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# Is there a human right to tobacco control?

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**Abstract:** This chapter defends a legal human right to tobacco control. Building on existing work, the chapter argues that the legal case for such a right is strong. Existing international human rights treaties, chiefly the International Covenant on Economic, Social and Cultural Rights, recognise a human right to health alongside several other rights that speak for covering tobacco control under human rights law. Drawing on Allen Buchanan's pluralistic justificatory framework for human rights, the chapter argues that the philosophical case is strong too. Tobacco is among the deadliest public health threats worldwide and its health impacts so severe that humans should have a claim against their governments to protect them against the harms of tobacco. Human rights law is a promising avenue to strengthen this claim. The chapter then defends a human right to tobacco control against several philosophical worries. For example, is strong tobacco control compatible with personal freedom? Is it compatible with personal consent? Would human right legislation facilitate power relations that unduly restrict national and individual self-determination? This chapter argues that concerns with freedom of choice, consent and power relations do not speak against tobacco control. Conversely, a concern with power relations speaks for a human right to tobacco control, as it could lessen the power asymmetries between tobacco companies and vulnerable populations, such as children, smokers of lower socioeconomic status and citizens in low-income countries with weaker governance structures.

# 1 Introduction

Smokers lose around ten years in life expectancy and one in two smokers die of smoking-related conditions, such as COPD, cancer and cardiovascular conditions.<sup>1 2</sup> The magnitude of tobacco as a public health problem is staggering. The World Health Organisation estimates that tobacco kills around seven million people each year, 890,000 of which through second-hand smoke.<sup>3</sup>

If human rights are meant to protect fundamental human interests – and life and health clearly rank among them – we might conclude that individuals should have a human right to be covered by tobacco control, given that tobacco threatens the health and life of so many people. However, legally and philosophically, human rights are in a category of their own. To claim that it would be good if fewer people smoked is one thing. To say that national sovereignty should be restricted by human rights law to enforce tobacco control is quite another.

In this chapter, I argue that tobacco control should be covered by human rights law and defend this idea against philosophical objections. In section 2, I draw on Allen Buchanan’s theory of human rights and existing legal research to make the case for a right to tobacco control. In sections 3, 4, 5, and 6, I complete this defence by addressing philosophical objections one might raise to a human right to tobacco control. Section 3 addresses a libertarian objection around the negative/positive rights distinction. Section 4 discusses whether strict tobacco control is compatible with freedom of choice. Section 5 discusses whether strict tobacco control is compatible with respect for individual consent. Section 6 discusses whether human rights legislation would facilitate power relations that unduly restrict national and individual self-

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<sup>1</sup> I would like to thank Marie Gispen, Brigit Toebes, Deryck Beyleveld and Adam Etinson for helpful comments and pointers.

<sup>2</sup> Prabhat Jha and others, ‘21st-Century Hazards of Smoking and Benefits of Cessation in the United States’ (2013) 368 *New England Journal of Medicine* 341.

<sup>3</sup> ‘WHO Tobacco Fact Sheet’ (*World Health Organization*, 2018) <<http://www.who.int/news-room/fact-sheets/detail/tobacco>> accessed 3 August 2018.

determination. I argue that concerns with negative rights, freedom of choice, consent and power relations do not speak against a human right to tobacco control. Rather than creating worrying power asymmetries, I argue that human rights legislation might help curb Big Tobacco's power to shape people's environments in deleterious ways. Particularly for people living in low-income countries with weaker public health governance – and other vulnerable groups like children – a human rights approach should be empowering.

Note that when I speak of 'a human right to tobacco control', I use this as a shorthand for the idea that existing human rights, such as a right to health, should be extended to ground claim rights for tobacco control. I do not mean that 'a human right to tobacco control' should itself be added as a fundamental human right to human rights treaties.

## 2 Human Rights and Tobacco Control

### 2.1 The Philosophy of Human Rights

Among other projects, philosophers writing on human rights are concerned with their *justification*. Philosophers often distinguish between 'moral rights theories' (or 'orthodox' or 'naturalistic') and 'political' theories of human rights.<sup>4</sup> Moral rights theories seek to justify legal human rights by determining first the fundamental and universal *moral* rights people have solely in virtue of being human. For example, Alan Gewirth and James Griffin, in different ways, defend human rights as those necessary to protect human agency.<sup>5</sup> *Political* theories of human rights, in contrast, focus on

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<sup>4</sup> Adam Etinson, *Human Rights: Moral Or Political?* (Oxford University Press 2018); S Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 *Journal of Moral Philosophy* 327.

<sup>5</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1991); Roger Crisp, *Griffin on Human Rights* (Oxford University Press 2014); Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982); James Griffin, *On Human Rights* (Oxford University Press 2009). Also see Beyleveld's chapter in this book. For other moral rights theories, see Rowan Cruft, S Matthew

the practical functions human rights play in international politics. Such theories take their cue from John Rawls in *Law of Peoples*, who focussed on the role of human rights to limit sovereignty.<sup>6</sup> Following Rawls, recent defenders of the political view think that what makes human rights ‘special’ are their functions in international political and legal practice. But, unlike Rawls, they draw a more varied and nuanced picture of what those functions are.<sup>7</sup>

For the purposes of this chapter – and the more applied focus of this book – I try to sidestep this dichotomy and largely draw on Allan Buchanan’s theory of human rights. Buchanan’s theory is theoretically flexible – thereby escaping the above distinction between moral and political theories – and seeks to connect relatively closely with the practice of international human rights. Two important planks of his theory are the following.

