Is everything a crime now?

Tobacco, Smoking, and Insider Trading

Speakers at recent Cato events have highlighted the disturbing trend of lawmakers' abusing the rule of law. At a November 10 Cato Book Forum for his new book, Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process, *Cato senior fellow Robert A. Levy argued that the rule of law was a casualty of the 1990s' war on the tobacco industry At a December 10 Cato City Seminar in New York, Vanity Fair columnist Christopher Hitchens criticized Mayor Bloomberg's nanny state for making New York City increasingly homogeneous. And at a December 14 Book Forum to promote his new book,* Go Directly to Jail: The Criminalization of Almost Everything, *Cato senior editor Gene Healy exposed Congress's increasing propensity to apply federal criminal penalties to conduct that no sane person would consider a crime. Excerpts from their remarks follow.*

Robert A. Levy: For 40 years, there was no final judgment in any trial against tobacco companies for smoking-related illness. Juries understood that we were each at liberty to consume the products that we want to consume; but if we do so, we assume the risk. And we are therefore responsible for the consequences of our acts.

At the same time that juries were laying down that basic principle, state Medicaid programs were coming under intense financial pressure. States are entitled to sue to recover Medicaid outlays for smoking-related illness if they can show that the tobacco companies caused those illnesses. But they have to do that under a legal process called subrogation. Basically, the state steps into the shoes of smokers who might have sued on their own behalf, except the state sues for them. But the state then bears the same burden of proof that the smoker would have borne. And the state is subject to the same defense that the tobacco company could have asserted. That defense includes "assumption of risk," which posits that the smoker was aware of the risk and is accountable for the consequences.

The assumption of risk defense had been a consistent winner for the industry, so the states had to find a way around it. They came up with a creative solution. They simply eliminated that provision of the law and applied the new rules—namely, no assumption of risk—retroactively.

Here's what the Florida statute said: "Assumption of risk is to be abrogated to the extent necessary to assure full recovery by Medicaid."

So the tobacco company, selling the same cigarettes to the same smoker, resulting in the same injury, would be liable if the smoker happened to be a Medicaid recipient, but not otherwise. Liability hinged on Medicaid status, a happenstance that was totally unrelated to any misbehavior by the industry.

Then, while they were at it, to absolutely ensure victory in court, the states also eliminated the requirement that they prove individualized causation. In other words, the states did not have to provide any link whatsoever between the tobacco companies' acts and the illness of a particular smoker. All they had to produce were generalized statistics showing that there is a higher incidence of certain diseases among smokers than among nonsmokers.

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In Maryland, the president of the state Senate acknowledged that he and his colleagues had effectively denied the industry any opportunity to defend itself. In an unguarded moment, he blurted to the *Washington Post*: "We changed centuries of precedent in order to assure a win in this case, which was no small feat."

So, faced with those odds in dozens of Medicaid suits, the industry decided to negotiate. The settlement was nothing but extortion, based on a repugnant rule of law. The states needed money. The tobacco companies have money. Ergo, companies pay; states collect.

There were also the settlement's restrictions on advertising. Consider this First Amendment paradox: We protect Klan speech. We protect flag burning. We protect gangster rap, which is targeted directly at kids and says to kids, you can spend your life in the drug culture, and if you happen to have a few spare moments, it's all right to murder some police officers. That's protected under the First Amendment. But if Tiger Woods appears in a cigarette ad wearing a Joe Camel tie tack, we're going to bring the boot of government down on R.J. Reynolds' neck.

There is little or no evidence of a link between cigarette ads and aggregate consumption. The purpose of cigarette ads, like automobile ads, is to encourage consumers to switch brands. Ads are not the cause of the problem. Why do kids smoke? They smoke because of peer pressure, because their parents smoke, and because they're rebelling against authority.

That said, if the plaintiffs in a tobacco suit can prove that they were defrauded, that they became addicted prior to age 18 by the industry's deception, and if tobacco indeed caused their illness, then they may have a decent legal argument. But if they're not addicted by age 18, at that point they're adults. They're the same adults who are allowed to go to war and kill people, allowed to vote and decide who is going to run the country, to get married, to get divorced, to have an abortion, and those decisions are no less weighty than the decision to smoke cigarettes.

If an adult can choose to stop and he doesn't, then he assumes the risk. And we can't hold the tobacco companies responsible, least of all on a retroactive basis.

So what should we do to protect the health of minors who might be seduced by cigarettes? We should vigorously enforce the laws that are on the books in all 50 states that prevent the sale of tobacco products to

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underage smokers. We ought to prosecute the retailers who break those laws. We ought to require proof of age at retail establishments, and even forbid vending machine sales of cigarettes where kids are the main customers, such as in arcades and schools.

