

## WHOSE LIFE IS IT ANYWAY? EMPLOYER CONTROL OF OFF-DUTY SMOKING AND INDIVIDUAL AUTONOMY

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“Your right to swing your fist stops at the end of my nose.”<sup>1</sup>

Henry Ford had his own private police force.<sup>2</sup> If you worked for Ford Motor Company, its officers could show up at your door at any hour of the day or night and search your entire home.<sup>3</sup> If they found anything Henry Ford disapproved of, you were fired.<sup>4</sup> If you were drinking, you were fired.<sup>5</sup> If there was someone upstairs at night that you were not married to, you were fired.<sup>6</sup> If you were playing cards for money, you were fired.<sup>7</sup> If you had books Ford did not like, you were fired.<sup>8</sup>

Today, we know that this was wrong. The fact that Henry Ford signed people’s paychecks did not give him the right to control their private lives.

But we are in danger of slipping back into this kind of world. Many employers are beginning to take control of employees’ private lives in the name of reducing health care costs.<sup>9</sup>

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1. Attributed to Justice Oliver Wendell Holmes.

2. See HENRY FORD & SAMUEL CROWTHER, *MY LIFE AND WORK* 128–29 (1922). Ford employed as many as fifty investigators in his “social welfare department” who looked into the private lives of Ford Motor Company employees. *Id.* The Social Department was originally instituted to evaluate each employee’s eligibility for a “prosperity-sharing” program. *Id.* at 129.

3. See KEITH SWARD, *THE LEGEND OF HENRY FORD* 59 (1948).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. See generally Jeremy W. Peters, *Company's Smoking Ban Means Off-Hours, Too*, N.Y. TIMES, Feb. 8, 2005, at C5.

The most common example of this trend involves employers who prohibit employees from smoking in their private lives.<sup>10</sup> The Administrative Management Society has estimated that six percent of all employers in the United States discriminate against off-duty smokers.<sup>11</sup> These employers argue that smokers incur higher medical costs that adversely affect profitability.<sup>12</sup> This is clearly correct. While the magnitude by which smokers' medical costs exceed those of other employees has not been precisely measured, nor the amount of these higher costs that fall on a particular employer, there is no question that smokers cost their employers more money for medical care.<sup>13</sup>

But smoking is not the only behavior that increases medical costs. Alcohol isn't good for you.<sup>14</sup> Neither is junk food, red meat, too much coffee, lack of exercise, or lack of sleep.<sup>15</sup> Many forms of recreation have medical risks, including skiing, scuba diving, and riding motorcycles. Getting to work by bicycle may be good exercise, but it increases the risk of being hurt in a traffic accident. Even your sex life has health care cost implications. People with multiple sexual partners have a greater risk of acquiring STDs than those who are monogamous.<sup>16</sup> If it is acceptable for employers to

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10. See, e.g., Peters, *supra* note 9.

11. NAT'L WORKRIGHTS INST., LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF-DUTY EMPLOYEE ACTIVITIES 2, [http://www.workrights.org/issue\\_lifestyle/ldbrieff2.pdf](http://www.workrights.org/issue_lifestyle/ldbrieff2.pdf) [hereinafter NWI ON LIFESTYLE DISCRIMINATION].

12. In 2002, the Centers for Disease Control and Prevention estimated that, on average, each adult smoker in the United States cost their employer \$3391 in additional health care and productivity losses annually. ANNUAL SMOKING-ATTRIBUTABLE MORTALITY, YEARS OF POTENTIAL LIFE LOST, AND ECONOMIC COSTS—UNITED STATES, 1995–1999, Apr. 12, 2002, <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm> [hereinafter CDC Report].

13. See *id.* The CDC, along with other individuals and organizations, has estimated the costs of smoking to employers. *Id.* See also AM. CANCER SOC'Y, SMOKING IN THE WORKPLACE COSTS YOU MONEY, [http://www.cancer.org/downloads/COM/Smoking\\_in\\_the\\_Workplace\\_Costs\\_You\\_Money.pdf](http://www.cancer.org/downloads/COM/Smoking_in_the_Workplace_Costs_You_Money.pdf). However, all of these estimates have methodological problems that are beyond the scope of this article.