First, Buchanan distinguishes between a legal human right and a moral human right. Buchanan argues that to justify a legal human right it is neither necessary nor sufficient to identify a corresponding moral right.<sup>8</sup> For example, a corresponding moral right is not always necessary when we seek to justify a legal human right, because some human rights are primarily there to enable societal values. For instance, legal human rights are sometimes meant to protect status equality which can encompass laws against discrimination. Conversely, a corresponding moral right is insufficient to ground a legal human right.<sup>9</sup> For example, if you promise to help me out,

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Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (Oxford University Press 2015) pt I. and James W Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press 1987).

<sup>6</sup> John Rawls, *The Law of Peoples: With, The Idea of Public Reason Revisited* (Harvard University Press 2001).

<sup>7</sup> Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2011); Joseph Raz, ‘Human Rights in the Emerging World Order’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

<sup>8</sup> Allen Buchanan, *The Heart of Human Rights* (Oxford University Press 2013) 9–24; 53–7.

<sup>9</sup> *ibid* 56–7.

then on some moral theories, I might have a moral right that you keep your promise. But that does not imply that there ought to be a corresponding legal right.

But, while Buchanan rejects traditional moral rights theories, his view is not reductionist or ‘merely political’. Accordingly, a theory like Buchanan’s can allow for moral rights to play a role in the justification of legal human rights.<sup>10</sup> To justify legal human rights, Buchanan favours a *pluralistic justification* that can invoke individual moral rights, instrumental concerns and societal goods.

Second, Buchanan connects normative theorizing about human rights closely to international human rights practice, identifying several properties of this practice.<sup>11</sup> First, like Rawls, Buchanan thinks one important function of international human rights practice is to impose constraints on national sovereignty. Second, international human rights practice seeks to not only list a desirable set of human rights but to also identify correlative institutional duties and duty-bearers. Third, human rights legislation is in some way ‘superior’ in status to domestic law, although countries with a dualist legal system that sign up to international human rights must still translate human rights into national law. Fourth, human rights law primarily invokes obligations for states by identifying duties that states have towards the people under their jurisdiction. However, human rights are also increasingly important to non-state actors like private corporations too. Fifth, human rights law needs to protect human wellbeing. Sixth, human rights law ‘exhibits a robust commitment to affirming and protecting the equal basic moral status of all individuals’ exemplified by ascribing human rights to all individuals irrespective of gender, race, religion and so on, by demanding anti-discrimination legislation and equality before the law.<sup>12</sup> Finally, human

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<sup>10</sup> Allen Buchanan and Gopal Sreenivasan, ‘Taking International Legality Seriously’ in Adam Etinson (ed), *Human Rights: Moral Or Political?* (Oxford University Press 2018).

<sup>11</sup> Buchanan (n 7) 86–106.

<sup>12</sup> *ibid* 28. [emphasis removed]

rights law is ‘aspirational’ in that it can sometimes exercise political influence beyond the strictly legal obligations it imposes. Or as Buchanan puts it: ‘international human rights law serves as a moral standard that can be employed for political mobilization to change the behavior of states, corporations, and other agents, even in cases where it does not impose clear legal duties on them.’<sup>13</sup>

## **2.2 Human rights and tobacco control**

Let us return to tobacco control. To justify legal human rights to tobacco control, we need to establish that there are fundamental interests to be protected, that such human rights cohere with the existing function and practice of international human rights law, and that we can plausibly identify correlative duties and duty-bearers. The legal case for a human right to tobacco control is relatively well explored in the literature.<sup>14</sup> Let me briefly rehearse its main points.

The central human right that speaks for tobacco control rights is a right to health, as outlined in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). As mentioned above, tobacco consumption is among the leading causes of death and disease. The ICESCR states in Article 12 that individuals have a right ‘to the enjoyment of the highest attainable standards of physical and mental health’.<sup>15</sup> Given just how big a threat tobacco is to life, health and wellbeing, a failure to protect against its harms is a failure to protect the human right to health.

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<sup>13</sup> *ibid* 26.

<sup>14</sup> ME Crow, ‘The Human Rights Responsibilities of Multinational Tobacco Companies’ (2005) 14 *Tobacco Control* ii14; Carolyn Dresler and Stephen Marks, ‘The Emerging Human Right to Tobacco Control’ (2006) 28 *Human Rights Quarterly* 599; Carolyn Dresler and others, ‘Human Rights-Based Approach to Tobacco Control’ (2012) 21 *Tobacco Control* 208; Oscar A Cabrera and Lawrence O Gostin, ‘Human Rights and the Framework Convention on Tobacco Control: Mutually Reinforcing Systems’ (2011) 7 *International Journal of Law in Context* 285; Brigit Toebe and others, ‘A Missing Voice: The Human Rights of Children to a Tobacco-Free Environment’ (2018) 27 *Tobacco Control* 3.

