

Nudging Smokers

The Behavioural Turn of Tobacco Risk Regulation

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Abstract

At a time when policy makers want to change the behaviour of citizens to tackle a broad range of social problems, such as climate change, excessive drinking, obesity and crime, a promising new policy approach has appeared that seems capable of escaping the liberal reservations typically associated with all forms of regulatory action. After having relied on the assumption that governments can only change people's behaviour through rules and regulations, policy makers now seem ready to design policies that better reflect how people really behave, not how they are assumed to behave as rational agents. The approach, which stems from the increasingly ubiquitous findings of behavioural research, is generally captured under the evocative concept of 'nudge'. Inspired by 'libertarian paternalism', it suggests that the goal of public policies should be to steer citizens towards making positive decisions as individuals and for society while preserving individual choice. This contribution aims at critically examining the application of nudging approaches to the current efforts of regulating lifestyle choices, such as tobacco use, excessive use of alcohol, unhealthy diets and lack of physical exercise. In particular, it discusses the viability of nudges approaches as applied to current tobacco control policies. After providing an account of the range of tobacco control policy tools that have developed over time, the article discusses the regulatory philosophy currently underlying anti-tobacco efforts by focusing on the mainstream concept of 'de-normalisation'. It then illustrates how most of the policies aimed at de-normalising tobacco today rely on 'nudging' approaches via behavioural change rather than via the provision of information. It finally argues that – due to the actual approach towards tobacco – most of the flaws generally identified with this alternative regulatory approach seem overcome in the context of tobacco control. However, despite its potential for providing a philosophical base justifying the current 'permit but discourage' approach typical of tobacco control and other lifestyle policies, it cannot be ruled out that 'nudging' might encounter some of the same obstacles it faces in other less contentious areas of policy-making.

I. Introduction

At a time when policy makers want to change the behaviour of citizens to tackle a broad range of social problems, such as climate change, excessive drinking, obesity and crime, a promising new policy approach has appeared that seems capable of escaping the liberal reservations typically associated with all forms of regulatory action. After having relied on the assumption that governments can only change people's behaviour through rules and regulations, policy makers now seem ready to design policies that better reflect how people really behave, not how they are assumed to behave as rational agents. The approach, which stems from the increasingly ubiquitous findings of behavioural research¹, is generally captured under the evocative concept of 'nudge'². Inspired by 'libertarian paternalism'³, it suggests that the goal of public policies should be to steer citizens towards making positive decisions as individuals and for society while preserving individual choice. Acting as 'choice architects' policy makers organize the context, process and environment in which individuals make decisions. In so doing, they exploit some patterns of irrationality, often called 'cognitive biases', to manipulate people's choices⁴. Thus, in the famous Cafeteria example, the school's management might try to affect students' diet by rearranging the display of food to make it more likely that students will choose the healthy option. This innovative approach to policy making is part of a broader shift from traditional regulation to regulatory governance that is generally referred to as New Governance. As behavioural research shows the limits of human rationality, New Governance unveils the limits of traditional regulation. In particular, by denouncing as too narrow and ineffective regulatory techniques such as command-and-control to manage the state's increasing dependence on non-state actors, New Governance promotes a diverse view of state authority and its relationship with civil society and the business world⁵. If effectively reconciled, behavioural and New Governance approaches together carry the potential to provide policy makers with a more complete understanding not only of how people behave and make decisions but also of how they react vis-à-

¹ Daniel Kahneman, *Thinking, Fast and Slow* (New York, NY: Farrar, Straus and Giroux 2011).

² Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness*, (London: Yale University Press 2008).

³ Cass R. Sunstein & Richard H. Thaler, "Libertarian Paternalism Is Not an Oxymoron", 70 *U. Chi. L. Rev.* (2003), pp. 1159–1202.

⁴ See, e.g., Jonathan Baron, *Thinking and deciding*, (Cambridge, MA: Cambridge University Press 2007); Dan Ariely, *Predictably irrational: The hidden forces that shape our decisions* (New York, NY: HarperCollins 2008).

⁵ See, e.g., Karen Yeung, "The Regulatory State", in Baldwin, Cave and Lodge, *Oxford Handbook of Regulation* (OUP : 2011), pp. 80-81.

vis different forms of regulatory intervention. As a result, they both encourage policy makers to experiment with new regulatory approaches capable of internalising human irrationality as well as the inherent flaws of traditional regulation.

By building upon Adam Burgess' opening essay, this contribution aims at critically examining the application of nudging approaches to the current efforts of regulating lifestyle choices, such as tobacco use, excessive use of alcohol, unhealthy diets and lack of physical exercise. In particular, it discusses the viability of nudges approaches as applied to current tobacco control policies. Tobacco regulation is a particularly contentious area because it affects the social habits of smokers by preventing them from enjoying products at the time and place and in the form they have become accustomed to. As such, it is often perceived as a symbol of the nanny-state infringing on individual liberty⁶. After providing an account of the range of tobacco control policy tools that have developed over time, the article discusses the regulatory philosophy currently underlying anti-tobacco efforts by focusing on the mainstream concept of 'de-normalisation'. It then illustrates how most of the policies aimed at de-normalising tobacco today rely on 'nudging' approaches via behavioural change rather than via the provision of information. It finally argues that – due to the actual approach towards tobacco – most of the flaws generally identified with this alternative regulatory approach seem overcome in the context of tobacco control. However, despite its potential for providing a philosophical base justifying the current 'permit but discourage' approach typical of tobacco control and other lifestyle policies⁷, it cannot be ruled out that 'nudging' might encounter some of the same obstacles it faces in other less contentious areas of policy-making.

II. Tobacco regulation as a driver of social change

After centuries of being a socially accepted habit, smoking has undergone a cultural transformation in most Western countries, which was made possible by a mix of legal controls, stigmatization, education and cessation programmes. The shifting public attitude and social norms have been both the cause and effect of the legal intervention, which is generally termed 'tobacco control'. As more

⁶ See, e.g., Alberto Alemanno, "Out of Sight Out of Mind – Towards a New Tobacco Products Directive", 18 *Columbia Journal of European Law* (2012), forthcoming; and Scott Crosby, "The New Tobacco Control Directive : An Illiberal and Illegal Disdain for the Law", 27 *European Law Review* (2002), pp. 177–193.

