Circulation Society, the Japan Pediatric Society, the Japan Society of Cardiology, and the Japan Lung Cancer Society) refer to the victims of nicotine addiction due to smoking as "patients" suffering from smoking-related diseases (i.e., dependency and smoking-related symptoms). The above could be an approach that denies the so-called freedom of smoking.

The Necessity of Tobacco Regulation

Ken TANAKA*

(Contents)

I. Introduction

In Japan, problems related to tobacco smoking have traditionally been perceived as problems of preference, such as whether tobacco use is a nuisance, is bothersome, or is enjoyed by others. These perceptions persist till date. Thus, the majority of people believe that problems concerning tobacco use should be addressed as issues that deal with "smokers' manners." Therefore, nonsmokers have neglected to demand legal and governmental rules or regulations concerning tobacco smoking.

However, are smoking problems truly limited to manners or preferences? Can problems related to tobacco use be effectively resolved by smokers' manners alone? In addition, is it unreasonable for nonsmokers to demand legal rules and smoking regulations?

In this study, I examine the defining characteristics of smoking problems in section (II) and elucidate why regulations on smoking are a necessity in section (III).

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II. Defining Characteristics of Problems regarding Tobacco-Smoking

In this study, I demonstrate how smoking problems are characterized based on the following two essential concepts: First, these problems are not an issue of preference, such as whether tobacco use causes a nuisance, is bothersome, or is enjoyed by others; instead, they are an issue of health and livelihood (and consequently, one's right to life). Second, problems related to tobacco use should not be resolved through "manners," but through legal rules and regulation.

1. Problems regarding tobacco use are not related to preference but to health and livelihood

Japan Tobacco International (JTI) indicates problems regarding tobacco use as being related to preference, such as whether tobacco use is a nuisance, is bothersome, or is enjoyed by others[1]. However, tobacco is essentially a "package of toxins," known to "be exceedingly difficult to quit for those who use it relatively consistently[2]". The effects of smoking tobacco are not just limited to harming smokers themselves: Use of tobacco produces environmental tobacco smoke (ETS[3]), and various diseases are caused by passive inhalation of this secondhand smoke. The meaning of the word "nuisance" may differ according to personal opinion; however, secondhand smoke extends to a dangerous level because it can lead to deterioration of one's health.

Based on the information above, problems regarding tobacco use certainly extend beyond preferences; moreover, tobacco use poses a threat to health and livelihood (and consequently, to one's right to life). Hence, it is imperative that these issues not be perceived as problems of preference. To prevent such a perception, words such as *aienka* (a person who takes pleasure in smoking) and *kenenka* (a person who greatly dislikes smoking) should not be used because whether people like or dislike tobacco creates an opportunity for a discussion to be overly influenced by emotion. To avoid discussing problems regarding tobacco use from a subjective perspective (i.e., maintaining a composed discussion), neutral words such as "smoker" and "nonsmoker" should be used instead of the more subjective *aienka* and *kenenka*[4].

1) For example, *see* JT Website, available at http://www.jti.co.jp/corporate/enterprise/tobacco/responsibilities/recognition/index.html, http://www.jti.co.jp/corporate/enterprise/tobacco/responsibilities/responsibility/coexistence/index.html (last visited October 16, 2015).

2) For more on tobacco, *see Smoking and Health, Report of the Committee on Smoking and Health Problems [New Edition] ((Shinpan) Kitsuen to Kenko, Kitsuen to Kenko Mondai Ni Kan Suru Kentokai Hokokusho)*, 2002, Hokendojinsha, p.35ff.

3) For more on ETS, *see Smoking and Health, Report of the Committee on Smoking and Health Problems*, *supra* note 2, p.175ff.

4) *See* Yohei Murata, 2012, *Environmental Study of Second-hand Smoke (Judo Kitsuen no Kankyogaku)*, Sekaishisosha, p.179ff.

2. Problems regarding tobacco use should not be resolved through manners, but through legal rules and regulation

The idea that nonsmokers should not wantonly evoke their rights without reason, that problems regarding tobacco use are essentially moral or related to manners, and that they can be resolved through social consideration is widely held. However, these problems cannot be resolved through morals and manners alone, thus giving nonsmokers no choice but to evoke their rights[5]. Relying on smokers' morals and manners to resolve problems regarding tobacco use equates to admitting the current state and consenting to oppression by smokers. Furthermore, nonsmokers can only complain about the damage it causes them. Certainly, this indicates that manners and morals cannot resolve any aspect of problems related to tobacco smoking.

If tobacco problems cannot be resolved by manners, then how should they be resolved? One can easily conclude that the answer is "through legal rules." However, when considering the complex ways in which these problems favorably and adversely affect different parts of society, configuring these rules is yet another issue. In modern Japanese society, laws (or regulations and ordinances) can be established by a majority opinion in the National Diet (or congress) after debates by elected delegates on a national or civil level and can be further revised to accommodate society's complexities. This being said, such laws should be citizens' written consensus nationally or locally, and tobacco-related problems should be resolved in accordance with them.

III. The Necessity of Tobacco Regulation (Legal restrictions on tobacco smoking)

Based on the problems related to tobacco smoking mentioned in section II, I now further examine the necessity of legal regulation on tobacco smoking.

In governmental regulation, many questions are decided based on "paternalism" in countries throughout the world, including Japan, for regulation that extends beyond questions of protection of intrinsic human rights. The root word of paternalism[6] is pater, Latin for father; in this concept, the government and its laws intervene in private citizens' lives and activities, similar to the way in which a father intervenes in his children's lives.

In this section, I examine why regulation of tobacco use, that is, legal restrictions on smoking tobacco, is deemed necessary through the perspective of (1) "freedom to smoke"

5) *See* Murata, *supra* note 4, p.22ff. And *See* Question 20 from "47 prefecture-wide opinion poll about second hand smoke," a study conducted by Pfizer in 2012 concerning the condition of damages caused by secondhand smoke in Japan, available at http://www.pfizer.co.jp/pfizer/company/press/2012/documents/20120525.pdf (last visited October 16, 2015).

