As suggested from the aforementioned content, regardless of the fact that the substance of the freedom to smoke is that individuals are free to choose to smoke, we must also note that this is premised on smoking, not impairing the lives or health of others. In other words, the freedom to smoke has the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others.

However, examining the current situation in Japan, it has been the case in the past (and perhaps remains so today) that smokers continue to smoke their cigarettes when and where they like, without taking any notice of how their behavior is detrimental to the people around them. This situation, rather than the freedom to smoke, should perhaps rather be called the "tyranny of the smokers."

There are very few who would oppose regulations for industrial air pollution, even among smokers. However, there are more than a few smokers who oppose the regulation of air pollution in places where it might affect the health of others, on the grounds of the freedom to smoke. This is no different than claiming that factories should have the "freedom to operate" in an attempt to justify the emission of polluted gases into the atmosphere[25].

Incidentally, there is a surprising number of smokers who are completely nonchalant about smoking cigarettes in typical restaurants and cafés, despite the nearby presence of non-smokers (including children), and except where by-laws prohibit outdoor smoking in specific neighborhood areas, there are more than a few smokers willing to smoke cigarettes on crowded city streets. Many of these smokers who casually smoke cigarettes in such areas claim, "I'm obeying the laws and regulations, and I'm not obliged to listen to anyone who wants to complain. As well as not being prohibited by laws or regulations, smoking is my *right*." However, are these claims valid? We examine three comments below.

First, the above claim misunderstands the difference between civil law and

exchange between two positions. For instance, where one party stands in a permanently compromised position and the other party is always being propped up by the compromised party; this would lead to a request to constrain the rights of the infringing party, from the perspective that this is not mutual adjustment but "protection of the weak." A limitation on human rights as portrayed from this perspective should be seen as qualitatively different from a limitation in the sense of mutual adjustment, and it would require political restraints. *See* Urabe, *supra* note 2, p.80.

In the case of tobacco, while smokers smoke by their own volition, non-smokers are always exposed to tobacco smoke regardless of their personal will. In other words, non-smokers are, so to speak, forced to inhale tobacco smoke. Moreover, non-smokers suffer only unilaterally from second-hand smoke. Non-smokers experience only the inconvenience of tobacco and derive none of the benefits. Furthermore, there is no possibility of a positional interchange between perpetrators (smokers) and victims (non-smokers). For the above reasons, given the structural antagonism between the interests of smokers and non-smokers, a constraint on smokers' freedom to smoke will be needed from the perspective of protecting the weak rather than a mutual adjustment in the case of cigarettes.

25) *See* Yasutaka Abe, 1980, "The Rights of Smokers and Nonsmokers, Regulation of Tobacco Smoking, Vol. I (Kitsuenken, Kenenken, Tabako no Kisei (Jo))", *Jurist*, No.724, p.45.

administrative law. In other words, the laws and regulations that make provision to protect the public from second-hand smoke fall under administrative law, which is an area of law that governs the relationship between individuals and the state. However, civil law governs the relationship among individuals. Hence, the above claim, even if it were to have been made against the state, should not be valid in claims against other individuals. Namely, simply because something is not prohibited on the basis of administrative law, this does not render the complaints of others invalid in terms of a problem among individuals in theory. The fact that someone is complying with administrative law does not necessarily mean they can escape civil liability[26].

Second, for someone to not want to hear anyone complain, a minimum unspoken assumption should be necessary: "Since it's not like I'm inconveniencing anyone else." However, when we listen to the claims made by smokers, they seem to be roughly similar to "I don't know whether I'm inconveniencing anyone else. Maybe I'm a nuisance for some. But it's none of my business. Stop your griping!" The statement "Stop your griping!" is tantamount to an offender's argument with a victim. However, since the victim is the one raising an objection to an "inconvenience" (or, more precisely, a "health hazard"), there should not be any question of anyone's "right" to smoke enough to "inconvenience" those nearby (or moreover, to place their health at risk) in the first place.