And of course, if kids are caught smoking or trying to buy cigarettes, we ought to tell their parents. Parenting is, after all, the job of moms and pops, not the job of the tobacco companies and not the job of the government.

One politician got it right. George McGovern lost a daughter to alcoholism, so he knows firsthand the ravages of abusive behavior. Writing in the *New York Times,* McGovern warned: "Our choices may be foolish or self-destructive, but we cannot micromanage each other's lives. When we no longer allow those choices, civility and common sense will be diminished."

Christopher Hitchens: I often take the train from Washington, D.C., to New York and back. A few years ago they put the smoking car on the end of the train so nonsmokers wouldn't have to go through it to get to other parts of the train. And then the day came when they said, "We're taking that car off the train altogether." And I thought, "Now we've crossed a small but important line." It's the difference between protecting nonsmokers and state-sponsored behavior modification for smokers.

And I thought there was insufficient alarm at the ease with which that was done. Because state behavior modification, no matter what its object, should be viewed skeptically at the very least. There's serious danger in the imposition of uniformity—the suggestion that one size must fit all.

When the complete ban on smoking in all public places was enacted in California, I called up the assemblyman who wrote the legislation and I said: "I've just discovered that bars are not going to be able to turn themselves into a club for the evening and charge a buck for admission for people who want to have a cigarette. You won't be able to have a private club. You won't even be able to have a smoke-easy, if you will, in California."

And he said, "That's right."

I said, "Well, how can you possibly justify that?"

And he said, "Well, it's to protect the staff. It's labor protection legislation. We don't want someone who doesn't want to smoke, who doesn't like it, having to work in a smoky bar."

And I said, "You don't think that if there were bars that allowed it and bars that forbade it, that, sooner or later people would apply for the jobs they preferred, and it would sort of shake out?"

He replied, "No. We could not make that assumption."

So we have to postulate the existence, if you will, of a nonexistent person in a nonexistent dilemma: the person who can find only one job, and that job is as barkeep in a smoking bar. This person must be held to exist, though he or she is notional. But everyone who actually does exist must act as if this person is real.

There used to be areas, like the West Village in New York or North Beach in San Francisco, that are now dull and boring and have to be policed. And I think that's a terrible loss. I write better when I have a cigarette and a drink. I'm more fun to be with—other people seem less boring. The life of bohemia, of the small cafe and the little bar that never quite closes, is essential to cultural production. It may seem like a small thing. It doesn't add very much to the GNP. But if you take it away, you may not know what you've lost until it's too late.

But suppose all this was really a good idea—people might live longer. Suppose all that was really true. There would still be the question of enforcement, that awkward little bit that comes between your conception of utopia and your arrival there. The enforcement bit. You could appoint regulators and inspectors to enforce the law. It would take quite a lot of them, but you could do it. There are such people. I know about them because they've come after me.

My editor, Graydon Carter, the splendid editor of *Vanity Fair,* and I were having a cigarette in his office. And someone on our staff—it's not very nice to think about it—was kind enough to drop a dime on us. And round the guys came. "You're busted!" These people are paid by the city, which evidently has no better use for its police.

I think that's bad enough. But then Graydon went on holiday, and I went back to Washington. And his office was empty. But they came round again and they issued him another ticket because he had on his desk an object that could have been used as an ashtray. In his absence. With no one smoking. But there are officials who have time enough to come round and do that.

The worst part is that the staff has to become the enforcers. The waitresses have to become the enforcers. The maitre d' has to become the enforcer. He has to act as the mayor's representative. Because it's he who is going to be fined, not you. If you break the law in his bar, he is going to have to pay.

So everyone is made into a snitch. Everyone is made into an enforcer. And everyone is working for the government. And all of this in the name of our health.

Now, I was very depressed by the way that this argument was conducted. There were people who stuck up for the idea that maybe there should be a bit of smoking allowed here and there. But they all said it was a matter of the revenue of the bars and the restaurants. That was the way the *New York Times* phrased it.

In no forum did I read: "Well, is there a question of liberty involved here at all? Is there a matter of freedom? Is there a matter of taste? Is there a matter of the relationship of citizens to one another?"

And something about it made me worry and makes me worry still. The old slogan of the anarchist left used to be that the problem is not those who have the will to command. They will always be there, and we feel we understand where the authoritarians come from. The problem is the will to obey. The problem is the people who want to be pushed around, the people who want to be taken care of, the people who want to be a part of it all, the people who want to be working for a big protective brother.