⁷ William A. Bogart, *Permit But Discourage, Regulating Excessive Consumption* (Oxford: Oxford University Press, 2011).

citizens perceived smoking as a filthy and unhealthy habit, support grew for regulatory intervention aimed at further decreasing consumption. In turn, as tobacco control initiatives intensified, more citizens accepted - at both the individual and collective level - the hazardousness of cigarettes. However, this normative shift did not occur outside of the developed world, where tobacco prevalence has grown in recent years⁸. Today, approximately 84% of the world's smokers, around 900 million people, live in developing or emerging economies⁹.

'De-normalisation' is the most popular concept in anti-tobacco circles today. Although its precise meaning has changed over time¹⁰ and varies within the tobacco control advocacy community¹¹, its underlying goal can be defined as aiming "to change the broad social norms around using tobacco – to push tobacco use out of the charmed circle of normal desirable practice to being an abnormal practice"¹². This means de-normalizing tobacco consumption by countering the allure of smoking created by the tobacco industry in order to stigmatize smokers¹³ and thereby reduce smoking rates¹⁴.

The recently-adopted – in spite of vast resistance from the tobacco industry¹⁵ – smoking bans in public places, such as bars and restaurants, epitomize this regulatory-induced phenomenon. In line with the de-normalisation objective, the bans, by creating an environment where smoking becomes increasingly more difficult, help shift social norms away from the acceptance of smoking in everyday life and promote public rejection of cigarettes. Yet tobacco control measures represent only one part of the factors affecting the 'de-normalisation' of smoking that also comprehend many facets of

⁸ See, e.g., P. Jha and F.J. Chaloupka, "The Economics of global tobacco control", *BMJ*, 321, 358-61 ; Campaign for Tobacco-Free Kids, *China : Tobacco Burden Facts*, Washington D.C. 2009 ; R. Iglesias et al., "Tobacco Control in Brazil", *Health Nutrition and Population (HNP) Discussion Papers*, World Bank, Washington D.C., 2007.

⁹ P. Jha and F.J. Chaloupka, "The Economics of global tobacco control", *BMJ*, 321, 358-61.

¹⁰ Eric A. Feldman and Ronald Bayer, "The Triumph and Tragedy of Tobacco Control: A Tale of Nine Nations", 7 *Annual Review of Law and Social Science* (2011), at p. 88 (illustrating how the denormalisation phenomenon was at first a consequence of the public health interventions but then became an autonomous 'discrete policy goal').

¹¹ Simon Chapman and Becky Freeman, "Markers of the De-normalization of Smoking and the Tobacco Industry", 17 *Tobacco Control* (2008), pp. 25–31.

¹² David Hammond, Geoffrey T. Fong and Mark P. Zanna, "Tobacco De-normalization and Industry Beliefs among Smokers from Four Countries", 31 *American Journal Prev. Med.* (2006), pp. 225–232.

¹³ Erving Goffman, *Stigma : Notes on the Management of Spoiled Identity* (New York, NY: Penguin, 1995).

¹⁴ Sei-Hill Kim and James Shanahan, "Stigmatising Smokers : Public Sentiment Toward Cigarette Smoking and its Relationship to Smoking Behaviors", 8 *J. of Health Communication* (2003), pp. 343–367.

¹⁵ Frank Jordans, "WHO chief slams tobacco firms that 'harass' governments to prevent anti-smoking measures", *The Washington Post*, 25 November 2011.

culture, custom and social norms¹⁶. Smoking, similar to eating and drinking, is accompanied and shaped by a myriad of norms, attitudes, opinions and reactions. Legal regulation is but one form of regulation, albeit the most prominent technique of social control, capable of altering this behaviour. It is as much about persuading people as it is about commanding them. Thus, Julia Black offers a very broad definition of regulation that goes well beyond legal norms: “the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information gathering and behavioural modifications”¹⁷. The convoluted relationship between the regulation of tobacco and public attitudes towards alcohol reflects a central theme about the co-dependence of legal intervention and norms. The relationship between law and norms, often defined as ‘normativity’, is of critical importance in regulating lifestyle choices. Indeed, any regulatory intervention is more likely to succeed if society has recognized the underlying issue as a problem and the regulation is aligned with other social control techniques pursuing similar goals¹⁸. Normativity also offers a valuable lens to examine nudging and its ability to induce not only behavioural change but also social norms. This leads to the question of the exact role played by tobacco regulation on smoking consumption¹⁹.

The history of tobacco has been closely intertwined with social values, habits and consumption patterns²⁰. As a result, tobacco regulation has largely been driven by then current attitudes towards the product. In this context the impact on social behaviour of the various regulatory mechanisms on packaging, product contents, advertising and sales are very difficult to assess and quantify. Asserting that a law produces a particular effect is one thing. Proving that these consequences have occurred and that they have been triggered by that law is quite another. In assessing the impact of a law there is the challenge of perspective: is there a neutral position from which to investigate the acts and behaviours said to be the effect of the law? In the affirmative, how can one assess and interpret

¹⁶ On the relationship between legal regulation and social norms, see, e.g., William A. Bogart, *Permit But Discourage, Regulating Excessive Consumption* (Oxford: Oxford University Press, 2011), at p. 130.

¹⁷ Julia Black, “Regulatory Conversations”, 29 *Journal of Law & Society* (2002), pp.163–196, at p. 170.

¹⁸ William A. Bogart, *Permit But Discourage, Regulating Excessive Consumption*, (Oxford: Oxford University Press, 2011), at p. 79.

