Ethical and Legal Analyses of Policy Prohibiting Tobacco Smoking in Enclosed Public Spaces

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It is axiomatic that tobacco smoking is hazardous to health. The statistics are well documented and often very grim. For example, the 2008 World Health Organization Report on the global tobacco epidemic presented the following statistics: a hundred million people died of tobacco-related diseases globally in the 20th century; there are approximately over five million tobacco-related deaths every year; and an estimated one billion could die of tobacco-related diseases in this 21st century.[1]

Significantly, no other risky, self-indulgent addictive behaviors such as cocaine abuse directly endanger bystanders as much as cigarette smoking or tobacco use endangers nonsmokers through secondhand tobacco smoke[2] or inhaled environmental tobacco smoke (ETS).[3] Environmental tobacco smoke comprises sidestream smoke (smoke that emanates from the burning end of a tobacco product) and mainstream smoke (smoke exhaled by the smoker).[4] About 85 percent of environmental tobacco smoke is sidestream smoke, while the remainder is mainstream smoke.[5]

Most significantly, environmental tobacco smoke harbors over 4,000 mostly unsavory chemicals, ranging from arsenic, benzene, cadmium, chromium, beryllium, carbon monoxide, ammonia, hydrogen, cyanide, to formaldehyde.[6] Of these chemicals, 50 are known to cause cancer, while at least 250 are generally harmful to health.[7] The great irony, however, is that sidestream smoke, to which nonsmokers are exposed, is reputedly "richer in known carcinogens than is the smoke that smokers themselves inhale."[8] Individuals exposed to environmental tobacco smoke would inevitably inhale nicotine, which would be absorbed directly into their bloodstream, where it would degrade relatively quickly, and through ensuing metabolism, morph into continine.[9] Nicotine levels in the bloodstream tend to reflect evidence of more recent exposure to environmental tobacco smoke, while continine is symptomatic of longer or more distant exposure.[10]

Study has shown that passive smokers would typically have continine levels of about one percent of those found in active smokers.[11] However, the greater the levels of exposure of nonsmokers to environmental tobacco smoke, the higher the concentration of continine in their body.[12] For example, a nonsmoking wife who is exposed to protracted periods of environmental tobacco smoke from her smoking husband at home is said to run approximately 34 percent greater risk of lung cancer than a nonsmoking wife, whose husband does not smoke at home.[13] More troublingly, an average nonsmoking person at work who is constantly exposed to multiple cigarette smokers would receive close to four times the dose of environmental tobacco smoke than the nonsmoking spouse would receive at home.[14] This would resonate well with workers who operate in work environments where cigarette smoking is the norm. These would include restaurant workers, bar attendants, and waitresses, for example, and is arguably one of the reasons that cities across the world now prohibit smoking at such venues.[15]

Thus, exposure to environmental tobacco smoke would inevitably lead to a slow but gradual build-up of nicotine and continine in the bloodstream of nonsmokers. Given that passive smoking is characterized as involuntary smoking,[16] it is literally nothing short of assault on nonsmokers,[17] and a fatal one at that, in light of the well-documented health hazards posed to nonsmokers by high levels of nicotine and

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continine in their bloodstream. For example, a 1990 Dutch Health Council Advisory Report found *inter alia* that inhaled environmental tobacco smoke or passive smoking could increase the risk of lung cancer by 20 percent; significantly increase the risk of other forms of cancer; or the risk of cardiovascular disease by 20 to 30 percent; increase the risk of underweight children by pregnant women by 20 to 40 percent; and double (by 100 percent) the risk of sudden infant death syndrome.[18] Furthermore, in the United States, secondhand tobacco smoke is held accountable for an estimated 3,400 annual lung cancer deaths, and approximately between 22,700 to 69,600 annual heart disease deaths amongst adult nonsmokers.[19]

Obviously, these smoking-induced expenses could be put to a better public use. In the United Kingdom, for example, evidence suggests that a general reduction in smoking would lead to an increase in overall employment and that the economic benefits of reducing passive smoking do outweigh its costs.[26]

While economics is a strong driving force in the general tobacco smoking reduction policy, arguably, the main justification for banning tobacco smoking in enclosed public spaces is the imperatives of protecting non-smokers from inhaled environmental or secondhand tobacco smoke. This justification is the hallmark of "public health" defense cum safety strategies, which was alluded to by the Scottish Health Minister, who following the 2006 tobacco smoking ban in enclosed public spaces, was quoted as saying that:

> As a smoke-free nation, Scotland can look forward to a healthier future.... A future where Scots live longer, families stay together longer and our young people are fitter and better prepared to make the most of their ambitions.[27]

Thus, without doubt, public health protection is the critical mass of the general governmental tobacco smoking discouragement policy,[28] or the bourgeoning global wave of tobacco smoking proscription in enclosed public spaces,[29] which is arguably buoyed by the 2005 World Health Organizations' Framework Convention on Tobacco Control.[30] The WHO Treaty stresses the imperatives of protecting all persons from exposure to tobacco smoke:[31]

> Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.... Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public

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Significantly, tobacco smoking also foists concomitant economic burdens on individuals, corporate bodies, and the society as a whole.[20] For instance, the very act of accommodating smokers' needs in customized smoking shelters in public spaces comes embedded with costs. This is exemplified by the report that since 1996, the U.S. Defense Department alone has spent at least $17.9 million dollars on the construction of self-standing smoking shelters.[21] While well-funded government agencies are arguably better suited to absorb the costs inherent in accommodating smokers in customized shelters, it is an externality that some businesses can ill afford. Ever anxious about the bottom line, some U.S. employers now controversially give preference to nonsmoking employees, or tie cigarette smoking cessation to job security and continuing employment in order to, *inter alia*, cut the premium costs of employees' health care insurance coverage.[22]

While this measure would appear extreme and could be tantamount to discriminating against smoking employees or trampling on their autonomy and privacy rights,[23] there is no denying the soundness of its costs-cutting objective and its potential to wean cigarette smokers off smoking, and thereby reverse the escalating costs of smoking, which, in the United States, was estimated at $97 billion by the FDA.[24] This figure comprises $50 billion in direct health care costs, $7 billion in direct morbidity costs, and $40 billion in lost future earnings from premature deaths.[25]

> transport, indoor public places and, as appropriate, other public places.[32]

However, there is no doubt that tobacco use or cigarette smoking is an autonomous and indeed, very private act.[33] Therefore, the central question in this paper is: Should political intervention in a private affair as basic as tobacco smoking in enclosed public spaces be justified in the name of public health protection? This main question arguably raises entwined legal and ethical sub-questions: Is there a right to tobacco use or to freely smoke as such? If there were such a right, wouldn't political intervention in the free use of tobacco products smack of paternalism or undermine smokers' privacy or their right to freely smoke? And if public health interests were so paramount, wouldn't a blanket ban, rather than the current partial tobacco-smoking proscription in enclosed public spaces, be more expedient in safeguarding the public health? The interconnectedness of these sub-questions to the main question will be expatiated on in relative detail in subsequent parts of this paper. To start, I will briefly explore the concept of public health, and then use ethical principles of paternalism, harm, utilitarian moralism, and rights-based legal arguments to analyze the public health defense rationalizations of tobacco smoking prohibition in enclosed public spaces.