6) As for paternalism, *see* Hideki Shibutani, 2013, "Paternalism and Review of Unconstitutionality (Paternalism to Ikenshinsa)", Yasuo Hasebe et.al. eds., *Aspects of Modern Constitutionalism 2 (Gendai Rikkensyugi no Syoso (Gekan))*, Yuhikaku, p.70ff.

and (tobacco) regulations based on protecting intrinsic human rights, as well as (2–8) (tobacco) regulations based on paternalism.

1. Preventing harm to others (internal constraint of "freedom to smoke")

All kinds of civil liberties are justly subject to restriction in order to prevent harm to other people's health or livelihood. Thus, we must be cautious of "the right to smoke," because this "right" operates on the assumption that it does not cause harm to others' health or livelihood. In other words, although one may claim "the right to smoke" on the grounds that it does not cause harm to others' health or livelihood, the fact is that smoking does cause harm and can be justifiably restricted to prevent such harm.

Tobacco smoke is more than a nuisance to nonsmokers who are exposed to it. In fact, secondhand smoke is linked to a variety of health ailments, including eye and throat pain, lung damage, and brain damage through exposure via the bloodstream. Because tobacco smoking causes damage to surrounding people's health, it can be justifiably regulated by government legislation.

Thus, from the perspective of preventing harm to nonsmokers' health, "secondhand smoke prevention measures" are entirely justifiable[7].

2. Balancing the interests of smokers and nonsmokers

In modern society, conflicts are not limited simply to those between government and citizens; conflict between individuals in terms of their freedoms and interests is quite common. To prevent such conflicts, the government is responsible for defining the limits of individual freedoms and preventing people from taking actions that exceed those limits[8].

In fact, since conflicts are not limited to those between government and citizens, the government is entrusted with regulating the complex system of society's opposing interests. Similar to environmental rights or the right to free access to information, regulations on tobacco use pose conflicts of interest. Regulations based on administrative law serve an important purpose as they are established after these opposing interests are considered. Furthermore, the very purpose of administrative law is to prevent disputes and damages; in other words, to promote a better society[9]. If this is the case, administrative

7) For more on secondhand smoke prevention measures, *see* Ken Tanaka, 2012, "A Study of Tobacco Regulation (3) (Tabako Kisei no Ho Shisutemu to Kongono Hoseiteki Kadai (3.Kan))", *The Law Review of Kansai University*, Vol.62, No.3, p.177ff.

8) *See* Makoto Kojo, 1989, " Paternalism and The Regulation by the Government (Paternalism to Seihu Kisei)", *Hogakukyoshitsu*, No.101, p.61ff.

9) 1) Prevention and straightforward resolution of disputes and damage; 2) control of disorder and the improvement of society; and 3) the direct provision or the securement of the provision of the services needed for daily life can be considered as three reasons for the existence of administrative law. For more on the reasons for the existence of administrative law, *see* Yasutaka Abe, 1997, *The Administrative Law System [New Edition] (Gyosei no Ho Shisutemu (Shinpan))*, Yuhikaku, p.2ff, Yasutaka Abe, 2008, *Interpreting Administrative Law (Gyoseiho Kaishakugaku)*, Yuhikaku, p.2ff.

10) *See* Yasutaka Abe, 1980, "The Rights of Smokers and Nonsmokers, Regulation of Tobacco Smoking, Vol. 2 (Kitsuenken, Kenenken, Tabako no Kisei (Ge))", *Jurist*, No.725, p.109ff.

11) "Mutual cooperation" is limited to cases where the two parties can exchange places with one another. In cases where this is not applicable, one party is always the offender and the other party is always the victim. This requires "protection of the weaker party" rather than "mutual cooperation," and the assailing party's rights must be restricted. From this perspective, to what extent civil rights are to be limited requires regulation via policy measures. *See* Noriho Urabe, 2006, *Constitutional Law [2nd. Edition] (Kenpogaku kyoshitsu)*, Nippon Hyoron sha, p.80.

regulations should be established for preventing disputes and damages related to tobacco use before such damages occur, thus promoting a better society.

Among various types of regulations on tobacco use, secondhand smoke prevention measures, in particular, require strident administrative legal regulation because that is where smokers and nonsmokers' interests are most clearly and directly in conflict[10]. However, such regulations must be configured to accurately address the essence of this conflict of interest, namely that smokers use tobacco voluntarily (i.e., for personal pleasure), whereas nonsmokers are indiscriminately exposed to tobacco smoke. In other words, nonsmokers are forced to smoke tobacco against their will. Moreover, the situation is biased because nonsmokers' health is damaged by secondhand smoke, and there is no merit in enduring exposure to tobacco smoke. Furthermore, there is no way for the offender (smoker) and victim (nonsmoker) to take one another's place in this conflict. Thus, the essence of the conflict of interests between smokers and nonsmokers is clearly not one wherein mutual cooperation will suffice, but the weaker party must be protected. Therefore, regulation on tobacco use must certainly restrict freedom to smoke[11]. A society that forces a nonsmoker to simply endure exposure to smoke cannot, be considered an egalitarian society. Since this is currently the case, public spaces shared by smokers and nonsmokers, particularly indoor spaces, should be ruled as "non-smoking areas" via strict administrative regulation.

In Japan, the majority of nonsmokers do not live in environments where clean air is common and exposure to polluted air is not that frequent. The air in workplaces, restaurants, cafes, and other areas is polluted by tobacco smoke. Ashtrays are commonly found at the entrances of buildings, where tobacco smoke easily drifts inside. Even outside, the level to which nonsmokers are exposed to tobacco smoke is surprising. Furthermore, several people—children and the physically infirm—may experience many adverse health effects from even minor exposures to secondhand smoke. If no action is taken to regulate tobacco use despite these circumstances, the situation equates to acceptance of "oppression" by smokers. From this perspective, secondhand smoke prevention measures can be justifiably enacted.

3. Protection of individuals who lack the ability to make decisions for themselves

Because some individuals lack the ability to make decisions for themselves, legal regulations to protect their interests are enacted on their behalf. While based on paternalism, these laws are more easily understood as restrictions that actually protect individual interests. That individuals are best equipped to make decisions about their interests holds true if the concerned individual is a legal adult and possesses a normal mental state that allows sound decision-making. Thus, minors and those with mental illness or disabilities are frequently incapable of making important decisions about their interests. In these cases, limitations of freedoms must be imposed on such individuals as a means of protecting their interests[12]. Some conventional examples include restrictions of certain actions and responsibilities of individuals with limited capacity (e.g., minors, adult wards, persons under curatorship) in civil law, as well as physical protection of mentally unstable people, regardless of their will or intentions; for example, Article 3 of the Police Official Duties Execution Act.

