

2014

## Beyond Paternalism: Rethinking the Limits of Public Health Law Response

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### Recommended Citation

Parmet, Wendy E., "Beyond Paternalism: Rethinking the Limits of Public Health Law Response" (2014).  
*Connecticut Law Review*. 253.  
[https://opencommons.uconn.edu/law\\_review/253](https://opencommons.uconn.edu/law_review/253)

# CONNECTICUT LAW REVIEW

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VOLUME 46

JULY 2014

NUMBER 5

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## Article

### Beyond Paternalism: Rethinking the Limits of Public Health Law

WENDY E. PARMET

*This response to David Friedman's Public Health Regulation and the Limits of Paternalism challenges his claim that the rejection of paternalism creates a "limit" on public health law's potential for addressing the obesity epidemic and offers a defense of public health laws as exercises of self-governance. The Article begins by showing why many of the laws that Friedman classifies as paternalistic are not actually paternalistic. Nor are most public health laws as unpopular as Friedman presumes. Moreover, the public's disapproval of some public health laws may be due to factors other than their paternalism, including their origination at times by out-of-touch public health agencies. Public health laws, the Article argues, can be justified as an exercise of self-governance; they should be the laws that populations enact to protect their own health. When officials act without regard to that popular foundation, as the New York City Board of Health did in banning the sale of large portions of sugary soda, a backlash may follow whether or not the law is paternalistic. Thus policymakers should worry less about whether a proposed law is paternalistic and more about whether it is responsive to the needs and concerns of the population it seeks to protect.*

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# Beyond Paternalism: Rethinking the Limits of Public Health Law

WENDY E. PARMET\*

## I. INTRODUCTION

“[P]aternalism,” David Friedman writes in his illuminating article, “may have reached natural limits of effectiveness,” especially with respect to public health.<sup>1</sup> Given the public’s disdain for paternalism, Friedman argues that paternalistic public health policies, particularly those embodying hard paternalism, are destined to fail, as did New York City’s ban on the sale of large sugary sodas.<sup>2</sup> This rejection of paternalism, Friedman argues, is deeply problematic for public health.<sup>3</sup> As Friedman sees it, many of the most critical public health problems of our times, especially obesity, can be addressed only by implementing paternalistic, including hard paternalistic, policies.<sup>4</sup>

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<sup>1</sup> David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1693 (2014). Friedman’s use of the word “natural” is intriguing. As will be discussed, I question whether the limits that public health is facing are based on paternalism. Even if they are, there is no reason to believe that the limits are “natural” and not contingent on the social and political culture of contemporary American society. See *infra* Part III.

<sup>2</sup> Friedman, *supra* note 1, at 1769; see also N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene, 23 N.Y.3d 681, 690 (2014) (finding that the Board of Health lacked authority to ban the sale of large sugary sodas).

<sup>3</sup> See Friedman, *supra* note 1, at 1765 (explaining that the rejection of paternalism will hurt “the future use of regulatory tools” to combat public health problems such as obesity). Friedman is hardly alone in seeing debates about paternalism as central to arguments about the appropriateness of public health interventions. See, e.g., L.O. Gostin & K.G. Gostin, *A Broader Liberty: J.S. Mill, Paternalism and the Public’s Health*, 123 PUB. HEALTH 214, 215 (2009) (arguing that the “political community should at least be open to the idea of paternalism to prevent or ameliorate harms in the population”); Lindsay F. Wiley et al., *Who’s Your Nanny?: Choice, Paternalism and Public Health in the Age of Personal Responsibility*, 41 J.L. MED. & ETHICS 88, 88 (Supp. 2013) (noting that arguments about paternalism “have cultural and political resonance”). Indeed, leading critics of the so-called “new public health” have assailed it at least in part for being paternalistic. See, e.g., Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1364 (2005) (presenting an argument against government intervention); Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 PERSP. IN BIOLOGY & MED. S199, S208 (Supp. 2003) (“[P]ublic health advocates seriously overstep their bounds when they call on government to address broad economic and political conditions as public health problems . . .”).

<sup>4</sup> See Friedman, *supra* note 1, at 1719 (“The only real way to solve the obesity problem in the United States . . . would be to press forward with solutions on every dimension of the problem.”).

In the face of this dilemma, Friedman seeks to provide policymakers with a guide for the effective use of paternalistic public health interventions. Drawing heavily on the insights of behavioral economics and the work of Christine Jolls and Cass Sunstein,<sup>5</sup> Friedman presents a spectrum of what he describes as five increasingly “hard” levels of intervention, ranging from those that are apaternalistic (and rely on the market), to debiasing strategies, insulating strategies (including subsidies and taxes), and the most “hard” form of paternalism, bans or mandates.<sup>6</sup> With great detail, Friedman explores different types of strategies that can be used to combat obesity within each of the levels on his spectrum. He also provides keen insights from the reaction to, and success or failure of, different regulatory tools in the areas of fluoridation, marijuana, and the regulation of genetically-modified foods or genetically-modified organisms (GMOs).<sup>7</sup> In so doing, Friedman exposes the thick particularity of public health policymaking. For example, while he suggests that “softer” interventions are generally less likely to raise the public’s ire, even calls for voluntarism have provoked a backlash in some circumstances.<sup>8</sup> In other cases, such as with trans fats, outright bans have encountered little resistance.<sup>9</sup> The devil, it seems, does lie in the details through which Friedman guides us.

Despite the context-laden nature of his analysis, Friedman draws some important general conclusions. One is that “[i]f regulators minimize the perception that they are reducing autonomy,” its restriction might prove more palatable.<sup>10</sup> A second is that “if regulators examine the entire spectrum of options . . . they may identify a mix of initiatives that combine efficacy with practicality.”<sup>11</sup> Or to put it another way, paternalism may yet be an effective public health tool as long as policymakers proceed with knowledge, caution, humility, and maybe even a little guile.

Friedman’s analysis of public health interventions is rich and nuanced, providing valuable reading for public health policymakers. Nevertheless, Friedman’s premise that paternalism, particularly hard paternalism, has reached its limits warrants fuller examination. Can we be sure that paternalism qua paternalism has reached its limits, or is the recent outcry against New York City’s portion cap rule and other public health measures recounted by Friedman due in large or small measure to factors other than a rejection of paternalism, especially in its hard form? Knowing the

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<sup>5</sup> Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

<sup>6</sup> Friedman, *supra* note 1, at 1698–99.

<sup>7</sup> *Id.* Part III.C.

<sup>8</sup> *See id.* at 1723–26 (explaining that even a small level of government intervention can result in harsh public criticism, as evidenced by the “Let’s Move!” effort).

<sup>9</sup> *Id.* at 1709.

<sup>10</sup> *Id.* at 1769.

<sup>11</sup> *Id.* at 1770.

answer to that question may be as important to the future of public health policymaking as knowing the specific features of the various regulatory interventions that Friedman discusses.

In this Article, I explore this question, revisiting Friedman's assumptions about the role that paternalism plays in debates about public health law. My conclusions are tentative, but perhaps surprising: while paternalism may be highly unpopular at this moment in the American polity, it is neither as critical for public health protection nor as central to the backlash against legal interventions as Friedman presumes.<sup>12</sup> Public health law is facing extraordinary challenges, but to respond to them we need to both better understand, and move beyond, the paternalism debate.

I begin in Part II by reviewing what is meant by paternalism, as well as the concepts of hard and soft paternalism. This discussion leads me to argue that many public health interventions should not be understood as exercises of paternalism. In Part III, I problematize Friedman's assertion that paternalism has met its limits, suggesting instead a variety of other ways to view public health laws as well as the criticism they face. In Part IV, I offer a different defense of public health laws, one grounded less on an acceptance of paternalism than on the recognition of the liberty to self-govern. This defense, I suggest, provides a different perspective on the "nanny state" critique of public health laws; it also offers some cautions about the value of guiding policymakers on the smart use of paternalism.