Deconstructing the Concept of "Public Health"

Understanding the jurisprudential, ethical, and conceptual parameters of "public health" is vital to grasping public health justificatory grounds for tobacco smoking discouragement policy in general, and tobacco smoking proscription in enclosed public spaces in particular. Such an understanding could also help inform the central inquiry of this paper on the propriety of political intervention or control of a private behavior as basic as tobacco smoking in enclosed public spaces.

Conceptual and definitional analyses of "public health" are susceptible to varied connotations, ranging from the normative, descriptive to the specific, and making the term a "contested concept."[34] Indeed, the term "public health" tends to be characterized by a myriad of "public health problems," ranging from infectious diseases, cigarette smoking, pollution, inadequate sanitation, societal inequalities, domestic violence, teenage pregnancy, gambling, to suicide.[35] Thus, the term "public health" seems to cover every conceivable social and economic problematic that put the society or public at risk.[36] However, it is this propensity for hotchpotch or arbitrarily generic conceptualization of "public health" that invariably raises the inevitable task of determining which amongst its numerous constituents is a "legitimate candidate for public health activity."[37] While that task is beyond the scope of this paper, it would suffice for our purposes to adopt the comprehensive albeit descriptive definition proffered by James F. Childress et al.:

> Public health is primarily concerned with the health of the entire population, rather than the health of individuals. Its features include an emphasis on the promotion of health and the prevention of disease and disability; the collection and use of epidemiological data, population surveillance, and other forms of empirical quantitative assessment; a recognition of the multidimensional nature of the determinants of health; and a focus on the complex interactions of many factors — biological, behavioral, social and environmental — in developing effective interventions.[38]

Consequently, if public health issues were mainly about concerns for, and the protection of the health of the general public rather than that of individuals, then the best entity most suited to safeguard public health is the government, due to its inherent legal and moral authority to do so.[39] Indeed, government's legitimacy to regulate public health issues is directly anchored on its authority to govern and protect public interest.[40]

With respect to tobacco discouragement policy in general, and cigarette smoking proscription in enclosed public spaces in particular, examples of such deliberate governmental policies ostensibly on behalf of the collectives, abound. These range from the unusually high tariffs on tobacco sales, compulsory labeling bearing graphic or explicit health warnings on cigarette packaging, to banning of tobacco sales to under-age persons.[41] In the United States, for example, following the 1964 Surgeon General's report on the adverse effects of tobacco use on health, Congress enacted the first legislation requiring compulsory explicit warning on cigarette packaging alerting users to the dangers inherent in smoking.[42]

While tobacco users and pro-smoking groups may feel hemmed in by contemporary anti-tobacco use policy measures, the measures actually pale in comparison to the draconian and punitive penalties that used to be the norm, at a time when certain authorities perceived tobacco use as a vice and corruptible influence that must be crushed.[43] Examples range from the reputed execution of 18 tobacco smokers a day by Murald IV, the Sultan of the Ottoman Empire, the slitting of smokers' noses by the first Romanov Tsar of Russia, to the 4,000 percent tax hike slammed on tobacco products by King James I of England.[44]

However, contemporary anti-smoking policies do have a more rational basis: public health protection. In the following paragraphs, I will use ethical principles of paternalism, harm, and utilitarianism, as well as a rights-based legal argument, as the framework for evaluating public health protection rationalization of tobacco smoking proscription in enclosed public spaces. However, and significantly, the said ethical and legal principles are used not as an end in themselves, but as assessment tools for measuring the propriety of public health justifications for the liberty restraining laws on tobacco smoking in enclosed public spaces.

Legal Paternalism, Nanny-statism, and the Defense of Public Health against Environmental Tobacco Smoke

Legal paternalism has its roots in the Latin word *pater*, which means to act like a father or treat someone like a child.[45] The term has been adapted by modern legal and political philosophers to describe situations where authority figures make decisions or act for another person or persons, ostensibly in their best interests or for their general good or welfare, and usually without their consent.[46] According to Peter Suber, paternalism advances societal interests such as life, health, and safety, at the expense of their liberty, but it is controversial because it is necessarily coercive, albeit with benevolent objectives.[47] Gerald Dworkin's definition echoes similarly liberty-restraining feature of paternalism, while it purportedly serves societal general welfare and good:

> [the] interference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced.[48]

Like Peter Suber, Tom L. Beauchamp and James F. Childress analogized paternalism with the father-figure who acts beneficently in what he conceives to be in the best interest of his children, and would prefer to make all or at least some of the decisions pertaining to their welfare.[49] They then defined paternalism as:

> [t]he intentional overriding of one person's known preferences or actions by another person, where the person who overrides justifies the action by the goal of benefiting or avoiding harm to the person whose preferences or actions are overridden.[50]

Thus, legal paternalists would support laws prohibiting the use of narcotics or provision of compulsory social security, or health insurance for example.[51] While libertarians are generally opposed to legal paternalism, they do make an exception for paternalistic interventions on behalf of children and the vulnerable.[52] Paternalism is often categorized into "soft" and "hard" paternalism.[53] The principle of soft paternalism justifies intervening in or overriding an individual's decision, where it is perceived that they lacked "the requisite decision-making capacity."[54] Generally, individuals could be deprived of requisite decision-making capacity by a lack of adequate information or freedom, or due to immaturity or coercion.[55] Therefore, in the context of the general tobacco-smoking discouragement policy, given the addictive nature of tobacco, soft paternalism would justify any measure aimed at helping an individual who genuinely wanted to quit smoking, but who lacked the willpower, resolve, or capacity to do so.[56]

However, it has been argued that soft paternalism is not really paternalistic at all since it does not really interfere with individual autonomy.[57] This line of argument would appear to support the above-mentioned example of a cigarette smoker who genuinely would like to quit, but is addicted to nicotine. For him or her, the seemingly restrictive tobacco laws such as the ones promoting higher taxes and a ban on smoking in enclosed public spaces, could only strengthen his or her resolve to quit smoking rather than undermine or interfere with his or her autonomy to make a decision on the propriety of tobacco use. The flip side of soft paternalism is "hard" paternalism, and in the context of restrictive tobacco use policy, it would necessarily override or undermine the autonomy or privacy of tobacco users, who have no intention of quitting, but who are being frustrated by spiraling tobacco prices and the ever shrinking public space to smoke at will and in comfort.