The "right to decide" refers to individuals' right to make decisions about their lives, but this right requires that the individual possess the autonomy to do so[13]. In cases where individuals lack sufficient ability to make decisions, intervention is justifiable[14].

From this perspective, the passage of administrative measures preventing minors from smoking tobacco is justifiable[15].

4. Protection of the right to information

Because tobacco smoking is a self-harming activity, it gives rise to the question of whether consenting individuals should have the freedom to partake in it. The crux of the problem is to what extent the government is able to exert paternalistic intervention for people who partake in self-harming activities. This extent is determined by whether individuals can make decisions based on complete and accurate information, with no influence from others[16]. That is, if one is not provided with accurate information, one cannot make an accurate decision. Concerning tobacco smoking, if consumers are not provided with accurate information, then it can be argued that their choices are limited[17]. Thus, when individuals are making decisions without access to necessary information, administrative regulation by the government is justifiable.

In terms of providing consumers with accurate information about tobacco, making notifications mandatory about harm from tobacco products through administrative

12) *See* Kojo, *supra* note 8, p.58ff.
13) *See* Joseph Raz, 1986, *The Morality of Freedom*, Oxford University Press, pp.371-373.
14) *See* Yoshiyuki Koizumi, 2007, " Self-Determination and Paternalism (Jikokettei to Paternalism)", *New Developments of human rights theory (Jinkenron no Shin-Tenkai)*, Iwanami Syoten, p.175.
15) As for administrative measures preventing minors from smoking tobacco, *see* Tanaka, *supra* note 7, p.201ff.
16) *See* Hideki Shibutani, 2013, *Japanese Constitutional Law [2nd. Edition] (Kenpo)*, Yuhikaku, p.190ff.
17) *See* Yoshio Isayama, 1999, *The Modern Tobacco War (Gendai Tabako Senso)*, Iwanami Shoten, p.12ff.

regulation is justifiable[18]. Moreover, such a statement[19] as "Tobacco is essential for a change of pace and stress relief" is not an example of providing accurate information to consumers; this can be avoided through administrative regulation[20]. Additionally, tobacco products of the JTI that bear words such as "mild" and "light" in their names promote the misconception among consumers that these products pose a reduced risk to their health; however, they do not. Such misinformation could also be justifiably regulated by administrative measures[21].

Currently, important information regarding tobacco is not being conveyed to consumers; for instance, the harm and risk of dependency (or addiction) that tobacco smoking possesses. The major reason is that the tobacco industry as a whole is involved in manipulating available information to conceal the truth from consumers[22]. Thus, strict regulation requiring the availability of accurate information is of utmost importance.

5. Protection of individuals who lack the ability to make decisions for themselves

Recently, administrative regulation concerning individuals who lack the ability to make decisions for themselves has been widely adopted, particularly in consumer protection and safety regulations. Against the background of administrative regulation is the fact that, although individuals receive the necessary and accurate information they need to make a decision, they might also lack the ability to determine if the information is accurate[23]. Thus, justification for administrative regulations concerning individuals who cannot make decisions for themselves in the real world is broadly defined.

This raises the following question: Do smokers possess the ability to make decisions for themselves? In general, smokers tend to focus on short-term enjoyment in the present, and they do not generally try to avoid dangers in the future[24]. Coincidentally, studies show that individuals who focus on pleasure in the present moment and have a low rate of danger avoidance tend to smoke tobacco, be heavy drinkers, and participate in various gambling activities such as pachinko and horse racing[25]. In the end, smokers choose to

18) As for making notifications mandatory about harm from tobacco products through administrative regulation, *see* Tanaka, *supra* note 7, p.228ff.
19) *See* the website of JT, available at http://www.jti.co.jp/corporate/enterprise/tobacco/responsibilities/responsibility/dependency/index.html (last visited October 16, 2015).
20) As for the administrative regulation on advertising of tobacco, *see* Tanaka, *supra* note 7, p.209ff.
21) As for the administrative regulation on product name of tobacco, *see* Tanaka, *supra* note 7, p.232ff.
22) *See* Philip J Hilts, 1996, *Smokescreen: The Truth behind the Tobacco Industry Cover-up*, Addison Wesley Reading. And *see* ASH (Action on Smoking and Health). 1998.*Tobacco Explained*, available at http://www.ash.org.uk/files/documents/ASH_599.pdf (last visited October 16, 2015).
23) *See* Kojo, *supra* note 8, p.62.
24) *See* Kazuhiro Arai, 2012, *The Health Economics of Smoking and Nonsmoking: Human Nature Revealed by Tobacco (Kitsuen to Kinen no Kenko Keizaigaku: Tabako ga Akasu Ningen no Honsho)*, Chuo Koron Shinsha, p.43ff.
25) *See* Takanori Iba and Rei Goto, 2009, "Interdependency among Addictive Behaviours and Time./ Risk

ignore the dangers of addiction and continue smoking, losing the ability to stop. It can also be indicated that smokers do not perceive and plan for their potential future expenses[26].

The majority of smokers begin smoking when they are still minors, and most cite their original motive as "curiosity" or "no particular reason"[27]. In other words, these minors reached for their first cigarette without considering the dangers of addiction (or by neglecting these dangers if they did consider them), optimistically believing that they would not become addicted. The result is certainly addiction brought about by continual use and an inability to quit when desired. This indicates that accurate information concerning tobacco addiction is not available to a sufficient degree.

"Characteristics of smokers" discussed above suggest that smokers lack the ability to make decisions for themselves, and if this is the case, then administrative regulation by the government is justifiable.