14. A recent study by the National Institute of Health found that how much and how often people consume alcohol independently influences the risk of death from a number of causes. Nat'l Inst. on Alcohol Abuse and Alcoholism, *Quantity and Frequency of Drinking Influence Mortality Risk*, <http://www.niaaa.nih.gov/NewsEvents/NewsReleases/mortalityrisk.htm>.

15. See, e.g., Rob Stein, *Scientists Finding Out What Losing Sleep Does to a Body*, WASH. POST, Oct. 9, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/08/AR2005100801405.html>.

16. The CDC states that "[t]he most reliable way to avoid transmission of STDs is to abstain from sex or to be in a long-term, mutually monogamous

ban off-duty smoking because it increases costs, it is equally acceptable for employers to control all of these other types of behavior. The more we learn about the relationships between behavior and health, the more we realize that everything we do in our private lives affects our health. If employers are permitted to control private behavior when it is related to health, virtually every aspect of our private lives is subject to employer control.

Some people argue this isn't really a slippery slope—employers wouldn't try to control other aspects of people's private lives, only smoking.<sup>17</sup> These people don't understand business. Employers don't ban off-duty smoking because they are anti-smoking; they ban off-duty smoking to increase the bottom line. To an employer, a dollar saved by forcing an employee to give up junk food and lose weight is just as valuable as a dollar saved by forcing an employee to quit smoking. Recent studies from the Centers for Disease Control show that obesity is rapidly overtaking smoking as the leading cause of preventable death in the United States.<sup>18</sup> Cost-conscious employers will soon have more incentive to regulate diet and exercise than smoking.

In fact, some employers have banned other forms of private behavior. Multi-Developers, a real estate development company, prohibits employees from skiing, riding a motorcycle, or engaging in any other risky hobby.<sup>19</sup> The Best Lock Corporation, in Indiana,

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relationship with an uninfected partner.” Ctrs. for Disease Control & Prevention, *Sexually Transmitted Diseases; Treatment Guidelines: 2006; Clinical Prevention Guidance*, <http://www.cdc.gov/std/treatment/2006/clinical.htm#clinical1>.

17. See Micah Berman & Rob Crane, *Mandating a Tobacco-Free Workforce: A Convergence of Business and Public Health Interests*, 34 WM. MITCHELL L. REV. 1653, 1672 (2008) (arguing that tobacco use is distinguishable from other potentially hazardous activities and that “slippery slope concerns are entirely speculative”); Michele L. Tyler, *Blowing Smoke: Do Smokers Have a Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783, 794–95 (1998) (discussing the slippery slope doctrine and concluding that a smoking ban is unlikely to result in further invasions of other privacy rights because of economic factors); Christopher Valleau, *If You're Smoking, You're Fired: How Tobacco Could Be Dangerous To More Than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 490–92 (2007) (concluding that the slippery slope doctrine fails because smoking is inherently different than other lifestyle behaviors).

18. Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 J. AM. MED. ASS'N 1238–45 (Mar. 10, 2004), available at <http://www.csdp.org/research/1238.pdf>.

19. Zachary Schiller et al., *If You Light Up on Sunday, Don't Come in on Monday*, BUS. WK., Aug. 26, 1991, at 68. Multi-Developers, Inc.'s policy prohibits employees from engaging in “hazardous activities and pursuits including such things as skydiving, riding motorcycles, piloting private aircraft, mountain climbing, motor

prohibits the consumption of alcohol at any time.<sup>20</sup> Best Lock fired Daniel Winn after eight years of good performance because Mr. Winn went out for a few beers with some friends after work.<sup>21</sup> The city of Athens, Georgia, required all municipal employees to take cholesterol tests—if your cholesterol was too high, you were fired.<sup>22</sup>

Other employers have gone further. Lynne Gobbell lost her job at an Alabama insulation company because she had a “Kerry for President” bumper sticker on her car.<sup>23</sup> Glen Hiller, from West Virginia, was fired because his boss didn’t like a question he asked a candidate at a political rally.<sup>24</sup> Laurel Allen, from New York, was fired by Wal-Mart because it disapproved of her boyfriend.<sup>25</sup> Kimberly Turic, from Michigan, was fired for telling her supervisor that she was considering having an abortion.<sup>26</sup>

Virtually all of these terminations were legal. Under American law, an employer has the right to fire an employee at any time, for any reason, unless there is a statute prohibiting a specific reason for termination.<sup>27</sup> A variety of federal and state laws prohibit discrimination based on race, age, gender, religion, disability, and (in some jurisdictions) sexual orientation.<sup>28</sup> However, in other

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vehicle racing, etc.” *Id.* To the author’s knowledge, this is still the policy at Multi-Developers, Inc.