## II. THE PARAMETERS OF PATERNALISM

There is no question that public health law has recently been playing defense.<sup>13</sup> Over the last several years, court decisions concerning

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<sup>12</sup> Like Friedman, I do not discuss here the ethics of public health paternalism, an issue that has been much mooted. See, e.g., SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013) (providing an ethical defense of the use of paternalism); Ronald Bayer & Amy L. Fairchild, *The Genesis of Public Health Ethics*, 18 *BIOETHICS* 473, 485–92 (2004) (arguing that public health ethics, as opposed to bioethics, may provide greater space for paternalism); David R. Buchanan, *Autonomy, Paternalism, and Justice: Ethical Priorities in Public Health*, 98 *AM. J. PUB. HEALTH* 15, 16–17 (2008) (questioning the ethics of using paternalism in public health); Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 *ARIZ. L. REV.* 685, 687 (2009) (arguing that soft paternalism is dangerous because of its inherent susceptibility to slippery slopes). I also do not consider, except in passing, the role that paternalism or debates over it have played in recent court decisions rejecting public health interventions. See *infra* text accompanying notes 108–09. It is worth noting that when Friedman argues that paternalism has met its limits, he seems to be referring to political rather than legal limits. For a discussion of the possible role that the discourse surrounding paternalism played in the United States Supreme Court's decision over the Affordable Care Act, see Wendy E. Parmet, *Valuing the Unidentified: The Potential of Public Health Law*, 53 *JURIMETRICS J.* 255, 272–77 (2013).

<sup>13</sup> Wendy E. Parmet & Peter D. Jacobson, *The Courts and Public Health: Caught in a Pincer Movement*, 104 *AM. J. PUB. HEALTH* 392, 392 (2014).

commercial speech, preemption, the scope of congressional authority, and the status of public health evidence—among other topics—have eroded the doctrinal foundations upon which many public health laws rest.<sup>14</sup> At the same time, the political and social climate has appeared increasingly hostile to the use of law to promote the public’s health, at least with respect to obesity.<sup>15</sup> As Friedman shows so well, the efforts by former New York City Mayor Michael Bloomberg to address the obesity epidemic sparked a wave of ridicule and outrage, epitomized by the term “Nanny Bloomberg.”<sup>16</sup> Numerous other proposed public health laws, from soda taxes to gun control measures, have met political dead-ends.<sup>17</sup> And even well-established public health legal interventions, such as vaccination laws, have faced renewed resistance.<sup>18</sup>

But does this mean that paternalism, especially so-called hard paternalism, has met its natural limits, as Friedman suggests? To answer that question, several prior questions need to be addressed, including: what is meant by the “limits” of law; what is meant by paternalism; and under what conditions are public health laws paternalistic? We also need to know whether the disapproval of public health laws that exists stems from a rejection of paternalism or from some other factors. Likewise, to decide whether hard paternalism is less palatable than soft paternalism, we need to identify the factors that distinguish hard from soft paternalism and consider

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<sup>14</sup> *Id.* at 393–94.

<sup>15</sup> The magnitude of the popular backlash may be overstated. While there is no doubt that several recent public health efforts regarding obesity have been met with resistance, if not scorn, many public health measures remain quite popular with the public, if not the courts. Compare Friedman, *supra* note 1, at 1719 (discussing “political resistance to paternalistic endeavors”), with Scott Burris & Evan Anderson, *Legal Regulation of Health-Related Behavior: A Half Century of Public Health Law Research*, 9 ANN. REV. L. & SOC. SCI. 95, 106–07 (2013) (arguing that legal intervention on behalf of public health is popular and that the central problem may be judicial, not popular resistance), and Stephanie Morain & Michelle M. Mello, *Survey Finds Public Support for Legal Interventions Directed at Health Behavior to Fight Noncommunicable Disease*, 32 HEALTH AFF. 486, 490–93 (2013) (presenting the results of a national survey that shows support for government intervention directed at health behavior that addresses noncommunicable diseases). For further discussion of this issue, see *infra* text accompanying notes 74–80.

<sup>16</sup> See Friedman, *supra* note 1, at 1689. For a defense of Bloomberg’s actions, see Lawrence O. Gostin, *Bloomberg’s Health Legacy: Urban Innovator or Meddling Nanny?*, 43 HASTINGS CENTER RPT. 19, 19–24 (2013).

<sup>17</sup> See Josh Blackman & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, Part VI.B–E (2014) (describing the rise and fall of public support for federal gun control legislation in the wake of the Newtown tragedy); Anemona Hartocollis, *Failure of Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES, July 3, 2010, at A14 (discussing New York State’s failed soda tax).

<sup>18</sup> See *Phillips v. City of New York*, Nos. 12-CV-237 (WFK)(LB), 13-CV-791 (WFK)(LB), 2014 WL 2547584 (E.D.N.Y. June 5, 2014) (rejecting a challenge to the New York City practice of barring unvaccinated children from attending school during outbreaks of vaccine-preventable diseases); Saad B. Omer et al., *Vaccine Refusal, Mandatory Immunization, and the Risks of Vaccine-Preventable Diseases*, 360 NEW ENG. J. MED. 1981, 1981 (2009) (noting that “increasing numbers of parents” are refusing or delaying vaccination for their children).

how those specific factors affect a law's legal or political reception. Unfortunately, although Friedman provides a valuable analysis of the strengths and pitfalls of various public health legal interventions, his analysis of these questions is at times insufficient and at other times inconsistent.

Consider first what Friedman means by the "limits" to paternalism. Although public health laws have faced some notable defeats in the courts in recent years,<sup>19</sup> these decisions have not, for the most part, relied on the paternalistic nature of the laws at issue.<sup>20</sup> Nor does Friedman rely on legal doctrine to demonstrate paternalism's limits; indeed, many of the examples he gives of failed paternalistic interventions concern laws that were never before a court.<sup>21</sup> Instead, when Friedman discusses the limits of paternalism, he seems to be referring to paternalism's political, rather than legal limits. He is making, in effect, the important claim that the public is unwilling to accept, or is at least uncomfortable with, certain paternalistic laws. For reasons I make clear in Part IV, Friedman's recognition that public health laws may be limited by public sentiment is an important one. However, although public sentiment undoubtedly influences the development of judicial doctrine, it is vital to recognize that political limits are distinct from legal ones.

As for the meaning of "paternalism," Friedman borrows from Gerald Dworkin, who defines "paternalism" as 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."<sup>22</sup> This definition is similar to others common in the literature. For example, in her recent defense of paternalism, Sara Conly relies on John Kleinig's definition that paternalism exists when "X acts to diminish Y's freedom, to the end that Y's good may be secured."<sup>23</sup> Likewise, Thaddeus Mason Pope states that paternalism is the "restriction of a subject's self-regarding

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<sup>19</sup> See Parmet & Jacobson, *supra* note 13, at 392 (discussing the enjoining of New York City's ban on large sugary sodas and the defeat of FDA regulations requiring graphic warning labels on cigarette packages).

<sup>20</sup> See, e.g., *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012) (striking down an FDA regulation requiring graphic warning labels on cigarettes as violating First Amendment protections for commercial speech), *overruled in part by* *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22–23 (D.C. Cir. 2014); *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 690 (2014) (striking down New York City's soda portion cap rule as being outside the Board of Health's regulatory authority). For further discussion of the New York Court of Appeals' rejection of the portion cap rule, see *infra* notes 108–09.

<sup>21</sup> See, e.g., Friedman, *supra* note 1, at 1732–33 (discussing a Mississippi statute prohibiting localities from requiring fast-food establishments from posting calories).

<sup>22</sup> *Id.* at 1695 (quoting Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 65 (1972)) (internal quotation marks omitted). Although paternalism requires the restriction of liberty, it may also enhance liberty. See *infra* text accompanying notes 96–98.

<sup>23</sup> CONLY, *supra* note 12, at 17 (quoting JOHN KLEINIG, PATERNALISM 18 (1984)) (internal quotation marks omitted).

conduct primarily for the good of the same subject.”<sup>24</sup>

Under each of these definitions, paternalistic laws are distinguished from other laws in that they regulate self-regarding rather than other-regarding behavior.<sup>25</sup> Moreover, they regulate behavior in order to benefit the individual whose behavior is in question. Thus a law that limits the liberty of one person *X* in order to benefit another *Y* is not rightly speaking paternalistic, even if it seeks to benefit *Y* by influencing *Y*'s self-regarding behavior. For example, a law compelling a tobacco company (*X*) to include a warning label on its advertisements is not actually paternalistic because the party intended to be benefitted (*Y*, the would-be smoker) is not the person whose liberty is limited.<sup>26</sup> Put differently, the activity that is regulated, tobacco marketing, is not a self-regarding behavior; like all advertising, it is very much directed to others. Similarly, a law that limits the liberty of a subject in order to benefit someone else is not ordinarily thought of as paternalistic even if the law has the incidental effect of benefiting the subject whose liberty is limited. For example, we would not say that laws limiting speeding are paternalistic even though they may also benefit the health of the drivers whose liberty is restricted.<sup>27</sup> Rather, we

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<sup>24</sup> Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 660 (2004).