Third, even where not prohibited by laws or regulations, the act of smoking cigarettes and being a nuisance to others nearby should not be something that can be termed as "correct behavior" (i.e., a right). When claiming a "right," it should be easy enough to think of the other meaning of the term in English. In other words, the meaning of "right" (translated into Japanese as *kenri*) is "something that is correct," and those who simply claim their rights, rather than claiming them because they are rights, should be able to appropriately state that "this is right[27]." Even though it is not prohibited by laws and regulations, could we say that it is "right" (or "a right") to smoke cigarettes and so inconvenience (and not just inconvenience but endanger the health of) others nearby?

26) For the difference between civil law and administrative law, cf. Abe Yasutaka, Gyōseihō kaishakugaku: Jisshitsuteki hōchi kokka o sōzōsuru henkaku no hō riron I [The Interpretation of Administrative Law: A Legal Theory of Reform to Create a Substantive Constitutional State, vol. 1] (Yūhikaku, 2008), p.193ff, esp. p.218ff. For example, as examples of evading civil liability while complying with administrative law, noises not subject to noise restriction legislation could be construed as illegal (e.g., karaoke music could be construed as unlawful even in the absence of karaoke regulations), and atmospheric pollution could lead to liability if it results in adverse health effects, even in the absence of regulation under administrative law (cf. the Yokkaichi asthma case, Judgement of July 24, 1972, Tsu District Court [Yokkaichi Branch], 672 Hanrei jihō 30).

27) *See* Urabe, *supra* note 2, p.5ff.

III . The Rights of Non-Smokers

It becomes more apparent that smoking in confined and congested spaces, which can be likened to the smoke of industrial pollution, is not only uncomfortable to non-smokers but also endangers their health. Hence, non-smokers have begun to advocate their rights "to breathe clean air not polluted by tobacco smoke" and "not to be subjected to second-hand smoke," specifically demanding that smoking be banned in public spaces. However, perhaps as a result of the label "anti-smoking rights" (*ken'en-ken*), these rights claims by non-smokers have also been met with opposition[28]. However, that is possibly because the true substance of "non-smokers' rights" has not been sufficiently understood. Therefore, in Section III, I aim to assess (1) the substance of non-smokers' rights, (2) the specific content of the rights claimed by non-smokers, and (3) the basis in positive law for non-smokers' rights in order to finally examine (4) whether there is any sense to rights claims by non-smokers, or whether cigarette smoke is ultimately something that non-smokers should "just have to put up with.

1. The Substance of Non-Smokers' Rights

Conventionally, in terms of what is meant by "non-smokers' rights," these have been associated in legal doctrines with environmental rights, moral rights, and health rights, principally in conjunction with the three principal theories described below. First, in what I shall call Theory A, there is the position that holds non-smokers' rights to involve "the right to breathe good air that is free from pollution" and which understands them "as constituent within environmental rights in the lived environment with which people are in closest and most familiar contact." Second, there is the position that argues that non-smokers' rights are also involved with environmental rights, in so far as the latter can be understood to have "qualities that could also be described as the moral rights established through the relationship with the natural environment" (hereinafter Theory B). Third, there is the position wherein since second-hand smoke impacts health, non-smoker's rights should be understood as separately as "health rights," which are to be differentiated from moral rights (hereinafter Theory C).

However, there have been problems indicated for each of these three theoretical perspectives[29]. In Theory A, the issue that, in addition to the absence of any accepted precedents for environmental rights, since previous judgments in tobacco litigation have required that there be danger of actual infringement rather than the abstract possibility

28) For example, while the *Aien-ka Tsūshin* [the Smoking Aficionado's Newsletter], the website of the Smoking Culture Research Society, available at http://aienka.jp/ (last visited October 16, 2015), presents a variety of people who advance their own claims. These claims hardly seem to be made by anyone familiar with the true substance of non-smokers' claims. Most people do not accurately understand what non-smokers are asking for.

29) *See* Hideyuki Osawa, 1994, " Antismoking Litigation (Kenenken Sosho)", *Jurist*, No. 1037, p.183.

thereof, they seem ill-suited to rights and remedies. However, Theory B, which considers environmental damage to infringe the most basic aspects of moral existence, including individuals' lives and physical safety, is an attempt to consider environmental rights as an issue of moral rights that gradually confer the legal protection of the courts. While Theory B has seen non-smokers' rights become more easily accepted as a subset of moral rights under traditional private law, it has been revealed that there is a problem in that their basis in constitutional theory remains inadequate. In contrast, Theory C has come to understand the issue of non-smokers' rights as a limitation on the freedom to smoke based on the right to health. However, along with this limitation, several other problems have been identified, including the fact that the question of how the substance of a "right to health" differs from the right to health based in Article 25 of the Constitution, which has been the grounds for previous claims.