6. Support for overcoming weakness of will

Within the framework of intervention through "strong paternalism," distinguishing between "will paternalism" and "critical paternalism" is helpful[28]. Will paternalism addresses problems of weak will, which can be overcome through intervention. An example is how wearing a seat belt is deemed mandatory when driving an automobile. Seat belts are an effective security measure; however, putting them on presents a temporary inconvenience, and thus some will chose not to wear them. However, if an accident occurs, these same people will surely regret their choice. In other words, the usage of seat belts being made mandatory is a form of intervention that helps people overcome weak will. Will paternalism essentially creates an incentive for individuals to take actions of which they are already aware and for which they understand the reasons[29]. On the other hand, in cases where a person's intended way of life is damaging, critical paternalism acts to restrict freedoms to protect their "true" interests. This line of thought, for example, can be applied to restrictions on homosexuality or on viewing pornography. Although such restrictions result from feelings of disgust that individuals have because they perceive the aforementioned acts as immoral or unpleasant, prohibition of

Preferences: Discrete Choice Model Analysis of Smoking, Drinking, and gambling," *Journal of Economic Psychology*, vol.30, pp.608-621.

26) *See* Ernst Fehr and Peter K. Zych, 1998, "Do Addicts Behave Rationally?", *Scandinavian Journal of Economics*, vol.100, pp.643-662.

27) *See* Hiroshi Kawane, 2004, "Nonsmoking Education (Kin'en Kyoiku)", *The Journal of the Japanese Respiratory Society*, No.42, p.601ff.

28) *See* Ronald Dworkin, Isao Kobayashi et al. trans., 2002, *What is the Equality? (Byodo toha Nanika)*, Bokutakusya, p.364.

29) *See* Will Kymlicka, Shin Chiba & Seiki Okazaki trans., 2005, *Contemporary Political Theory [New Edition] ((shinpan) Gendai Seiji Riron)*, Nihon Keizai Hyoronsya, pp.397-398.

homosexuality and pornography use as punishment can at times be justified thorough critical paternalism.

As mentioned in section 8, will paternalism can also be justified to balance the overall interests of society at large, such as measuring public costs related to traffic accident management in the case of the compulsory seat belt use. However, regarding critical paternalism, unless a certain activity causes direct harm to others, an individual's freedom to perform it should not be restricted[30].

Incidentally, for the majority of smokers, the effectiveness of efforts at self-restriction is limited. Thus, it can be argued that higher levels of quitting (or decreasing the use of) tobacco would be achieved if smokers are not the only party regulating themselves and if other entities act to support their self-restraint. The most appropriate entity for conducting this support is the government through administrative regulation[31]. Restrictions on tobacco use that can be expected to produce results may include limiting smokers' access to smoking areas in public and the workplace, as well as raising taxes on tobacco products.

7. Implementation of minimal social morality

Administrative regulation exists to enforce a minimal level of social morality. Foolish acts or conduct against social morality is not beneficial to the perpetrator and may be a nuisance to others. Restrictions that deal with these concepts are divided into two categories[32].

The first refers to restrictions on abandonment of life and liberty, in terms of, for instance, "death with dignity" (euthanasia) and human trafficking. Regulating one's life and liberty is recognized as valid. Life and liberty are defined as inalienable rights, and their disposal is strictly regulated without regard for an individual's ability or inability to make decisions[33]. Thus, consensual disposal of one's life is punishable as murder, and any agreements to dispose off one's life are viewed as invalid.

The second category refers to legislation that prohibits immoral conduct even in the absence of an injured party, such as prostitution, drug use, pornography, and gambling. In these cases, individual decisions to partake in these activities are thought to lack proper reasoning and are thus disregarded. The hallmark examples of pornography, gambling, drug use, and an individual's choice to partake is assumed to signify lack of ability to make decisions due to weak ethics.

As stated earlier, the idea that nonsmokers should not wantonly evoke their rights

30) *See* Koizumi, *supra* note 14, p.175ff.

31) *See* Arai, *supra* note 24, p.178.

32) *See* Kojo, *supra* note 8, p.59, 62.

33) However, many constitutional scholars hold the opinion that "it is necessary to legally admit 'death with dignity' or euthanasia as exceptional cases in order to guarantee a self-decision by the person in question and to preserve human dignity." *See* Koji Tonami, 1999, *Constitutional Law [3nd. Edition] (Kenpo)*, Gyosei, p.186.ff, *see* Shibutani, *supra* note 16, p.190ff., *see* Koizumi, *supra* note 14, p.186.

without reason, that issues related to tobacco use are essentially moral/manners' problems, and that they can be resolved through social consideration is widely held. Certainly, there is no better case than one in which this is true; however, this is simply not a reality. In the end, relying on smokers' morals and manners alone to solve problems related to tobacco use solves nothing and leaves nonsmokers with no other choice than to complain about the damage it causes them. Thus, perceiving problems related to tobacco use as moral issues results in exclusive support of the smoker and offers no understanding of the nonsmoker's plight.

Based on "Guidelines for the Advertising of Tobacco Products" in Japan, tobacco-related advertising allowed on broadcast media might serve only to increase public awareness of smoking manners. In other words, "manners development commercials" are currently permitted in Japan. Notably, however, by addressing problems related to tobacco use as manners' problems, information about issues concerning secondhand smoke, environmental tobacco smoke, the harmfulness of tobacco, and the risk of dependency is not fully conveyed to the consumers. Furthermore, this places responsibility for solving problems related to tobacco use entirely in smokers' hands[34].

Certainly, differentiating between the realms of morality and law is a difficult problem in itself; however, when morality does not offer an adequate solution to a problem, legal regulation is the only option[35]. Thus, to implement a minimal level of social morality, administrative regulation can be justifiably applied to the issue of tobacco use.

8. Reducing the burden on society

In a departure from the concept that the results of an individual's mistaken judgment or choices are borne by the concerned individual alone, individual choices are limited by government intervention when they burden society or when the government must clean up after individual mistakes. In the example of mandatory use of seat belts, since seat belts are designed to protect drivers and passengers of vehicles, there is certainly an argument for leaving the decision of whether to wear a seatbelt to the driver and passengers themselves. However, the inconvenience of being obligated is significantly outweighed by the social benefits, such as seat belts' contribution to injury prevention in accidents, reduction of the burden on victims, and reduction of costs associated with accidents (e.g., car repair, medical bills, and temporary or permanent physical handicaps)[36]. Just as the enforcement of wearing seat belts is justified by its correlation to reduced traffic-related

34) *See* Kazuhiro Nagao, 2009, *Let's change a life in a non smoking (Kinen de Jinsei wo Kaeyou)*, Kabushiki Gaisya Epokku, p.148.ff. As for Prohibition of CM of tobacco companies, *see* Tanaka, *supra* note 7, p.209ff.