<sup>25</sup> Of course, to paternalism's critics, it is this focus on regulating an individual's behavior that affects only that individual that is problematic. See JOHN STUART MILL, *On Liberty*, in JOHN STUART MILL: A SELECTION OF HIS WORKS 97 (John M. Robson ed., 1966) (“[W]hen the person's conduct affects the interests of no persons besides himself . . . there should be perfect freedom, legal and social, to do the action and stand the consequences.”).

<sup>26</sup> Cass Sunstein offers a different reason why such a law is not paternalistic. He writes that “disclosure of truthful information is not ordinarily understood as paternalistic . . . [because] disclosure requirements are meant to inform, not to displace, people's understanding of which choices will promote their welfare.” Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1865–66 (2013); see also Stephen A. McGuinness, *Time to Cut the Fat: The Case for Government Anti-Obesity Legislation*, 25 J.L. & HEALTH 41, 54 (2012) (arguing that disclosure laws are not paternalistic because they do not limit liberty). Thaddeus Mason Pope, in contrast, contends that such laws are an example of so-called “indirect paternalism,” in that they try to dissuade the individual from harms without the individual's consent to dissuasion. Pope, *supra* note 24, at 687. This conclusion, however, eviscerates the distinction between the harm principle and paternalism. All laws that limit the conduct of *X* to benefit *Y* can be criticized on the claim that we do not know a priori whether *Y* would consent to limiting *X*'s liberty. For example, a law preventing *X* from selling spoiled food would generally be thought of as one permitted by the harm principle. But like the smoking ban, it can be claimed that the purchasers of the unwholesome food have not consented to the law. Likewise a law prohibiting *X* from stabbing *Y* might be claimed (ludicrously) as paternalistic in that it prevents *X* from harming *Y* even though *Y* might prefer to defend herself (perhaps she thinks her honor is better maintained if she relies on self-defense rather than the law to protect her). In both cases, the law should not be viewed as paternalistic because the goal is to prevent *X* from harming *Y*. As Pope notes, quoting Dennis Thompson, “paternalism refers not to a distinct class of actions but [refers instead] to a class of reasons that we may use [or may be used] to justify or condemn restrictions.” *Id.* at 694 (first alteration in original) (quoting DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 153 (1987)) (internal quotation marks omitted).

<sup>27</sup> Sunstein notes that paternalism “does not include government efforts to prevent people from harming others.” Sunstein, *supra* note 26, at 1863.

recognize that the benefits that accrue to drivers who are stopped from speeding are secondary to the benefits that accrue to others who are protected from would-be speeders.

Of course, it is always problematic to evaluate laws by their “goals.”<sup>28</sup> Laws—including regulations promulgated by administrative agencies—are the product of many actors who may be motivated by multiple conflicting or indeterminate goals. As a result, the task of determining whether a law is paternalistic, i.e., whether it seeks the good of the subject whose liberty is restricted, is invariably fraught with uncertainty. Some policymakers may want to limit indoor smoking to protect the smoker; others may want to reduce the risk faced by non-smokers. In such a case, there may be no real way of knowing for certain whether a law is properly categorized as paternalistic.

Yet, even if we can put the problem of determining a law’s motivation to one side, there are reasons to question Friedman’s assumptions about the paternalistic nature of some public health interventions. For example, while Friedman posits a spectrum of paternalistic laws and policies applicable to public health, he seems to accept that almost all public health interventions that go beyond voluntarism or reliance on the unregulated market are in fact paternalistic. He thus categorizes “efforts to improve decision making by stringing data together into truthful narratives of harm” as a form of paternalism that he calls “strong-form debiasing.”<sup>29</sup> But are such interventions—if we can even call them such—paternalistic?

Consider the example Friedman offers, Morgan Spurlock’s movie, *Super Size Me*, a powerful documentary film that uses narrative to critique and condemn the fast food industry.<sup>30</sup> Even if we accept that Spurlock created the film in order to influence viewers’ consumption of fast food (and Friedman does not give us any insight as to Spurlock’s motive),<sup>31</sup> the film still would not be paternalistic because it does not in any way limit the

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<sup>28</sup> For that reason alone, it is problematic to conclude that some laws are unjustifiable simply on the grounds that they are paternalistic. Take for example a law requiring cyclists to wear a helmet. If a majority of members of the legislature believe that the law would reduce the incidence of lung cancer (obviously a ridiculous belief), under the definitions cited above, the law would not be paternalistic. Would that appease the law’s critics? I think not.

<sup>29</sup> Friedman, *supra* note 1, at 1734.

<sup>30</sup> Friedman does not explicitly claim that the Spurlock movie is paternalistic. Perhaps he simply offers it as an example of a narrative’s impact. *See id.* at 1735 (“The 2004 film *Super Size Me* told a compelling, salient narrative about the harms of fast food through the truthful tale of a thirty-day journey of consuming nothing but McDonald’s food offerings.”). Still, he discusses the film at length in sections of his article about “strong-form debiasing,” which he categorizes as a paternalistic level on his spectrum. *Id.* at 1704–05, 1734–35.

<sup>31</sup> Friedman does not tell us why Spurlock produced the film. Perhaps Spurlock merely wanted to make money or create art. Maybe he wanted to harm the fast food industry because it had hurt him. Although the answer to this question may be irrelevant to telling us whether the movie was powerful, truthful, or influential, it is critical to telling us whether it had paternalistic aims.

*liberty* of the subjects it seeks to aid.<sup>32</sup> Indeed, even if the film were produced and promoted by the government, rather than a private party, it would be a stretch to see it as paternalistic, as it still would not limit anyone's liberty.<sup>33</sup> That is not to say, of course, that the film might not aim to convince people to refrain from doing something for their own good, or that it might not be troubling for any number of other reasons. But unless it restricts liberty, it is not, properly speaking, paternalistic. It follows that while there may be many valid and not-so-valid reasons to disapprove of the government's use of strong-form debiasing,<sup>34</sup> a critique of paternalism is not one of them unless the policy at issue is actually paternalistic.

Without question, as one moves along Friedman's spectrum from debiasing strategies to insulation strategies to bans and mandates, the deprivations of liberty become starker and more apparent.<sup>35</sup> Indeed, as I will suggest below, Friedman's spectrum should be viewed more as a spectrum of coercion than of degrees of paternalism.<sup>36</sup> That still does not mean that each and every restriction of liberty undertaken in the name of public health is paternalistic. The discussion of speed limits above offers an example of a ban that restricts liberty to prevent injury to others. Likewise, a law that bans texting while driving would readily be viewed as one that restricts other-regarding behavior, and hence is not paternalistic.<sup>37</sup>

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<sup>32</sup> Friedman suggests that because Spurlock is a private actor, his film could be classified "as a market-driven, apaternalistic venture." Friedman, *supra* note 1, at 1704. Yet, as Friedman observes, private actors can also act paternalistically when they limit the liberty of individuals, as parents do when they "ground" a child. *See id.* at 1695 (noting Dworkin's "distinction between narrow and broad paternalism, with narrow paternalism describing state action, and broad paternalism further including private actors"). It is not the private nature of Spurlock's film, however, that precludes its classification as paternalistic. It is the fact that the film does not limit *liberty*. *But see* Sunstein, *supra* note 26, at 1865–66 (suggesting that efforts to stigmatize a product might be described as a form of private paternalism because it imposes psychic costs).

<sup>33</sup> *See* Pope, *supra* note 24, at 686–87 ("To be paternalistic, the agent must limit the subject's liberty. . . . The intended effect in both the direct paternalism and the indirect paternalism examples is the same: to prevent individuals from smoking tobacco and harming their health.").

<sup>34</sup> For example, such tactics may be misleading, ineffective, or a waste of taxpayer funds.

<sup>35</sup> Friedman views conditional mandates (an insulation strategy in his taxonomy) as a restriction of autonomy. *See* Friedman, *supra* note 1, at 1750 (describing how the Big Gulp ban in New York City was a conditional mandate, one kind of insulation strategy that would have had minimal impact but was still considered an "autonomy deprivation"). As he recognizes, this classification is questionable as the subject continues to have considerable autonomy. For example, a lover of large portions of soft drinks could have circumvented New York's soda ban by buying two beverages rather than one. *Id.* at 1738–39. Friedman, however, is correct in concluding that the government is setting some restriction on autonomy by requiring individuals to make two purchases rather than one to attain the larger portion. *Id.* Still, it is worth noting that consumers never enter the marketplace with unlimited choices. Prior to the portion cap rule, consumers who wanted to buy small size portions often were unable to do so. The law thus substituted a condition of the marketplace for one of the polity. In neither case was individual freedom absolute, nor could it ever be.