As described above, while certain problematic points have been indicated with respect to each of these theories, among the three, it is basically Theory C that is seemingly valid on the point of being bold to confer remedies prior to the occurrence of any specific health damages[30]. However, at present, discussions on the right to health have been relatively few. Since it will likely be more meaningful to identify specifically what non-smokers are demanding as "rights[31]," rather than whether to think in conjunction with environmental rights, moral rights, or health rights, I next aim to ascertain the specific content of the rights claimed by non-smokers.

2. The Specific Content of Rights Demanded by Non-Smokers

What, specifically, are non-smokers demanding as their "rights"?

The rights that non-smokers are claiming include those that might be called "the right not to be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke." Meanwhile, views that such rights "seem to interfere with the freedom to smoke" and "seem to be insisting on a complete ban on smoking" are not uncommon. However, such views have been extensively misunderstood. Below, I aim to ascertain three points regarding the contents of the rights that non-smokers are specifically demanding.

(1) Simply a Request to Restrict Smoking in Public Spaces

First, non-smokers are demanding nothing more than to restrict smoking in public spaces. The contents of the right that non-smokers claim are no more than simply a demand "not to pollute the air that non-smokers breathe." This demand is simply "to ban

30) *See* Osawa, *supra* note 29, p.183.,

31) *See* Ken Tanaka, 2004, "Trends in Cigarette Litigation and Future Legal Challenges (Tabako Sosho no Doko to Kongo no Hoseiteki Kadai), *Annual Review of Economics, Faculty of Economics, Nagasaki University*, Vol.20, p.63ff

smoking in public spaces, while allowing the freedom to smoke in private spaces." In other words, the right that non-smokers are demanding is nothing more than a request to restrict smoking in public spaces that are in common use, or otherwise lived spaces shared by smokers and non-smokers.

(2) No Interference of any Kind with the Freedom to Smoke

Second, the demands of non-smokers do not interfere in any way with smokers' freedom to smoke. As described earlier, the freedom to smoke should have the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others. However, the rights that non-smokers demand are no more than the demand "not to pollute the air that non-smokers breathe," while recognizing that "it is fine to have the freedom to smoke in places where the lives and health of others will not be impaired." That is, no more than a materialization of the inherent limitations of the freedom to smoke[32]. Accordingly, it will be understood that the right demanded by non-smokers does not interfere in any way with smokers' freedom to smoke.

(3) This does not mean an Insistence on a Complete Anti-Smoking Ban

Third, non-smokers' demands do not constitute an insistence on a complete anti-smoking ban against smokers. Certainly, as described earlier, the rights that non-smokers are demanding do involve a ban on smoking in public spaces, but this is in no way a demand that smoking be banned in private spaces. It is no more than, so to speak, an appeal for the institutionalization of limitations on smoking in certain locations. It will therefore be understood that it is certainly not an insistence on a complete smoking ban.

3. The Basis of Non-Smokers' Rights in Positive Law

The basis of non-smokers' rights in positive law also presents a problem. As described earlier, the rights being demanded by non-smokers include those that might be called "the right not to be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke." However, these rights are certainly not provided for in positive law, and even if this is true, since "the right to breathe" is a natural and inborn human right not needing to be newly provided for in the Constitution or other legislation, we could also say that the absence of such provision is intentional. Similarly, "the right to breathe clean air not polluted by tobacco smoke" is also a natural and inborn human right not needing to be newly established in the Constitution or legislation. While it may be (affirmatively) sought on the basis of the constitutional right to the pursuit of happiness provided in Article 13, it is patently obvious that the violation of these rights would be impermissible even without being prohibited by law[33].

32) *See* Abe, *supra* note 25, p.45.
33) *See* Abe, *supra* note 25, p.46ff.