¹⁹ For two different narratives of tobacco control, see, e.g. William A. Bogart, *Permit But Discourage, Regulating Excessive Consumption*, (Oxford: Oxford University Press, 2011); Eric Feldman and Ronald Bayer, *Unfiltered : Conflicts over Tobacco Policy and Public Health*, (Cambridge : Harvard University Press 2004).

²⁰ Allan M. Brandt, *The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America* (New York : Basic Books 2007).

these acts and behaviours in order to draw conclusions in terms of impact? Moreover, given the existence of a regulatory ‘mix’ in the fight against tobacco, i.e. coexistence of different strategies targeting the same goal over the same period of time, how can one distinguish the precise effect of any one intervention? Those questions suggest that one may encounter a number of difficulties when called upon to show that a law actually caused any particular result. But there is one particular complication that makes the proof of causation particularly arduous to overcome: this is the so-called ‘plausible rival hypothesis’. To demonstrate that a law produced a particular effect, it is necessary to prove that there were no other social, political, economic or other forces that might explain that particular result. Only insofar as rival hypothesis can be eliminated, can conclusions be drawn with some confidence about the causal relationship existing between the law and the specific result. Moreover, law, like many other human endeavours, might also produce unintended consequences²¹. Thus, evidence suggests that as smoking rates dropped among the most privileged segments of society, tobacco prevalence among the low-income classes dropped less dramatically²². As it has been argued, “When we develop the ability to control disease and death, the benefits of this new-found ability are distributed according to resources and knowledge, money, power, prestige, and beneficial social connections”²³. This seems to render the task of measuring the impact of regulatory intervention even harder than originally expected and illustrates that the outcomes are not as straightforward and effective as advocates of such interventions typically claim.

However, there seems to be a shared belief that regulation may play a role in behavioural change alongside education, public health reform and tax policy²⁴. In particular, it seems that even though tobacco regulation should only contribute to make the adverse effects stemming from tobacco consumption salient within society, it might still successfully contribute to the de-normalization phenomenon. Yet the philosophy of tobacco regulation fundamentally lies on a self-evident incongruity: unlike any other form of product regulation, its rules do not promote the underlying product by making it more acceptable to the public but constrain its production, marketing and

²¹ William A. Bogart, *Six Ideas about the Impact of Law – America the Outlier*, in *Consequences : The Impact of Law and its Complexity* (Toronto: Toronto University Press 2002), at p. 111.

²² On the existence of a social gradient in smoking, Eric A. Feldman and Ronald Bayer, *Conclusions : lessons from the comparative study of tobacco control*, in E. Feldman and R. Bayer, *Unfiltered : Conflicts over Tobacco Policy and Public Health*, (Cambridge : Harvard University Press 2004), p. 300.

²³ John Pehlman and Bruce Link, *Controlling disease and creating disparities : A fundamental cause perspective*, *J. Gerontology B.* , 60B, p. 27.

²⁴ Geraint Howells, *The Tobacco Challenge – Legal Policy and Consumer Protection*, (Surrey: Ashgate 2011), at p. 7.

consumption without banning it. As Chapman observes, “The paradox with tobacco is that it is so dangerous that no routine regulatory approach can make sense of it”²⁵. Hence, how to de-normalise a product that remains legally placed on the market? Unsurprisingly, tobacco companies, which are always ready to challenge the control efforts, have largely highlighted this contradiction²⁶.

In this context, ‘libertarian paternalism’ seems to provide a promising and badly needed philosophical justification for today’s apparently contradictory tobacco control policies. Even the most radical anti-smoking groups within the health community concede that members of the public should have the freedom to smoke if they want to, but the groups would rather prefer that people did not smoke and seek to do everything they can to make it hard for smokers to do so. As a result, acting in the name of ‘libertarian paternalism’, public authorities let you to smoke but since they know that you would like to quit - if only you had the strength of will as well as the sharpness of mind - they will keep you away from tobacco products. Unlike paternalists, who ban some things and mandate others, ‘nudging’ – as is currently embedded in most tobacco control efforts – aims only to skew individual decisions, without infringing greatly on freedom of choice²⁷.

III. The evolution of tobacco control

Although it was not until the twentieth century that the health problems associated with tobacco use gained public knowledge, smoking bans in public places are as old as tobacco consumption. The first known smoking ban occurred in 1590 and was declared by Pope Urban VII during his short reign as pope, and others were issued by the Ottoman sultan Murad IV in 1633, by the Prussians in Königsberg in 1742, and finally by the Nazi regime, under the auspices of Karl Astel’s Institute for Tobacco Hazards Research, created in 1941 under the orders of Adolf Hitler. Yet what makes smoking bans more salient today is their rapid spread and virtually universal character, being mandated by an International agreement, the Framework Convention on Tobacco Control (FCTC), the world’s first global public health treaty negotiated under the auspices of the World Health

²⁵ Simon Chapman, “Benefits and Risks in Ending Regulatory Exceptionalism for Tobacco”, 17 *Tobacco Control* (2008), pp.73–74.

²⁶ Michael Givel, “FDA Legislation”, 16 *Tobacco Control* (2007), pp. 217–218.

²⁷ Leaders, “Soft Paternalism: the State is Looking After You”, *The Economist*, 6 April 2006.

Organization (WHO)²⁸. Under this instrument, its 174 signatories, representing more than 90% of the world's countries – including China and India – are expected to adopt, besides advertising and smoking bans, an entire new generation of tobacco control measures. Interestingly enough, the FCTC “instead of treating the act of smoking as an individual preference or a legal right, [] presents it as an unacceptable risk obligating the national and international community to intervene in the name of public health”²⁹.

The first generation of measures was implemented only during the Seventies, when taxes imposed on tobacco products, especially cigarettes, became a principal weapon in the fight against tobacco use. A series of studies by economists demonstrated convincingly that increases in cigarette prices, driven by increases in cigarette taxes, reduced cigarette smoking³⁰. In particular, several studies indicated that tax-induced price increases were particularly effective in discouraging smoking by young people³¹. Although demand for cigarettes is only modestly responsive to price changes, there is consensus that in developed countries, for every 10 per cent increase in price, the quantity of cigarettes demanded by consumers will fall by about 4 per cent. Since cigarette taxes constitute only a fraction of total cigarette price, large increases in cigarette tax rates can simultaneously generate significant increases in governmental revenues and a substantial decrease in smoking. Thus, tobacco taxation gives governments the opportunity to enrich their treasuries while improving public health³².