<sup>36</sup> *See infra* text accompanying notes 58–60.

<sup>37</sup> Sunstein suggests, however, that such a law could be viewed as paternalistic if it sought to override individuals' judgments as to what is good for them, rather than preventing harm to others. *See*

Often the question of whether a law aims to benefit the subject or others is indeterminate, as the law may well be viewed as seeking to benefit both the individual whose liberty is limited and others. The most salient recent example of this is the Affordable Care Act's so-called individual mandate.<sup>38</sup> Many critics of the law regard it as paternalistic by forcing insurance upon individuals who would rather not be insured.<sup>39</sup> Others view it as a form of redistribution that seeks to bring young and healthy individuals into the insurance market for the good of older and not-so-healthy individuals.<sup>40</sup>

As the above examples suggest, perspective matters. Policymakers may have one goal and perspective, while those who are regulated may have others. One challenge for those thinking about paternalism and public health law is that many laws that seem paternalistic to those being regulated may not appear as such to public health advocates and regulators who share a population perspective. As I have argued elsewhere, public health adopts a population perspective that prioritizes the good of populations qua populations and treats populations not simply as the summation of individuals, but as subjects.<sup>41</sup> With populations in the forefront, this perspective emphasizes the ubiquity of the influence of social and environmental factors—the so-called social determinants of health—on the health of populations and the individuals within them.<sup>42</sup>

From a population perspective, many interventions that appear to be paternalistic from an individualistic vantage point do not qualify as such. For example, in defending former Mayor Bloomberg's initiatives against obesity, Lawrence Gostin writes, "[P]ersonal choice is always conditioned by social circumstances in various ways. The public health approach rejects the idea that there is such a thing as unfettered free will, recognizing instead that the built environment, social networks, marketing, and a range of situational cues drive complex behaviors."<sup>43</sup> Note that Gostin's

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Sunstein, *supra* note 26, at 1863 ("My working definition of paternalism does not include government efforts to prevent people from harming others . . . . By contrast, the definition includes government efforts to override people's judgments . . . ."). One possible distinction between a public health and a libertarian perspective is how readily one is apt to view such a law as paternalistic or aimed at preventing harm to others.

<sup>38</sup> See 26 U.S.C. § 5000A (2012) (requiring individuals to maintain minimum health care insurance for themselves and their dependents).

<sup>39</sup> E.g., Charles Krauthammer, *Obamacare Laid Bare*, WASH. POST, Nov. 1, 2013, at A19; Jim Yardley, *A Different View of Paternalism*, AM. THINKER (Nov. 6, 2013), [http://www.americanthinker.com/2013/11/a\\_different\\_view\\_of\\_paternalism.html](http://www.americanthinker.com/2013/11/a_different_view_of_paternalism.html).

<sup>40</sup> See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2585 (2012) (describing the mandate as a way of forcing healthier people into insurance pools to "subsidize" the costs of the unhealthy).

<sup>41</sup> WENDY E. PARMET, POPULATIONS, PUBLIC HEALTH, AND THE LAW 19 (2009).

<sup>42</sup> *Id.* at 16.

<sup>43</sup> Gostin, *supra* note 16, at 23.

statement contains two rejoinders to those critics, such as Friedman, who view most anti-obesity initiatives as paternalistic. First, drawing from social epidemiology, but in close company with behavioral economists,<sup>44</sup> Gostin questions whether we can speak intelligently about an “unfettered free will” that public health measures restrict.<sup>45</sup> If individuals develop their preferences and goals only in the context of their social environments and within the populations they comprise, the idea of an unfettered autonomy denied by public health laws becomes problematic. Yet as suggested above, if a law does not restrict autonomy, its classification as paternalistic is problematic; and certainly it cannot be viewed as an exercise of hard paternalism.<sup>46</sup>

Second, and perhaps more importantly for present purposes, Gostin’s approach dissolves the distinction between self-regarding and other-regarding behavior. Once we recognize that social networks and situational cues influence preferences, we must concede that behaviors that initially appear to be self-regarding can have spillover effects that can influence others to engage in unhealthy behaviors.<sup>47</sup> As a result, laws that appear from an individualist perspective to regulate a subject’s behavior for his or her own good often appear from a public health perspective to regulate behavior for the good of the group.<sup>48</sup>

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<sup>44</sup> See Friedman, *supra* note 1, at 1721, 1727 (explaining how personal autonomy is also limited by societal influences and norms, as well as by genetics and personal preferences).

<sup>45</sup> Gostin, *supra* note 16, at 23.

<sup>46</sup> See Pope, *supra* note 24, at 687 (“To be paternalistic, the agent must limit the subject’s liberty.”). This is close, but not identical, to Thaler and Sunstein’s argument that soft paternalism is justified because individual preferences are affected by both bounded rationality and what they call “choice architecture.” RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT, HEALTH, WEALTH, AND HAPPINESS* 3–6, 255 (2008). They urge policymakers to use law to “nudge” individuals to the choices that they would have made if they were fully informed and fully rational. *Id.* at 4–6, 255. But as David Yosifon points out, so-called libertarian paternalists continue to assume that authentic individual preferences exist apart from an individual’s social environment. David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 *GEO. MASON L. REV.* 681, 698–99 (2008) (“The three ‘bounds’ of the behavioral law and economics approach maintain the basic dispositional perspective at that heart of the conventional rational actor model.”). The population perspective, by focusing on populations, questions that notion.

<sup>47</sup> See Gostin, *supra* note 16, at 23 (“[The] harm principle . . . argue[s], for example, that secondhand smoke, increased medical costs, and lost productivity amount to harm to others and so are not purely self-regarding. Third-party harms are not imaginary . . . .”); see also Elizabeth Weeks Leonard, *The Public’s Right to Health: When Patient Rights Threaten the Commons*, 86 *WASH. U. L. REV.* 1335, 1345–49 (2009) (explaining how individual self-regarding actions can negatively affect society and others, while public health regulations can simultaneously be paternalistic and seek to protect people from themselves and be for the benefit of others); Lindsay F. Wiley, *Rethinking the New Public Health*, 69 *WASH. & LEE L. REV.* 207, 261 (2012) (“Measures aimed at altering the social environment in ways that influence health behaviors and outcomes are supported by public health science . . . .”).

<sup>48</sup> See Gostin & Gostin, *supra* note 3, at 217 (“[P]ublic health practices are ‘communal in nature, and concerned with the well-being of the community as a whole and not just the well-being of any particular person.’” (quoting Dan E. Beauchamp, *Community: The Neglected Tradition of Public*

The disjuncture between the individualistic and public health perspectives is easy to see in the case of vaccination. Vaccines are sometimes defended as benefiting the health of individuals who are vaccinated.<sup>49</sup> Public health advocates, in contrast, value vaccinations for their ability to establish herd immunity or, in other words, because they benefit the group.<sup>50</sup>

But even some laws that are widely viewed as paternalistic do not always appear as such from a public health perspective. Consider, for example, motorcycle helmet laws, which Friedman presents as an example of an insulating law.<sup>51</sup> Critics of such laws contend that they aim to protect the health of the motorcycle rider they regulate and any attempt to defend such laws on the basis of savings to the public health care system is disingenuous.<sup>52</sup> From a public health perspective, however, helmet laws may not serve to save taxpayers money as much as to influence the norms of other would-be motorcycle riders who may be more likely to develop a preference for wearing helmets if they observe others doing so as well. In this sense, helmet laws act like indoor smoking laws in that they alter the norms of the population.<sup>53</sup>

My goal here is neither to assert that the above-cited public health laws are or are not paternalistic, nor to defend any of these laws from a population perspective. Rather, I simply wish to suggest that the relationship between paternalism and public health is far more problematic and nuanced than Friedman, and indeed many public health supporters, suppose.<sup>54</sup> This not only raises questions about Friedman's assertion that

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*Health*, in NEW ETHICS FOR THE PUBLIC'S HEALTH 57, 66 (Dan E. Beauchamp & Bonnie Steinbock eds., 1999)).

<sup>49</sup> Wendy E. Parmet, *The Individual Mandate: Implications for Public Health Law*, 39 J.L. MED. & ETHICS 401, 408 (2011).

