

2014

## Three Comments on Paternalism in Public Health Response

Yofi Tirosh

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_review](https://opencommons.uconn.edu/law_review)

---

### Recommended Citation

Tirosh, Yofi, "Three Comments on Paternalism in Public Health Response" (2014). *Connecticut Law Review*. 254.

[https://opencommons.uconn.edu/law\\_review/254](https://opencommons.uconn.edu/law_review/254)

# CONNECTICUT LAW REVIEW

---

VOLUME 46

JULY 2014

NUMBER 5

---

## Article

### Three Comments on Paternalism in Public Health

YOFI TIROSH

*This Article offers three critical observations concerning the debates surrounding paternalism in public health. First, the assessment of paternalistic health-promoting policies stops at efficacy considerations and fails to consider the possibility that such policies may infringe basic rights. Second, discussions on health and paternalism are not sufficiently context-specific, as they tend to classify policies according to their degree of paternalism rather than according to the often unique characteristics of each risky behavior. And third, debates on public health and paternalism fail to address background structural conditions that may change our understanding of whether paternalistic means are at all needed.*

**ARTICLE CONTENTS**

I. INTRODUCTION..... 1797

II. THE HARMS THAT THE DEBATE IGNORES ..... 1801

III. THE PROBLEMATIC FRAMING OF PATERNALISM DEBATES ..... 1805

IV. IT’S THE STRUCTURE, STUPID! ..... 1810

    A. BACKGROUND CONDITIONS MATTER ..... 1811

    B. CONSIDERING WHAT REGULATORS DO NOT DO..... 1812

    C. COMPLICATING THE UTILITY CALCULUS ..... 1813

V. CONCLUSION ..... 1814



# Three Comments on Paternalism in Public Health

YOFI TIROSH\*

## I. INTRODUCTION

Professor Friedman’s article offers an extremely effective typology of the various “flavors” of paternalism aimed at helping individuals make better decisions to promote their health and reduce general health care costs.<sup>1</sup> Friedman dedicates most of his analytical attention to paternalistic policies targeting obesity, but his comparative discussion includes such other public health issues as marijuana, water fluoridation, and GMO labeling.<sup>2</sup> Friedman helpfully classifies paternalism on a spectrum of growing intervention, ranging from encouraging voluntarism (e.g., influencing food producers to commit to reducing the caloric value of their products),<sup>3</sup> through using soft means or “nudges” such as labeling,<sup>4</sup> to hard paternalistic policies such as bans or mandates (e.g., a marijuana ban or a mandate for manufacturers to exclude lead as a paint ingredient).<sup>5</sup> Every paternalistic policy is assessed according to its potential to effectively promote health and its potential to attain public approval. Designing and introducing any paternalistic policy, Friedman argues, involves a delicate balancing act between effectiveness and public support: more intrusive policies oftentimes may be more effective but less tolerated by the public.<sup>6</sup>

Through this rich study of various paternalistic instruments used by regulators in different fields, Friedman concludes that there are signs that the American public has recently become less tolerant of interferences with autonomy, and “the momentum seems to be veering against hard paternalism.”<sup>7</sup> The public’s objection to former New York City Mayor Michael Bloomberg’s soda size limitation is strongly indicative of the low

---

\* Assistant Professor, Tel Aviv University Faculty of Law. I am grateful to Amy Cohen, Ronit Donyets Kedar, Kevin Kolben, and Zohar Kohavi for commenting on earlier versions of this text.

<sup>1</sup> David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, Part II.A (2014).

<sup>2</sup> *Id.* Part III.B–C.

<sup>3</sup> *Id.* at 1722.

<sup>4</sup> *Id.* at 1729–34.

<sup>5</sup> *Id.* at 1707–08.

<sup>6</sup> *See id.* at 1770 (“An integrated response that accounts for the potential to improve public health along with the popular tolerance or appetite for regulatory interventions will produce the best possible social outcomes.”).