Besides fiscal measures, laws were passed to protect bystanders and youth so as to counter the pervasive criticism of paternalism. Thus, governments prohibited tobacco sales to minors and banned smoking in public places, notably work places. In the same period, authorities introduced

²⁸ See Framework Convention on Tobacco Control, 21 April 2003, 42 International Legal Materials (2003), at p. 503. For an analysis, see Benn McGrady, *Trade and Public Health: Tobacco, Alcohol and Diet* (Cambridge: Cambridge University Press 2011).

²⁹ Eric Feldman and Ronald Bayer, *Unfiltered : Conflicts over Tobacco Policy and Public Health*, (Cambridge : Harvard University Press 2004), p. 81.

³⁰ See, e.g. Frank J. Chalopka, Melanie Wakefield and Christina Czart, “Taxing Tobacco : The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use”, in Robert L. Rabin and Stephen D. Sugarman (eds.), *Regulating Tobacco*, (Oxford: Oxford University Press 2001).

³¹ For an overview of the literature on tax policies in tobacco control, see, e.g., Geraint Howells, *The Tobacco Challenge – Legal Policy and Consumer Protection* (Surrey: Ashgate 2011), pp. 208–211.

³² Kip Viscusi controversially argued that – as smokers tend to die a few years before non-smokers – states save costs in health coverage, pensions and social security and, as a result, tobacco could be argued to be a net benefit to society. See Kip Viscusi, *Regulation through Litigation*, (Washington, DC: AEI Brookings 2002), pp. 24–25.

restrictions on direct advertising, leading the way, in several European countries, to a prohibition of indirect advertising. Moreover, as soon as policy-makers across industrialised countries realized that tobacco companies had begun using cigarette packs and specialized retail outlets as advertising vehicles, they adopted space appropriations rules. Thus, for instance, laws were adopted mandating companies to print large messages on cigarette boxes, such as “Smoking causes peripheral vascular disease”, “Don't let children breathe your smoke” or “Smoking causes lung cancer”. This kind of message had been written on boxes since the late Sixties, but the legislation begun in the 1990s was more ambitious. In line with the FCTC, for instance, warnings must cover a given percentage of the packet front and back³³. In most countries, messages are written in large, standardized black letters on a white background, surrounded by a black frame. Within the EU, some countries decided to go further by introducing mandatory graphic warnings and combining these warnings with images of tobacco-linked diseases. It seems undisputed that the combined adoption of this first set of tobacco control measures has proven effective, since there is evidence suggesting that they have helped reduce tobacco consumption³⁴. Yet, as previously illustrated, to ascribe to each measure a specific reduction in tobacco prevalence is a difficult task. It is particularly difficult to distinguish the causes and effects of the ‘cultural’ shift against smoking – first among the middle class – from regulatory, pricing and other factors³⁵.

By the beginning of the new century, European and other developed countries had implemented most of these first generation measures, and governments were ready to take a new, historical step. By far the largest achievement in the fight against tobacco was the conclusion of the Framework Convention on Tobacco Control as it paved the way to a second generation of tobacco control

³³ Thus, for instance, in the EU, the general warnings (‘Smoking kills’ or ‘Smoking seriously harms you and others around you’) should cover no less than 30% of the most visible surface of the unit pack; whereas the additional warnings (to be chosen from an agreed list and to be rotated on a regular basis) should cover no less than 40% of the other most visible part of the packet. See Article 5 of the Tobacco Products Directive.

³⁴ David Hammond, Geoffrey T. Fong, Ron Borland et al., “Text and Graphic Warnings on Cigarette Packages: Findings from the International Tobacco Control Four Country Study”, 32 *American Journal of Preventive Medicine* (2007), pp. 202–209; Marc C. Willemsen, “The New EU Cigarette Health Warnings Benefit Smoker Whoe Want to Quit : Results from the Dutch Continuous Survey of Smoking Habits”, 15 *European Journal of Public Health* (2005), pp. 389–392.

³⁵ I would like to thank Adam Burgess for drawing my attention to the class aspect of smoking. Smoking being now a working class habit in the West, this class distinction suggests that conscious efforts at curbing smoking tend to be severely constrained by socio-economic reality. For an excellent illustration, see Eric A. Feldman and Ronald Bayer, “The Triumph and Tragedy of Tobacco Control: A Tale of Nine Nations”, 7 *Annual Review of Law and Social Science* (2011), pp. 79–100.

measures. Addressing complex issues such as smuggling and illegal traffics, besides the more conventional marketing and packaging aspects of tobacco, this convention identifies a comprehensive series of actions whose implementations have been further detailed by a set of Guidelines.

These new, radical measures include inter alia standardized plain packaging as well as visual display bans. While the former implies the removal of trademarks, logos, pictures graphics and other promotional elements from the pack, the latter consists of prohibiting the display of tobacco products at points of sale³⁶. Through the adoption of these measures, policy-makers aim not only at diminishing the attractiveness of the brand logo and graphical world but also at encouraging smokers to pay more attention to health warning messages. This seems increasingly crucial today because there is evidence suggesting that tobacco companies' efforts to associate themselves with positive images are effective in mitigating the impact of health warnings³⁷. An important focus has developed around challenging the industry's ability to advertise its products so as to reduce their appeal and attractiveness among consumers. Both plain packaging and visual display bans – as well as graphic warnings and smoking bans – seem potentially capable of nudging citizens away from consumption of tobacco products.