20. *Best Lock Corp. v. Review Bd.*, 572 N.E.2d 520, 521 (Ind. Ct. App. 1991). Best Lock Corporation’s tobacco, alcohol, and drug use rule (TAD Rule) states: “The use of tobacco, the use of alcohol as a beverage, or the use of drugs by an employee shall not be condoned. . . . Any employee violating this policy, at work or away from the plant, will be summarily terminated.” *Id.*

21. *See id.* (Winn admitted under oath, in a proceeding involving the termination of his brother from Best Lock Corporation, that he had consumed alcohol on several social occasions while employed at Best Lock Corporation).

22. Schiller et al., *supra* note 19. The city of Athens, Georgia, for a short period of time, required job applicants to submit to a cholesterol test. *Id.* Applicants whose cholesterol levels ranked in the top 20% of all applicants were eliminated from consideration for employment. *Id.* Local protests led to elimination of the policy. *Id.*

23. Paola Singer, *Fired Over Kerry Sticker; Her Loss Is Their Gain*, NEWSDAY, Sept. 17, 2004, at A33.

24. Jessica Valdez, *Frederick Company Fires Employee Who Taunted Bush*, WASH. POST, Aug. 22, 2004, at C06.

25. Dottie Enrico, *When Office Romance Collides With the Corporate Culture*, NEWSDAY, Aug. 1, 1993, at 70. Allen was dating a fellow employee while she was still married to her husband, although they were separated. *Id.*

26. *Pregnancy Bias Case Costs a Hotel \$89,000*, CHI. TRIB., Mar. 16, 1994, at M3. Turic later won a lawsuit for wrongful termination and was awarded \$89,000. *Id.*

27. *See generally* 27 AM. JUR. 2D *Employment Relationship* § 10 (2008).

28. *See, e.g.*, 42 U.S.C. § 2000e-2 (2000) (making it illegal for an employer to discriminate on the basis of race, color, religion, sex, or national origin); MINN.

than a handful of states,<sup>29</sup> there is no law against being fired because your employer disapproves of your private life.

Employment decisions should be based on how well you do your job, not on your private life. Most successful companies operate on this principle. There is no reason all companies shouldn't follow it.

Where does this leave employers who don't want to absorb the additional health care costs created by employee smoking? One option is for employers to require a higher personal contribution to the health care plan for employees who smoke.<sup>30</sup> There is nothing wrong with this in principle. We may all have the right to conduct our private lives as we choose, but we do not have the right to make other people take responsibility for the consequences of our behavior. If people choose to smoke, there is nothing unfair about requiring them to take financial responsibility for the health care costs this behavior creates. Employers could determine the amount by which health care costs of smokers exceed those of non-smokers and require smoking employees to contribute this amount personally.

Employers that choose this policy need to ensure that their surcharge is actuarially correct. While there is no question that smokers have higher health care costs, the actual cost differential is not entirely clear.<sup>31</sup> Moreover, most of the published estimates come from advocates and not from neutral experts.<sup>32</sup> Employers need to check their sources and consult with independent actuaries before determining the amount of the surcharge.

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STAT. § 363A.08 subdiv. 2 (Supp. 2007) (listing sexual orientation as a class protected from employment discrimination).

29. New York, Colorado, North Dakota, and Montana offer broad protection of legal off-duty behavior. See NWI ON LIFESTYLE DISCRIMINATION, *supra* note 11, at 11–13 (citing 2004 STATE BY STATE GUIDE TO HUMAN RESOURCES LAW (John F. Buckley & Ronald M. Green eds., 2004)).

30. See Peters, *supra* note 9 (describing the \$50 fee charged by one employer to all smokers to cover increased healthcare costs associated with smoking-related illnesses).

31. See CDC Report, *supra* note 12; see also KATE FITCH ET AL., AMERICAN LEGACY FOUNDATION, COVERING SMOKING CESSATION AS A HEALTH BENEFIT: A CASE FOR EMPLOYERS 11 (2007), [http://www.americanlegacy.org/PDFPublications/Milliman\\_report\\_ALF\\_-\\_3.15.07.pdf](http://www.americanlegacy.org/PDFPublications/Milliman_report_ALF_-_3.15.07.pdf) (estimating that employees who suffer strokes or develop coronary artery disease can cost their employers upwards of \$65,000 per year in medical expenses).