<sup>50</sup> *Id.* at 405; see, e.g., Sabrina Tavernise, *Vaccine Is Credited in Steep Fall of HPV Infection in Teenagers*, N.Y. TIMES, June 20, 2013, at A1 (describing "herd immunity" in the context of the HPV vaccine as a phenomenon wherein "people who are vaccinated reduce the overall prevalence of the virus in society, decreasing the chances that unvaccinated people would be exposed to someone who is infected").

<sup>51</sup> Friedman, *supra* note 1, at 1705–06.

<sup>52</sup> Gostin and Gostin note that such justifications have been criticized as "strained attempts to frame paternalism as coming within the harm principle." Gostin & Gostin, *supra* note 3, at 219; see also Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121, 170 (2005) (citing cases concerning motorcycle helmets for the proposition that "[t]he concept of harm to others is subject to limitless expansion").

<sup>53</sup> An individualist might reply that this is just an indirect form of paternalism, as the public health advocates wish to protect everyone in the group from their own poor judgment. This argument disregards the fundamentally different ontological stance between the public health perspective and the individualist perspective. One sees the individual as logically prior to the group; the other views the group (or population) as a subject with its own inherent characteristics and worth.

<sup>54</sup> See, e.g., Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health: Talking Point on Public Health Versus Civil Liberties*, 8 EMBO REP. 1099, 1101–02 (2007) (arguing for strong "paternalistic restrictions with regard to motorcycle helmets").

paternalism has reached its limits, but also about his typology.

According to Friedman, his five-level spectrum of interventions classifies regulatory tools by the degree to which they rely on soft or hard means of paternalism.<sup>55</sup> At one end of the spectrum are “softer” techniques, which “attempt to address cognitive biases through the presentation of more information to improve the quality of decision making.”<sup>56</sup> At the other end of the spectrum are “outright bans, reflecting hard paternalism.”<sup>57</sup>

Space here precludes a full discussion of the literature surrounding cognitive biases, soft paternalism, and even so-called libertarian paternalism.<sup>58</sup> What is critical for present purposes is that Friedman’s typology assumes a relationship between the degree of coerciveness of a law and the softness or hardness of its paternalism. In effect, Friedman classifies policies that are less coercive and leave the subjects with more “choice,” i.e., policies that Thaler and Sunstein term “nudges,” or examples of “libertarian paternalism,”<sup>59</sup> as soft paternalism, and those that are more coercive and leave the subject with less choice as exercises of hard paternalism.<sup>60</sup> This approach seems roughly compatible with that of Sunstein, who writes, “[I]t might be best to understand paternalistic interventions in terms of a continuum from hardest to softest, with the points marked in accordance with the magnitude of the costs (of whatever kind) imposed on choosers by choice architects.”<sup>61</sup>

Friedman’s association of soft paternalism with a lack of coercion (or the maintenance of choice) is not unprecedented. As Sara Conly notes, “The terms ‘hard’ and ‘soft’ may differentiate between the methods used to induce paternalistic actions, where hard paternalism . . . [makes] some actions impossible, and soft paternalism merely recommends incentivizing

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<sup>55</sup> Friedman, *supra* note 1, at 1698–99.

<sup>56</sup> *Id.* at 1699.

<sup>57</sup> *Id.*

<sup>58</sup> See THALER & SUNSTEIN, *supra* note 46, at 4–5 (noting that using “the term *libertarian* to modify the word *paternalism* . . . mean[s] liberty-preserving”).

<sup>59</sup> *Id.* at 5–6.

<sup>60</sup> Friedman’s placement of different interventions along his spectrum is questionable. For example, Friedman treats New York City’s portion cap rule as a conditional mandate that, in his typology, is softer than bans or mandates. Friedman, *supra* note 1, at 1705–06. However, while it is possible to categorize the portion cap rule as a conditional mandate, because consumers can continue to consume large quantities of soda, it is equally plausible to claim that the portion cap rule was a “ban” that barred a particular type of purchase. Indeed, Friedman uses the term “ban” in conjunction with the portion cap rule throughout the article. On the other hand, Friedman treats regulations of school lunches and SNAP purchases as examples of hard paternalism within a zone of control. *Id.* at 1744–47. Yet these regulations can also be viewed as conditional mandates, since children can consume food not sold in school, and SNAP recipients are not prohibited by law (only economics) from using other funds to purchase junk food.

<sup>61</sup> Sunstein, *supra* note 26, at 1859.

certain preferable options.”<sup>62</sup> But other scholars argue that soft paternalism “protects autonomy by ensuring that the subject’s choices reflect her true preferences,”<sup>63</sup> while hard paternalism “may impose actions the agent would not want even if aware of the facts.”<sup>64</sup> Under this approach, the key characteristic distinguishing hard from soft paternalism is the respect (or lack thereof) given to the subject’s own preferences.<sup>65</sup>

Each of these different approaches raises distinct questions about Friedman’s spectrum. If respect for the subject’s authentic preferences is the key to determining whether an intervention is soft or hard, there is no reason a priori for assuming that bans or mandates are necessarily harder than debiasing strategies. After all, a powerful narrative (an advertisement, perhaps) can momentarily induce an individual to take an action contrary to his or her own “true” preferences and, in that sense, disrespect the individual’s autonomous preferences without being highly coercive. Conversely, a mandate might propel someone to do what he or she really wants to do, but would not do in the absence of compulsion. It follows that some laws that Friedman treats as hard, and which he suggests may be more problematic for that reason alone, may actually be—depending on the definition of soft paternalism used—softer than laws that rely less on compulsion. On the other hand, if the distinction between hard and soft paternalism is based, as Friedman claims, on the degree of coerciveness (or, as Sunstein argues, on the cost imposed by a policy),<sup>66</sup> then the question arises whether paternalism qua paternalism rather than the use of coercion has very much to do at all with the reception given to various laws.

In the public health context, the use of coercion in the absence of necessity may sometimes be problematic even when it is not paternalistic. Thus, quarantines and other coercive communicable-disease-control laws, such as mandated tuberculosis treatment and laws requiring the reporting of communicable diseases, raise a host of both ethical and public health problems even though they are not paternalistic.<sup>67</sup> Indeed, lawyers and ethicists have long employed concepts such as the least-restrictive

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<sup>62</sup> CONLY, *supra* note 12, at 5.

<sup>63</sup> Pope, *supra* note 24, at 671–72.

<sup>64</sup> CONLY, *supra* note 12, at 5.

<sup>65</sup> Pope, *supra* note 24, at 673–78, 683–84 (defining both soft and hard paternalism).

<sup>66</sup> See Sunstein, *supra* note 26, at 1836, 1859–60 (describing various forms of paternalism as alternatively exacting “material,” “psychic,” “large,” or “small” costs).

<sup>67</sup> See Wendy K. Mariner, George J. Annas & Wendy E. Parmet, *Pandemic Preparedness: A Return to the Rule of Law*, 1 DREXEL L. REV. 341, 370–72, 374–76 (2009) (citing forced treatment, patient consent, confidentiality, and Fourth Amendment strictures against search and seizure as ethical and legal problems raised by public health programs).

alternative,<sup>68</sup> proportionality,<sup>69</sup> and ladders of intervention<sup>70</sup> to argue against the application of any more coercion than is necessary to support public health—even when the harm prevented is to others rather than to the subject being coerced. Seen in this context, Friedman’s spectrum of interventions has less to do with paternalism per se than with well-established cautions against the excessive use of public health powers.

### III. THE LIMITS OF PUBLIC HEALTH LAW

So far I have argued that the relationship between public health law, coercion, and paternalism is more nuanced than Friedman supposes. That does not mean that he is wrong in claiming that paternalism has reached its political limits. Some public health laws may be widely rejected because they are viewed as paternalistic.<sup>71</sup> After all, John Stuart Mill’s distinction between the use of law to limit self-regarding and other-regarding actions remains highly influential.<sup>72</sup> Further, as Friedman suggests, the perception that many public health laws are paternalistic, and problematic precisely for that reason, is widespread in both the popular media and the scholarly literature.<sup>73</sup> Indeed, paternalism and the nanny state have become common tropes in popular discourse.

Still, there are several reasons to question whether the rejection of paternalism, understood as the restriction of someone’s liberty for his or her own good, is as central to the problems facing public health law today as Friedman and the nanny-state trope suggest.<sup>74</sup> For one thing, many laws

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<sup>68</sup> See, e.g., *In re Washington*, 735 N.W.2d 111, 119–21 (Wis. 2007) (discussing a Wisconsin statute permitting involuntary confinement of an individual with tuberculosis if “no less restrictive alternative exists”).