However, rights based in the constitutional right on the pursuit of happiness provided in Article 13 are basically called "rights to freedom" that serve the function of making claims for the exclusion from interference, i.e., inaction (in relation to aspects of the right to freedom), and seek non-interference and inaction from state power over the rights and freedoms of human beings. On the other hand, rights being demanded by non-smokers, such as "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," seek to limit smoking in public places, appealing specifically for the institutionalization of limitations on smoking in certain locations. These demands have a function that makes a claim on state institutions to act (in relation to social rights). Thus, we could follow the discussion on constitutional law that holds that the function of making claims for the exclusion from interference (in relation to aspects of the right to freedom) is based in Article 13 of the Constitution, which makes general legal provisions for human rights, and that the function that makes claims on state institutions to act (in relation to social rights) is based in Article 25 of the Constitution[34]. Then, the rights being demanded by non-smokers such as "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke" could be said to have their basis in Article 25 rather than in Article 13[35].

In the first place, clean air, water, and soil are an absolute prerequisite for human survival. To be unable to breathe air, drink water, or eat food, it would be impossible for humans to survive as animals, let alone as human beings. This is a basic premise of personal dignity and also a fundamental premise of "wholesome and cultured living[36]." In that sense, the rights being claimed by non-smokers "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke" could be said to be rights naturally predicated in Articles 13 and 25 of the Constitution.

That said, even if non-smokers do have the rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," there remains the very difficult problems of what remedies they might be able to demand as arising directly from these "concrete rights."

34) As for a discussion on the provisional basis of environmental rights (in other words, not with reference to "the right to not be subjected to second-hand smoke" or "the right to breath clean air not polluted by tobacco smoke"), *see* Ashibe, *supra* note 3, p.262ff., Shibutani, *supra* note 9, p.289ff., Urabe, *supra* note 2, p.241ff., Tadashi Otsuka, 2010, *Environmental Law [3rd. Edition] (Kankyoho)*, p.58ff.
35) However, beyond "the right to not be subjected to second-hand smoke" or "the right to breathe clean air not polluted by tobacco smoke," it may be unreasonable to try to position these "new human rights," within which environmental rights are included, in the Constitution under the umbrella of traditional human rights of moral rights and the right to survival. For this reason, to achieve these new human rights, we could demand that the obligations of national and regional governments should be clearly defined and theorized with reference to the Constitution. As for a discussion on environmental rights, *see* Kitamura Yoshinobu, 2013, *Environmental Law [3rd. Edition] (Kankyoho)*, Kobund, p.53ff.
36) *See* Urabe, *supra* note 2, p.241ff.

Regarding the legal character of the right to life provided for in Article 25[37], these matters ultimately amount to the issue of the possibility of remedy by the courts. (1) The "Program Rules" theory (which holds that Article 25 of the Constitution does no more than lay out the objectives of political and moral effort) denies any legal effectiveness and renders the courts completely incapable of involvement. (2) The "Objective Legal Norms" theory, which allows legal effectiveness, does recognize restrictions of the activities of the legislature and executive. However, since it allows for significant discretion within these domains, it also makes it difficult for citizens to obtain remedy in practice. (3) The "Abstract Rights" theory, while affirming the subjective legal norms of the right to life, also accepts that the realization of this right is limited by virtue of its impact in the established legislation, which makes it impossible to bring an action in the absence of the enactment of laws that make specific provision for the right to life. (4) The "Concrete Rights" theory, although the substantive rights of Article 25 are not sufficiently clear to constrain the executive, is sufficiently clear to constrain the legislature. In that sense, it makes provision for concrete rights that, in the absence of any specific method for their implementation, are nevertheless able to bring about litigation or sue for anonymous appeal to ascertain unconstitutional violations. While this may be construed as allowing for judicial relief even in the absence of separate laws, the necessary conditions for bringing suit are not clear. In the hypothetical case that a remedy should be presented, the solution to the problem will ultimately be handed back to the legislature, which will not constitute direct relief to those who are in need and seeking rapid relief.

Based on the above, even if non-smokers do have rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," in order to be able to exercise these rights in concrete terms and demand effective remedy, separate legislation needs to be clearly enacted (or else, already existing legislation will need to be appropriately amended). While the extension of the logic of the Abstract Rights Theory could mean that the rights of non-smokers would only become "concrete" for the first time through the enactment of legislation that gives them concrete force, it is still possible to use the word "rights" to characterize the content of these privileges[38].