Therefore, in the context of public health policies such as tobacco smoking proscription in enclosed public places, "hard" paternalism,[58] which has been described as the "real paternalism,"[59] would still impinge on autonomy, liberty, or personal freedoms of smokers, even if the policy was designed to save them from harming themselves, as well as for the protection of the public from harmful environmental tobacco smoke.[60] Significantly, not all paternalistic actions aimed at curbing tobacco use stem from political authorities, and such curbs could be driven more by economics than by public health imperatives or the agenda to save the smoker from harming himself. This is exemplified by some U.S. employers who would prefer to hire nonsmokers or tie job security to tobacco use cessation in order to cut the premium costs of employees' health care insurance coverage.[61] Such apparent discriminatory workplace practices would arguably be

paternalistic as they could pressure habitual smokers into sacrificing tobacco use for job security.

More crucially, legal paternalistic strictures such as tobacco smoking proscription in enclosed public places do carry sanctions with punitive undertones. According to Peter Suber, the inherent punitive or criminalizing nature of paternalistic legislations make paternalistic policies as instruments of behavioral change even more divisive.[62] In the context of tobacco smoking prohibition in enclosed public spaces for example, smokers would not only suffer the concomitant inconvenience of not being able to smoke in enclosed public spaces, but could be fined or imprisoned if they flouted the law. However, it is arguable that since the prohibited act is not victimless or harmless as exemplified by the ills of environmental tobacco smoke catalogued above,[63] any restrictions placed on the act would appear morally justifiable.

Since legal paternalism necessarily curbs individual autonomy and freedoms, it is apt to ask whether or not the harms prevented from befalling the public from environmental tobacco smoke outweigh the individual loss of freedom or autonomy to smoke cigarettes in enclosed public spaces. Without doubt, trading individual tobacco users' autonomy or freedom to smoke in enclosed public spaces for the safety and well-being of the public would be morally justifiable.

There is, however, a strong countervailing and libertarian argument that smokers should only be scolded for "a private regarding indulgence" and not be sanctioned, and that any legal prohibition is no more than extreme paternalism.[64] This sentiment is aptly encapsulated in the following excerpt from Joel Feinberg's work:

> Many perfectly normal, rational persons voluntarily choose to run…a grave risk of lung cancer or heart disease… for whatever pleasures they find in smoking. The way the state can assure itself that such practices are truly voluntary is to confront smokers continually with the ugly medical facts so that there is no escaping the knowledge of exactly what the medical risks to health are…. But to prohibit [smoking] outright for everyone would be to tell voluntary risk-takers that even their informed judgments of what is worthwhile are less reasonable than those of the state and that, therefore, they may not act on them. This is paternalism of the strong kind…. As a principle of public policy, it has an acrid moral flavor, and creates serious risks of governmental tyranny.[65]

However, there are evident flaws in Feinberg's argument. First, with the exception of the tiny Himalayan Kingdom of Bhutan, there is no country in the world where cigarette smoking is prohibited outright,[66] and due to economic, political, and social reasons, it is arguably a safe bet that Bhutan would remain an exception for the foreseeable future.[67] Rather, there are a series of restrictive laws aimed at generally discouraging tobacco use, and they range from a ban on tobacco smoking in enclosed public spaces to imposition of higher tariffs on tobacco products.

Second, most countries now routinely advertise the dangers of tobacco use in the media, in conjunction with the legally required and often graphic health warnings on cigarette packaging. Therefore, and arguably, smokers are already saturated with information on the inherent health risks of cigarette smoking, needless to mention cigarette-smoking medical personnel, who we must assume, know or should know everything there is to know about the dangers of smoking.[68] Third, it would be disingenuous to characterize the current restrictive tobacco use laws as "government tyranny," although there are truly circumstances whereby a law may be tyrannical, oppressive, immoral, or unjust,[69] but restrictive tobacco use regulation is arguably, most certainly not one of them. Besides, it is well within the constitutional remits of parliamentary democracies to pass laws that would protect the interests of the generality of the population from harm, even if such laws are strongly paternalistic, provided parliamentary or legislative due processes are duly followed.[70]

Having discussed the essence of legal paternalism, the pertinent question is determining its ethical propriety in the context of tobacco smoking proscription in enclosed public spaces. Since legal paternalism necessarily curbs individual autonomy and freedoms, it is apt to ask whether or not the harms prevented from

befalling the public from environmental tobacco smoke outweigh the individual loss of freedom or autonomy to smoke cigarettes in enclosed public spaces. Without doubt, trading individual tobacco users' autonomy or freedom to smoke in enclosed public spaces for the safety and well-being of the public would be morally justifiable.[71] This is because the health of the public is paramount and its protection should trump individual autonomy or freedom to smoke in enclosed public spaces, which is arguably a voluntary lifestyle, whose restriction is not life-threatening to smokers, and non-restriction could make victims of non-smokers. Besides, it is clearly not the claim of opponents of the law that lawmakers lack the constitutional power or authority to pass anti-tobacco smoking laws per se; rather their central argument has almost always centered on their right to smoke cigarettes unrestrained and wherever they wished,[72] an argument that will be separately dealt with later in this paper.

In addition, and significantly, while paternalistic interventions in the context of tobacco smoking proscription in enclosed public spaces are primarily aimed at safeguarding the public health, cigarette smokers could also benefit indirectly since the measure could over time, reduce their cravings for cigarettes and strengthen their will or encourage them to quit cigarette smoking. This, in effect, would amount to saving cigarette smokers from themselves, since their will to quit could be impaired or compromised by the addictive nature of nicotine. Therefore, paternalism provides a veritable and compelling moral basis for public health justificatory grounds for political constraints on individuals' freedom to smoke in enclosed public spaces.