32. Two of the most active of these advocates are The American Cancer Society, <http://www.cancer.org>, and The American Legacy Foundation, <http://www.americanlegacy.org>.

To be completely fair, employers should also analyze the amount of smokers' higher health care charges that the company will pay. For example, one of the largest components of smokers' health care costs is cancer treatment.<sup>33</sup> In many cases, smoking-related cancers occur later in life, after the person has retired, with the majority of that person's medical costs paid by Medicare.<sup>34</sup> Such factors should be included in calculating an employee's surcharge.

Even if actuarially correct, however, there are other concerns about surcharges. To be fair, surcharges should apply to all health-related off-duty behavior. Some non-smokers have higher health risks than some smokers. Someone who eats lunch at McDonald's seven days a week, never exercises, and drinks a six-pack of beer every day probably has greater health risks than a light smoker who does everything else right. Since the justification for the surcharge is the higher cost that the employee's behavior creates, in such cases the non-smoker should pay a higher surcharge. To be fair, a surcharge program needs to contain penalties for poor diet, lack of exercise, risky hobbies, risky sex, and anything else that affects health. This may not be unfair from the standpoint of personal responsibility, but from the perspective of individual autonomy it is "Henry Ford-light."

There are also privacy concerns implicated in such surcharges. For an employer to establish a comprehensive surcharge program, it needs comprehensive knowledge of its employees' private lives. It needs to know how much employees drink, what they eat, what they do in their spare time, and how many sexual partners they have. Do we really want to reveal this information to our employers? Employers' poor historical record of maintaining the privacy of personal information increases the level of concern about surrendering our privacy to this degree.<sup>35</sup>

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33. See AM. CANCER SOC'Y, CANCER FACTS & FIGURES 2008, at 48-51, <http://www.cancer.org/downloads/STT/2008CAFFfinalsecured.pdf>.

34. See News Release, U.S. Dep't of Health & Human Servs., Medicare Will Help Beneficiaries Quit Smoking: New Proposed Coverage for Counseling as Medicare Shifts Focus to Prevention (Dec. 23, 2004), *available at* <http://www.hhs.gov/news/press/2004pres/20041223a.html> (stating that "[i]n 1993, smoking cost the Medicare program about \$14.2 billion, or approximately 10 percent of Medicare's total budget").

35. See, e.g., RITA TEHAN, CONG. RESEARCH SERV. REPORT FOR CONG., DATA SECURITY BREACHES: CONTEXT AND INCIDENT SUMMARIES tbl. 1 (May 7, 2007), *available at* <http://ftp.fas.org/sgp/crs/misc/RL33199.pdf>.

Enforcement of surcharge programs also raises privacy issues. Many employees will misrepresent their private behavior in order to avoid penalties. To protect the integrity of the program, employers will need programs to detect such deception. One method is urine testing. Cotinine, the most common metabolite of nicotine, can be detected in smokers' urine, just as THC metabolites are detected in the urine of marijuana users.<sup>36</sup> Before initiating such a program, however, employers need to consider how employees will react. While Americans have generally become accustomed to one-time pre-employment urine tests, random testing of incumbent employees is relatively rare, in part because of employee resistance. Such programs could also run afoul of the Americans with Disabilities Act's prohibition of medical testing that is not job-related.<sup>37</sup>

Another method is to encourage employees who know another employee is secretly smoking off-duty (or secretly riding a motorcycle) to inform management. This approach, however, seems even more likely to cause conflict. What happens to the working relationship between two people when one has turned the other in for smoking or drinking off-duty?

In short, surcharge programs may well create more problems than their cost savings justify.

It might be far more productive for employers to approach employee medical costs from a helpful perspective rather than a punitive one. Very few of us are proud of our bad habits. Surveys repeatedly show that most smokers want to quit.<sup>38</sup> Millions of us make New Year's resolutions to eat less, go to the gym more often, and cut down on our drinking.<sup>39</sup> Employers could do a great deal

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36. Found. for Blood Research, Important Patient Information About . . . Cotinine Testing, <http://www.fbr.org/publications/pamphlets/cotinine.html> (last visited Apr. 10, 2008).