Moreover, the World Health Organization's Framework Convention on Tobacco Control (FCTC[39]) was adopted at the meeting of the WHO held on May 21, 2003. In

37) As for the legal character of the right to life provided for in Article 25, *see* Shibutani, *supra* note 9, p.276ff., Ashibe, *supra* note 3, p.260ff., Urabe, *supra* note 2, p.227ff.

38) *See* Ashibe, *supra* note 3, p.260.

39) As for more information about the Framework Convention on Tobacco Control, *see* the website of the World Health Organization (WHO), available at http://www.who.int/fctc/en/index.html, as well as that of the Ministry of Foreign Affairs, available at http://www.mofa.go.jp/mofaj/gaiko/treaty/treaty159_17.html (last visited October 16, 2015). In addition, as for an overview of the Convention and the history of its development, *see* Kazuhiko Nakamura, 2004, "World Health Organization Framework Convention on Tobacco Control (Tabako no Kisei ni kansuru Sekai Hoken Kikan Wakugumi Joyaku)," *Jurist* No.1274, p.84ff and Narutoshi Nagao, 2005, "WHO Framework Convention on Tobacco Control (Tabako no Kisei ni kansuru Sekai Hoken Kikan Wakugumi Joyaku)," *Horei Kaisetsu Shiryo Soran*, No.283, p.59ff.

40) *See* the website of Pfizer Inc., Q20, available at http://www.pfizer.co.jp/pfizer/company/press/2012/documents/20120525.pdf (last visited October 16, 2015).

addition to the fact that Japan became the nineteenth party to join the Convention, which took effect on February 27, 2005, there are regulations relating to "Protection from exposure to tobacco smoke" in the FCTC's Article 8, which imposes a mandate on signatory nations to "adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places" (Article 8[2]). Based on the stipulation in Article 98(2) of Japan's Constitution that "the treaties concluded by Japan and established laws of nations shall be faithfully observed," the rights demanded by non-smokers "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke," could have grounds not only in Articles 13 and 25 but also in the FCTC.

4. Is it Unreasonable for Non-Smokers' to insist on Their Rights?

Traditionally, the act of smoking cigarettes in Japan has been considered as a "right" similar to the acts of drinking water or consuming food. In addition to smoking being the exercise of a right, the way that society responded was to expect that cigarette smoke could and should be tolerated by non-smokers as much as possible. In other words, Japan was (and perhaps is) a society in which non-smokers were called on to "put up with" a certain amount of smoking. This is the thought behind the "Maximum Permissible Limit" theory. Hence, Japan has become a society where smokers were able to smoke when and where they liked.

In fact, according to the Comparative Opinion Survey on Second-hand Smoke conducted by Pfizer[40], Inc on 47 prefectures in 2012, regarding their actions when discomfited by smoking by others, 29.1% of respondents indicated that they "put up with it, despite wanting to ask the other party to stop smoking," whereas 63.4% "left the area"; no more than a mere 3.8% "clearly asked the other party to stop smoking," revealing that more than 90% of people tended to "put up with" smoking behavior, even in the presence of second-hand smoke.

However, is tobacco smoke really something that non-smokers should be expected to put up with, and is it really so unreasonable that they claim rights of their own? While we may feel that the backgrounds of such claims are that tobacco smoking and similar behavior are only minor problems, such a characterization may itself be open to question. In addition, could a society that insists that only non-smokers should have to put up with

the behavior of others be said to be a truly fair society?

Initially, tobacco smoke engenders the development of a variety of illnesses caused by second-hand smoke, and the hazards of second-hand smoke are extremely severe, even greater than those posed by active smoking. Indeed, tobacco smoke has majorly impacted the health and lives of non-smokers, and it is certainly not something to be dismissed as a "minor" problem.