35) *See* Yasutaka Abe, 1980, "The Rights of Smokers and Nonsmokers, Regulation of Tobacco Smoking, Vol. 1 (Kitsuenken, Kenenken, Tabako no Kisei (Jo))", *Jurist*, No.724, p.46ff.

36) *See* Takao Yamada, 1987, *Private Business and Law's Business (Shiji to Jiko Kettei)*, Nippon Hyoronsya, p.113.ff., *see* Abe, *supra* note 9, *The Administrative Law System [New Edition]*, p.90.ff., *see* Kojo, *supra* note 8, p.62ff.

public costs, administrative regulation is justified when it reduces a burden on society at large[37].

Furthermore, not only does tobacco use cause problems from a health perspective—increased rates of disease and death in smokers and those exposed to environmental tobacco smoke—but it also causes problems at a different social level; for instance, causing fires and their related economic and environmental burdens. At the very least, the cost of damages associated with tobacco greatly exceeds tax revenue produced by their sales; thus, it can be argued that tobacco products are very cheap[38]. Strangely, despite available scientific evidence, the government has chosen not to enact tobacco regulations and has instead chosen not to avoid the dangers associated with tobacco[39].

From this perspective, raising taxation on tobacco products by administrative regulation in order to balance the burden tobacco use places on society is entirely justifiable[40].

IV. Conclusion

First, I would like to consider the constitutionality of regulations on tobacco use (administrative regulation of tobacco use).

Smoking tobacco not only negatively impacts smokers' health but also significantly impacts nonsmokers' health. According to the WHO "Framework Convention on Tobacco Control," "scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability" (Article 8, Clause 1), thus indicating the damage of secondhand smoke. In today's international community, harm from secondhand smoke is treated as a self-evident truth. Additionally, several examples of significant economic losses can be noted in society; for instance, medical costs associated with diseases caused due to tobacco use in smokers and nonsmokers and decreased productivity due to such diseases. With such serious health risks facing the populace, especially the contraction of smoking-related diseases, the government should have a vested interest in addressing this issue.

Based on this, without disregarding the constitutionally recognized "right to smoke," appropriate regulations on tobacco use can also exist within the reaches of the constitution as long as they apply to publicly shared spaces (e.g., public transportation, the workplace, and other areas) and operate according to reasonable methods in appropriate situations[41].

37) *See* Koizumi, *supra* note 14, p.177.

38) *See* Sijbren Cnossen and Michael Smart, 2005, "Taxation of Tobacco," Sijbren Cnossen ed., *Theory and Practice of Excise Taxation*, Oxford University Press, pp.33-46.

39) *See* Hiromu Nishiuchi, 2013, *Statistics is the Strongest Academic (Tokeigaku ga Saikyo no Gakumon de aru)*, Daiyamondosya, p.144ff.,

40) As for the administrative regulations on price increases of tobacco tax, *see* Tanaka, *supra* note 7, p.219ff.

41) *See* Hideyuki Osawa, 1994, " Anti-Smoking Rights Litigation (Kenenken Sosho)," *Jurist*, No. 1037, p. 183.

Moreover, regarding restrictions on the use of tobacco from a public health perspective, it is essential to alter views on the issue in order to produce stronger regulations. In the United States, regulations on smoking tobacco in public spaces, particularly the workplace, are universally recognized as constitutional. While "the right to smoke" and "nonsmokers' rights" come into conflict, smokers use tobacco voluntarily (for personal pleasure), whereas nonsmokers are indiscriminately exposed to tobacco smoke. Moreover, the situation is prejudiced because nonsmokers' health is damaged by secondhand smoke, and there is no merit for enduring tobacco exposure. Thus, the essence of the conflict of interests between smokers and nonsmokers is clearly not one wherein mutual cooperation will be sufficient, but the weaker party must be protected by limiting smokers' freedom to smoke. Additionally, if freedom to smoke is treated as an intrinsic right on the grounds that it does not cause harm to others' health or livelihood, then freedom to smoke equals "the right to subject others to secondhand smoke." Currently, in Japan, one cannot possibly say that smokers are appropriately considering manners since nonsmokers are being exposed to tobacco smoke, along with its negative health effects, in their daily lives. Considering all such situations, it can be concluded that hereafter, more stringent administrative regulation of tobacco use is in order.

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短期集中連載

タバコ受動喫煙と刑法
事例別Q＆A（第1回）

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受動喫煙（本稿では，他人のタバコの煙を吸わされることをいいます。）に対する社会の捉え方及び法的評価は，従前と昨今とで大きな変化が見られます。本稿は，改めて，刑法上の観点から受動喫煙を捉え直し，警察実務上問題となり得る場面を事例別に示し，Q＆Aで解説を行いました。各事例は，筆者らがこれまで多数の受動喫煙に関する相談や訴訟に関わった経験に基づきつつ，警察実務を意識しながら，設定しました。

なお，本稿は，厚生労働科学研究費補助金（循環器疾患・糖尿病等生活習慣病対策総合研究事業)「たばこ規制枠組条約を踏まえたたばこ対策に係る総合的研究」（平成26年度総括・分担研究報告書（研究代表者　中村正和）2015年）において，筆者らが報告した内容を基に，これを分かりやすくQ＆A形式にしたものです。刑法学説及び判例も踏まえた，より理論的な検討については，同研究報告書「たばこによる健康被害の法的・倫理的評価と国内法の課題の検討　刑法の観点からの受動喫煙に関する考察」95頁-114頁（http://mhlw-grants.niph.go.jp/niph/search/NIDD00.do?resrchNum=201412039A）をご参照ください。この場を借りて，厚生労働科学研究費補助金による支援をいただいたことに感謝申し上げます。