<sup>7</sup> *Id.* at 1762.

tolerance for paternalistic regulations that reduce autonomy.<sup>8</sup> The growing support for de-criminalizing marijuana and for GMO labeling, coupled with the growing objection to water fluoridation, also contributes to the conclusion that the current public atmosphere is one reflecting a “rejection of paternalism.”<sup>9</sup> This recent public rejection of limitations placed on autonomy, Friedman warns, is a dynamic that “portends ills for the future use of regulatory tools, soft and hard.”<sup>10</sup> Friedman is quick to add that this public suspicion is a reason for policymakers to avoid introducing overtly paternalistic policies to promote public health.<sup>11</sup> However, the public’s diminished susceptibility to paternalism requires more caution and care in designing policies. One strategy, Friedman suggests, is for policymakers to hide the infringement of autonomy in their proposed regulations (as was done in the trans fat ban)<sup>12</sup> because “[t]he forgone autonomy is invisible or simply has no value.”<sup>13</sup> Friedman also recommends that policymakers use narrative strategies that string data together into truthful and concrete accounts of the harm that certain behaviors cause to health.<sup>14</sup> This is strong-form debiasing in Friedman’s typology, but since it is still a weaker instrument than mandates or bans, Friedman urges using it more.<sup>15</sup>

One of the strengths of Friedman’s article is that it is written in the spirit of humbleness. Friedman constantly stresses that policies, however well-meaning, can have unintended and unanticipated consequences: “Too much disclosure might distort risk assessment. Consumers may misapply information or develop false confidence from having it. . . . If disclosure unduly pushes consumers to eschew more sugar, for example, which leads to consumption of more salt, the net effect might not be desirable.”<sup>16</sup> Add caloric information to menus, and you may find that caloric intake increases rather than decreases.<sup>17</sup> Teach Americans to reduce their fat

---

<sup>8</sup> *Id.* at 1706; see also 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, 851 & n.320 (2013) (noting that six out of ten New York City residents opposed the regulation prior to its passage and that 450,000 residents signed a petition opposing the ban once it passed).

<sup>9</sup> Friedman, *supra* note 1, at 1765.

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

<sup>11</sup> See *id.* at 1769 (arguing that regulators should “minimize the perception” that they are reducing autonomy).

<sup>12</sup> See *id.* at 1750 (“The trans fats ban proved less tangible, possibly because consumers did not notice that it was missing.”).

<sup>13</sup> *Id.* at 1709.

<sup>14</sup> *Id.* at 1734–37.

<sup>15</sup> See *id.* at 1737 (noting that “it may behoove regulators to invest more in uncovering the raw cognitive science and in finding avenues to deploy these” narrative regulatory measures).

<sup>16</sup> *Id.* at 1702–03 (footnote omitted).

<sup>17</sup> See *id.* at 1731 (noting a survey’s findings that disclosing calories slightly increased caloric intake).

consumption, and they may disregard the amount of sugar in their food.<sup>18</sup>

My comments evince my aim to continue in this spirit of humbleness and awareness of unintended consequences and unnoticed challenges in considering paternalistic policy means. I will offer three critical observations about the discussions on paternalism in public health.

First, while it is surely essential to typify and assess the different degrees of paternalistic policies by their public support and success in shaping behavior, assessments of paternalistic policies cannot stop there. An evaluation of paternalistic health policies must include an assessment of their legitimacy, whether viewed as an aspect of utility (i.e., the social cost of infringement of the rights of liberties), or as a separate, deontological consideration. By beginning his examination of paternalistic policies with their level of effectiveness and public support, Friedman neglects first-order questions about the theory of rights that justify paternalistic policies.<sup>19</sup> Through the lens of obesity-related policies, Part II of this Article grapples with some of those first-order questions and argues that a rights-centered assessment may reveal problems and raise questions that are not addressed by an efficacy-centered analysis.

Second, discussions about paternalism should be issue-specific. Instead, discussions about paternalism are typically general and move between contexts. For example, labeling regarding the respective risks of GMOs and tobacco are often examined under one umbrella, horizontally cutting across different issues to draw comparisons between paternalistic means. This horizontal methodology misses the particular characteristics of each issue that would be unveiled if they were examined alone. Such review would also enable realizing that each behavior the government may want to prevent invokes different intuitions, as well as emotional responses, moral and sometimes moralistic views, and cultural convictions. One's principled standpoint about paternalism—if one holds such a stance at all—does not necessarily imply that one would have identical positions about labeling GMOs and fluoridating water. For example, many people may oppose governmental paternalism regarding marijuana but support