<sup>69</sup> See, e.g., James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS 170, 173 (2002) (explaining proportionality as requiring that “public health benefits outweigh the infringed general moral considerations”).

<sup>70</sup> See, e.g., NUFFIELD COUNCIL ON BIOETHICS, PUBLIC HEALTH: ETHICAL ISSUES 41–42 (2007), available at <http://nuffieldbioethics.org/wp-content/uploads/2014/07/Public-health-ethical-issues.pdf> (proposing an “intervention ladder” as a way of assessing the appropriateness of public health laws, in which laws that are “more intrusive” are higher on the ladder and require a stronger justification).

<sup>71</sup> See Sunstein, *supra* note 26, at 1853 (arguing that paternalistic laws regard people “as children” and without “respect”).

<sup>72</sup> See MILL, *supra* note 25, at 13, 96–97 (introducing and explaining the principle that limitations of liberty are warranted only to prevent harm to others).

<sup>73</sup> See Friedman, *supra* note 1, at 1690–91 nn.11–16 (noting a popular-press book and a plethora of scholarly articles on paternalism). Thaddeus Mason Pope has argued that “[p]aternalism is at the normative center of increasingly pressing public health questions concerning the permissibility of restrictions on the consumption of tobacco products and sugary, fatty foods.” Pope, *supra* note 24, at 660–61.

<sup>74</sup> It is also quite debatable, for reasons explained above, whether the distinctions between the so-called “new public health,” that tries to protect people from self-regarding activities, and the old public health, that supposedly protected people from communal harms, are as stark as many critics of the new public health have contended. See, e.g., Epstein, *supra* note 3, at 1368 (demonstrating the new public health approach through obesity, which is non-communicable and does not necessitate “coercive

that are (or are perceived to be) paternalistic remain highly popular. Friedman notes, for example, that despite being an example of hard paternalism, trans fat bans have encountered little resistance, perhaps because they do not appear to impose a significant cost on the population.<sup>75</sup> And while he points to opposition in some localities against fluoridation of the water supply as an example of anti-paternalism even where the “science appears to be settled,” he also observes that some jurisdictions have recently opted to retain fluoridation.<sup>76</sup> Given the mixed results, it is hard to say that fluoridation has met paternalism’s limits.

Many other examples of popular public health laws that are often viewed as paternalistic can be offered. For example, the public seems to want the FDA to do more to protect it from unsafe foods and drugs.<sup>77</sup> Additionally, although seat belt laws are generally viewed as paternalistic, a 2012 Minnesota report shows that they are now widely accepted.<sup>78</sup> Even helmet laws, though unpopular among many motorcycle riders, have widespread support.<sup>79</sup> Laws requiring food manufacturers and restaurants to reduce sodium are also very popular.<sup>80</sup>

As Friedman shows so well, context and particularities matter. For example, as the growing acceptance of seat belt laws and smoking bans illustrates, laws that are controversial when first introduced often become

collective action”); Hall, *supra* note 3, at S204–05 (making the same point with fluoridation, but concluding that collective action is “much more cost-effective than . . . individual responses”). For a further discussion of the distinctions between the new and old public health, see Burris & Anderson, *supra* note 15, at 108.

<sup>75</sup> Friedman, *supra* note 1, at 1709, 1750–51.

<sup>76</sup> *Id.* at 1762. Opposition to fluoridation, like opposition to vaccination and other public health efforts, may be attributable, at least in part, to the fact that as prevention efforts become more successful, the need for them becomes less apparent. See, e.g., Doren D. Frederickson et al., *Childhood Immunization Refusal: Provider and Parent Perceptions*, 36 FAM. MED. 431, 436 (2004) (concluding that “non-immunizing parents are aware that their children may be at lower risk if most other children . . . are immunized”); Wendy E. Parmet, *Informed Consent and Public Health: Are They Compatible When It Comes to Vaccines?*, 8 J. HEALTH CARE L. & POL’Y 71, 74 (2005) (noting that the more successful vaccination is, the less important it is for individuals). This relates to the fact that public health is a public good that confronts collective-action problems. Parmet, *supra*, at 75; Leonard, *supra* note 47, at 1339 (defining public health as an activity that aims at promoting public goods).

<sup>77</sup> See Amanda Gardner, *U.S. Public Lacks Confidence in FDA: Poll*, HEALTHDAY (Apr. 30, 2009), <http://consumer.healthday.com/public-health-information-30/food-and-drug-administration-news-315/u-s-public-lacks-confidence-in-fda-poll-626405.html> (noting that about half of the public feels that the FDA “isn’t doing enough” to protect the public). For reasons discussed previously, many FDA regulations may not in fact be paternalistic. See *supra* text accompanying notes 25–27.

<sup>78</sup> For a recent review of the public’s acceptance of seat-belt laws in Minnesota, see FRANK DOUMA & NEBIYOU TILAHUN, CTR. FOR EXCELLENCE IN RURAL SAFETY, *IMPACTS OF MINNESOTA’S PRIMARY SEAT BELT LAW 14, 15* (2012), available at <https://dps.mn.gov/divisions/ots/seat-belts-airbags/Documents/dps-eval-primary-seat-belt-law.pdf>.

<sup>79</sup> Wiley et al., *supra* note 3, at 89.

<sup>80</sup> Morain & Mello, *supra* note 15, at 490. Morain and Mello provide a chart showing that a majority of the public supports a wide range of public health interventions aimed at preventing non-communicable diseases. *Id.*

well-accepted (though not less paternalistic) over time.<sup>81</sup> In addition, as Friedman's analysis suggests, paternalistic laws are more likely to be accepted when the burdens they place on the public are minimal.<sup>82</sup> It also seems likely, as Scott Burris and Evan Anderson hypothesize, that the public's intuition about risk and causality affect its support of a public health law.<sup>83</sup> The public might be quite supportive of a law barring the sale of *E. coli* infested meat both because the disease seems fearsome and the law seems well-targeted. On the other hand, despite widespread recognition that obesity is a significant public health problem,<sup>84</sup> Americans are most likely less afraid of it than of *E. coli*. So too, the relationship between specific laws aimed at obesity, such as New York City's soda portion cap rule, and the obesity epidemic may appear, to many, to be quite attenuated. Importantly, when it comes to perception, all risks are not equal.<sup>85</sup>

Nor are all restrictions on liberty equally contentious. As Peter Jacobson has noted, there is an important distinction between paternalistic laws that limit fundamental rights and those that restrict lesser liberties.<sup>86</sup> Under our Constitution, and in our political culture, a health regulation that limited reproductive autonomy or freedom of worship would be thought of quite differently than one that restricted an individual's "right" to ride a motorcycle without a helmet or smoke indoors. The short reason for this is simply that in the latter cases, no legally-recognized "right" is infringed. Not all exercises of liberty are rights.<sup>87</sup>

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<sup>81</sup> See DOUMA & TILAHUN, *supra* note 78, at 14 (showing that a seat belt law gained and sustained public approval); Friedman, *supra* note 1, at 1747 n.340 (citing the proliferation of smoking bans and restrictions).

<sup>82</sup> See Friedman, *supra* note 1, at 1747–51 (citing the example of trans fats, the banning of which caused little burden or loss of pleasure for consumers, resulting in public acceptance).

<sup>83</sup> Burris & Anderson, *supra* note 15, at 108.

<sup>84</sup> See PEW RES. CTR., PUBLIC AGREES ON OBESITY'S IMPACT, NOT GOVERNMENT'S ROLE: YES TO CALORIES ON MENUS, NO TO SODA LIMITS 1 (2013), available at <http://www.people-press.org/files/legacy-pdf/11-12-13%20Obesity%20Release.pdf> (noting sixty-three percent of Americans think that obesity is a significant problem for society, and not just individuals).

<sup>85</sup> See Wendy E. Parmet, *Public Health & Social Controls: Implications for Human Rights* 11 (Northeastern Pub. Law & Theory Faculty Working Papers Series, No. 44-2010, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1546654](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546654) (suggesting that rare and overtly symptomatic diseases are more likely to be feared, and therefore more likely to be addressed by public health laws, than commonplace diseases).

<sup>86</sup> Peter D. Jacobson, *Changing the Culture of Rights: One Public Health Missstep at a Time*, 51 SOC. SCI. & MOD. SOC. 221, 226–27 (2014).