<sup>15</sup> Cabrera and Gostin (n 13); Crow (n 13).

To specify the nature and scope of the ICESCR, the Committee on Economic, Social, and Cultural Rights (CESCR) adopted General Comments. These comments are highly authoritative but not, strictly speaking, legally binding. In General Comment 14 the CESCR specifies that states have obligations ‘to provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health behaviour choices they make.’<sup>16</sup> So, the case is even stronger and more straightforward for protecting children.<sup>17</sup>

But human rights to tobacco control extend beyond a right to health. Dresler et al. list further relevant rights:

For example, the right to a healthy environment (consider secondhand smoke or protection from nicotine from green tobacco sickness, or exposure to pesticides during tobacco agriculture); right to information (consider knowledge relative to risks of nicotine addiction ... ); right to education (consider children kept from school for tobacco agriculture); right to a sustainable income (consider indentured servitude or ‘company store’); right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development (consider use of limited family income to purchase tobacco rather than food).<sup>18</sup>

Going back to Buchanan’s identification of central features of international human rights practice, we can now appreciate how those make a human right to tobacco control plausible and attractive. First, such a right protects fundamental human wellbeing against the grave dangers posed by tobacco. Second, establishing protection against the harms of tobacco as a human right might help constrain or at least better monitor states that fail to protect their citizens. Such a right might open up avenues and instruments for better international reporting, monitoring and

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<sup>16</sup> General Comment 14, paragraph 23, ICESCR.

<sup>17</sup> Marie Gispén and Brigit Toebes, ‘The Human Rights of Children in Tobacco Control’ (2019) Forthcoming Human Rights Quarterly; Toebes and others (n 13).

<sup>18</sup> Dresler and others (n 13) 209–10.

enforcement.<sup>19</sup> Third, human rights can empower states when they face powerful tobacco companies. Clearly identifying human rights-based duties to protect citizens might legally empower states and add international power (more on this in section 6). Fourth, as mentioned earlier, Buchanan argues that the practice of international human rights can help mobilize politically around an issue even beyond existing legal obligations. This could potentially give greater prominence to tobacco's threat to human life and health. Finally, a legal human right to tobacco control need not be based on exactly one moral right only, as the above quotation shows. Multiple reasons can justify such a right, something that is well captured by Buchanan's justificatory pluralism.

So, we have both a good philosophical and legal case for a human right to tobacco control. However, the philosophical case encounters challenges, to which I turn now. Logically, they all revolve around the worry that *even if* it is valuable for individuals not to smoke, this by itself is insufficient to establish that governments have enforceable duties to pursue tobacco control.

### **3 A Libertarian Challenge: Negative Rights**

The first worry stems from the familiar distinction between negative and positive rights. A libertarian might argue that legal human rights can only be negative. A legal human right to tobacco control cannot be universally demanded of states, because such a right would imply many *positive* and not just *negative* duties. For example, tobacco control is typically thought to include policies like warning labels, public health information campaigns and cessation provision, all of which go beyond a negative duty not to interfere.

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<sup>19</sup> See Cabrera and Gostin (n 13).

However, Henry Shue famously argued that the distinction is untenable. Even traditional, purportedly negative rights involve a rich set of positive duties from states.<sup>20</sup> For example, the ‘negative’ right to bodily integrity requires ‘positive’ duties such as policing.<sup>21</sup> Conversely, many purportedly positive rights involve several negative duties. For example, Shue defends a right to subsistence. He argues that the state and private actors can act in ways that move people below the subsistence line.<sup>22</sup> A basic right to subsistence implies a negative duty to abstain from such actions. We can easily transfer the argument to tobacco control: a human right to tobacco control is largely about states protecting citizens against actions from companies that threaten human life and health. Accordingly, even purportedly ‘positive’ rights involve protecting individuals against third parties. Moreover, even if a right appears ‘positive’ rather than ‘negative’, this would be no principled argument against it.

Human rights practice now commonly replaces the negative/positive distinction with a threefold distinction. First, states ought themselves *respect* human rights and not violate them. Second, states ought to *protect* rights against those that seek to violate human rights. Third, states and the international community need to develop the necessary infrastructure, monitoring and delivery systems to positively *fulfil* human rights.<sup>23</sup>

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<sup>20</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1980). Also see Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5 Human Rights Law Review 81.

<sup>21</sup> Shue (n 19) 21.

<sup>22</sup> *ibid* 2.

<sup>23</sup> See General Comments 3 and 14 of the ICESCR and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. Also see Cabrera and Gostin (n 13) 288; Koch (n 19).

