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D. Douglas Blanke

Kerry Cork

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EXPLORING THE LIMITS OF SMOKING REGULATION

D. Douglas Blanke[†] & Kerry Cork^{††}

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“Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law”¹ -Oliver Wendell Holmes

Justice Oliver Wendell Holmes was never one to agonize over legal line-drawing. For the rest of us, however, the demarcation between necessary regulation and government overreaching can sometimes be difficult to trace. Almost by definition, measures that test the limits of government’s role tend to be controversial. Certainly this is true when it comes to the regulation of smoking. Of course, public health law is no stranger to controversy; tobacco control, in particular, is steeped in it. Tobacco control measures that undoubtedly advance the aggregate health of the community often stand in tension with individual claims to liberty, autonomy, and other constitutionally protected interests. Even where legal tensions are absent, and where legislative intervention is solidly supported by medical evidence, measures perceived as “going too far” may hold the potential to trigger public backlash against all regulation. Whether some recent proposals for smoke-free regulation have crossed this line was the subject of a thought-provoking symposium convened by the Tobacco Control Legal Consortium at William Mitchell College of Law on October 23, 2007. The five papers that follow reflect the diversity of opinions exchanged during the course of lively debate and discussion.

[†] J.D., Director, Tobacco Law Center and Adjunct Professor of Law, William Mitchell College of Law; Executive Director, Tobacco Control Legal Consortium.

^{††} J.D., Associate Counsel, Tobacco Control Legal Consortium.

1. *Irwin v. Gavit*, 268 U.S. 161, 168 (1925).

I. SYMPOSIUM BACKGROUND

Over the last ten years, as medical evidence of the dangers of secondhand smoke has mounted,² smoke-free laws have proliferated across the United States and around the world.³ Today, more than 60% of the U.S. population is protected by laws eliminating smoking in indoor workplaces, including restaurants, and almost 50% of Americans live in communities where even bars are smoke-free.⁴ Many Americans are surprised to learn that these laws reflect an accelerating global trend: more than a dozen countries, including France, Ireland, Italy, Norway, Sweden, Thailand, Turkey, the United Kingdom, and Uruguay, have already adopted strong smoke-free laws, as have most Canadian provinces, most Australian states, and cities from Mexico City to Hong Kong.⁵

In the United States and elsewhere, a growing number of jurisdictions are beginning to expand the scope of regulation and to consider enforcing smoke-free policies in areas previously regarded as off-limits: outdoor dining areas of restaurants and bars; public parks, beaches and golf courses; multi-unit residential housing; and motor vehicles.⁶ In employment settings, some companies have imposed higher health insurance premiums on

2. The U.S. Environmental Protection Agency, the National Toxicology Program, the International Agency for Research on Cancer, and the U.S. Surgeon General have all designated secondhand smoke as a known human carcinogen, or cancer causing agent. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL 6, 29-33, 576 (2006), available at <http://www.surgeon-general.gov/library/secondhandsmoke/report/>.

3. See Americans for Nonsmokers Rights Foundation, Summary of 100% Smokefree State Laws and Population Protected by 100% U.S. Smokefree Laws 1, 1-2 (Apr. 1, 2008), available at <http://www.no-smoke.org/pdf/SummaryUSPopList.pdf>.

4. *Id.* at 1 (stating that 49% of Americans live in communities that prohibit smoking in bars).

5. See Campaign for Tobacco Free Kids, Int'l Resource Ctr., *Smoke-Free Laws*, http://tobaccofreecenter.org/smoke_free_laws (last visited Apr. 21, 2008); GlobalSmokefreePartnership, *Smokefree Progress: An Overview of Smokefree Laws Around the World*, http://tobaccofreecenter.org/files/pdfs/SF_world_overview.pdf (last visited Apr. 21, 2008).