37. See Americans with Disabilities Act, 42 U.S.C. § 12112 (d)(4)(A) (2000). This provision of the ADA states:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

*Id.*

38. See, e.g., Jonathan Lynch, *Survey Finds Most Smokers Want to Quit*, CNN.com, July 25, 2002, <http://archives.cnn.com/2002/HEALTH/07/25/cdc.smoking/index.html> (citing a CDC survey that found that 70% of the 32,374 smokers surveyed responded that they wanted to quit smoking).

39. See, e.g., RIS Media.com, *The Top New Year's Resolutions for 2008* and

to help us follow through on these good intentions. For example, employers could pay for smoking cessation programs for employees who want to quit.<sup>40</sup> They could even offer a modest incentive for employees who are successful, such as an extra vacation day or a small amount of money. Such programs are highly cost-effective.<sup>41</sup> The same approach could be equally effective in helping employees who want to lose weight. A more ambitious program would make medical personnel available for voluntary consultations with employees about how to improve their health. This type of program not only avoids the legal and morale problems of the punitive approach but would be perceived as an added benefit by employees.

The fact that so many employers are approaching this issue in a punitive fashion reflects that we have lost our way on smoking in the United States. Our goals should be:

1. Protecting non-smokers from second-hand smoke;
2. Keeping tobacco out of the hands of minors; and
3. Helping smokers who want to quit.

Our actual policy, however, has become eliminating smoking by any means necessary.

You can see this in our official national policy on smoking. The Healthy People Initiative, a program of the Federal Department of Health and Human Services, has a goal of cutting adult smoking in half by the year 2010.<sup>42</sup> Not to protect non-

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How to Keep Them (Dec. 20, 2007), <http://rismedia.com/wp/2007-12-19/the-top-new-years-resolutions-for-2008-and-how-to-keep-them/>.

40. See, e.g., Milt Freudenheim, *Seeking Savings, Employers Help Smokers Quit*, N.Y. TIMES, Oct. 26, 2007, at A1 (citing U.P.S. and Union Pacific Railroad as companies that offer smoking cessation programs).

41. See Free & Clear, Inc., *Reducing the Burden of Smoking on Employee Health and Productivity*, [http://www.freeclear.com/case\\_for\\_cessation/library/studies/burden.aspx?nav\\_section=2](http://www.freeclear.com/case_for_cessation/library/studies/burden.aspx?nav_section=2) (“There is much evidence to support that paying for tobacco cessation treatment is the single, most cost-effective health insurance benefit for adults and is the benefit that has the greatest positive impact on health.”) (citing NAT’L BUS. GROUP ON HEALTH, *REDUCING THE BURDEN OF SMOKING ON EMPLOYEE HEALTH AND PRODUCTIVITY*, VOL. 1, NO. 5 (2003), available at [http://www.businessgrouphealth.org/pdfs/issuebrief\\_cphssmoking.pdf](http://www.businessgrouphealth.org/pdfs/issuebrief_cphssmoking.pdf)).

42. Healthy People 2010 Volume II, Tobacco Use, [http://www.healthypeople.gov/Document/HTML/Volume2/27Tobacco.htm#\\_Toc489766214](http://www.healthypeople.gov/Document/HTML/Volume2/27Tobacco.htm#_Toc489766214) (last visited Apr. 6, 2008).

smokers, not to help smokers who want to quit, but to eliminate smoking, period.

This mistake is not merely verbal; it shows in actions as well. Legislation has been enacted in most states prohibiting companies from terminating employees based on off-duty smoking.<sup>43</sup> Such laws do not expose employees to second-hand smoke—they simply protect peoples' right to behave as they want in their own home. Employers can still restrict or ban tobacco use on company property. Anti-smoking groups consistently and vigorously opposed the enactment of these laws.<sup>44</sup> When challenged, they claimed that such laws give undeserved special protection to smokers.<sup>45</sup> But when bills were introduced protecting all forms of legal off-duty conduct, the anti-smoking establishment opposed them too.<sup>46</sup> The only policy consistent with the actions of the anti-smoking establishment is prohibition.