## 4 A Freedom-Right to Smoke?

A deeper philosophical challenge to public health legislation revolves around individual freedom.<sup>24</sup> Even if cigarettes are bad for individuals, a commitment to personal freedom might severely limit how far governments can regulate the sale, advertising and consumption of harmful products, including cigarettes.<sup>25</sup>

In this section, I use ‘freedom of choice’ exclusively as being about *external* choice options. I do not discuss the psychology behind an agent’s decision (which I discuss in section 5). Freedom of choice is about having ‘specific freedoms’ to choose from. On so-called negative theories of freedom, I have the specific freedom to do  $x$ , if and only if no one imposes interpersonal constraints on my doing  $x$ .<sup>26</sup> Other theories, for example the capability view, hold that not being interfered with is necessary but insufficient for having a specific freedom. I am free to do  $x$ , if and only if I have the capability to do  $x$ .<sup>27</sup> How much freedom of choice I have then depends on how many and what kinds of specific freedoms I have.

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<sup>24</sup> Tobacco companies have in recent years adopted the language of freedom rights to push a different objection, claiming that tobacco control interferes with their property rights and freedom of expression. In response, legal scholars have argued that those rights do not apply to tobacco companies the way they claim and, even if they did, proportionality would require that other rights, such as a right to health, carry more weight (Cabrera and Gostin 2011).

<sup>25</sup> Philosophers sometimes debate whether there is ‘a right to liberty’. For example, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 266; HLA Hart, ‘Are There Any Natural Rights?’ (1955) 64 *The Philosophical Review* 175; Douglas N Husak, ‘Ronald Dworkin and the Right to Liberty’ (1979) 90 *Ethics* 121. However, on the pluralistic justification picture adopted here, justifying a legal right does not necessitate a corresponding moral right. Plausibly, whatever the ‘correct’ set of human rights, freedom is among the values such rights should protect.

<sup>26</sup> Isaiah Berlin, ‘Two Concepts of Liberty’, *Four Essays on Liberty* (Oxford University Press 1969); Ian Carter, *A Measure of Freedom* (Oxford University Press 1999); David Miller, ‘Constraints on Freedom’ (1983) 94 *Ethics* 66; Hillel Steiner, *An Essay on Rights* (Wiley 1994).

<sup>27</sup> GA Cohen, ‘Freedom and Money’, *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (Princeton University Press 2011); Matthew H Kramer, *The Quality of Freedom* (Oxford University Press 2003); Andreas T Schmidt, ‘Abilities and the Sources of Unfreedom’ (2016) 127 *Ethics* 179; Amartya Sen, *Development as Freedom* (1st. ed., Knopf 1999).

So, is tobacco control compatible with (external) freedom of choice? The answer, one might be tempted to say, is ‘it depends’. Tobacco control can be very hands-off, for example, when the government offers cessation programmes or makes information about health risks available on a government website. At the other extreme, tobacco control might take more invasive forms, such as a ban on cigarettes, as has been put in place in Bhutan. My strategy here is to provide arguments as to why even the most radical proposals are in principle compatible with personal freedom. Given this compatibility, we should then have an easier time justifying less invasive, more standard tobacco control measures, such as taxation, restrictions of smoking in public places, information campaigns, regulation of products, age restrictions and so on. I develop the arguments in much greater detail elsewhere, so I here only rehearse the main argumentative moves.<sup>28</sup>

The first argument builds on a thought experiment. Imagine cigarettes were not yet a consumer product in your society and a company sought to introduce cigarettes as a new product.<sup>29</sup> Imagine a regulator such as the FDA must now decide whether to allow cigarettes. Assume further that the regulator knows what we know about cigarettes’ health risks. The regulator would not permit cigarettes, and such a decision might strike us as justified.<sup>30</sup> As Khoo et al. write: ‘tobacco is such a public health hazard that it is only an historical accident that makes its use lawful’.<sup>31</sup> But if *withholding* such an option is justified in this hypothetical scenario, should it not also be justified to

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<sup>28</sup> Andreas T Schmidt, ‘Freedom and Tobacco Control’ (2018).

<sup>29</sup> Andreas T Schmidt, ‘Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control’ (2016) 16 *The American Journal of Bioethics* 3; Andreas T Schmidt, ‘Response to Open Peer Commentaries on “Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control”’ (2016) 16 *The American Journal of Bioethics* W1.

<sup>30</sup> Richard Ashcroft, ‘Smoking, Health and Ethics’ in Angus Dawson (ed), *Public Health Ethics: Key Concepts and Issues in Policy and Practice* (Cambridge University Press 2011) 88; Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge University Press 2013) 169; Robert E Goodin, ‘The Ethics of Smoking’ (1989) 99 *Ethics* 574, 611; Deborah Khoo and others, ‘Phasing-out Tobacco: Proposal to Deny Access to Tobacco for Those Born from 2000’ (2010) 19 *Tobacco Control* 355.

<sup>31</sup> Khoo and others (n 29) 356.

*withdraw* such an option when it already exists? As I argue elsewhere, while forceful, this argument is not by itself decisive. Withdrawing an existing freedom might typically require a stronger justification than withholding a new, equivalent freedom. For example, existing options might have entered people's conceptions of the good, or communities might have developed traditions that involve such options. But the overall challenge remains: unless we have strong arguments as to why such reasons should be decisive, withdrawing the freedom to smoke should not be prohibitively harder to justify than withdrawing the option.