However, if we agreed that public health was paramount, then viewed entirely from public health protection prisms, other than through paternalistic lens, there is a strong moral case for the expansion of the scope of the law prohibiting smoking in enclosed public spaces, in order for it to accommodate a comprehensive and outright ban of tobacco smoking both in private and public spheres (whether enclosed or not) as in the Kingdom of Bhutan, for example.[73] Without doubt, such a drastic measure would still fall under the remit of paternalism, or "strong" paternalism, according to Joel Feinberg,[74] and would be morally justifiable and defensible on grounds of public health protection, even if it "creates serious risks of governmental tyranny."[75] Thus paternalism is no more than an ethical or philosophical framework or tool for assessing or rationalizing the morality or legitimacy of liberty-restricting governmental legislations, and is arguably separable from the underlying policy objectives that underpin legislations, such as the imperatives of public health protection.

The Harm Principle Argument for Prohibiting Tobacco Smoking in Enclosed Public Spaces

In his seminal work, *On Liberty*, John Stuart Mills espoused the kernel of the "the harm principle" as follows:

> That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so would be wise, or even right. These good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise.... The only part of the conduct of any one, for which he is answerable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[76]

Thus, the harm principle advocates absolute individual sovereignty over all matters concerning him, and that the only circumstance under which the state may coerce an individual is if such coercion will prevent harm from befalling persons other than the individual.[77] According to Arthur Ripstein, the harm principle has become the center piece of liberal perception of criminal law, as opposed to non-liberal constructs, which hold the view that criminal law could be used for broader moral agenda.[78]

Thus *ex facie*, the harm principle would appear narrower in scope than paternalism in the sense that while paternalistic legislations would readily brush aside individual autonomy or freedom both for their sake (with the aim of saving the individual from himself/herself) and for the sake of the generality of the public, the harm principle could only undermine individual autonomy or actions or omissions, if they would result in harm to other people other than the individuals. It is sacrosanct that environmental tobacco smoke causes harm to nonsmokers, and impairs public health,

so there is no doubting the aptness of using the harm principle argument in support of legislations prohibiting tobacco smoking in enclosed public spaces. Theoretically, even the harm principle argument could be extrapolated to support argument for a comprehensive or complete ban on tobacco manufacturing, sales, and uses in public and private spheres, (including homes) as the said activities would cause harm to people other than those who are trading in and using tobacco.[79]

Ironically, however, the harm principle would appear inherently limited as an argument to *directly* rein in cigarette smokers from harming themselves, as they do have absolute sovereignty over themselves, and could do whatever they liked provided that others are not endangered or harmed in the process. The individual's sovereignty over himself/herself is the kernel of the harm principle as noted above; therefore, the harm principle would allow individual cigarette users to smoke away provided their activities do not constitute harm to others. Herein lays the inherent weakness of the harm principle, since smokers crippled by ill health could indirectly impose social or economic losses on the society, such as losses induced by their regular absence from work, lost production, or diminished workplace efficiency for example.

However, Robert D. Tollison and Richard E. Wagner, in their strongly pro-tobacco work sponsored by the Tobacco Institute, downplayed and rationalized any losses that could emanate from smokers' regular absenteeism borne out of tobacco-related illnesses as follows:[80]

> [a] day spent on sick leave is rarely wasted. Even such an activity as lying in bed and watching television is valuable to the sick person, so in principle, the value of such activities should be subtracted from the lost earnings to arrive at a cost of the lost production due to illness. Furthermore, a consistent application of the line of analysis that assigns a cost to lost work would have to conclude that weekends, holidays, and vacations also impose a cost of lost production upon society, for production is as much diminished by these days away from the workplace as it is by sick leave. Furthermore, sick leave may represent time spent fishing, and the value the worker places on a day of fishing may well exceed the lost output particularly in blue-collar occupations. Such cases would actually represent a social benefit rather than a social cost.[81]

However, while the time spent lying in bed and watching television may be valuable to the sick smoker, it is a time they would otherwise not have had or been entitled to if they had not been caught up in a tobacco-related illness. Moreover, to equate the value of time spent by an employee smoker recuperating from a tobacco-induced illness with weekends, public holidays, and formal leave from work, which by the way, are standard features of most contract of employment, is at best ingenious. This is more so since an employee stricken with a tobacco-related illness and on sick leave would still stay away from work on weekends and public holidays. Therefore, it is little surprising that some U.S. employers would prefer non-smoking employees to employees who smoke.[82]

Crucially, another upshot of self-harm, which the harm principle endorses on the premise of individuals' sovereignty over themselves, is the inevitable health burden that self-harm could place on the public health system through the escalation of public health care costs.[83] Since smokers are susceptible to sundry tobacco-smoking related diseases such as lung cancer, there is no denying the fact that smokers could foist extra financial burden on the public health system especially in countries with compulsory health insurance, or where national health care costs are subsidized by the government, or paid for by the taxpayers.[84]

Therefore, to the extent that smokers' self-destructive lifestyle could place an undue financial burden on the public health system, it is arguable that smokers are harming public interests, and by the very terms of the harm principle, they should be morally and legally banned from smoking. However, whether or not individuals whose chosen lifestyle causes self-harm should be refused medical treatment at the expense of the taxpayers raises ethical and legal issues that are beyond the scope of this paper.[85] However, it is clear from the foregoing discourse that the harm principle could be used to rein in smokers not only because their habits *directly* cause harm to others via environmental tobacco smoke, but also on grounds that their chosen lifestyle *indirectly* harms public interests through undue escalation of public health care costs.