---

<sup>18</sup> See *Low Fat Foods Could Contain More Sugar than Standard Versions, Study Finds*, HUFFINGTON POST UK (Sept. 20, 2012), [http://www.huffingtonpost.co.uk/2012/09/20/calorie-and-sugar-warning\\_n\\_1899366.html](http://www.huffingtonpost.co.uk/2012/09/20/calorie-and-sugar-warning_n_1899366.html) (citing a study that finds that some low-fat foods contain more sugar than standard versions); see also Melinda Wenner Moyer, *Carbs Against Cardio: More Data that Refined Carbohydrates, Not Fats, Threaten the Heart*, SCI. AM., May 2010, at 19 (“Processed carbohydrates, which many Americans eat today in place of fat, may increase the risk of obesity, diabetes and heart disease more than fat does . . .”).

<sup>19</sup> Rights-centered considerations are mentioned in passing in Friedman's article but they are not the core lens for review. See, e.g., Friedman, *supra* note 1, at 1737 (noting that long and dramatic narratives may be too intrusive or even unlawful if imposed on the public); *id.* at 1752 (discussing Mayor Bloomberg's musings about the normative aspects of forcing people to exercise); *id.* at 1769 (mentioning that it would be morally inappropriate for policymakers to give up on attempts to regulate to promote public health).

government intervention in banning trans fats.<sup>20</sup> The debate is not necessarily divided neatly along the lines of the acceptable limits of paternalism, but rather is divided according to positions on the specific issue. These positions are often deep and intuitive, and not always derivable or justifiable on principled grounds pertaining to paternalism. People may, for example, hold “back to nature” and anti-pharmaceutical standpoints, leading them to advocate marijuana legalization and support GMO labeling at the same time. Examining those issues together through the lens of paternalism might create a false impression that the discussion is unaffected by strong convictions, intuitions, or value systems; that it is not always rational; and that it is sometimes tainted with moralistic sentiments and cultural biases about specific topics. Therefore, any discussion of paternalistic policies must be completed by a separate, issue-sensitive analysis. Part III demonstrates this point by highlighting the deep-rooted positions about obesity—positions that remain hidden in a horizontal review of paternalism across multiple issues. It explains why the strong moralistic positions at play in the obesity debate should be factored into the design of policies aimed at reducing obesity.

Third, debates about paternalism often neglect issues of structure, such as economic, legal, technological, social, and physical conditions that shape health-risking behaviors. Structural changes sometimes turn a previously harmless behavior into a risky behavior. For example, shopping for vegetables used to be a low-risk behavior, but the prominence of chemicals in agricultural usage has heightened the health risks surrounding food and has made it harder to shop for pesticide-free vegetables.<sup>21</sup> Part IV stresses the need to incorporate the background environment into paternalism debates and points to three problems regarding the neglect of structure in these debates. First, background conditions often determine whether there is a need for paternalistic policies. For example, the need for a rule mandating safety belts arguably changes according to the availability of public transportation, road quality, and tort rules that allocate responsibility to different parties in an accident. Second, paternalism debates often focus on what regulators *do* to promote health, but ignore what regulators *do not do* to promote health. For instance, regulators can

---

<sup>20</sup> See William J. Bennett & Christopher Beach, *What Are They Smoking?*, POLITICO (Jan. 22, 2014), <http://www.politico.com/magazine/story/2014/01/marijuana-liberal-hypocrisy-102489.html#.U02oX-ZdVbt> (“The national debate over marijuana legalization has caught many liberals in a confounding paradox. These liberals, who have fought vociferously for bans on cigarettes, super-sized sodas, trans fats and other unhealthy substances, now either advocate for the legalization of marijuana or stand unopposed to it.”).

<sup>21</sup> See Danielle Dellorto, *‘Dirty Dozen’ Produce Carries More Pesticide Residue, Group Says*, CNN (June 1, 2010), <http://www.cnn.com/2010/HEALTH/06/01/dirty.dozen.produce.pesticide/> (reporting on the use of pesticides in non-organic produce and discussing the potential harm of pesticide consumption).

mandate that restaurants indicate the caloric value of their food,<sup>22</sup> while at the same time permitting aggressive advertisement to children. These types of omissions should also be taken into account when assessing health-promoting paternalism. Third, changes in legal, technological, or economic structure may render paternalistic means unnecessary or change our evaluation of such means. In sum, background conditions may determine whether a paternalistic policy is indeed paternalistic, or whether it is needed at all.