A second argument is about *intrapersonal freedom* or *freedom across time*. If a person's freedom matters now, her future freedom should also matter. If a young person takes up smoking, she might develop a strong addiction and, as a result, her future health, life expectancy and expected disposable income will be drastically reduced. As a result, her expected future freedom is drastically reduced.<sup>32</sup> Therefore, removing the option to smoke can sometimes increase a person's expected future freedom.<sup>33</sup> Therefore, a concern with freedom of choice can speak for rather than against strict tobacco control.

## 5 Consent

Some readers might worry that my response treats freedom as a good that ought to be promoted. Instead – they might argue – freedom is about *respecting* individuals in their voluntary decisions: even if cigarette smoking reduces people's range of options, it is not the state's responsibility to

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<sup>32</sup> The structure of the argument is familiar from John Stuart Mill's argument about voluntary slavery. John Stuart Mill, *On Liberty* (Penguin 1979) 173.

<sup>33</sup> Andreas T Schmidt, 'An Unresolved Problem: Freedom across Lifetimes' (2017) 174 *Philosophical Studies* 1413; Schmidt, 'Freedom and Tobacco Control' (n 27). Also see Kalle Grill and Kristin Voigt, 'The Case for Banning Cigarettes' (2016) 42 *Journal of Medical Ethics* 293. for a similar argument and Jessica Flanigan, 'Double Standards and Arguments for Tobacco Regulation' (2016) 42 *Journal of Medical Ethics* 305, 305. for a response.

increase expected freedom, as long as people consent freely. Respecting individuals as free implies letting people make their own decisions, even when those are bad for them.

Of course, respecting consent would leave many tobacco control policies untouched. First, we typically do not consider children sufficiently responsible to freely consent to various drugs, which gives the government much leeway for tobacco control directed at minors. Second, second-hand and third-hand smoke are hard to consent to, which makes protections such as smoking bans in restaurants and pubs easier to justify. Third, providing health information about cigarettes and even graphic warning signs are compatible with consent, as individuals can still decide for themselves whether to smoke or not.

But I argue now that a concern with consent does not even rule out more drastic interventions. For this, I first discuss how rational and autonomous people are in their decisions to smoke. Prima facie, how strongly we should value consent as an argument in law and public policy also depends on the extent to which people make decisions autonomously. Being able to consent requires, first, that one is sufficiently autonomous in one's preferences and desires when one decides (volitional autonomy) and, second, that one is sufficiently rational in assessing options (rationality). If those conditions are not fulfilled, then the argument against interference becomes much weaker and other reasons, such as health and wellbeing, more easily override a concern with consent. Let me start with volitional autonomy.

First, acting autonomously requires acting from desires or preferences that are truly one's own.<sup>34</sup> Consider cases where I lack volitional autonomy: through manipulation, peer pressure, brainwashing, or oppression, I might acquire preferences that I would not have chosen for myself

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<sup>34</sup> John Christman, 'Autonomy and Personal History' (1991) 21 *Canadian Journal of Philosophy* 1; Harry G Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 68 *The Journal of Philosophy* 5; Michael Garnett, 'The Autonomous Life: A Pure Social View' (2014) 92 *Australasian Journal of Philosophy* 143; Marina Oshana, *Personal Autonomy in Society* (Ashgate Publishing, Ltd 2006).

had I had the opportunity to develop preferences in a free and non-heteronomous environment. While different theories spell out volitional autonomy differently, the theoretical details should not detain us here. Most theorists agree that tenacious addictions impinge volitional autonomy. And nicotine addiction does so in several ways.

First, most smokers say they wish they had never started, most have tried to stop but failed, and most wish they could stop.<sup>35</sup> Smoking is addictive. One way to capture addiction here is through Harry Frankfurt's classic analysis. While addicted smokers desire cigarettes, this first-order desire clashes with a higher-order desire most smokers have, namely the desire not to desire to smoke.<sup>36</sup> Moreover, most smokers likely hold desires whose fulfilment is made difficult or even thwarted by their addiction. For example, along with almost everyone else, most smokers likely prefer to be in good rather than bad health, to live longer rather than shorter lives, and to have disposable income to spend on things other than cigarettes.

Second, most smokers started smoking, either occasionally or daily, before the legal age of consent. For example, 80% of adult US-American smokers had their first cigarette before they were 18 and more than 60% of daily smokers were daily smokers before they were 18.<sup>37</sup> Moreover, if you start early, your brain structure is more malleable, which can intensify your nicotine addiction later.<sup>38</sup> Finally, young people can be subject to peer pressure, which makes their decision to take up smoking look even less like the result of an autonomous preference.<sup>39</sup>

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<sup>35</sup> Grill and Voigt (n 32).

<sup>36</sup> Frankfurt (n 33).

<sup>37</sup> 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (US Department of Health and Human Services 2012) 134–5.

<sup>38</sup> Stephanie R Morain, 'Tobacco 21 Laws: Withdrawing Short-Term Freedom to Enable Long-Term Autonomy' (2016) 16 *The American Journal of Bioethics* 26, 26–7.

<sup>39</sup> See (Grill and Voigt 2016) for further discussions.

Taken together, these points suggest that smoking itself can reduce people's volitional autonomy and thereby their capacity to consent to using tobacco.