Significantly, the notion that tobacco smokers could drain public health care resources and thereby escalate public health care costs was queried by a 1997 epidemiology and health economy paper.[86] According to Jan J. Barendregt et al., who authored the paper, while a major reduction in smoking could reduce health care expenditures in the short term, the costs would increase dramatically over the long term, as those who would have died of smoking-related diseases would live longer and might reach old age, where the costs of health care for old age-related diseases are relatively higher.[87] This view is better encapsulated by Robert D. Tollison and Richard E. Wagner's argument as follows:

> With shorter life spans, smokers make less use of extended stays in hospitals and convalescent homes where the expenses can become particularly heavy, in the later years of life, when many of the expenses are covered by Medicare and Medicaid. A smoker who dies seven years before his nonsmoking neighbor will not be around to make those especially costly claims that occur later in life.[88]

However, the Barendregt study has been criticized for reducing everything to monetary costs and benefits, and that if it were to be followed, it would engender a favorable policy for cigarette smoking rather than a policy discouraging the habit.[89] Arguably another major problem with the thesis of Jan J. Barendregt et al. and of Robert D. Tollison and Richard E. Wagner is that there is no way it could accurately monetize or account for the values represented by the contributions, which healthy individuals (who could have died earlier from tobacco-related diseases) would make to the society. Therefore, the thesis does not significantly derogate from the validity of the claim that smokers could *indirectly* harm public interests, through possible escalation of health care costs borne out of their chosen lifestyle.

Viewed from the foregoing perspectives, the harm principle is a veritable tool for assessing the harm that tobacco smoking causes to non-smokers and smokers, and could be used to justify laws prohibiting cigarette smoking in enclosed public spaces, in open and unenclosed public spaces, in homes and private premises, and even against the manufacture and sales of cigarettes.

Utilitarian Moralism and the Proscription of Tobacco Smoking in Enclosed Public Places

Utilitarianism is an ethical and philosophical principle or political morality often used to promote and justify policies and acts, which produce the greatest happiness for the members of the society.[90] Utilitarianism demands that "…the production of happiness or the reduction of unhappiness should be the standard by which actions are judged right or wrong and by which rules of morality, laws, public policies, and social institutions are to be critically evaluated."[91]

Significantly, utilitarianism is anchored on "the principle of utility" which connotes the desirability of happiness as an end, and that all other things should serve as a means to that end.[92] It is utilitarianism's undue fixation on the consequences of what the end of an act or policy produces, rather than the means to that end, which evokes the concept of "utilitarianism's consequentialism."[93] Thus by extrapolation, while some may perceive gambling as morally wrong, by the terms of utilitarianism's consequentialism, gambling would not simply be prohibited unless it produces bad consequences for the people.[94] However, it is not the intention of this paper to review the literature critiquing utilitarianism. Rather, the paper will take utilitarianism on the face value, and use it to assess the moral or ethical propriety of the policy prohibiting tobacco smoking in enclosed public spaces.

Therefore, in the context of tobacco smoking proscription in enclosed public spaces, the law would be morally justified not because smoking is morally wrong per se, but because its prohibition in enclosed public spaces would safeguard non-smokers from secondhand tobacco smoke, and protect them from secondhand tobacco smoke-related illnesses. Thus arguably, the consequences of prohibiting cigarette smoking in enclosed public places are in synch with public health protection policies, which in utilitarian context, could lead to the greatest happiness for the society as a whole.

Significantly, it would appear that utilitarianism shares similar objectives of public health safeguard and promotion with paternalism and the harm principle as adumbrated above.[95] Perhaps the crucial difference between the concepts is that utilitarianism and paternalism, unlike the harm principle, implicitly discountenance individual preferences of tobacco smokers who would like to smoke wherever they wished. Thus while paternalism and utilitarianism could justify a comprehensive or absolute ban on tobacco smoking in enclosed and open public and private spheres, on grounds of public health protection, the harm principle would only do so if tobacco smoking would cause harm to other persons other than the individual cigarette smokers. However the three concepts do share a common feature in that they could be used to morally justify laws proscribing tobacco smoking in enclosed public spaces.

A Rights-Based Perspective on Cigarette Smoking Proscription in Enclosed Public Spaces

The argument has often been advanced that smokers do have or should have the right to smoke at anytime and wherever they choose to light up, and that laws such as the one prohibiting cigarette smoking in enclosed public spaces, are impinging on smokers' right to smoke.[96] In this section, I will examine the validity of smokers' claim to the rights to smoke vis-à-vis non-smokers' rights to a tobacco smoke-free environment.

However, it is apt to discuss the general concept of rights before delving into whether or not smok-

ers do have the rights to smoke. According to Mary Warnock:

> A right is an area of freedom for an individual that someone else has a duty to allow him to exercise, as a matter of justice. It is a freedom that one claims, for oneself or for another, and that one can properly prevent other people from inhibiting.[97]

In modern democratic societies, rights do not exist in vacuum, but are usually conferred and guaranteed by national or international laws. For example, following the Second World War, the 1948 United Nations Universal Declaration of Human Rights, established and guaranteed certain basic rights such as the right to life, freedom of speech, freedom of movement or liberty, freedom of worship or religion, etc.,[98] and member states were enjoined to establish and guarantee similar rights in their domestic laws.

It logically follows that in modern democratic societies, no one may claim to be entitled to a right that is unknown to law or not conferred by law. This proposition would clearly exclude all natural, imaginary or hypothetical rights. Significantly, the proposition is a demonstration of legal positivist theory, a school of thought in jurisprudence and philosophy of law, championed by Jeremy Bentham, and rooted in the idea that the concept of natural rights is no more than a fallacy, and that without government, there could be no laws, and without laws, there could be no rights.[99]

Thus, according to legal positivists, a right could only exist and be claimed if it was explicitly conferred by law,[100] and that the very existence of a right in law in favor of one person, connotes the imposition of a duty on another not to obstruct the execution of the right, or stand in the way of implementing the right.[101] According to Jeremy Bentham, if someone thought that they were morally entitled to a right that was unknown to law, then they should argue for the law to be amended in order to accommodate their right.[102] Jeremy Bentham's contempt for natural rights is encapsulated thus:

> Of natural right who has any idea? I, for my part, I have none: a natural right is a round square, – an incorporeal body. What a legal right is I know. I know how it was made. I know what it means when made. To me a right and a legal right are the same thing, for I know no other. Right and law are correlative terms: as much so as son and father. Right is with me the child of law: from different operations of the law result different sorts of rights. A natural right is a son that never had a father. By natural right is meant a sort of a thing which is to have the effect of law, which is to have an effect paramount to that of law, but which subsists not only without law, but against law: and its characteristic property, as well as sole and constant use, is being the everlasting and irreconcilable enemy of law.[103]