Indeed, as Friedman recognizes, any paternalistic public health policy infringes on autonomy to some degree.<sup>23</sup> We differ, however, in recognizing when autonomy is infringed. As I explain below, policies that Friedman may consider mundane are problematic to me because my understanding of autonomy includes a rich understanding of the embodiment and significance of food and eating. We also differ on *why* autonomy is a central issue. Friedman focuses on the public's appreciation of autonomy and explains that "[t]he measure of a given ban or mandate's sustainability would be the level of public toleration for the autonomy loss."<sup>24</sup> But policies that infringe upon autonomy are problematic not mainly because of the difficulty in marketing them to the public, but because they are wrong in principle. Autonomy, in other words, is a much heftier value than the weight it receives in Friedman's discussion.

As mentioned above, I will focus on the example of obesity-prevention policies to illustrate my critique. In my earlier work on this topic, I argued that body size should be recognized as a domain of liberty and autonomy, similar to religious practice or political speech.<sup>25</sup> Moreover, I maintained that the best way to promote public health is to foster an environment which is free from the stigma of being fat<sup>26</sup> and leaves room for *everybody*, size notwithstanding.<sup>27</sup>

## II. THE HARMS THAT THE DEBATE IGNORES

Friedman explores the limits of paternalism through two factors: the

---

<sup>22</sup> See N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.50(a)–(c) (2013) (mandating that chain restaurants display the caloric content of their food and beverages).

<sup>23</sup> See Friedman, *supra* note 1, at 1701 (noting that even in instances where consumers are "slightly nudged toward [their] choice," autonomy is still "slightly reduced").

<sup>24</sup> *Id.* at 1707.

<sup>25</sup> See generally Yofi Tirosh, *The Right to Be Fat*, 12 YALE J. HEALTH POL'Y L. & ETHICS 264 (2012) (discussing the right to be of any body size).

<sup>26</sup> I use the term "fat" and not "overweight" or "obese" deliberately. "Fat" is used in the emerging field of fat studies and by advocates of affirmative approaches to large bodies. Moreover, terms such as "overweight" and "obese" reflect the medical monopoly on the understanding of such bodies. For a more elaborate discussion, see *id.* at 270 n.11.

<sup>27</sup> Arguably, anorexia nervosa presents a challenge to this overarching acceptance of every body size. For my initial take on anorexia nervosa, see *id.* at 318–19 n.221.

effectiveness of a paternalistic policy and the corresponding level of public approval or impatience with the paternalistic means.<sup>28</sup> While these are important factors, a significant third factor is missing: the justification (or lack thereof) for the paternalistic policy in terms of rights. Some public policies may be effective and approved by the public, but still unjust in non-utilitarian terms.<sup>29</sup>

The questions surrounding anti-obesity policies not only require consideration of whether the policies would promote general welfare<sup>30</sup> and find approval across the general public, but also whether they would violate basic rights. Consider prominent legal scholar James J. White's recent suggestion overweight and obese people should pay more taxes on calorie-dense foods.<sup>31</sup> According to White, a customer at a supermarket or restaurant would have to present a "not-fat card"<sup>32</sup>—an annually-issued card on which one's Body Mass Index (BMI) is recorded—to avoid the fat tax.<sup>33</sup> This tax would thus make fat people internalize the externalities they impose on the thin.<sup>34</sup> White argues that the tax would separate "the fat from the thin,"<sup>35</sup> both financially and socially, by stigmatizing the former.<sup>36</sup> He explains that humiliating fat people "is an inevitable part" of this scheme.<sup>37</sup> Essentially, by adding a "platypygous tax" into the calculation, White advocates public shamings in front of supermarket checkout lines

---

<sup>28</sup> See Friedman, *supra* note 1, at 1692–93 ("Public attitudes toward paternalism can be . . . inconsistent. Positing that paternalism has reached its limits can be challenging to prove or disprove, but nowhere has the debate about paternalism been sharper than in public health. Though I focus on various components of the obesity problem and other public health issues, I have composed this narrative to show that paternalism may have reached the natural limits of effectiveness.").