Next, to argue that tobacco smoke is something that should be "put up with" even when it damages health and not being able to claim "the right to clean air," would be akin to arguing that the damaging atmospheric pollution emitted by factories is something that should be "put up with" and the non-recognition of "the right to breathe clean air." However, it is usually the case wherein even smokers believe that atmospheric pollution from industrial emissions is not something that should be tolerated. Basing one's opposition to tobacco restrictions in public spaces in order to prevent second-hand smoke on the grounds of the freedom to smoke is akin to justifying rampant pollution by claiming that offending factories should have freedom to operate[41].

Furthermore, having identified the structural opposition between the interests of smokers and non-smokers, although smokers smoke according to their own volition, non-smokers are always exposed to tobacco smoke regardless of their personal will. In other words, non-smokers are, so to speak, forced to inhale tobacco smoke. Moreover, non-smokers suffer only unilaterally from second-hand smoke. In other words, non-smokers experience only the inconvenience (or more accurately, "health hazards") of tobacco and derive none of the benefits.

Furthermore, as described above, the substance of the rights being claimed by non-smokers are the following: (1) no more than simply the demand "to not pollute the air that non-smokers breathe," which is in addition to being no more than a request to restrict smoking in public places, (2) does not interfere in any way with smokers' freedom to smoke, and (3) does not insist on a complete anti-smoking ban targeting smokers.

In light of the above, our contemporary society, wherein over 90% of people are compelled to "put up with" second-hand smoke, can in no way be described as a fair society. Moreover, as described above, on the basis that the right to breathe clean air not polluted by tobacco smoke is a natural inborn human right, non-smokers should be considered to be able to claim their rights "to not be subjected to second-hand smoke" and "to be able to breathe clean air not polluted by tobacco smoke."

IV. The Relationship of the Freedom to Smoke to the Rights of Non-Smokers

At the risk of repeating some aspects of my argument, since there generally seems to

41) *See* Abe, *supra* note 25, p.45.

be exceptional misunderstandings concerning the relationship of the freedom to smoke to the rights of non-smokers, I aim to reiterate the ascertainment of this relationship.

1. The Inherent Limitations of the Freedom to Smoke as materialized in the Rights of Non-Smokers

The rights claimed by non-smokers do not interfere with smokers' freedom to smoke. While this freedom has the inherent limitation, from the perspective of essential human rights, of not impairing the lives or health of others, non-smokers' rights are no more than the manifestation of this inherent limitation. In this way, although we say "freedom to smoke," this freedom should be understood to be constrained by the inherent limitation of not subjecting others to second-hand smoke. Additionally, it can be stated that the right to not be subjected to second-hand smoke and the right to breathe clean air are no more than the manifestation of the inherent limitations of the freedom to smoke.

2. The Right of Non-Smokers Does Not Conflict with the Freedom to Smoke

Non-smokers' rights do not insist on the imposition of a complete smoking ban on smokers; however, they are no more than simply making an appeal for the institutionalization of limitations on smoking in certain locations. Specifically, this is no more than a request "to ban smoking in public spaces, while allowing the freedom to smoke in private spaces." In other words, non-smokers are not interfering in any way with the freedom to smoke. Accordingly, it will be understood that the freedom to smoke and the rights of non-smokers are not necessarily in conflict, and there is room for both to be satisfied. For example, the freedom to smoke does not imply the right to subject others to second-hand smoke and hence is in no way incommensurable with the right to not be subjected to second-hand smoke. While the freedom to smoke has been characterized as a right that is far subordinate to the right to not be subjected to second-hand smoke[42], we should precisely say that the right to subject others to second-hand smoke is not a part of the freedom to smoke.

3. The Inalienable Right of Non-Smokers to Breathe Clean Air

Even if non-smokers were an absolute minority, as long as one person did not consent, there would be a need to insist on the impermissibility of polluting clean air where almost everyone was in favor of smoking. In other words, it is not the freedom to smoke but the right of those who do not to breathe clean air that is inalienable by the majority[43].

42) *See* Japan Society for Tobacco Control ed., 2007, *Tobacco Control Advocacy (Kinengaku)*, Nanzando, p.18ff.

43) *See* Abe, *supra* note 25, p.45.

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].