An interesting example of further anti-smoking initiatives is the removal of information regarding tar, nicotine and carbon monoxide yields (commonly referred to as TNCO)³⁸. By prohibiting the indication of the TNCO information, the idea is to nudge smokers towards believing that all cigarettes are equally dangerous. Because smokers (be they current or future) would no longer find any information about TNCO yields on their packs, they might consider all tobacco products similarly threatening. Yet, interestingly enough, the factor that triggered the idea that 'safer' cigarettes may exist was a reaction to regulatory action aimed at disciplining tobacco ingredients by, for instance, establishing maximum levels of TNCO. In particular, the development of low-tar cigarettes

³⁶ For a detailed legal and policy analysis of plain packaging and visual display ban under EU Law, see Alberto Alemanno, "Out of Sight Out of Mind – Towards a New Tobacco Products Directive", 18 *Columbia Journal of European Law* 2 (2012), forthcoming.

³⁷ See, e.g., George Lowenstein, "Out of Control: Visceral Influences on Behavior", 65 *Journal Org. Behav. And human. Dec. Proc.* (1996), pp. 272–292; Jon D. Hanson and Douglas A Kysar, "Taking Behavioralism Seriously: Some Evidence of Market Manipulation", 112 *Harvard Law Review* (1999), pp. 1420–1569.

³⁸ TNCO labelling should be printed on one side of the cigarette packet in the official language(s) of the Member State where the product is placed on the market so that at least 10% of the corresponding surface is covered.

has been the tobacco industry's response to increased health concerns. It is no surprise that low-tar cigarettes have immediately sparked enduring scientific debates over their supposedly safer use. In particular, by the 1980s the methods commonly used to measure tar and nicotine were found to be limited in accurately reproducing smoking behaviour. This has been ascribed to the fact that smokers are able to take larger, more frequent and higher velocity puffs than machines do, giving rise to the so called 'compensation effect', i.e. compensatory adjustments capable of turning nominally lower 'tar' and nicotine cigarettes into 'higher' tar and nicotine cigarettes³⁹. Thus, TNCO information – currently mandated in Europe and most industrialised countries – is not only incomplete but also positively misleading, as it suggests greater safety of low-tar cigarettes. Policy makers around the world have responded with bans on the use of descriptors such as 'light' and 'mild', and the EU Commission is set to eliminate the obligation of tobacco manufacturers to display the results of the commonly measured yields from tobacco smoke on products⁴⁰. It is believed that eliminating the existing TNCO quantitative labelling might prevent them from being misread by consumers who might "think that lower levels indicate that a product is less risky to their health"⁴¹. However, the ensuing no-information policy sits uneasily with another well-established tobacco control policy aimed at establishing maximum content levels of tar, nicotine and carbon monoxide. Either tar, nicotine and carbon monoxide yields have a role in tobacco safety or they do not. *Tertium non datur*.

IV. Tobacco control measures as Nudges

As recently stated, "There is no single science of behaviour change. A number of scientific disciplines, including neuroscience, psychology, sociology and behavioural economics, contribute to what is known about human behaviour and we refer to these sciences collectively as the 'sciences of human behaviour'. Behaviour change interventions apply findings, drawn from these various sciences, in order to influence human behaviour"⁴². But what is a 'Nudge'?

³⁹ US Surgeon-General Report, *The Health Consequences of Smoking* (Bethesda, MD: US Department of Health and Human Services 1981).

⁴⁰ European Commission, *Public Consultation Document on the Possible revision of the Tobacco Products Directive*, (Health and Consumer Protection Directorate-General, 2010).

⁴¹ *Ibid.*, p. 7.

⁴² UK Parliament, "Science and Technology Committee – Second Report Behaviour Change", 11 July 2011, available on the Internet at <<http://www.publications.parliament.uk/pa/ld201012/ldselect/ldsctech/179/17902.htm>> (last accessed 24 January 2012).

A nudge, according to its theorists, "...is any aspect of the choice architecture that alters people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives"⁴³. However, the exact contours of this innovative approach to policymaking are not clear and often differ from the standard definition provided for by both academics and public authorities⁴⁴. Typically, 'nudges' prompt choices without motivating people to consider their options consciously, and therefore do not include openly persuasive interventions such as media campaigns and the provision of information. Furthermore, 'nudges' themselves may be provided through regulatory means and thus are not necessarily an alternative to regulatory tools. In particular, by building upon Luc Bovens's proposed taxonomy, a policy instrument qualifies as a nudge when it satisfies the following features:

- its intervention must not restrict choice;
- it must be in the interest of the person being nudged;
- it should involve a change in the architecture or environment of choice;
- it implies the strategic use of some pattern of human irrationality (e.g. cognitive biases);
- the action it targets does not stem from a fully autonomous choice (e.g. lack of full knowledge about the context in which the choice is made)⁴⁵.

If measured against this definition, several tobacco control policies seem to qualify as 'nudges':

- graphic warnings (typically portraying dramatic images suggesting a direct link between consumption and death or morbidity);
- plain packaging (implying the removal of brand, colours and other design features of the product to decrease attractiveness and increase visibility of graphic/textual warnings);
- visual display ban (changing the context of access to the products by hiding them from

⁴³ Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness*, (London: Yale University Press, 2008), at p. 6.

⁴⁴ *Ibid.*, at para 2.5.

⁴⁵ Luc Bovens, "The Ethics of Nudge", in Till Grüne-Yanoff and Sven Ove Hansson, *Preference Change: Approaches from Philosophy, Economics and Psychology*, (Berlin and New York: Springer, 2008).

public view)⁴⁶.

Given the increasing salience of the danger of tobacco smoking, none of these policies, not even the health warnings, is set to correct ignorance. Instead they aim at fighting inertia – by discouraging automatic behaviour – and akrasia, i.e. the weakness of the will, by breaking social norms. Moreover, unlike social advertising, these policies are all designed to affect the present choice situation and not future, indeterminate situations⁴⁷.