Besides volitional autonomy, competent consent also requires some degree of *rational agency*. Imagine you are confronted with a choice between many options. Assume you have 'volitionally autonomous' goals and now need to assess which options will best further your goals. In many cases, you might consistently make the wrong choices. For example, imagine you plan to stick to a healthy diet and consistently misjudge what is healthy, miscalculate calorie information and consistently make unhealthy choices. Your inability to make good decisions seriously hampers your ability to lead an autonomous life. Rational agency here requires sufficient information about options and the ability to process such information guided by one's conception of the good. Now, applied to smoking, various arguments suggest that smokers consistently make irrational choices.

First, do people know enough about smoking? In rich countries these days, most people know that smoking is not good for you.<sup>40</sup> But such information dispersion might not be enough. It is not clear everyone can adequately assess the *magnitude* and *extent* of the risks. Smokers might know that smoking increases one's cancer risk but are often ill-informed about the other risks, such as cardiovascular and pulmonary conditions. Smokers also often have false beliefs about the relative harmfulness of cigarettes, for example thinking that low-tar, filtered or light cigarettes are less harmful.<sup>41</sup> Moreover, knowledge of health risks strongly varies with socioeconomic status,

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<sup>40</sup> K Michael Cummings and others, 'Are Smokers Adequately Informed about the Health Risks of Smoking and Medicinal Nicotine?' (2004) 6 *Nicotine & Tobacco Research* S333; M Siahpush and others, 'Socioeconomic and Country Variations in Knowledge of Health Risks of Tobacco Smoking and Toxic Constituents of Smoke: Results from the 2002 International Tobacco Control (ITC) Four Country Survey' (2006) 15 *Tobacco Control* iii65.

<sup>41</sup> Cummings and others (n 39).

education and across countries. Highly educated people in industrialized countries might know enough about the risks of smoking, but that is not so for most others.<sup>42</sup>

Second, human decision-making is riddled with cognitive biases, which stands in the way of rational decision-making. Philosopher Sarah Conly builds her case for a smoking ban largely around such failures of rationality. Such biases can include optimism bias, the availability heuristic, and hyperbolic discounting.<sup>43</sup>

A third reason to add here is that people are not very good at judging the costs and benefits of smoking. Smokers might perceive several benefits: smoking can have an enjoyable social dimension, it might help smokers manage stress, give them something to do when they are bored, or just make them feel cool.<sup>44</sup> There is also the widespread belief that cigarettes help with weight loss.<sup>45</sup> But most purported benefits are either smaller than believed or wholly non-existent. Smoking overall does not reduce but increase stress, does not help with weight loss, and does not increase but reduce people's reported life satisfaction and happiness.<sup>46</sup>

Finally, most people are not good at considering and estimating their future preferences and wellbeing. A person who values smoking highly given her current preferences might think her future self will happily give up some life years to facilitate her former self being able to smoke.

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<sup>42</sup> Siahpush and others (n 39).

<sup>43</sup> Conly (n 29); Grill and Voigt (n 32); Goodin (n 29); Paul Slovic, 'What Does It Mean to Know a Cumulative Risk? Adolescents' Perceptions of Short-Term and Long-Term Consequences of Smoking' (2000) 13 *Journal of Behavioral Decision Making* 259.

<sup>44</sup> Bonnie L Halpern-Felsher and others, 'Perceived Risks and Benefits of Smoking: Differences among Adolescents with Different Smoking Experiences and Intentions' (2004) 39 *Preventive Medicine* 559.

<sup>45</sup> 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (n 36) ch 2.

<sup>46</sup> AC Parrott, 'Nesbitt's Paradox Resolved? Stress and Arousal Modulation during Cigarette Smoking' (1998) 93 *Addiction* (Abingdon, England) 27; R West and P Hajek, 'What Happens to Anxiety Levels on Giving up Smoking?' (1997) 154 *The American Journal of Psychiatry* 1589; 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (n 36) ch 2; Daniel Kahneman and Angus Deaton, 'High Income Improves Evaluation of Life but Not Emotional Well-Being' (2010) 107 *Proceedings of the National Academy of Sciences* 16489.

However, such reasoning is often misguided. We typically falsely assume that how we are now is our ‘real self’ and systematically underestimate how much our personality changes over time.<sup>47</sup> Second, we might be bad at predicting our future wellbeing. Smoking reduces life expectancy by about ten years.<sup>48</sup> Life years lost tend to come towards the end of one’s life. Anecdotally, I have heard smokers say that given that one has a lower quality of life towards the end of one’s life, one might rationally want to frontload some of the benefits at the expense of a shorter life. But data seems to bear out a different picture.<sup>49</sup> According to the U-curve of life satisfaction, young people are on average very happy – that is until their 30s – and then their satisfaction drops. Life satisfaction then picks up again in old age (after 60). Accordingly, this gives us reason to be careful about trading off minor benefits now with life years lost at the end of one’s life, given that those can potentially be among the happiest of our lives.

Overall then, smokers often act with insufficient volitional autonomy and rational agency. While this does not make consent irrelevant, it means that consent is a relatively weak reason against interference – weak enough to not rule out drastic interference.