<sup>29</sup> See, e.g., James J. White, *Taxing the Platypygous*, 46 U. MICH. J.L. REFORM 975, 989 (2013) ("There are many possible objections to any tax that applies to some foods but not to others, and an even larger number to discrimination between fat people and thin ones. Some of these objections are prompted by sympathy for the fat: some will find it morally repugnant to direct more scorn at those already afflicted with the social stigma against the obese. Others may object out of doubt about the efficacy of the tax, about the cost of its application, or from doubt concerning the externalities.").

<sup>30</sup> Public welfare often decreases if basic rights are violated. That is, infringement of basic rights may reduce happiness and decrease welfare. Thus, rights violations should, of course, be incorporated into the utility calculus. In what follows, I will delineate rights infringement as normative or deontological considerations and discuss them separately from utility. But, it is possible to frame the debate within utilitarian considerations and still arrive at the same conclusion.

<sup>31</sup> White, *supra* note 29, at 977.

<sup>32</sup> *Id.* at 983.

<sup>33</sup> *Id.* at 978–79.

<sup>34</sup> See *id.* at 979 (providing three "virtues" the tax addresses); see also Friedman, *supra* note 1, at 1700–01 ("Market enthusiasts might endorse an externality-related tax, not for the primary purpose of displacing personal choice, but to ensure that an actor's choice is not distorted by making behavior less expensive to the actor than it would be if internalized. In other words, if the tax internalizes the externality of the behavior, balance would be restored to the market.").

<sup>35</sup> White, *supra* note 29, at 980.

<sup>36</sup> See *id.* at 979 ("[T]his monetary tax can be expected to have a more powerful impact than a conventional Pigovian tax, because it will stigmatize the overweight and obese . . .").

<sup>37</sup> *Id.* at 983.

and at restaurant dinner tables.<sup>38</sup>

Even if a fat tax drew high public approval and effectively promoted health, it would be morally and legally unjustifiable. In legal terms, such a policy should be declared unconstitutional because it would infringe on individual dignity, privacy, and autonomy. White's calculus does not incorporate the social cost of rights infringement, for under his proposed model the government would monitor one's BMI and subject a citizen's body to its gaze. Moreover, under his proposal, one-third of the population (thin people) would regularly humiliate the remaining two-thirds (fat people).<sup>39</sup>

Rights protection should be considered, however, even if overall utility would not be affected by whether rights are violated. One should also ask whether a society in which most members undergo ongoing humiliation is a society that cares about its members' welfare, even minimally.<sup>40</sup> In other words, taxing the fat may promote some aspects of health, but it would likely harm other, no less important aspects of well-being—such as living a life free of repeated humiliation and the infringement of basic rights.

Examining obesity prevention techniques through a normative perspective, which takes into account not only efficacy but principled legitimacy, may lead to the conclusion that despite their efficacy, certain techniques are illegitimate. A recent case from Israel serves as an example. JCDecaux Israel, a company that rents out street signs to advertisers, donates its sign space for a few weeks every year to a campaign to promote a public cause (such as encouraging the adoption of abandoned pets).<sup>41</sup> JCDecaux invites advertising agencies to design pro bono posters for each year's cause.<sup>42</sup> This year, the campaign was dedicated to raising awareness of child obesity,<sup>43</sup> as childhood obesity rates are high and increasing rapidly.<sup>44</sup> In December 2013, street posters carried

---

<sup>38</sup> *Id.* White adds, "Of course, the humiliation can be more pointed—suppose the checkout clerk asks if the patron left his card at home, eliciting a second response that amounts to an admission that he is overweight." *Id.*

<sup>39</sup> In 2010, about seventy percent of the U.S. population was defined as overweight or obese. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2012: WITH SPECIAL FEATURE ON EMERGENCY CARE 205 tbl.63 (2013), available at <http://www.cdc.gov/nchs/data/abus/abus12.pdf#063>.

<sup>40</sup> White concludes his article by saying, "To those who think the tax too harsh, I say, consider the scorn that we happily inflict on smokers. The platypygous deserve no better." White, *supra* note 29, at 997.

<sup>41</sup> Itamar Sharon, *Agency Pulls "Fat-Shaming" Child Obesity Awareness Ads*, TIMES ISR. (Jan. 9, 2014), <http://www.timesofisrael.com/agency-pulls-fat-shaming-child-obesity-awareness-ads/>.