The prohibitionist mentality is not confined to tobacco regulation. Kelly Brownell of Yale University is one of the leading thinkers of the health community. She has proposed that the government create a special tax on junk food so that people will be encouraged to eat less of it.<sup>47</sup> According to Brownell, "the government needs to regulate food as it would a potentially dangerous drug."<sup>48</sup>

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43. Thirty states and the District of Columbia have lifestyle discrimination statutes that prohibit employers from firing employees for certain legal, private activities, including smoking. These states include: Arizona, California, Colorado, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. NWI ON LIFESTYLE DISCRIMINATION, *supra* note 11, at 11–13.

44. *See, e.g.*, SAMANTHA K. GRAFF, TOBACCO CONTROL LEGAL CONSORTIUM, THERE IS NO CONSTITUTIONAL RIGHT TO SMOKE: 2008, at 3 (2d ed. 2008) (arguing that off-duty restrictions on smoking are not precluded by an employee's right to privacy), *available at* <http://tobaccolawcenter.org/documents/constitutional-right.pdf>.

45. *See, e.g.*, Matthew Reilly, *Florio Urged to Provide Smokers Bias Protection*, STAR-LEDGER (Newark, N.J.), Jan. 4, 1991 (quoting Regina Carlson, executive director of the New Jersey Group Against Smoking Pollution (GASP), as stating that the passage of a bill that protects the privacy rights of smokers "would elevate drug addiction to civil rights status, along with race and sex").

46. *See, e.g.*, GRAFF, *supra* note 44, at 5 (stating that "smoker protection laws," including laws protecting all off-duty legal conduct, are a "barrier to a smoke-free agenda").

47. *Is it Time for a Fat Tax?*, PSYCHOL. TODAY, Sept.–Oct. 1997, at 16.

48. *Id.*

This is a serious error. Not only is it wrong for any of us to try to tell the rest of us how to live in our own homes, prohibition is unworkable in practice.

America has tried prohibition. In 1919 the Volstead Act prohibited the production or consumption of alcohol.<sup>49</sup> Alcohol production didn't stop; it merely went underground as legitimate companies were replaced by criminals like Al Capone.<sup>50</sup> Nor did Americans stop drinking. They just turned to illegal bars and homemade liquor. This required us to devote vast amounts of our criminal justice resources searching for underground bars and ordinary citizens brewing beer in their bathtubs. Only fourteen years later, Prohibition was universally rejected as a colossal failure and the law was repealed.<sup>51</sup> One definition of insanity is to keep repeating the same behavior expecting different results.

A comprehensive proposal for an alternative national policy is beyond the scope of this paper, but a good first step would be to give the Food and Drug Administration (FDA) jurisdiction over tobacco products. Tobacco is by far the most dangerous consumer substance available in America. To fail to regulate it is indefensible. We regulate air conditioners, hammocks, and even coffee mugs in the interest of public safety.<sup>52</sup> It is absurd not to regulate tobacco. Giving the FDA jurisdiction would also establish that tobacco is a legitimate consumer product that needs to be regulated, not prohibited.<sup>53</sup>

We need to follow a similar regulatory policy regarding other forms of risky behavior; one that focuses on protecting other

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49. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 238 (2007).

50. See, e.g., Chi. Historical Soc'y, History Files—Al Capone, <http://www.chicagohs.org/history/capone/cpn1a.html> (last visited Apr. 6, 2008).

51. See Brown, *supra* note 49, at 238.

52. See, e.g., 67 Fed. Reg. 36368-01 (Aug. 6, 2002) (to be codified at 10 C.F.R. pt. 430) (concerning the regulation of energy conservation standards for central air conditioners); Christopher D. Zalesky, *Pharmaceutical Marketing Practices: Balancing Public Health and Law Enforcement Interests; Moving Beyond Regulation-Through-Litigation*, 39 J. HEALTH L. 235, 252 (2006) (discussing the FDA's regulation of the advertisement of prescription drugs, including the imprinting of prescription drug names on items such as coffee mugs).

53. A bipartisan group of legislators proposed legislation in February 2007 that would give the FDA regulatory power over tobacco. See Christopher Lee, *New Push Grows for FDA Regulation of Tobacco*, WASH. POST, Feb. 17, 2007, at A08. The Bush administration and the FDA's skepticism of such a regulatory measure appear to have stalled the movement for now. See Marc Kaufman, *Decades-Long U.S. Decrease in Smoking Rates Levels Off*, WASH. POST, Nov. 9, 2007, at A07.

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people from the risks we choose to take.