6. See Americans for Nonsmokers Rights Foundation, Summary of 100% Smokefree Beaches (Apr. 1, 2008), available at <http://www.no-smoke.org/pdf/SmokefreeBeaches.pdf>; Americans for Nonsmokers Rights Found., Summary of 100% Smokefree Outdoor Dining Areas (Apr. 1, 2008), available at <http://www.no-smoke.org/pdf/SmokefreeOutdoorDining.pdf>; Americans for Nonsmokers Rights Foundation, Summary of 100% Smokefree Parks (Apr. 1, 2008), available at <http://www.no-smoke.org/pdf/SmokefreeParks.pdf>.

employees who smoke, while others have adopted policies prohibiting employees from smoking, even off the job.⁷

Not all members of the public health community have welcomed these new measures as inevitable, necessary, or even appropriate. In fact, many thoughtful and respected tobacco control experts believe that prohibiting cigarette smoking on a public beach or in a private apartment goes too far in regulating the use of a product that is undeniably deadly, but that is nevertheless used by one of every five American adults.⁸ In 2007, recognizing that these new initiatives were beginning to spark debate around the world, the Tobacco Control Legal Consortium, headquartered at William Mitchell College of Law, organized a forum for leaders in tobacco control policy to exchange views on this issue in a structured format to identify the key points of consensus and disagreement. The Legal Consortium, a network of legal resource centers supporting tobacco control policy change throughout the United States, was a natural sponsor for such an event. In addition to helping officials throughout the country develop and defend effective public health policies, the Consortium serves as a nationally-recognized think tank, conducting legal and policy research and developing publications on emerging legal issues.

The Legal Consortium's symposium, "*Going Too Far? Exploring the Limits of Smoking Regulation*," was held at William Mitchell on October 23, 2007. The symposium was timed to coincide with the National Conference on Tobacco or Health, held in Minneapolis, Minnesota, on October 24–26, 2007, which enabled experts from around the country to participate. The interactive symposium was designed to allow attendees to improve their understanding of divergent views about the impact of expansive new smoke-free policies on autonomy, privacy, confidentiality, personal liberty, and public health, and to test their own views against those of respected colleagues. Symposium participants included approximately fifty nationally-recognized experts in tobacco control policy, public

7. See, e.g., Joe Robinson, *Light Up, Lose Your Job*, L.A. TIMES, Feb. 19, 2006, at M3.

8. U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, ADULT CIGARETTE SMOKING IN THE UNITED STATES: CURRENT ESTIMATES (Nov. 2007), http://www.cdc.gov/tobacco/data_statistics/factsheets/adult_cig_smoking.htm.

health lawyers, academics, and leading professionals from national public health organizations.

Before the event, the Legal Consortium surveyed invitees, to gauge their preliminary views on the appropriate scope of regulation. Participants were asked whether they “Strongly Agreed,” “Agreed,” “Disagreed,” “Strongly Disagreed,” or had “No Opinion” about statements such as the following:

- “Smoking should be banned in all outdoor spaces, including beaches, parks, and personal yards (unless the smoker’s yard is separated from other housing by at least 300 feet).”
- “If we want to prohibit smoking in all indoor public areas, workplaces, and multi-unit housing complexes, we actually hurt our cause by passing laws that prohibit smoking in cars and outdoor areas because we look fanatical.”
- “Employers should not have the right to prohibit employees from smoking during their personal time, as long as smoking is a legal activity for adults. What’s next—allowing employers to make hiring and firing decisions based on people’s risky hobbies, like motorcycle riding, or other lifestyle activities?”

While the survey was neither formal nor scientific, the responses were striking. On every question posed, the respondents were almost evenly divided, with about half in agreement with the statement and about half in disagreement. This division reflected not only the controversial nature of the policies being debated, but also the divergence of opinion within the public health community about the risks and benefits the policies represent—a divergence reflected in the articles presented here.

The symposium featured five speakers, all experts in public health law and tobacco control policy. Canadian law professor and policy expert David Sweanor, who has been influential for a quarter of a century in making Canada a world leader in this area of public health, set the stage for debate with thoughtful insights about the way forward after all of the “obvious” steps have been taken. The symposium then featured two moderated point/counterpoint

sessions, with speakers presenting and debating differing views on each topic. Attendees were then invited to explore areas of consensus and debate the potential pitfalls of competing policy options. These spirited exchanges were moderated by Marice Ashe, Director of Public Health Law & Policy with the Public Health Institute in Oakland, California, and Micah Berman, Executive Director of the Tobacco Public Policy Center and visiting Professor at Capital University Law School in Columbus, Ohio.