V. A paradigm shift: the behavioural turn of tobacco regulation

So what emerges nowadays is a new paradigm in tobacco control policies. The first generation measures were based on incentives (such as excise duties) as well as on the provision of detailed information (about product contents and their adverse effects), which assumed that consumers were rational decision makers. The individual targeted by those policies was a free, responsible, autonomous subject, capable of making the right choice insofar as she received the correct information. With the emergence of the new generation of measures, this neoclassical figure of a reasonable decision-maker becomes irrelevant. The idea is to keep consumers away from temptation, by preventing them from having to make a choice. The choice itself is in no way presented in a balanced way: the act of buying occurs in an entirely new context. Those who want to buy a cigarette box face a series of physical and moral obstacles and, as exemplified by the elimination of TNCO labelling, they often receive less information than in the past about the product itself. Indeed, in line with behavioural economics findings, policy makers seem to increasingly question the assumption that consumers will always react rationally to warnings⁴⁸. There is indeed evidence suggesting that consumers tend to overvalue immediate benefits and downplay delayed costs.

VI. Testing the validity of Burgess' concerns about Nudging in tobacco control

⁴⁶ For a detailed legal and policy analysis of these regulatory measures, see Alberto Alemanno, “Out of Sight Out of Mind – Towards a New Tobacco Products Directive”, 18 *Columbia Journal of European Law* 2 (2012), forthcoming.

⁴⁷ See Luc Bovens, “The Ethics of Nudge”, in Till Grüne-Yanoff and Sven Ove Hansson, *Preference Change: Approaches from Philosophy, Economics and Psychology* (Berlin and New York: Springer, 2008).

⁴⁸ See, e.g., Kris N. Kirby and Richard Herrnstein, “Preference Reversals Due to Myopic Discounting of Delayed Reward”, 6 *Psych. Sci.* (1995), pp. 83–89.

This is where some of the criticisms elaborated by Adam Burgess on ‘social architecture’ kick in: To what extent might ‘nudging’ allow policy-makers to hide the facts in the name of a higher interest? When may induced behavioural changes be ethically and morally justified? To what extent may the public health objective compromise the right to be informed? Is the government justified in nudging citizens not to smoke without providing them facts? How can governments ‘know’ it better? Does ‘nudging’ induce genuine preference change?

1. Why Nudging smokers?

The success of nudge policies within tobacco control neither seems driven by the economic climate nor by the attempt to embrace an alternative, less heavy-handed regulatory approach to risk issues, as illustrated by Burgess. Rather its rapid acceptance within the tobacco control movement seems to have more to do with the process aimed at counter industry efforts to influence and manipulate individual choice. This idea of opposing corporate influence can also be traced as one of the main drivers behind the conclusion of the FCTC⁴⁹. However, it is true that, as suggested by Burgess’ analysis, these nudge-inspired tools are designed to depart from the ‘process of risk dramatization’. In line with the objective of the ‘de-normalisation’ of tobacco, these policies aim at making the individual believe that the social norm is different, typically lower, than they may have assumed. Thus, plain packaging (whereby a cigarette no longer looks like a consumer product), visual display bans (whereby a cigarette is no longer assimilated to other products presented on the shelves) as well as smoking bans (nobody smokes in public places in its most radical form) portray the smoking reality in a way that differs from what it actually is: tobacco products are still legally manufactured products that are largely consumed. As sharply suggested, the objective is to encourage individuals “to adjust their behaviour and eat, drink and smoke less, or consume less energy”. Therefore, the contribution that nudging might offer to tobacco control is significant because it favours the de-normalisation of smoking without dramatizing its effects on society. It has indeed been argued that the social norms approach is gradually emerging as an alternative to the unsuccessful approach of

⁴⁹ Stephen D. Sugarman, *International Aspects of Tobacco Control and the Proposed WHO Treaty*, in Robert L. Rabin and Stephen D. Sugarman (eds.), *Regulating Tobacco*, (Oxford: Oxford University Press 2001), p. 245.

“health terrorism”⁵⁰. Instead of scaring people into abstaining from tobacco, this approach seeks to change the context within which they are exposed to it. This in turn may help young people to break free from an “imagined false norm of behaviour”⁵¹.

2. The libertarian argument

The most immediate argument raised against nudging is that ‘libertarian paternalism’, despite the original claim of its theorists⁵², is an oxymoron because its policies are too paternalistic. However, as noted by Burgess, the overall resistance to public policies on grounds of individual liberty and autonomy seems to have weakened in recent times. If attachment to the concepts of liberty and autonomy were dismantled in the 1990s, the libertarian argument against tobacco control was undermined much earlier and, as a result, plays only a residual role in the actual debate about tobacco regulation⁵³. Historically, the industry has systematically opposed tobacco control initiatives as paternalistic and patronizing⁵⁴. Being that smoking is deeply rooted in individualism, it has been constantly held that smoking is a voluntary behaviour engaged in by consenting adults who are well-aware of the risks inherent in their choice⁵⁵. In Western societies it is indeed generally believed that individuals should be free to choose their own lifestyles, including the risks that a lifestyle may entail⁵⁶. This seems especially true for a product like tobacco (or alcohol) that is associated with enjoyment, relaxation, celebration and entertainment. Although this ‘libertarian’ argument has been widely and successfully used by the tobacco industry for some time, it came under attack several decades ago, thus losing some of its normative power⁵⁷. The emergence of evidence showing the

⁵⁰ David J. Hanson, “Social Norms of Marketing is Highly Effective”, available on the Internet at: <<http://www2.potsdam.edu/hansondj/YouthIssues/1093546144.html>> (last accessed 24 January 2012).

⁵¹ Ibid.

⁵² Richard Thaler and Cass Sunstein claim that, “the libertarian aspect...lies in the straightforward insistence that, in general, people should be free to do what they like...The paternalistic aspect lies in the claim that it is legitimate for choice architects to try to influence people’s behaviour in order to make their lives longer, healthier and better”. See, *Nudge: Improving Decisions About Health, Wealth and Happiness*, (London: Yale University Press, 2008), at p. 232.

⁵³ For a recent attempt, see Scott Crosby, “The New Tobacco Control Directive: An Illiberal and Illegal Disdain for the Law”, 27 *European Law Review* (2002), pp. 177–193.