また，本稿では，上記報告書の後に生じた事象についても，検討を加えました。幼児に喫煙させた親が逮捕，略式起訴されるという事件がありました。近時，政府は，2020年の東京五輪に向けた受動喫煙対策強化として，対策をとらない公共施設や飲食店に罰則を科す新法の検討を始めました。こうした近時のニュースと従来の刑法理論との関係についても論じます。

Question 1　（総論　刑法条文の解釈）

タバコの煙の受動喫煙に，暴行罪（刑法208条），傷害罪（刑法204条），過失傷害罪（刑法209条）が成立する可能性はありますか？

Answer

【結論】

判例及び学説上多数派の考え方によれば，これらの罪が成立し得ると考えられます。

【検討】

暴行罪（刑法208条）における「暴行」とは，人の身体に対して向けられた不法な有形力の行使をいいます。「有形力」の中には，狭義の物理的な力（力学的作用）に加え，音（最判昭和29年８月20日，大阪地判昭和42年５月13日）や光によるもの，熱・冷気・電気等のエネルギー作用によるものも含まれると解されています。臭気や化学的作用についても含まれるとする積極説が学説上多数です（『刑法判例百選Ⅱ各論』［第三版］1992年４月・内田博文15頁，法学教室344号2009年５月・井田良59頁）。判例は，音による暴行罪成立を肯定し，また，塩をまく行為に関して，「単に不快嫌悪の情を催させる行為といえども」暴行に該当するとしています（福岡高判昭和46年10月11日）。なお，判例及び通説は，傷害の危険性のない場合にも暴行罪の成立を肯定しています（大判昭和８年４月15日）。「タバコの煙をふきかける行為」についても暴行に該当すると考える学説（『続刑法判例百選』1971年１月・大野真義43頁，『条解刑法』［第３版］（前田雅英ほか）597頁，『大コンメンタール刑法』［第二版］（大塚仁ほか）492頁）が，判例及び学説上多数派の考え方に沿うものと思われます。

傷害罪（刑法204条）における「傷害」とは，判例・通説によれば，身体の生理機能の障害又は健康状態の不良な変更と解されています。判例は，その程度について，ごく軽微なものであっても傷害罪の成立を認め，また，身体内部の変化で足り，外見上の変化を要せず，身体的な苦痛を感じることにより健康状態の不良変更が認められれば傷害罪に当たるとしています（大判昭和８年６月５日，大判昭和８年９月６日，最判昭和26年９月25日，最決昭和32年４月23日）。また，精神的なストレス等を与えることにより精神的機能

を害し，精神的健康を不良に変更することも傷害罪に当たると解されています（最決平成17年３月29日，東京地判昭和54年８月10日，名古屋地判平成６年１月18日，富山地判平成13年４月19日，東京地判平成16年４月20日他多数）。判例・通説の理解を前提とすれば，受動喫煙による急性影響（眼症状，咳，喘鳴，鼻・喉の痛み，頭痛，めまい・嘔吐）及びストレス関連障害等（精神衰弱症，不安抑うつ状態，ＰＴＳＤ，睡眠障害・慢性頭痛症・耳鳴り症等）についても，傷害罪及び過失傷害罪の成立が認められ得ると考えられます。

Question 2　（受動喫煙の法令上及び行政上の位置付け）

受動喫煙は，現在，法令上及び行政上，どのように捉えられていますか？

それは，どのような医学的知見に基づいていますか？

Answer

【結論】

受動喫煙を防止すべきことは，健康増進法，労働安全衛生法，たばこ規制枠組条約等によって規定されています。厚生労働省の通知（通達）や検討会の報告書において，受動喫煙の悪影響が記述され，「他者危害」であるとされています。

【詳細】

我が国の法律では，健康増進法第25条（平成14年８月２日公布）及び労働安全衛生法第68条の２（平成26年６月25日公布）が，施設管理者及び事業者の受動喫煙防止の努力義務を規定しています。

日本国政府は，平成16年３月「たばこの規制に関する世界保健機関枠組条約」（「たばこ規制枠組条約」）に署名し，平成17年２月27日条約の効力が発生しました（外務省ホームページ）。条約第８条第１項には，「締約国は，たばこの煙にさらされることが死亡，疾病及び障害を引き起こすことが科学的証拠により明白に証明されていることを認識する。」と規定されています（外務省訳）。

厚生労働省健康局長通知「受動喫煙防止対策について」（健発第0430003号・平成15年４月30日）には，「受動喫煙による健康への悪影響については，流涙，

鼻閉，頭痛等の諸症状や呼吸抑制，心拍増加，血管収縮等生理学的反応等に関する知見が示されるとともに，慢性影響として，肺がんや循環器疾患等のリスクの上昇を示す疫学的研究があり，ＩＡＲＣ（国際がん研究機関）は，証拠の強さによる発がん性分類において，たばこを，グループ１（グループ１～４のうち，グループ１は最も強い分類。）と分類している。」と通達されています。

厚生労働省「分煙効果判定基準策定検討会報告書」（平成14年６月）には次のように記述されています。「体の粘膜が，たばこ煙，特に副流煙に暴露することによって生ずる刺激症状として，咳，喘鳴，鼻症状（くしゃみ，鼻閉，鼻汁，かゆみなど），眼症状（痛み，流涙，かゆみ，瞬目など），頭痛などが挙げられる。また，鼻咽頭反射を介する呼吸抑制も認められる。」「常習喫煙者よりも非喫煙者の方がより強い反応を示すことも明らかにされており，他人のたばこからの煙への迷惑感，不快感の原因となりうる。」

厚生労働省の検討会及び審議会では，繰り返し，受動喫煙が「他者危害」であると記述されています。

タバコ煙には，約4,000種類の多様な化合物，250種類以上の人体に有害な物質，約60種類の発がん性物質が含まれています（厚生労働省健康局長要請『新版喫煙と健康』平成14年・保健同人社，「厚生労働省の最新たばこ情報」http://www.health-net.or.jp/tobacco/front.html，アメリカ合衆国公衆衛生総監報告2006年ほか）。