Gene Healy: In a free society, there ought to be very few offenses for which you can be handcuffed and hauled off to jail. Those offenses ought to be clearly defined. You ought to be able to look them up. And they ought to be limited to the kind of behavior that everybody recognizes as things you can rightfully lose your liberty for—killing people, stealing from them, defrauding them. Serious matters.

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POLICY FORUM *Continued from page 9*

That's not the system we live under today. Over the past several decades, an unholy alliance of tough-on-crime conservatives and anti-big-business liberals has utterly transformed the criminal law. So while violent crime often goes unpunished, Congress continues to add new, trivial offenses to the federal criminal code. The criminal law has become just another way for Congress to show it's serious about whatever the social problem of the month is, whether it's corporate scandals or steroid use.

As you might expect, all of this happened in clear violation of the Constitution. There are only three specifically enumerated federal crimes in the Constitution: treason, piracy, and counterfeiting. The federal government has no general police power to prosecute ordinary crimes. It was never intended to do that. But it acts as though it does have that power. Federal jurisdiction has expanded to include a host of crimes that are already illegal at the state level: drug crimes, gun crimes, robberies, car theft—almost everything short of jaywalking can now be prosecuted federally.

On top of that comes a host of crimes that hardly pass the straight face test. It is a federal crime to deal in the interstate transport of unlicensed dentures. You can get up to a year in jail for that. You can go to prison for up to six months for pretending to be a member of the 4-H Club. You can get six months for misappropriating the character "Woodsy Owl" or his associated slogan "Give a hoot, don't pollute." It is a federal crime to disrupt a rodeo. Now, I yield to no man in my desire for orderly rodeos—but why on earth is this a federal issue?

But overcriminalization is not just a matter of a few ridiculous crimes or some violations of federalism. I wish it were. But it's much more serious than that.

It's also laws that sweep far too broadly. For example, most people think Martha Stewart went to jail for insider trading. That's false. She wasn't even charged criminally with insider trading. Instead she was sent to prison for attempting to cover up something that wasn't even a crime. She was convicted under an insanely broad statute covering "misrepresentations to the federal government." You don't have to be under oath. And they don't have to give you a warning. And it's perfectly OK for them to lie to you. The statute applies to "any matter within the jurisdiction of the executive, legislative or judicial branch of the United States." Which, given the expansion of federal jurisdiction to every area of American life, is broad indeed.

You can also go to prison for mere negligence. Historically, to lock someone up, you had to show criminal intent—what Blackstone called "a vicious will." But today we often send people to jail for making mistakes or not understanding the stag-

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geringly complex regulations under which businesspeople have to operate.

For example, four years ago, the Supreme Court refused to hear the appeal of a guy named Edward Hanousek. Hanousek was a roadmaster for an Alaskan railroad company. When a contractor working under him accidentally punctured an oil pipeline and caused a spill in the Skagway river, Hanousek was sent to jail for violation of the Clean Water Act. At the time of the spill, Hanousek had the day off, and was at home. Hanousek didn't break the pipe and didn't intend for it to be broken. But he went to jail.

Now, no one's saying that Hanousek and his company shouldn't have to pay through the nose for the damage they caused. But to put the guy in jail for negligence violates every historic principle of the criminal law. And it puts a great number of people at risk. In their dissent from the Supreme Court's denial of review, Justices Thomas and O'Connor noted that the lower court's decision had the potential to "expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."

And, speaking of heightened criminal liability: three U.S. seafood dealers and one Honduran lobster fleet owner are currently doing hard time in federal prison for importing the wrong size lobster tails and packaging them in clear plastic bags rather than cardboard boxes. They ran afoul of the Lacey Act, a federal statute that makes it a crime to import fish or wildlife taken "in violation of any foreign law."

The U.S. government argued that they had broken Honduran law because some of the lobster tails in their shipment—3 percent, to be exact—were less than five and a half inches long, and because a Honduran regulation supposedly required them to be packed in boxes.

One problem with that theory was that, according to the government of Honduras, no laws were violated. The Honduran embassy filed an amicus brief in the case saying that the regulations were invalid and no laws had been violated. That view was supported in court by the attorney general of Honduras and the agriculture secretary. Nonetheless, Robert Blandford, Albert Schoenwetter, and Donald McNab, three small businesspeople with no criminal record, are now serving eight-year terms in federal prison. Their partner in crime, Diane Huang, a seafood importer with two kids aged 6 and 10, got off easy. She got two years and will be out in July 2006.

I'm afraid that this is a case where diagnosing the problem is a whole lot easier than prescribing a solution. But as hard as it is to find solutions, it's urgent that we start talking about how to relimit the criminal law. It's an issue that goes right to the core of individual liberty and the kind of society we want to be. ■