⁵⁴ Interestingly enough, sociological research suggests that the modern anti-smoking movement began, similarly to Prohibitionism of the mid-30s, as a typically upper-middle-class phenomenon intended to impose its values on the lower orders of society by “education”, if possible, or by government intervention, if necessary.

⁵⁵ Robert L. Rabin and Stephen D. Sugarman (eds.), *Regulating Tobacco*, (Oxford: Oxford University Press 2001), p. 3.

⁵⁶ Ibid.

⁵⁷ The evidence about the hazards of second-hand smoke began to emerge in the 1980s. See, Geraint Howells, *The Tobacco Challenge*, supra note 16, at pp. 72–73.

health risks of second-hand smoking shifted the debate from the rights of smokers to the rights of non-smokers⁵⁸. The ensuing paradigm shift in developing demand reduction strategies, by freeing the tobacco movement from this remaining ideological obstacle, served as a catalyst for embracing the more radical second-generation measures. As a result, despite the existence of some scepticism about the hazards of second-hand smoke⁵⁹, the libertarian argument does not seem to weaken as such the normative power of nudges in tobacco control. By now a consensus has arisen that governmental intervention to reduce tobacco consumption is “not only legitimate but essential”⁶⁰. This seems confirmed by the fact that the tobacco industry itself, facing uncontroversial evidence and an increasingly critical public, no longer contests the need to curtail youth access and to inform adults about the dangers of smoking.

3. The legitimacy argument

The other criticism generally levelled against nudging policies, and here further elaborated by Burgess, pertains to legitimacy: who makes the choices about people’s choices? While ‘libertarian paternalism’ is not an oxymoron, it is inherently technocratic, and it cannot be otherwise since nudging tends to work best when users are unaware that their behaviour is shaped by choice architecture. Therefore, like any form of technocratic intervention, the legitimacy of nudges depends on citizens’ acceptance of the manipulative character of the policy as well as on citizens’ trust in the ‘choice architects’, also called ‘nudgers’. In other words, how comfortable are citizens with having experts and bureaucrats designing policy to prevent them from smoking?

Whilst an important question, this argument does seem to lose some normative sharpness when invoked in the framework of tobacco regulation. Given the general knowledge of the adverse effects stemming from tobacco consumption, nobody – not even the tobacco industry – seems ready to

⁵⁸ The US Surgeon General’s 1972 Report identified the hazards of second-hand smoke before its 1986 Report decisively concluded that, “Involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers”. In 1998, the UK Scientific Committee on Tobacco found that exposure to second-hand smoke led to a 24 per cent increased risk of lung cancer. See UK Report of the Scientific Committee on Tobacco and Health, 1998, available on the Internet at <http://www.who.int/tobacco/mpower/en_tfi_scientific_committee_dh.pdf> (last accessed 24 January 2012).

⁵⁹ See, e.g., Virginia Berridge, “Passive smoking and its pre-history in Britain: policy speaks to science?”

49 *Social science and medicine* (1999), pp. 1183–1195.

⁶⁰ Robert L. Rabin and Stephen D. Sugarman (eds.), *Regulating Tobacco*, (Oxford: Oxford University Press 2001), p. 3.

challenge governmental action aimed at reducing tobacco consumption on legitimacy grounds⁶¹. This is not the same in other areas, such as obesity prevention, in which due to the multifactorial character of the problem at stake (e.g. genetic, lifestyle, socio-economic factors) the scientific evidence proving the existence of a causal relationship between overconsumption and adverse effects is still lacking. Although our understanding of the causes of both overweight and obesity has increased, there remain scientific uncertainties: the role played by genetic and ethnicity; the role of physical activities in preventing weight gain; the changing nature of food; the relative importance of each cause and their interactions⁶². In these circumstances, the legitimacy of a nudge aimed at discouraging food consumption seems more limited than with tobacco control.

4. The short-term argument and the infantilisation effect

Nudges, by aiming at behavioural change through strategic manipulation of cognitive patterns, achieve their objective neither through education nor personal will. The ensuing risk is that nudges do not build moral character, but rather weaken our capacity for self-control⁶³. As elaborated by Burgess, this argument might imply that while nudging may produce benefits in the short term, its long-term effect may be ‘infantilisation’, i.e. decreasing responsibility in matters regarding one’s own welfare.

However, the history of tobacco control seems to contradict such a conclusion insofar as it suggests that induced behavioural changes and de-normalisation may also bring about long-term effects. In other words, nudge-inspired policies such as visual display bans, plain packaging of cigarettes as well as smoking bans may induce genuine preference changes through a permanent alteration of the context in which decisions are taken. Given the possibility of individualized reactions to these policies, only an empirical investigation will be able to show whether the long-term effects will systematically be matched by their short-term successes.

⁶¹ On the corporate approach of tobacco companies towards regulation, see, e.g., Patricia McDaniel and Ruth Malone, “Understanding Philip Morris’s Pursuit of US Government Regulation of Tobacco”, 14 *Tobacco Control* (2005), pp. 193–200. See also, Robert L. Rabin and Stephen D. Sugarman (eds.), *Regulating Tobacco*, (Oxford: Oxford University Press 2001).

⁶² Amandine Garde, *EU Law and Obesity Prevention*, (Alphen aan de Rijn: Wolters Kluwer 2011), at pp. 10–16.

⁶³ Luc Bovens, “The Ethics of Nudge”, in Till Grüne-Yanoff and Sven Ove Hansson *Preference Change: Approaches from Philosophy, Economics and Psychology* (Berlin and New York: Springer 2008).