(Acknowledgements)

This study is the compilation of the results of research conducted from FY 2008–2011 under scientific research grants from the Japan Society for the Promotion of Science (B) under the research topic "Law and Policy of Tobacco Regulation" (Topic Number 20730007). It also contains the results of research conducted under an FY 2013–2015 Ministry of Health, Labor and Welfare science research grant (Project for General Research on Measures Against Circulatory Conditions, Diabetes and Lifestyle-Related Diseases) research topic "General Research on Countermeasures Based on the WHO Framework Convention on Tobacco Control" (Representative: Dr. Masakazu Nakamura) (Topic Number H25 Junkanki To (Seishu) Ippan 010).

In addition, the author thanks Crimson Interactive Pvt. Ltd. (Ulatus) – www.ulatus.jp for their assistance in manuscript translation and editing.

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.

短期集中連載

タバコ受動喫煙と刑法
事例別Q＆A（第1回）

弁護士　岡本　光樹　　岡本総合法律事務所
弁護士　片山　　律　　萱場健一郎法律事務所
弁護士　谷　　直樹　　谷直樹法律事務所

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）

弁護士　岡本　光樹　　岡本総合法律事務所
弁護士　片山　　律　　萱場健一郎法律事務所
弁護士　谷　　直樹　　谷直樹法律事務所

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。

【検討】

本設例は，職場における受動喫煙の問題として，実務上はまず民事事件として扱われるものと考えられますが，刑法の観点からも問題となり得ます。

判例及び通説は，精神的健康に関して，精神衰弱症（東京地判昭和54年８月10日），不安抑うつ状態（名古屋地判平成６年１月18日），ＰＴＳＤ（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），睡眠障害・慢性頭痛症・耳鳴り症（最決平成17年３月29日）も傷害に当たるとしています。

Ｙは，Ｘが分煙を求めた後も半年間にわたり，受動喫煙を継続し，さらにＸの顔に直接タバコの煙を吹きかける「暴行」（前述のとおり）を行って，Ｘにうつ病とＰＴＳＤを発症させたので，傷害罪が成立します。立証の問題はありますが，行為と結果発生との因果関係も認められる可能性があると考えられます。

Question 7－2　【事例別検討】（職場における受動喫煙）

前記設例で，Ｙが嘲笑やＸの顔に直接タバコの煙を吹きかけるといった言動を行うことなく，受動喫煙の継続的なストレスによってＸがうつ病を発症した場合は，どう考えますか？

Answer

【結論】

この場合のＹの暴行罪の成立については，肯定と否定のいずれも考えられます。

未必の故意が認められれば傷害罪が成立し，未必の故意が認められない場合は，過失傷害罪が成立し得ます。

【検討】

この場合のＹについては，Ｘが分煙を求めた後も半年間にわたり，受動喫煙を継続していますが，これが「暴行」に該当するか否かが問題となります。

Question 1でも解説したとおり，暴行罪の「有形力」には，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。この見解に基づけば，暴行罪が成立し得ます。ただし，判例及び学説が，本件のような直接タバコの煙を吹きかける態様ではない継続的な受動喫煙について，「暴行」と判

断するかどうかは明らかでありません。「暴行」の定義では「人の身体に対して向けられた」と解されていますが，直接タバコの煙を吹きかける態様ではない上記場合に，この要件を肯定し得るかも問題となり得ます。

他方，このような場合は，「暴行」ではないと考える消極説に立てば，「物理的有形力の行使」ではなく，「無形的方法による」傷害結果の発生と考えられます（「暴行によらない傷害」）。「暴行によらない傷害罪」の肯定例として，ラジオ及び目覚まし時計アラームの騒音により，人に精神的ストレスを与えて睡眠障害等にする場合（最決平成17年３月29日），嫌がらせ電話により不安感を与えて精神衰弱症にする場合（東京地判昭和54年８月10日）等があります。

設例では，YはXを困惑させる意図のもとに行為を行っている訳ですが，それがXの大きな精神的負担となり，その身体に障害が生じる可能性があることを認識しつつ行ったとして，Yに「未必的故意」があったといえれば，傷害罪が成立します（上記最決平成17年３月29日の事案に関する奈良地判平成16年４月９日及び大阪高判平成16年９月９日参照。）。

Xの傷害結果の発生について，Yに未必の故意が認められなければ，Yは「過失傷害罪」となります。