However, this line of reasoning has been criticized for giving undue authority or primacy to law, over possible fair, just, or moral causes, which the law might not protect, recognize or accommodate, or take cognizance of,[104] but which, arguably, are the sort of things that natural rights might accommodate. For according to Jeremy Waldron, "…natural right is an emancipatory theory: it regards freedom, choice and self-determination as the natural condition of human beings and the customs and structures that hobble individual liberty as aberrations."[105]

Although legal positivists would dismiss any claimed right that is not expressly stated in the law or constitution, nevertheless, in practice, rights that are not explicitly stated in the law or the constitution, may be construed by the judiciary to be implied therein. For example, in the United States, the court has never recognized a constitutional right to any particular lifestyle.[106] However, in *Jane Roe v. Henry Wade*,[107] the U.S Supreme Court held that "…only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in the guarantee of personal liberty."[108] Thus, rights that are neither fundamental nor "implicit in the concept of ordered liberty" would comprise lower order rights, such as moral rights, and natural rights that Jeremy Bentham so much detested and railed against.[109] This class of rights often exists by default and would ostensibly cover many activities that are not expressly prohibited or protected by the law or constitution. For example, in general, smokers do have an implicit right — natural or moral — to smoke at home or on private premises because this activity has not been expressly prohibited by any law.

The pertinent question therefore is: How does legal positivism fare in the context of the claimed right by cigarette smokers to be able to smoke anywhere including enclosed public spaces? Is there such a right in the first place, and if not, has it been unjustly excluded? To start with, despite the ready availability of tobacco products for sale across counters in supermarkets and shops around the world, there is no explicit fundamental right to smoke as such, because there is no known national law, constitutional or otherwise, that expressly confers such a right. Although a case could be made that the ready availability of tobacco products, as opposed to cocaine for example, provides a

tacit sanction by law that smokers could smoke cigarettes freely wherever and whenever they wanted. If this were so (which is very doubtful, by the letters of legal positivism), then whatever tacit right that cigarette smokers may have to smoke freely wherever they want has arguably been taken away by the explicit law prohibiting tobacco smoking in enclosed public places.

This point is well exemplified by the United States District Court decision in *NYC C.L.A.S.H., INC v. City of New York*.[110] CLASH challenged the constitutionality of the smoking restrictions contained in the New York State Clean Indoor Air Act and the New York City Smoke Free Air Act, which prohibited smoking in most indoor places.[111] It is instructive that while CLASH claimed the First Amendment protection for its members' right to associate or gather together and smoke indoors at public places, it conceded in its claim that its members had no fundamental right to smoke per se, but "a right to smoke."[112] In dismissing their claims, the Federal District Court held *inter alia* as follows:

> ers cannot fully engage in conversation and other activities in bars and restaurants unless they are permitted to smoke, or that only by being permitted to smoke in these places can they fully exercise their constitutional rights of association and speech. Without summarily dismissing all possibility that smoking may contain some scintilla of associational value for some people, there is nothing to say that smoking is a prerequisite to the full exercise of association and speech under the First Amendment."[113]

The next logical question is whether the right to smoke freely has been wrongly or unjustly excluded or whether smokers have been discriminated against by the exclusion of their right to smoke from the law. This line of reasoning necessarily appeals to the concepts or theories of natural right, justice, or morality, which legal positivism clearly discountenances.[114] Nevertheless, it could be argued that while tobacco smoking is not immoral per se, its ability to cause harm to non-smokers is immoral and unjust, and consequently, cig-

I explore the recent spate of tobacco laws prohibiting smoking in enclosed public spaces ostensibly on grounds of public health. Using ethical framework of paternalism, harm principle, and utilitarianism, and highlighting the unique characteristics of each ethical principle, I argue that the prohibition is ethically and morally justifiable in defense of public health, which should of necessity, trump individual rights to smoke freely.

A critical flaw inherent in CLASH's First Amendment arguments is the premise that association, speech, and general social interaction cannot occur or cannot be experienced to the fullest without smoking, or conversely, that unless smokers are allowed to light up on these occasions and at these places, their protected right is somehow fundamentally diminished. Implicit in this premise is that smoking enhances the quality of the social experience and elevates the enjoyment of smokers' First Amendment rights; in other words, that only by being allowed to smoke can smokers contribute fully and enjoy to the maximum the experience of association, assembly, and speech in public spaces such as bars and restaurants. CLASH's allegation that the Smoking Bans "curtail" certain activities for smokers, in essence suggests that smokarette smokers cannot appeal to morality or justice to have their rights recognized or accommodated by law.

Alternatively, if smokers' right to smoke freely were recognized and enshrined in law, the right would have to be exercised in such a way that it would not prejudice the right of non-smokers, since there is no absolute right as such. For example an individual's right to liberty or freedom of movement could be suspended by a lawful imprisonment imposed by a court of law for violations of the law of the land. In the same vein, a smoker's right to smoke, if it existed, would have to be exercised in such a way so as not to impinge a non-smokers' right to a tobacco smoke-free environment.

For example, the European Court of Human Rights has demonstrated its willingness to enforce a non-smoker's right to a smoke-free environment, as exemplified by the case of *Ostrovar v. Moldova*.[115] Mr.

Ostrovar was an asthmatic prisoner who was detained 23 hours a day in a shared cell with up to 20 prisoners, some of whom were smokers. The prison was generally plagued with inadequate medical facility. The ECHR held that the Moldovan government had failed in their obligation to safeguard the prisoner's health, in violation of Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading treatment or punishment.[116] While the decision in Ostrovar cannot arguably be extrapolated to generally protect non-smokers from smokers in private residences or spaces, it underscores the extent to which smoking right is defined and permitted by law. In other words, the right to smoke and where to smoke is at the whims of the law of the land. The question of whether or not smokers have a moral or natural right to smoke in enclosed public spaces is largely academic and could be discussed *ad infinitum*. However, such discourse won't change or trump the law, which continually sets the boundary of smoking rights.