<sup>87</sup> This raises a crucial point: under well settled constitutional doctrine, state laws that limit liberty, but not fundamental rights, receive a presumption of constitutionality, even if they are paternalistic and highly coercive. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (explaining that a challenged state action must implicate a fundamental right before the courts will require more than a reasonable relation to a legitimate state interest to sustain the law). In law, if not in politics, the onus is on those who challenge such laws, at least under the Constitution. Challenges

In addition, many of the objections that can and are made to paternalistic laws are also laid at regulations of other-regarding actions.<sup>88</sup> Although Mill's harm principle condones restrictions on liberty to prevent harm to others, the current anti-regulatory mood in contemporary American culture does not only set a limit on paternalistic laws, it also undermines support for laws aimed at other-regarding behaviors.<sup>89</sup> For example, health care workers have been surprisingly resistant to mandates requiring them to be vaccinated against the flu, even though such policies are aimed at protecting patients, rather than the health care workers themselves.<sup>90</sup> Public health and safety advocates have also failed in many of their attempts to impose new gun controls, even though such laws seek to prevent harm to others.<sup>91</sup> Indeed, at times it seems as if the public may be more willing to accept laws that regulate self-regarding behavior than those that restrict other-regarding behavior. At least public health advocates sometimes appear to believe that to be the case, as is evident by their attempts to promote vaccines as something that individuals should obtain to protect themselves, rather than to protect others.<sup>92</sup> Perhaps, then, the limits to public health arise less from paternalism than from a resistance to regulation in general, one fueled in part by the record low levels of trust Americans have in government.<sup>93</sup> That lack of trust is a problem for public health, but it is not a problem specific to paternalism.

#### IV. BEYOND PATERNALISM: PUBLIC HEALTH AND SELF-GOVERNANCE

In 1988, the Institute of Medicine ("IOM") famously stated, "Public health is what *we*, as a society, do collectively to assure the conditions for people to be healthy."<sup>94</sup> This definition suggests that public health is an enterprise that individuals or groups, coming together, do to promote *their*

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based on a lack of statutory authority, in contrast, raise different issues. See *infra* text accompanying notes 108–18.

<sup>88</sup> See CONLY, *supra* note 12, at 115 (suggesting that attacks against paternalism are actually arguments against legislation generally).

<sup>89</sup> In this sense, libertarianism as a contemporary political and cultural force has a far lower tolerance of regulation than does libertarianism as a political theory.

<sup>90</sup> See, e.g., Wendy E. Parmet, *Pandemic Vaccines—The Legal Landscape*, 362 NEW ENG. J. MED. 1949, 1951 (2010) (describing health worker resistance to an H1N1 vaccine mandate).

<sup>91</sup> See Jay Newton-Small, *Gun Control Activists Seek to Reboot After Newtown Shooting Momentum Fades*, TIME (Dec. 13, 2013), <http://swampland.time.com/2013/12/13/gun-control-activists-seek-to-reboot-after-newtown-shooting-momentum-fades/> (discussing the failure of gun control advocates to effectuate change in the wake of Newtown).

<sup>92</sup> See Parmet, *supra* note 12, at 268–69 (suggesting that vaccine proponents often emphasize the benefits to the individual over the benefits to the population as a whole).

<sup>93</sup> See *Public Trust in Government: 1958–2013*, PEW RES. CENTER FOR PEOPLE & PRESS (Oct. 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-interactive/> (finding that only nineteen percent of Americans trust the government).

<sup>94</sup> INST. OF MED., THE FUTURE OF PUBLIC HEALTH 19 (1988) (emphasis added), available at [http://www.nap.edu/openbook.php?record\\_id=1091&page=19](http://www.nap.edu/openbook.php?record_id=1091&page=19).

*own health*. In this sense, public health legal interventions are not or should not be viewed as paternalistic for two reasons. First, at least in a democratic polity, public health laws should not be seen as the edict of a disembodied policymaker seeking to benefit an unwilling public. Rather, they should be understood as tools that populations use to benefit themselves. In effect, public health laws are the means by which populations achieve their own health ends.<sup>95</sup>

Second, and related, public health laws can be viewed not simply as limitations of liberty, but also as exercises of positive liberty. Public health laws are both the manifestation of the positive liberty of self-governance<sup>96</sup> and a means by which individuals attempt to enhance their own autonomy by reducing the risks they face.<sup>97</sup> After all, while there may be freedom in not being vaccinated, there is also the freedom that comes from living in a community with herd immunity. Likewise, although indoor smoking laws undoubtedly limit some people's freedom, they also enhance the freedom of others who can more easily avoid both the exposure to second-hand smoke and the seductions to a habit they might prefer to forgo. More generally, public health laws enhance liberty by freeing people from the restrictions imposed by injury and disease.<sup>98</sup>

The merits of viewing public health law in this way, as an exercise of and enhancement to positive liberty are numerous, and well beyond the scope of this Article. For present purposes, one point especially relevant to Friedman's article warrants consideration. In his discussion of GMOs, Friedman sheds light on how a popular movement can support interference in the market in the name of public health.<sup>99</sup> In Friedman's view, "[t]he GMO debate fits comfortably into the broader narrative about the limits of paternalism in public health," because legislation is required to protect consumers from the "broader, hard paternalism of food producers."<sup>100</sup> That's one way of telling the tale, but the same argument can be made

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<sup>95</sup> See Wiley et al., *supra* note 3, at 88 (suggesting that government regulation of public health is actually a medium for the public at large to address their own public health policy concerns).

<sup>96</sup> It is important to remember that this is the very reason why most public health laws, paternalistic or not, are given the presumption of constitutionality. See *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997) (asserting that "it is up to those who attack [a] law to demonstrate that there is no rational connection between the challenged ordinance and the promotion of public health" because the "Constitutional presumption in this area of the law is that the democratic process will, in time, remedy improvident legislative choices and that judicial intervention is therefore generally unwarranted").

<sup>97</sup> See *PARMET*, *supra* note 41, at 116 ("[T]he recognition of a positive right to population health necessarily assumes that individuals cannot fulfill all of their goals, which presumably includes being healthy, without the assistance or support of others.").

<sup>98</sup> Jacobson, *supra* note 86, at 222.

<sup>99</sup> Friedman, *supra* note 1, at 1763–64. For reasons discussed above, a law demanding that food producers disclose the presence of GMOs is not properly understood as paternalistic. See *supra* text accompanying notes 25–27.

<sup>100</sup> Friedman, *supra* note 1, at 1765.

about many other public health laws that Friedman treats as problematically paternalistic. Once we recognize that the market limits consumers' liberty (a coercion that is not properly understood as paternalistic because it does not aim at benefitting the consumer), then, as the advocates of soft paternalism remind us,<sup>101</sup> many laws that regulate the market in the name of public health can be seen as promoting, rather than stifling, liberty.

So what is different about the GMO example from the other purportedly paternalist laws that Friedman reviews? One possibility is that the first clause of the IOM's definition matters: "Public health is what *we*" do.<sup>102</sup> Public health laws that are strongly rooted in, and indeed arise from, the public, may face a quite different fate than those that derive from the good intentions of public health policymakers alone.

To be sure, in our complex and often polarized society, it is always problematic to proclaim that any particular law is or is not popularly rooted. After all, the views of social movements demanding public health protection—consider for example, the movement that developed in response to the HIV epidemic—need not be representative of the opinions of the majority.<sup>103</sup> Similarly, as in the case of enhanced background checks for gun purchases, a highly mobilized group may undermine a law's political viability even if the law has broad popular support.<sup>104</sup>

Determining a law's provenance—whether it derived top-down from officials or bottom up from popular mobilization—can also be complex. As Friedman pointed out in an earlier article, actions instigated by public health officials can spark public dialogue,<sup>105</sup> which in turn can lead to more popularly-rooted laws. Moreover, popular movements can give birth to broad administrative authority, as the genesis of many federal agencies, from the FDA to the EPA, suggests. There is also no doubt that public health protection often demands that broad authority be exercised even in

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<sup>101</sup> See Sunstein, *supra* note 26, at 1835–36 (identifying "hard" paternalism as highly aggressive and "soft" paternalism as weaker, preserving the freedom of choice).

<sup>102</sup> See INST. OF MED., *supra* note 94, at 19 (emphasis added).