As for the contended infantilisation process, this seems *prima facie* of no concern to an anti-smoking lobby exclusively driven – in line with the public health approach – by the imperative of reducing the number of smokers. Its policies do not pursue the goal of obtaining informed choices and informed behavioural changes. Rather they are only driven by the need to reduce the number of smokers. As a result, their posture *vis-à-vis* the tobacco issue has no other justification than an instrumental one. This is exemplified by the actual inconsistent policy pursued and promoted regarding low-tar products. On the one hand, the legislation establishes maximum levels of tar, nicotine and carbon dioxide contents – thus suggesting that lower contents might be safer products – and, on the other hand, it prohibits tobacco manufacturers from listing the amount of tar contents and other ingredients to consumers.

In the light of the above, neither the short-term argument nor the infantilisation effect seem relevant to the extension of nudging policies to tobacco control.

5. The evidence argument

Although Adam Burgess does not seem to share optimism about the ability of ‘choice architecture’ to increase rational living, he concedes that nudge is presented as a potentially cheaper means of dealing with social problems⁶⁴. Yet, as highlighted in his opening essay, no compelling evidence supports this alternative regulatory approach. As it was recently concluded by the UK Science and Technology Select Committee, “There is a marked lack of information about what works to change behaviour at policy level”⁶⁵. In particular, although most of the proposed schemes are designed to address human misperceptions, their elaboration is based on experimental settings⁶⁶. This is certainly the case for plain packaging of tobacco products, a policy that has never been implemented, but only partly for smoking bans and visual display bans, which have been in force in several jurisdictions for some time already. Hence, the question arises whether nudge-inspired measures as applied to

⁶⁴ According to Thaler and Sunstein, “Many of these policies cost little or nothing; they impose no burden on the taxpayers at all”. See Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (London: Yale University Press, 2008), at p. 14.

⁶⁵ Science and Technology Select Committee at the House of Lords, *Behaviour Change*, 2nd Report of Session 2010-12, pp. 18-19.

⁶⁶ For an early recognition of the lack of both a theoretical and an applied experimental basis for integrating cognitive biases into policy making, see William Eskridge and John Ferejohn, *Structuring Lawmaking to Reduce Cognitive Bias: A Critical View*, 87 *Cornell Law Review* 616, p. 647.

tobacco control are capable of changing behaviour?

While it is undisputed that following the entry into force of an overall set of tobacco control measures, smoking prevalence in the West began to decline after years when it had flatlined⁶⁷, there has been insufficient evaluation of the overall strategy to be able to determine the relative impact of each individual element. This seems particularly sensitive in the area of tobacco control since governments have reporting obligations as a party to the WHO Framework Convention on Tobacco Control. The protocols and guidelines to the FCTC provide guidance on the implementation of evidence-based behaviour change interventions to reduce smoking prevalence and uptake. Although no specific targets are listed, there is a clear commitment to evidence-based policies. However, the general impression is that, given the highly instrumental character of the anti-smoking efforts, this commitment is not always taken as seriously as it should.

VII. Conclusions

The most recent tobacco control policies being inspired by the ‘permit but discourage’ approach all seem to be supported by ‘libertarian paternalism’: they let individuals smoke but they do not miss a chance to nudge them towards less consumption in order to reduce morbidity and mortality generally associated with tobacco smoking. They aim to achieve this not by informing you about how harmful smoking is but by changing the context within which all smoking choices are ‘made’. As such, ‘libertarian paternalism’ seems capable of accommodating (and justifying) the rather contradictory governmental stance towards tobacco products, which allows the legal marketing of a deadly product capable of generating significant income for both the industry and the government through taxation, while at the same time heavily regulating and disincentivizing its consumption.

While the libertarian argument has lost ground in opposing tobacco control since the emergence of studies proving the adverse effects of second-hand smoke, the paternalistic argument is not yet fully established. Although the number of tobacco control policies has progressively increased in number and significance, there is still resistance to the introduction of tobacco control measures that remain perceived as contradictory. Libertarian paternalistic-inspired policies may be able to overcome such a

⁶⁷ Prevalence of current tobacco use among adults aged ≥ 15 years (percentage) , World Health Organization. Retrieved 2012-01-26.

last frontier in the social and intellectual acceptance of tobacco control policies. As demonstrated above, most of the arguments levelled against nudging do not necessarily weaken the use of this regulatory approach to tobacco control: manipulation of individual choice and public intervention seem both increasingly accepted in the area of tobacco control. However, whilst nudging offers a badly needed intellectual underpinning to the current regulatory stance against tobacco, it might encounter some of the same obstacles that it faces in other less contentious areas of policy-making: the effectiveness of its policies and the risk that, in the long term, they might backfire. Until society decides to ban smoking completely, adults will continue to make their individual choices. Should these choices not occur in an informed way, there is a risk that governmental efforts will lose credibility vis-à-vis both current and new, potential smokers. In sum, despite the specificity of the tobacco industry, this account of the latest nudge-inspired control measures confirms Burgess' conclusion: "nudge is only the latest addition to the portfolio of interventionist approaches, rather than an alternative to it"⁶⁸. Indeed, by calling for an original regulatory 'mix' of adequate intervention, regulating lifestyle choices clearly defies "the power of law to correct all of the evils"⁶⁹. There is an emerging consensus that although nudging people along cannot be a self-sufficient strategy, it should necessarily become part of a broader and multifaceted strategy. Therefore, the remaining question is how to select the right components in order to define the regulatory 'mix' capable of achieving the intended goals. Unfortunately, neither Thaler/Sunstein nor Burgess provide the recipe for the optimal 'regulatory mix' that would both shift norms away from consumption and use those changing norms to support more extensive legal intervention which also contributes to reduced consumption.

As a result, policy-makers dealing with regulatory efforts to curb tobacco consumption are likely to continue their desperate search to identify the right regulatory 'mix' of policy tools holding the key to further curtailment. This is likely to remain the case until society determines that the advantages derived from a ban on tobacco outweigh the costs that it would impose.

⁶⁸ This is also the conclusion reached by the Annual Update 2010-11 of the Behavioural Insights Team (BIT) established at the UK Cabinet Office. See p. 29.

⁶⁹ Joseph R. Gusfield, *Symbolic Crusade* (Champaign, IL: University of Illinois Press 1963), at p. 1.