II. SYMPOSIUM PROCEEDINGS

The symposium proceedings which follow are divided into three parts: a Canadian perspective on the limits of effective regulation as proven interventions are fully implemented and attention shifts toward less “obvious” options, arguably with declining marginal utility; two papers on the pros and cons of smoke-free policies in outdoor venues; and two papers on the pros and cons of smoke-free policies in the workplace.

David Sweanor, adjunct Professor of Law at the University of Ottawa, describes the impressive range of Canadian tobacco control measures enacted with great effort over the last twenty-five years. These include tobacco tax increases, elimination of most forms of tobacco advertising and promotion, graphic health warnings on tobacco product packages, stringent smoke-free laws, and tobacco product testing. As a result of these policies, cigarette smoking in Canada has been greatly reduced. Sweanor points out, however, that despite these hard-won advances, smoking persists as Canada’s leading preventable cause of death, and he expresses concern that further regulatory progress may be increasingly constrained by tobacco control advocates who adhere to an “ideological view of appropriate interventions rather than pragmatic public health orientation.”

Sweanor’s concern about the risk of excessive or unwise regulation is shared by Simon Chapman, a leading figure in tobacco control and Professor of Public Health at the University of Sydney, Australia, who takes up the issue of outdoor smoking policies. While strongly supporting smoke-free policies in indoor venues, Chapman argues that the risk of exposure to toxic particles and gases outdoors is much less than indoors, and that risks are associated with exposure to smoke caused by the incomplete combustion of any biomass (fuel, barbecues, car exhaust, campfires, in addition to tobacco). He contends that smoke-free

policies are becoming detached from evidence of direct harm and that paternalistic zero-tolerance policies may undermine the scientific credibility of the evidence base for tobacco control and alienate important public health allies.

James Repace, a biophysicist, former senior policy analyst and scientist with the U.S. Environmental Protection Agency, and visiting Clinical Professor at Tufts University School of Medicine, disagrees that it is excessive to regulate smoking outdoors. He draws on several studies of the hazards of secondhand smoke exposure in outdoor venues, to argue that banning smoking outside and inside vehicles (especially where children are at risk) or wherever people are congregated, is scientifically justified.

Next, Lewis Maltby, an attorney and President of the National Workrights Institute, addresses the topic of smokefree policies in the workplace. Maltby expresses grave concerns that giving employers the authority to regulate the off-site smoking of their employees jeopardizes individual privacy and autonomy. He points out that smoking is just one of many private activities that affect employees' health and employers' health care costs, and that intrusive zero-tolerance tobacco regulation sets a dangerous precedent in the workplace.

Finally, Micah Berman, Executive Director of the Tobacco Public Policy Center and visiting Professor at Capital University Law School, and Dr. Rob Crane, an Assistant Professor of Medicine at Ohio State University, make the case that current tobacco control efforts are not reducing smoking rates quickly enough to prevent the "continuing public health catastrophe caused by cigarette smoking." They discuss the increased healthcare and productivity costs of smoking employees; legal measures, such as insurance surcharges, that employers can take to regulate smoking; and the overall need for tobacco control advocates to work with business to support private-sector initiatives such as tobacco-free workforce policies.

III. CONCLUSION

The symposium did not reach a breakthrough consensus about the proper limits of smoking controls. Even the most passionate advocacy and discussion could not resolve the disagreements among participants, who continue to debate the wisdom of expansive new regulation. Rather, the exchange served mainly to expose the complexities of the trade-offs involved, leaving

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many participants less confident of their own positions than when the day began. Perhaps that is the first step toward an answer. Certainly, given the deadly nature of the products involved, participants ended the day convinced that this is an area where, as Justice Holmes put it, the question of where to draw the line is worth arguing; even if, unlike Justice Holmes, they remained troubled about where to draw it.