<sup>103</sup> See Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED. & ETHICS 594, 596 (2002) ("[P]ublic opinion surveys conducted in the early years of the epidemic revealed widespread fear of AIDS, lack of accurate information about its transmission, and willingness to support draconian public policies that would restrict civil liberties in the name of fighting the disease."); Joan Beck, *AIDS Activists Shake Up the Medical Establishment*, BALTIMORE SUN (Jan. 14, 1992), [http://articles.baltimoresun.com/1992-01-14/news/1992014058\\_1\\_aids-activists-spent-on-aids-research](http://articles.baltimoresun.com/1992-01-14/news/1992014058_1_aids-activists-spent-on-aids-research) ("AIDS activists have pressured research into unprecedented urgency and concentration with their demands[] . . . [and] have insisted on and gotten far more than a fair share of money for research and care.").

<sup>104</sup> Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN (Apr. 17, 2013), <http://www.cnn.com/2013/04/17/politics/senate-guns-vote/>.

<sup>105</sup> See David Adam Friedman, *Micropaternalism*, 88 TUL. L. REV. 75, 108–09 (2013) (explaining that micropaternalistic laws can "spark public dialogue in a way that can influence the broader picture").

the absence of a popular movement—consider the need for officials to respond quickly to a pandemic or new type of injurious product.<sup>106</sup> The public may balk when public health agencies act without its support, but it also hollers when officials fail to act in the face of a new threat.

Despite these complexities, if public health's limitations on liberty are justified because public health constitutes an exercise of self-governance, the public rooting of public health laws remains important.<sup>107</sup> Unfortunately, it is hard to view many contemporary public health laws as exercises of popular will. Given the popular outcry against New York City's portion cap rule, it seems specious to view that regulation as anything other than an edict imposed by public authorities over the opposition of the public and their elected representatives. Importantly, it was this very lack of approval by elected officials that the New York Court of Appeals found to be decisive in striking down the regulation.<sup>108</sup> In other words, the soda portion cap rule was struck down not because it was paternalistic and violated the harm principle, but because "it is the province of the people's elected representatives rather than appointed administrators, to resolve difficult social problems by making choices among competing ends."<sup>109</sup>

A recent case from Ohio provides an interesting contrast. In *City of Cleveland v. State*,<sup>110</sup> an Ohio Court of Appeals reviewed a state law

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<sup>106</sup> Importantly, I am not arguing that a public health law is only legal if it is rooted in popular sovereignty. Nor am I saying that popular sovereignty is the only justification for a public health law. My argument instead is limited to the point that popular sovereignty matters to the political limits of public health laws, and that its absence, rather than paternalism, may help to explain the problems public health law is facing.

<sup>107</sup> See Wiley et al., *supra* note 3, at 91 ("[W]e suggest utilizing the language of the democratic process. . . . The goal of public health is collective problem solving, not authoritarianism."). As noted, this is not to say that all public health laws need be popularly rooted; rather, this is an important factor to the extent that the coercion exercised by public health laws is justified as an exercise of popular sovereignty.

<sup>108</sup> *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 700 (2014) (finding that the Board of Health exceeded its authority by making a policy choice rather than a means to an end chosen by the legislature). The court did find important the fact that, in its view, the regulation limited autonomy. According to the court, the restriction on autonomy was a factor to be considered in deciding whether the board had exceeded its authority in acting without legislative guidance. *Id.* at 699. The court never suggested, however, that the limitation on autonomy would have been problematic if it had come from the legislature rather than the board. Rather, the problem with the portion cap rule, as the court saw it, was the fact that the board imposed a limitation on autonomy in the absence of legislative approval. *Id.* For a defense of the legality of the portion cap rule, see Kara Marcello, Note, *The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic*, 46 CONN. L. REV. 807 (2013).

<sup>109</sup> *N.Y. Statewide Coal. of Hispanic Chambers of Commerce*, 23 N.Y.3d at 697 (quoting *Boreali v. Axelrod*, 72 N.Y.2d 1, 13 (1987)).

<sup>110</sup> 989 N.E.2d 1072 (Ohio Ct. App. 2013).

forbidding cities from banning trans fats,<sup>111</sup> which was enacted in response to a Cleveland city council ban.<sup>112</sup> In striking down the state law, the court relied on the state constitution's protection for home rule,<sup>113</sup> noting that localities had the right to enact laws to protect the health of their populations and that the state could not preempt the exercise of that right in the absence of a comprehensive state public health law.<sup>114</sup> In short, although Cleveland's trans fat ban represented a harder flavor of paternalism in Friedman's terms than New York City's portion cap rule, the Cleveland ordinance was viewed by the Ohio court as an exercise of popular sovereignty, something that the New York court could not say about the New York City portion cap rule.<sup>115</sup>

This distinction between critiquing a public health intervention on the basis of paternalism rather than on the basis of its legal provenance may be a subtle one, but it raises some significant questions about Friedman's analysis, as well as the future course of public health law.<sup>116</sup> Most particularly, it raises the question of whether the limits that public health law is facing derive from a rejection of paternalism qua paternalism or from a distancing of public health policymakers from the public they serve.<sup>117</sup> Has the public come to reject limitations on self-regarding behaviors, or has it come to feel that public health officials are no longer responsive to its concerns?

Friedman clearly believes that the problem is paternalism's limitations on autonomy, rather than the top-down nature of public health law today. Assuming that the public's skepticism of paternalism thwarts efforts that he believes are necessary for public health protection, Friedman offers policymakers (i.e., experts) a detailed and context-specific guide as to how they can nevertheless achieve their goals. Chief among the advice he offers is to go soft, be practical, and "identify a mix of initiatives that

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<sup>111</sup> *Id.* at 1076.

<sup>112</sup> *Id.* at 1075–76, 1085.

<sup>113</sup> OHIO CONST. art. X, § 1.

<sup>114</sup> *City of Cleveland*, 989 N.E.2d at 1078–79, 1082.

<sup>115</sup> Friedman gives a quite different, but not incompatible, argument as to why trans fat bans have been successful despite the hardness of their paternalism. See Friedman, *supra* note 1, at 1750 (noting that New York City's hard paternalism trans fat ban "proved less tangible [than the portion cap rule], possibly because consumers did not notice that [trans fats were] missing" and, thus, "did not taste a loss of autonomy").

<sup>116</sup> The discussion below argues that questions surrounding the legitimacy of the administrative state form one of the limits of public health law. This is not to say, however, that there are not important reasons why public health law relies on administration. I hope to review and reconcile these claims in a subsequent article.

<sup>117</sup> I recognize that the two critiques are related. A distrust of expertise may underline a disapproval of paternalism. But as I have suggested, the two critiques are not the same, and one can disapprove of expertise even in the absence of paternalism. Conversely, one can approve of paternalism as an exercise of self-governance while rejecting expertise.

combine efficacy with practicality.”<sup>118</sup>

However, if the rejection of the nanny state is based more on public health officials’ willingness to intervene in the absence of popular support than on disapproval of paternalism itself, efforts such as those by Friedman to inform policymakers about the tools they should employ may backfire. Indeed, if public health is facing a backlash based on its own over-reliance on expertise and administrative authority, efforts to inform policymakers about how to *hide* their paternalism—or exercise it softly—risk offering policymakers the false assurance that they can promote public health without first seeking the public’s active trust and engagement.

To gain that trust and engagement—to ensure that public health laws are indeed the laws that “we the people” establish to protect *us*—public health advocates need to rethink how they speak and, more importantly, how they listen to the populations they serve.<sup>119</sup> This requires a renewed respect for the public’s priorities and concerns, as well as a deep awareness of the limits of public health officials’ own authority.<sup>120</sup> It also may require a new humility about the scope of public health powers. With this, I suspect Friedman would agree, as in his conclusion he wisely reminds policymakers of the need to be “attuned to public sentiment.”<sup>121</sup> In a democracy, after all, the public’s views set the true limits to public health law.

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<sup>118</sup> Friedman, *supra* note 1, at 1770.

<sup>119</sup> See Morain & Mello, *supra* note 15, at 494 (“Our data suggest that the public’s conception of fairness may have less to do with how particular decisions are made than with more general considerations of access to the decision-making process and faith that decision makers know their constituents well enough to carry out their will.”); Wiley et al., *supra* note 3, at 91 (advocating the benefit of communities collaborating on issues of public health).

<sup>120</sup> For more than a decade, many public health law scholars have emphasized the breadth of public health powers. See, e.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 92, 98 (2d ed. 2008) (discussing the “pervasive” nature of state police powers that can be used to further the public health, and stating that the “federal government possesses considerable authority to act and exerts extensive control in the realm of public health and safety”).

<sup>121</sup> Friedman, *supra* note 1, at 1769.