Question 3　（受動喫煙と民事裁判）

受動喫煙は，近年，民事の裁判上，どのように捉えられていますか？

Answer

【結論】

かつての判決では，受動喫煙による急性影響を受忍限度などとして損害賠償請求を否定していたのに比べ，近時の判決及び和解では，急性影響の損害賠償を肯定しています。

有名な判決及び和解事例を以下に挙げます。

【事例】

① 江戸川区職場受動喫煙訴訟　東京地判平成16年７月12日

江戸川区職員（原告）が職場での受動喫煙被害を理由に，30万円の慰謝料を江戸川区（被告）に求めた裁判。裁判所は，職場側の安全配慮義務違反を認めて，約２か月半の間の精神的肉体的苦痛の慰謝料として，金５万円の賠償を命じました。

② 札幌簡裁平成18年10月19日調停

女性会社員が職場での受動喫煙被害（気管支の痙攣，肺・胸の痛み，不整脈，化学物質過敏症）を理由に100万円の慰謝料を会社に求めた調停事件で，裁判所において，会社が金80万円を支払う調停が成立しました。

③ 札幌地裁滝川支部平成21年３月４日和解

男性会社員が職場での受動喫煙被害（化学物質過敏症，頭痛）を理由に2,300万円の損害賠償を会社に求めた裁判。裁判所において，会社が金700万円を支払う和解が成立しました。

④ 名古屋地判平成24年12月13日

マンションの女性居住者（原告）が，階下の男性（被告）のベランダ喫煙により，原告の居室内にタバコの煙が流れ込んだために体調を悪化させたとして，不法行為に基づく損害賠償を請求した裁判。裁判所は，他の居住者に著しい不利益を与えていることを知りながら，喫煙を継続し，何らこれを防止する措置をとらない場合には，喫煙が不法行為を構成する旨判示し，約４か月半の間の慰謝料として，金５万円の賠償を命じました。

Question４－１　【事例別検討】（タバコの煙の吹きかけ行為）

【設例①】　ＡはＢと口論になり，かねてよりＢが受動喫煙を苦痛に感じ嫌っていることを承知して，腹立ちまぎれに，敢えてＢの目の前で喫煙し，さらに，Ｂの顔に対して直接にタバコの煙を吹きかけ，Ｂは，せき込むとともに，眼の痛み及びのどの痛みを生じた。

この場合に，刑法上，暴行罪は成立しますか？

Answer

【結論】

成立します。

【検討】

Question 1 において解説したように，臭気や化学的作用についても含まれるとする積極説が学説上多数です。空気を隔てて人に直接作用するタバコ煙についても，「暴行」の態様に該当し得ると考えられます。

暴行罪の保護法益は，「人の身体が不法に痛めつけられたり，危険にさらされたりしないということを内容とした身体の安全」です。「不法に人の身体を軽んじるような行為を禁止しようとするところにある。」と解されています。受動喫煙による急性影響として，眼症状，頭痛，咳，喘鳴，鼻症状等が挙げられ，受動喫煙はしばしばこうした肉体的・生理的苦痛を伴います。また，近年は，政府が受動喫煙は「他者危害」であると繰り返し発表している状況からも，受動喫煙惹起行為は，不法に人の身体を軽んじるような行為と捉えることが可能であり，暴行罪適用は，上記暴行罪の保護法益に合致する法解釈と考えられます。

また，前記「塩まき」に関する福岡高判昭和46年10月11日によれば，「相手方において受忍すべきいわれのない，単に不快嫌悪の情を催させる行為といえども」暴行に該当するとされています。Aの行為は，Bにおいて「受忍すべきいわれのない，不快嫌悪の情を催させる行為」ですから，暴行罪に該当します。

なお，暴行罪の成立を限定的に解釈し，「相手方に与える苦痛」として単なる心理的不快感や嫌悪感それ自体では足りず，肉体的・生理的な身体的苦痛とその発生可能性を要するとする学説（山火正則・木村栄作）から考えても，Aの行為は，Bにおいて肉体的・生理的な身体的苦痛が現に発生しており，またAもそのことをあらかじめ認識・認容していたのですから，暴行罪に該当します。

また，暴行罪の成立をより限定的に解釈し，「その社会的意味を通じた心理的攻撃」では足りないが，「行使された物理力が軽微とはいえず，一定以上の強度を有している」ことを要するとする見解（佐伯仁志）から考えても，受動喫煙の有害性と急性影響を「一定以上の強度」の物理力と解すれば，暴行罪が成立し得ると考えられるでしょう。

Question 4－2　【事例別検討】（タバコの煙の吹きかけ行為）

前記【設例①】について，刑法上，傷害罪は成立しますか？

Answer

【結論】

Ｂの急性症状が立証されれば，Ａに傷害罪が成立します。

【検討】

Question 1 において解説したように，判例・通説によれば，「傷害」とは，身体内部の変化で足り，身体の外見上の変化を要せず，身体的な苦痛を感じることにより健康状態の不良変更が認められれば傷害罪に当たるとされていますから，本件Ｂの身体的な変化は「傷害」に当たります。このことの立証面の問題はありますが，立証ができれば，刑法の理論上は，Ａに傷害罪が成立します。

次に，故意についてですが，暴行罪（208条）と傷害罪（204条）とは，結果的過重犯の関係と解されていますから（判例・通説），傷害の故意がない場合であっても，暴行の故意さえあれば，傷害罪が成立します。

したがって，Ａに「暴行」（タバコの煙を吹きかける行為）の事実の認識・認容さえあれば，暴行の故意が認められ，傷害罪の成立も認められます。本設例では，Ａは何ら犯罪の故意に欠けることはありません。

Question 5　【事例別検討】（警察官に対するタバコの煙の吹きかけ行為）

Sは路上で喫煙している際に，警察官Pから職務質問を受けたが，これを拒否しようと考えて，突然，Pの顔に対して，直接にタバコの煙を吹きかけ，Pがこれによって後ずさりしてひるんだ隙に，走り出し，Pから誰何されるも逃走した。PはSを追いかけて，何とかこれに追いついた。Pは，日頃より，受動喫煙をさほど苦痛には感じない体質であり，Pはタバコの煙を吹きかけられたことによる身体症状・身体的苦痛は特に認識していない。

