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Response to Open Peer Commentaries on 'Withdrawing Versus Withholding Freedoms

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Published in:
The American Journal of Bioethics

DOI:
[10.1080/15265161.2016.1222019](https://doi.org/10.1080/15265161.2016.1222019)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2016

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Schmidt, A. T. (2016). Response to Open Peer Commentaries on 'Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control'. *The American Journal of Bioethics*, 16(11), W1-W3. <https://doi.org/10.1080/15265161.2016.1222019>

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Response to Open Peer Commentaries on “Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control”

Andreas T. Schmidt, University of Groningen

I thank the commentators for their thoughtful pieces written in response to my “Withdrawing Versus Withholding Freedoms: Nudging and the Case of Tobacco Control” (Schmidt 2016b). In that article, I discuss whether withdrawing options people currently have is a stronger interference with their freedom than withholding similar options they do not have. A number of features can make this the case in public policy: More than withholding, withdrawing options might hamper people’s ability to pursue plans across time, might interfere with people’s traditions and identities, might remove options that, over time, can lead to further options, and might impose transition costs. However, whether and to what extent these considerations apply will vary from policy to policy. Applied to tobacco control, the reasons for favoring the status quo are comparatively weak. This being so, a popular argument in favor of endgame measures—that is, policies that seek to abolish cigarette smoking completely—should be allowed to stand: Given that we would be justified to withhold the option to smoke cigarettes in hypothetical scenarios in which cigarettes did not yet exist, there is no decisive freedom-based reason against also withdrawing the option. Applied to nudging policies, the lesson is more general. If nudging is done democratically and transparently, a concern about the status quo does not limit the extent to which we can employ nudges to achieve public policy outcomes.

If correct, the conclusions of the article provide a new, systematic way to think about freedom and the status quo in public policy. On the one hand, if we want to prioritize the status quo, we need good reasons in individual cases. Sometimes such reasons will be lacking and we should be less conservative. On the other hand, we have systematic philosophical reason not to dismiss the relevance of the status quo out of hand. Public policy and ethical discussions thereof do not happen in the state of nature.

A number of commentaries point out ways in which my discussion leaves out something important about status freedom and fails to engage with personal autonomy. To provide some structure, let us split up freedom—as a complex ideal for liberal policy—along the following three dimensions. First, negative freedom is about how many and what kinds of choices and opportunities a person has (“negative freedom” or “social freedom”). Second, freedom in the positive sense is a psychological ideal. It is about how far a person is autonomous in her psychological states and the exercise of her freedom (“personal autonomy,” “positive freedom,” or “psychological freedom”). Finally, freedom might refer to a person’s social and legal status (“status freedom”).

Among other points, Conly argues that in my discussion of status freedom and paternalism I miss the important subjective dimension of paternalist public policy:

Much of the reaction to such changes [paternalist interventions such as a cap on soda sizes] is a function of a perceived loss of status freedom—from being people who are able to make their own decisions as to what to consume they have been changed into people whose decisions about what to eat and drink are made by others, and made by others precisely because their own ability to make good decisions in these issues is impaired. (Conly 2016, 18)

Voting and other avenues for democratic control over such issues might not be enough to save people’s perceived status; we also need to attend to the subjective, psychological dimensions as well as to issues of fundamental rights. If correct, my argument that democratically controlled and transparent nudging is compatible with status freedom is too quick. However, I think that Conly’s points can be incorporated if the framework in my article is

extended a little. First, I agree that a plausible conception of status freedom might well include psychological components and should thus be sensitive to a perceived loss of status. If status freedom is about both legal and social status, as republicans like Philip Pettit typically argue, the kinds of psychological considerations mentioned by Conly should be incorporated. Accordingly, how far an intervention conflicts with status freedom might, *inter alia*, be a function of how the intervention is perceived by those affected and their own perceived status as self-determining agents. Second, proper consultation and democratic procedures might help create an environment in which nudging comes to be perceived as compatible with people's status freedom. For that to work, democracy should be understood in a richer fashion and not just as simple majority voting. It will involve deliberation, consultation, opportunities for contestation, adequate protection of minority interest and fundamental rights, and so on. Finally, Conly discusses the attempted Sugary Drinks Portion Cap Rule in New York City (or "soda ban") as an example highlighting that a majority of New Yorkers objected to such a cap. However, I am wary of extrapolating from this case to other possible and actual cases of nudging (although I should add that Conly does not do so in her commentary). Among other things, corporate media strategies might have exercised an outsized influence on public discourse and opinion in the New York case. Recent data suggests that using nudges to reduce sugary drink consumption generally enjoys higher public acceptability than it did in the New York case and higher acceptability than taxing sugary drinks (Petrescu et al. 2016).