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

<sup>43</sup> *Id.*

<sup>44</sup> According to a 2010 OECD report, twenty-six percent of Israel's children were designated as overweight—which was the eleventh-highest figure out of thirty-three countries. OECD, OBESITY AND THE ECONOMICS OF PREVENTION: FIT NOT FAT 7 (2010); Sarit Rosenblum, *Report: Child Obesity High in Israel*, YNETNEWS.COM (Oct. 7, 2010), <http://www.ynetnews.com/articles/0,7340,L->

such slogans as, “When your child gains weight, his smile becomes smaller,”<sup>45</sup> or “One in every four teenage girls does not like to go shopping due to weight problems.”<sup>46</sup> Another poster presented an image of a fat kid sitting on a seesaw with three kids on the other side.<sup>47</sup> Finally, another poster printed the word “DIET” in large type case and emphasized the letters “DIE,” with the caption saying, “Children who suffer from being overweight have only two options.”<sup>48</sup>

This campaign quickly drew extensive public criticism. Op-ed columnists, parents, pediatricians, bloggers, social network users, and even a children’s rights NGO expressed shock and repulsion over the humiliation of children and the fact that this campaign stigmatized and isolated fat kids and lacked empathy.<sup>49</sup> After a few days, the posters were removed and replaced by a still-moralistic and patronizing sign declaring in rounded, bold font: “[N]ow that the posters have come down, it remains in your hands alone.”<sup>50</sup>

Now, imagine that no one criticized this campaign. After all, this is a plausible scenario, as many fat people and parents of fat children internalize the shame and the denouncement of their bodies and feel that judgment against them is justified.<sup>51</sup> Even if those hurt by the campaign said nothing, we should still denounce it on principled grounds, as it fosters stigma and discrimination against fat individuals and infringes on their basic welfare and dignity as humans.<sup>52</sup>

---

3964014,00.html. The 2013 statistics almanac entitled *Children in Israel*, presented in December 2013 by the National Council for the Child, found that “[a]mong first through ninth graders, 27.3 percent are overweight, with Arabs and non-Haredi Jewish children more likely to be overweight than Bedouin or Haredi children.” Yarden Skop, *In Israel, Child Poverty, Abuse, Obesity, Idleness Rise, Study Finds*, HAARETZ (Dec. 30, 2013), <http://www.haaretz.com/news/national/.premium-1.566103>; see also NAT’L COUNCIL FOR THE CHILD, *CHILDREN IN ISRAEL: 2013* (2013) (English translation).

<sup>45</sup> Nati Tucker, *JCDecaux Israel Pulls Ad that Allegedly Insulted Overweight Children*, HAARETZ (Jan. 11, 2014), <http://www.haaretz.com/business/.premium-1.568030>.

<sup>46</sup> See [Roy Farbstein, *Great: 40 Signs of Creative Competition “Preventing Obesity in Children”*], PITRIA.COM (Dec. 23, 2013), <http://www.pitria.com/jsdecaux-competition> (English translation) (providing some of the “best ads” submitted to the competition).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., [Avi Yofe, *Pediatric Association: “Take Down the Appalling Campaign”*], NRG (Jan. 9, 2014), <http://www.nrg.co.il/online/1/ART2/538/572.html> (English translation) (describing the public outrage over the obesity campaign posters). Some responses this author observed were sarcastic, such as the following: “One in every four children suffers from the stupidity of advertisers,” or “One in every four children knows your campaign sucks,” or pointing out that advertisers have a vested interest in pointing to the damage to shopping, because they depend on consumption for their livelihood.

<sup>50</sup> Tucker, *supra* note 45.

<sup>51</sup> This, I hypothesized, is a central reason why fat people do not sue for weight-based discrimination even in jurisdictions in which such a suit is possible. See Tirosh, *supra* note 25, at 332 (noting a dearth of litigation pertaining to weight-based discrimination).