However, someone might now accuse me of double standards. We typically do not think irrationality sufficient to justify government interference for other suboptimal decisions. Smokers are not the only ones being irrational. As much behavioural science research shows, we all tend to often act on cognitive biases.<sup>50</sup> Why should we treat smoking differently than other consumption

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<sup>47</sup> Jordi Quoidbach, Daniel T Gilbert and Timothy D Wilson, ‘The End of History Illusion’ (2013) 339 *Science* 96.

<sup>48</sup> Jha and others (n 1).

<sup>49</sup> Andrew Steptoe, Angus Deaton and Arthur A Stone, ‘Subjective Wellbeing, Health, and Ageing’ (2015) 385 *The Lancet* 640; Arthur A Stone and others, ‘A Snapshot of the Age Distribution of Psychological Well-Being in the United States’ (2010) 107 *Proceedings of the National Academy of Sciences* 9985.

<sup>50</sup> Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux 2011); Richard H Thaler and Cass Sunstein, *Nudge* (Yale University Press 2008).

choices?<sup>51</sup> In response, we should grant that cognitive biases and lack of information are not problems uniquely specific to smoking. But we should nonetheless treat smoking differently than many other unhealthy choices. Smoking is very addictive and deadly and any benefits, inasmuch as there are any, are marginal. So, smoking is in a different category than many other unhealthy or otherwise suboptimal activities. The government should often let us make mistakes, but only if those do not trap us in dangerous addictions and kill us. Here irrationality need not justify interference. But when irrationality applies to extremely harmful and addictive substances, the case is different.

Together with section 4, we can thus conclude that concerns around personal freedom and consent do not speak against a human right to tobacco control. In principle, such concerns are even compatible with very severe government interference.<sup>52</sup>

## **6 Human rights and power**

In this final section, I address issues around power. Human rights legislation changes power structures in various ways.<sup>53</sup> What would be the effects for tobacco control?

Human rights law should protect individuals against illegitimate government interference. But we might now worry that a human right to tobacco control achieves the opposite, because it furnishes governments – and international institutions involved with human rights law – with too much power to exercise control over individuals and their consumption choices. We can draw on neo-republicanism to formulate such worries around power. Philip Pettit argues that the central

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<sup>51</sup> Flanigan (n 32); Grill and Voigt (n 32).

<sup>52</sup> In principle, I think strict endgame measures are justifiable (if effective), see Grill and Voigt (n 32); Schmidt, ‘Withdrawing Versus Withholding Freedoms’ (n 28). However, I here do not further this question, as I only defend a human right to tobacco control. And a human right imposes a ‘floor constraint’ on countries rather than requiring maximal tobacco control.

<sup>53</sup> See (Gilbert 2018) on general issues around human rights and power.

value in normative political philosophy should be *non-domination*. Non-domination requires being free from uncontrolled power:

**Domination:** person *A* is dominated by person *B* with respect to *A*'s option *x*, if and only if *B* has the power to determine whether *A* has *x* or not and such power is not suitably controlled.<sup>54</sup>

Other people, private companies and groups, and the government dominate me, if they can interfere with my options without their power being controlled in such a way that they must track my interests. For example, a slaveholder dominates a slave, because they have the power to interfere with the slave's options without their power being controlled by the slave or by anyone acting on behalf of the slave. Note that the slave can remain dominated, even if the slaveholder does not exercise their power. Conversely, some forms of interference, say a just government collecting taxes, are not dominating, when the power to interfere is suitably controlled, for example, through constitutional provisions, democratic decision-making, regular free elections and so on.

Here I think we ought to conclude that even very strict tobacco control need not be a form of government domination. I have above argued that a concern with freedom of choice does not rule out strict tobacco control. So, if interference with people's option to smoke is decided and implemented by institutions that are not dominating, then such an interference is not dominating. For that, it should be exercised by institutions and agents that are institutionally forced to track the relevant interests of citizens through, for example, democratic and transparent decision-making, constitutional protections and so on. Of course, the justificatory stakes for strong tobacco control can be high, seeing that some smokers might be opposed to strong interference. But this raises the stakes for such control to be enacted in a non-dominating way and through

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<sup>54</sup> See Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (W W Norton & Company 2014); Andreas T Schmidt, 'The Power to Nudge' (2017) 111 *American Political Science Review* 404.

non-dominating political and legal institutions. It does not imply that strict tobacco control is a form of government domination.<sup>55</sup>

Note how we can now turn this potential objection around to use non-domination as an argument in favour of strict tobacco control. Besides the government, private companies also exercise power over our lives. Tobacco companies have the power to influence our choice environments. Whether people decide to smoke is often dependent on the choice environment they find themselves in, where this encompasses which options are available, how they are priced, how they are presented, what information is available, what norms exist around smoking, what people in one's peer group do, and so on.<sup>56</sup> Domination need not be brute coercion but can also come from uncontrolled power to influence our choice environments in more subtle ways.<sup>57</sup> Tobacco companies have ample strategies to do so. They, for example, use marketing strategies and ad campaigns. Such campaigns can be powerful in, among other things, giving consumers systematically false beliefs about the harmfulness of their products (such as so-called 'light' cigarettes).<sup>58</sup> Or they devise clever differentiated pricing strategies, use point-of-sale marketing in stores, use attractive package designs, install cigarette vending machines to make cigarettes more accessible and so on.<sup>59</sup> So, furnishing governments with the power needed for strict tobacco control can reduce domination, because it can protect individuals against powerful tobacco companies and their power to shape our choice environments.