Bovens's contribution features a number of interesting points, including an application of my framework to alcohol policies. Bovens also raises issues concerning status freedom and tobacco control. Because tobacco control policies disproportionately affect people of low socioeconomic status and vulnerable populations, he adds, "Policies for smoking cessation need to be responsive to the needs and sensitivities of target populations. . . . For a policy to be nonarbitrary it is not sufficient that it is backed up by legitimate concerns of public health, but it also needs to go through procedures of deliberative democracy" (Bovens 2016, 17). I agree with Bovens. A concern for status freedom requires a rich notion of democracy, including adequate deliberation, consultation and community involvement, and opportunities for contestation. But I would add that, conversely, tobacco control measures can also be ways to improve the status freedom of vulnerable populations. Successful tobacco control measures might restrict the power of tobacco companies to lock people of low socioeconomic status (SES)—and vulnerable populations in developing countries—into unhealthy and financially burdensome addictions. Thus, while tobacco control measures involve an exercise of power, they might also contribute toward empowering vulnerable populations.

Some commentators raise issues regarding personal autonomy (or "positive freedom" or "psychological

freedom"). Among other things, Houk and colleagues object that in being too focused on negative freedom, I miss that some nudging policies undercut people's rationality and might thus stand in the way of autonomous agency (Houk, DiSilvestro, and Jensen 2016). Rationality and personal autonomy are complex notions, which is why I did not discuss them in my article. But I agree that they should form part of a comprehensive ethical assessment of nudging and tobacco control. In other work in progress, I argue that the conflict between nudging and rationality is often overstated. The idea is roughly this: Choice architecture, if done right, can sometimes enhance people's opportunities for rational agency. As a realistic normative model of rational agency, I believe we should move away from traditional rational choice models toward ecological models. Such models hold that rational agency is about applying the right decision-making procedure in the right circumstances. Democratically controlled choice architecture can then be seen to support ecologically rational agency by helping to match choice environments to people's decision-making procedures. (However, I agree with Houk and colleagues that nudges still need to be assessed on a case-by-case basis.)

Kabasenche's discussion of personal autonomy focuses on how people's identities form over time and develop in complex social contexts (Kabasenche 2016). Kabasenche argues for a relational model of autonomy to stake out how and when people can legitimately influence a person's identity formation. In focusing on identity formation, Kabasenche offers an interesting different avenue from which to approach some of the questions in my article. First, tobacco control interventions aimed at young people are easier to square with a concern for personal autonomy, as young people's identities are still in development. We might even hope that successful tobacco control policies curb the influence of tobacco companies and peer pressure, as such influences seem intuitively problematic in a relational model of identity formation. Second, most ethical discussions of nudging so far focus on individual personal autonomy, where autonomy is often understood as being about people's preferences and their ability to choose rationally. Kabasenche's focus suggests paying more attention to the social relations that form the context for such nudging interventions.

In her contribution, Morain engages with questions of personal autonomy and uses my framework to support the recent Tobacco 21 initiative (Morain 2016). Tobacco 21 proposes to move the legal age of sale for tobacco and nicotine products from 18 to 21 years. Morain advances the stronger claim that not only is Tobacco 21 compatible with people's freedom and autonomy, it might in fact enhance people's autonomy. First, citing research on cognitive development, she argues that delaying the age of consent puts people in a better position to decide whether to smoke or not. Second, delaying when people take up smoking can make smoking less addictive, as the adolescent brain seems more vulnerable to nicotine and to nicotine

addiction. Finally, because addiction is one of the classic sources of lowered personal autonomy, preventing nicotine addiction might leave people with more autonomy overall. I am very sympathetic to Morain's line of argument. On the second point, I would add that preventing nicotine addiction might enhance freedom not only in the psychological but also the negative sense. Smoking significantly reduces people's life expectancy, increases morbidity, and makes people financially worse off. The longer and healthier one's life, the more options and opportunities one has across a lifetime. A straightforward reason to prevent smoking might thus lie in an effort to prevent people from abridging their own future levels of freedom (Schmidt 2016a; Sen 2007).

Finally, Kreitmair discusses whether my discussion can be improved upon by attending to the withdrawing/withholding distinction in clinical contexts (Kreitmair 2016). In a footnote in my article, I list structural differences between my discussion and the discussion as to whether there is a moral difference between withdrawing and withholding treatments in critical care (Schmidt 2016b, n. 2). Kreitmair identifies consent as the salient aspect in end-of-life decisions and argues that consent should also play a more central role in my discussion of public health policies. I, of course, agree that consent is a salient ethical feature in decisions whether to continue or stop life-prolonging measures. But I worry somewhat about overextending the analogy between clinical cases and public health. The role of consent in public health is more indirect, given that we are dealing with populations rather than individuals. In my framework, consent enters at two junctures. First, respecting individual consent in the regulation of consumer options is typically achieved by granting people a choice between different options. Second, in enacting tobacco control policies, we do not require the consent of each individual. However, a respect for status freedom implies that radical tobacco control measures require democratic control, which, in a pluralist mass society, is the best way to account for the reasons we endorse consent in clinical contexts. ■

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