この場合に，刑法上，暴行罪及び公務執行妨害罪は成立しますか？

Answer

【結論】

判例によれば，暴行罪が成立します。また，公務執行妨害罪も成立する可能性があると考えられます。

【検討】

前記「塩まき」に関する福岡高判昭和46年10月11日によれば，「相手方において受忍すべきいわれのない，単に不快嫌悪の情を催させる行為といえども」暴行に該当するとされていますから，上記設例のSの行為は，Pにおいて「受忍すべきいわれのない，不快嫌悪の情を催させる行為」として暴行罪が成立します。

なお，他の学説（前記山火・木村・佐伯）によって検討する場合は，肯定・否定両論考えられると思われます。一般的に受動喫煙は有害性と急性影響が認められることから，たまたまPが苦痛に感じなかったとしても，「肉体的・生理的な身体的苦痛の発生可能性」は存するものとして，Sの行為は，暴行罪に該当すると解することも可能でしょう。他方，この場合に，肉体的・生理的な身体的苦痛がないとして，単なる心理的不快感や嫌悪感とみなして，暴行罪不成立と考える余地もあり得るでしょう。

次に，公務執行妨害罪の保護法益は，暴行罪・傷害罪とは異なり，公務（国家作用）の円滑な遂行です。公務執行妨害罪の「暴行」は，公務員に向けられたものであれば必ずしも直接公務員の身体に対して加えられる必要はな

いと解されるなど，「暴行罪」の「暴行」概念よりも，広義であると解されています。

暴行罪と公務執行妨害罪とでは，保護法益及び法定刑が異なりますから，必ずしも，両者の「暴行」概念は一致するものではありません。

Sの行為は，実際にPの公務の円滑な遂行を妨害しており，一般的に公務の円滑な遂行を害する危険がある（抽象的危険犯）と考えれば，公務執行妨害罪が成立すると考えられます。他方，上記設例と異なり，何らPがひるむことなく職務質問を継続したような場合を想定すれば，公務の円滑な遂行を害する危険があるとはいえないとして，公務執行妨害罪は成立しないと考える余地もあり得ます。

（おかもと　こうき，かたやま　りつ，たに　なおき）

最終回

タバコ受動喫煙と刑法
事例別Q＆A（第2回）

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前回に引き続き，Q＆A形式で解説を行います。

今回は，事例別検討に加えて，近時のニュースと従来の刑法理論との関係についても論じます。

Question 6　【事例別検討】（タバコの煙の吹きかけに対する正当防衛）

女子学生Wは，室内禁煙のナイトクラブで違反して喫煙する男性Mに「ここは禁煙ですよ」と注意した。注意された男性Mは，これに腹を立てて，女子学生Wの顔にタバコの煙を思いっきり吹きかけた。女子学生Wは自分の身を守ろうと反射的にガラスのコップを男性Mに投げ，Mの頭にこぶができた。男性Mは女子学生Wを傷害罪で告訴し，女子学生Wは正当防衛を主張した。

女子学生Wの正当防衛の主張は認められますか？

なお，上記Questionは，2013年11月に実際にニュース報道されたドイツの事例を基に設定したものです。

Answer

【結論】

個別具体的な状況によりますが，女子学生Wには正当防衛が成立し，無罪となり得ます。

【検討】

ドイツのエアフルト区裁判所は，男性Mがタバコの煙をWに吹きかけた行為は「傷害罪」に当たるとの判定を下し，女子学生Wが防衛手段としてガラスのコップを投げたのは正当であると判断した旨報道されています。

これを日本法で検討した場合，次のように考えられます。

「正当防衛」を規定する刑法第36条第１項の「急迫不正の侵害」行為については，必ずしも犯罪構成要件に該当しない場合であっても，「不正」となり得ると解されています。男性Mがタバコの煙をWに吹きかけた行為が「傷害罪」に当たるか否かにかかわらず，前述のとおり少なくとも「暴行」に該当するので，「不正」の侵害と言えることは明らかと思われます。

次に，同条項中の「やむを得ずにした行為」として，防衛行為の必要性と相当性が問題となります。正当防衛は，反撃行為によって生じた結果（コップによるこぶの傷害）が，侵害されようとした法益より大きくても成立し得ます。

もっとも，次の点で注意が必要です。防衛行為が侵害を排除するために必要な限度でなければなりません（Wが手近にあったコップではなく，攻撃用の武器を使用した場合は，正当防衛は認められにくくなるでしょう。ただし，両者の体格，身体能力，個別具体的な状況等についても検討する必要があります。）。また，既になされた侵害に対しての仕返しの場合は，急迫性が認められません。

Question 7－1　【事例別検討】（職場における受動喫煙）

分煙等がなされておらず自席での喫煙がなされている職場において，非喫煙者Xは，かねてより受動喫煙を苦痛に感じていたが，ある時点から気管支喘息を発病し，さらに喘息による咳・喘鳴症状，頭痛・めまい，鼻汁・鼻の痛み等の症状が次第に悪化し，上司Yらに診断書を添えて，分煙を求めた。上司Yらは，自席での喫煙を継続できなくなることを嫌がり，Xの求めを疎ましく思い，Xのいない社内会議の場で，今後分煙の措置をとることなく放置することでXがこのまま体調不良で自ら退職するのを待とうと話した。半年間，Xは，繰り返しYらに分煙を求めたが，Yは確たる返答をせず先延ばしにして，自席での喫煙を継続した。Xの身体症状はさらにひどくなり，Xは毎日精神的苦痛が蓄積していったが，ある時，YがXに対して「タバコくらいで，つべこべ言うな。」と嘲笑して，Xの顔に直接タバコの煙を吹きかける言動を行った。Xは，それまでの肉体的苦痛並びに改善要求に対する職場側の不誠実な対応による心理的ストレスに加えて，このYの言動が直接の引き金となって，翌日からうつ病によって休職するとともに，タバコに対する強い恐怖心によりPTSD心的外傷後ストレス傷害（Post-Traumatic Stress Disorder）を発症した。

この場合，刑法上，Yに暴行罪及び傷害罪は成立しますか？

なお，上記Questionは，実際の民事裁判及び紛争事例を参考にして事例を設定したものです。

Answer

【結論】

Yに，暴行罪が成立します。また，Yの一連の喫煙継続やXの顔に直接タバコの煙を吹きかけた行為と，うつ病・PTSD発症との因果関係が立証されれば，傷害罪も成立します。