Note how this argument has particular force for less powerful groups.

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<sup>55</sup> Schmidt, 'Withdrawing Versus Withholding Freedoms' (n 28).

<sup>56</sup> Alberto Alemanno, 'Nudging Smokers: The Behavioural Turn of Tobacco Risk Regulation' (2012) 3 *European Journal of Risk Regulation* 32; 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (n 36) ch 4.

<sup>57</sup> Schmidt, 'The Power to Nudge' (n 53).

<sup>58</sup> Cummings and others (n 39).

<sup>59</sup> 'Preventing Tobacco Use among Young People: A Report of the Surgeon General' (n 36) ch 5.

First, people of low socioeconomic status (SES) typically already experience more domination than those with a higher SES. Lack of tobacco control might make lower-SES populations more vulnerable to harmful social pressures and the influence of tobacco companies. Smoking has a social gradient, affecting lower-SES populations more strongly and thereby contributing strongly to the social gradient of mortality and morbidity.<sup>60</sup> And financing a nicotine addiction is expensive, which affects lower-SES populations and their disposable income more strongly given their weaker financial positions.

Second, nicotine addiction is more prevalent among people with mental health problems who often find themselves in more vulnerable positions already.<sup>61</sup> Preventing and reducing nicotine addiction can thus be empowering.

Finally, the case is at its strongest at the international level. Around 80% of smokers are from low and middle-income countries.<sup>62</sup> Weaker regulations, threats by tobacco companies to sue countries if they implement tobacco control measures, less information about the harms of smoking, and weaker public health institutions all imply that the protection against Big Tobacco's influence can be weaker in such countries.<sup>63</sup> Strong tobacco control and strong (non-dominating) public health institutions are then less a source of domination but likely the opposite: they should empower public institutions to curb Big Tobacco's power over individuals and their choice environments.

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<sup>60</sup> See Michael Marmot, 'Social Determinants of Health Inequalities' (2005) 365 *The Lancet* 1099. on health inequality in general and Prabhat Jha and others, 'Social Inequalities in Male Mortality, and in Male Mortality from Smoking: Indirect Estimation from National Death Rates in England and Wales, Poland, and North America' (2006) 368 *The Lancet* 367; Michael Marmot, 'Smoking and Inequalities' (2006) 368 *The Lancet* 341. on smoking inequalities.

<sup>61</sup> Karen Lasser and others, 'Smoking and Mental Illness: A Population-Based Prevalence Study' (2000) 284 *JAMA* 2606.

<sup>62</sup> 'WHO Tobacco Fact Sheet' (n 2).

<sup>63</sup> Anna B Gilmore and others, 'Exposing and Addressing Tobacco Industry Conduct in Low and Middle Income Countries' (2015) 385 *Lancet* 1029.

So, tobacco control can be empowering. Human rights law might here play a dual role. On the one hand, a human right to tobacco control can empower national governments, as it might intensify the international community's efforts and support structures to aid national governments in their tobacco control efforts. On the other hand, human rights law constrains national governments: if governments fail to protect against tobacco harms, they might face outside pressures. A core function of human rights law is to protect citizens against bad governments. And in this sense, human rights law is a legitimate form of controlling government power. Forcing governments to protect their populations forces them to at least minimally act in their interests. Note that a human right to tobacco control does not, and should not, impose a maximal and fully determinate tobacco control strategy. Rather, as with most other human rights, it imposes a 'floor constraint' of what kind of protection should exist and gives governments leeway to tailor policies to their specific situation. Moreover, an international framework should not require measures that are very controversial or whose evidence basis is weak.<sup>64</sup> But in both ways – empowering and limiting national governments – a human right to tobacco control could help empower individuals and their protection against Big Tobacco's power.

## 7 Conclusions

I have argued that the legal and philosophical case for a human right to tobacco control is strong. Individuals ought to have a claim against their government to protect them against tobacco harms. I have also addressed several philosophical worries around such a right. I argued that neither the traditional distinction between negative and positive rights, nor a concern with external freedom of choice or personal consent stand in the way of a human right to tobacco

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<sup>64</sup> For example, tobacco control specialists fervently debate whether e-cigarettes and other Electronic Nicotine Delivery Systems (ENDS) should accompany tobacco harm reduction or whether they instead pose a grave threat. Given serious disagreements, I think it would be a serious mistake if international legal frameworks tried to impose an anti-ENDS approach on countries.

control. I also analysed how a human right might affect power relations arguing that a human right to tobacco control is a promising avenue to empower governments and individuals to curb the power of big tobacco companies. This argument has particular force in developing countries where governance structures are often less powerful in the face of corporate power. Individual claims to be protected against tobacco harms are so strong that it warrants both international support for and limitations on national governments through human rights legislation.