Conclusions

In this paper, I explore the recent spate of tobacco laws prohibiting smoking in enclosed public spaces ostensibly on grounds of public health. Using ethical framework of paternalism, harm principle, and utilitarianism, and highlighting the unique characteristics of each ethical principle, I argue that the prohibition is ethically and morally justifiable in defense of public health, which should of necessity, trump individual rights to smoke freely. Additionally, using legal positivist theory, I explore the argument on whether or not cigarette smokers have the right to smoke freely without constraints. Since legal rights are necessarily conferred and defined by law, I point out the fact that there is no such law that expressly vests the right to smoke freely in cigarette smokers. Rather, there are spates of restrictive laws that are designed to deliberately discourage tobacco use. I also pursue the alternative argument that if there was a law that conferred smoking rights, then the rights would have to be exercised without prejudice to the rights of non-smokers to a tobacco smoke-free environment. I conclude the paper by asserting that there is no right to smoke freely as such, and that to the extent that the laws prohibiting tobacco smoking in enclosed public spaces do not impinge smokers' rights, they are morally and legally justifiable.

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6. *Id.*
7. *Id.*
8. R. E. Goodin, *No Smoking: The Ethical Issues* (Chicago: The University of Chicago Press, 1989): at 60.
9. See Tobacco Advisory Group of the Royal College of Physicians, *supra* note 5, at 2.
10. *Id.*
11. *Id.*
12. *Id.*
13. See Goodin, *supra* note 8, at 61.
14. *Id.*
15. See Bosky, *supra* note 4, at 847-848 (nothing the story of one Heather Crowe, a waitress for over 40 years in cigarette smoke-filled restaurant, who in March 2002 was diagnosed with inoperable lung tumor.)
16. Passive smoking was characterized by the U.S. Surgeon General as "involuntary smoking." For a robust discussion on this characterization, and for countervailing views such as Tollison and Wagner who claimed that "...prolonged exposure to ETS cannot be anything but the result of *voluntary choice*," see Goodin, *supra* note 8, at 69-73.
17. The argument has been advanced that the release of environmental tobacco smoke should be an actionable tort. See generally G. P. Smith, "Cigarette Smoking as a Public Health Hazard: Crafting Common Law and Legislative Strategies," *Michigan State University Journal of Medicine & Law* 11, no. 2 (summer 2007): 251-335, at 269-285.
18. See Health Council of the Netherlands, *supra* note 3.
19. See Bosky, *supra* note 4, at 848.
20. S. J. Winokur, "Seeing Through the Smoke: The Need for National Legislation Banning Smoking in Bars and Restaurants," *George Washington Law Review* 75, no. 4 (2007): 662-693, at 666.
21. See Smith, *supra* note 17, at 286.
22. M. Berman and R. Crane, "Mandating A Tobacco-Free Workforce: A Convergence of Business and Public Health Interests," *William Mitchell Law Review* 34, no. 4 (2008): 1651-1674, at 1653.
23. *Id.*, at 1665-1668.
24. See Winokur, *supra* note 20, at 666.
25. *Id.*
26. See Tobacco Advisory Group of the Royal College of Physicians, *supra* note 5, at 132.
27. *BBC NEWS*, "Scotland Begins Pub Smoking Ban," March 26, 2006, *available at* <http://news.bbc.co.uk/1/hi/scotland/4845260.stm> (last visited October 10, 2009).
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29. See Bosky, *supra* note 4, at 848, at footnote 11 (noting that countries from France, Ireland, New Zealand, Norway, and Uruguay have passed legislations banning smoking in workplaces.)
30. The WHO Framework Convention on Tobacco Control opened for signature in June 2003, and came into force on February 27, 2005. To date, 168 countries are signatories to the Treaty. See <http://www.who.int/fctc/en/> (last visited October 10, 2009).
31. See *id.*, at Articles 4(1), 4(2) (a), and 5(2) (b) of the WHO Framework Convention on Tobacco Control.

32. *Id.*, at Article 8(1)(2).
33. See Smith, *supra* note 17, at 251 and 253-254 (nothing that smoking is an expressive act of autonomy although it is subject to reasonable restrictions.)
34. M. Verweij and A. Dawson, "The Meaning of 'Public' in 'Public Health,'" in A. Dawson and M. Verwij, eds., *Ethics, Prevention, and Public Health* (Oxford: Oxford University Press, 2007): at 13.
35. *Id.*, at 14.
36. *Id.*
37. *Id.*
38. J. F. Childress, R. R. Faden, and R. D. Gaare et al., "Public Health: Mapping the Terrain," *Journal of Law, Medicine, & Ethics* 30, no. 2 (2002): 170-178.
39. See Smith, *supra* note 17, at 253-254 (nothing the right of the state to prevent identifiable social harm.); T. Christoffel and S. P. Teret, *Protecting the Public: Legal Issues in Injury Prevention* (New York: Oxford University Press, 1993): at 25-65, (nothing the power of the state to enact injury prevention laws and the judicial support for governmental health and safety measures.)
40. M. D. Bayles, *Principles of Legislation: The Uses of Political Authority* (Detroit: Wayne State University Press, 1978), at 95-118 (nothing that one of the purposes of political authority was to protect people from harm); J. Locke, "Political Power," in M. Rosen and J. Wolff, *Political Thought* (Oxford: Oxford University Press, 1999), at 54 (nothing that political power connotes a right of government to make laws to safeguard the security of property, defense of the realm, and generally for the public good.)
41. M. Verweij, "Tobacco Discouragement: A Non-Paternalistic Argument," in A. Dawson and M. Verwij, eds., *supra* note 34, at 181; S. A. Ostapski, L. W. Plumly, and J. L. Love, "The Ethical and Economic Implications of Smoking in Enclosed Public Facilities: A Resolution of Conflicting Rights," *Journal of Business Ethics* 16, no. 4 (March, 1997): 377-384.
42. See *The Cigarette Labeling and Advertising Act*, 15 U.S.C sections 1331-1341 (2000); see Winokur, *supra* note 20, at 687.
43. See Goodin, *supra* note 8, at 1.
44. *Id.*
45. J. Hospers, "Libertarianism and Legal Paternalism," *Journal of Libertarian Studies*, IV, no. 3 (Summer 1980): 255-265, at 255-256.
46. P. Suber, in C. B. Gray, ed., *The Philosophy of Law: An Encyclopedia* (New York: Garland Publishing, 1999): at 632-635.
47. *Id.*
48. G. Dworkin, "Paternalism," *The Monist* 56, no. 1 (1972): 64-84.
49. T. L. Beauchamp and J. F. Childress, *Principles of Biomedical Ethics*, 5th ed. (Oxford: Oxford University Press, 2001): at 178.
50. *Id.*
51. See Hospers, *supra* note 45, at 255-256.
52. *Id.*, at 256-257.
53. T. M. Pope, "Balancing Public Health against Individual Liberty: The Ethics of Smoking Regulations," *University of Pittsburgh Law Review* 61, no. 2 (winter 2000): 419-498, at 428.
54. *Id.*, at 429.
55. *Id.*
56. However, while noting that 70 percent of American servicemen who were addicted to heroine in Vietnam gave up the habit upon returning to the United States, Goodin posited that "the test of addictiveness is not impossibility but rather difficulty of withdrawal." See Goodin, *supra* note 8, at 25.
57. See Pope, *supra* note 53, at 430.
58. For the sake of convenience, "hard paternalism" will henceforth be simply referred to as paternalism in this paper.
59. See Pope, *supra* note 53, at 430.
60. H. Hayry, M. Hayry, and S. Karjalainen, "Paternalism and Finnish Anti-Smoking Policy," *Social Science Medicine* 28, no. 3 (1989): at 293-297.
61. See Berman and Crane, *supra* note 22, at 1653.
62. See Suber, *supra* note 46.
63. See *supra* notes 1-19.
64. See Goodin, *supra* note 8, at 4-6 (referencing philosophers such as Mill and Feinberg, who subscribed to the Victorian view that smoking is no more than a private indulgence that should merely be scolded and not sanctioned.)
65. J. Feinberg, cited in Goodin (*id.*), at 4-5.
66. In the Himalayan Kingdom of Bhutan, sales of cigarette and tobacco products were prohibited and the country became the first in the world to impose a complete ban on the sale and smoking of cigarettes in 2005. See BBC, "Smoking Is Stubbed Out in Bhutan," February 22, 2005, *available at* <http://news.bbc.co.uk/1/hi/world/south_asia/4287331.stm> (last visited October 10, 2009).
67. Even the Kingdom of Bhutan allows tourists to smoke in designated places. The outright smoking ban only applies to Bhutan citizens and residents. *Id.*
68. H. Adriaanse and J. Van Reek, "Physicians' Smoking and Its Exemplary Effects," *Scandinavian Journal of Primary Health Care* 7, no. 4 (1989): 193-196.
69. It is axiomatic that not all laws or policy no matter how well-intended, are just or fair as exemplified by historic laws, which institutionalized slavery and racial segregation. This is aptly summed up by T. Christoffel et al., as follows: "Even though a law may be legally supportable and even though it may be effective in reducing the toll of injuries, if it offends other socially important interests, maybe it ought not to exist as a law." See Christoffel and Teret, *supra* note 39, at 213.
70. A. Przeworski, and J. M. Maravall, *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003): at 223.
71. M. Verweij, "Tobacco Discouragement: A Non-Paternalistic Argument," in *supra* note 34, at 182-183 (noting that paternalistic interventions may be justified in certain circumstances such as when there are public interests or concerns at issue.)
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73. See *supra* note 66.
74. J. Feinberg, cited in Goodin, *supra* note 8, at 4-5.
75. *Id.*, at 4.
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78. A. Epstein, "Beyond the Harm Principle," Paper No. 3, General Aspect of Law Seminar, University of California, Berkeley, 2004, 1-32, at 1, *available at* <http://repositories.cdlib.org/Berkeley-gala/fall2004/3> (last visited October 10, 2009).
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80. R. D. Tollison and R. E. Wagner, *Smoking and the State: Social Costs, Rent Seeking, and Public Policy* (Massachusetts and Toronto: Lexington Books, 1988): at 19-37.
81. *Id.*, at 28-29.
82. Some U.S. employers would prefer non-smoking employees to employees who smoke, see Berman and Crane, *supra* note 22, at 1653.
83. See Pope, *supra* note 53, at 437-440 (noting the change by U.S. courts from initially denying to affirming the legality or constitutionality of states statutes aimed at preventing self-harm, such as the ones requiring mandatory helmets for motorcyclists and seatbelts for motorists. The change in courts' attitude to such laws was rationalized on the grounds that the self-harm meant to be prevented by the laws was not an entirely victimless crime, as the courts initially thought, and that the society as a whole would ultimately bear the concomitant healthcare burden.)
84. See Verweij, *supra* note 34, at 188-189.
85. For example, on the propriety of alcohol abusers and heavy drinkers receiving one in four of liver transplants in 2007, the Chairman of the Medical Ethics of the British Medical Asso-

ciation, Dr. Tony Calland suggested that it was up to the surgeons whether or not to refuse organs transplants to anyone with alcohol-related liver disease, if they did not demonstrate a genuine desire to stop drinking. See J. Doward and D. Campbell, "Transplant Row over Organs for Drinkers," *The Observer*, February 15, 2009, at 1.

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89. See Verweij, *supra* note 34, at 189.
90. W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed. (Oxford: Oxford University Press, 2002): at 10.
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96. See Smith, *supra* note 17, at 252 (noting that smokers often argue that they have unfettered right to smoker anywhere and anytime they wish.)
97. M. Warnock, *Making Babies* (Oxford: Oxford University Press, 2002): at 17.
98. 1984 Universal Declaration of Human Rights, at Articles 1-30, *available at* <http://www.un.org/Overview/rights.html> (last visited October 10, 2009).
99. See J. Bentham, "Anarchical Fallacies and Supply without Burden," in J. Waldron, ed., *Nonsense on Stilt: Bentham, Burke, and Marx on the rights of Mans* (Methuen, London: Routledge, 1987): at 53, 72-73.
100. See Warnock, *supra* note 97, at 17.
101. Note however that the existence of a duty does not necessarily connote that someone has a right. *Id.*
102. *Id.*, at 19.
103. See Bentham, *supra* note 99, at 73.
104. See Warnock, *supra* note 97, at 17.
105. J. Waldron, "The Decline of Natural Right," *New York University School of Law, Public Law & Legal Theory Research Paper Series*, Working Paper no. 09-38, July 2009, 1-31, at 4, *available at* <http://ssrn.com/abstract=1416966> (last visited October 19, 2009).
106. See Smith, *supra* note 17, at 253.
107. *Jane Roe v. Henry Wade*, 410 U.S 113, (1973)
108. *Id.*, at 152.
109. See Bentham, *supra* note 99.
110. 315 F.Supp.2d 461 (2004).
111. *Id.*
112. *Id.*, at 473.
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115. Application no. 35207/03, (September 13, 2005).
116. *Id.*