<sup>52</sup> Such a campaign is bound to be ineffective as well, as research indicates that blaming and shaming does not prompt fat people to lose weight, but causes exactly the contrary result. See *infra*

Professor Maureen Arrigo-Ward powerfully articulated this point almost two decades ago: “Try to imagine anything more invasive of personal liberty than legislation or judicial decisions mandating the size of one’s body and what one chooses to put into that body to nourish or comfort it. . . . [T]hese choices should be deemed private and beyond the realm of governmental intrusion.”<sup>53</sup>

### III. THE PROBLEMATIC FRAMING OF PATERNALISM DEBATES

Juxtaposing soft and hard paternalistic regulatory means in the areas of marijuana, obesity, and fluoridation, as Friedman does,<sup>54</sup> misses the particular nature of each risky behavior. Regulating food and eating habits presents different challenges than regulating marijuana or GMO labeling, and such regulation merits its own separate discussion. Indeed, this “horizontal” method enables a comparative perspective on the legitimacy and effectiveness of varying degrees of paternalism, but, as Friedman himself recognizes, the behaviors that contribute to obesity are much more complex and multi-dimensional than the behaviors involved in smoking or in not wearing helmets when riding a motorcycle.<sup>55</sup>

This heightened complexity is not only relevant for designing an *effective* policy, but is also relevant because anti-obesity paternalism would be more invasive and infringe upon dignity. A more robust understanding of the meaning and phenomenology of food, eating, and embodiment, as I develop in my scholarship,<sup>56</sup> would help recognize that eating and exercising practices, which paternalistic policies wish to shape, are core aspects of dignity and autonomy.<sup>57</sup> Moreover, body size itself is a matter of selfhood. The size of our body is an extremely important part of our identity and personhood. It defines the texture of our skin, the pace of our breath and our walk, and many other sensory experiences that are immensely hard to articulate and conceptualize. The size of our body is

---

text accompanying notes 91, 93 (noting two studies’ findings that people responded to negative messages about their weight by either eating more snacks or refusing to diet).

<sup>53</sup> Maureen J. Arrigo-Ward, *No Trifling Matter: How the Legal System Supports Persecution of the Obese*, 10 WIS. WOMEN’S L.J. 27, 62 (1995).

<sup>54</sup> Friedman, *supra* note 1, at Part III.B–C.

<sup>55</sup> See, e.g., *id.* at 1710–11 (acknowledging that “obesity presents perhaps the biggest and most complex public health challenge facing regulators” due to “complexities and controversies from medical, epidemiological, and regulatory perspectives”).

<sup>56</sup> See Tirosh, *supra* note 25, at 306, 309–10 (expounding on the idea that food, eating, and embodiment are reflections of who we are as humans and how we live our lives in the everyday world); see also Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 YALE J.L. & FEMINISM 49, 53–54 (2007) (arguing that appearance is part of the core aspects of personhood and thus worthy of legal protection).

<sup>57</sup> See Tirosh, *supra* note 25, at 273–74, 313 (explaining that the right to determine one’s body size derives from rights to dignity and autonomy and that the state has tried to limit this right through direct intervention).

also a major factor in our social identity, in how others see us, and in how we see and understand ourselves. This is indeed such a vulnerable and sensitive area of existence that the government (and private actors) should be extremely careful and hesitant when considering direct or indirect interventions in managing people's body size. Harm of this kind usually does not accompany policies aimed at behaviors such as seat belt wearing or marijuana smoking. A horizontal analysis of paternalism often misses this difference.

Policies aimed against marijuana consumption can have markedly different effects if applied to obesity prevention—even if they are theoretically of the same degree of paternalism. We cannot conclude, for example, that if the government employs a personal narrative strategy in a marijuana-prevention campaign and this strategy is publicly accepted, effective, and does not interfere with basic rights, then it is a desirable and legitimate strategy for obesity-prevention policies. Therefore, a narrative-based campaign about John, whose marijuana smoking caused him to move to stronger and more dangerous drugs or to suffer psychological damage, is different in terms of the intrusion on autonomy and infringement of dignity than a campaign based on the story of Jack, whose extra pounds led to his diabetes or his layoff.

Although the campaigns about John and Jack employ a similar degree of paternalism according to Friedman's typology,<sup>58</sup> the interference with autonomy in these two cases is unequal, both in degree and in shape. One difference is that fat people are continuously stigmatized and shamed and are socially visible as belonging to the denounced group, whereas other groups of people are not so easily identifiable. Therefore, a narrative-based campaign that presents fat people as ill, regretful, lacking self-control, or lonely would double their stigmatization and further legitimize discrimination against them.<sup>59</sup> Moreover, such a campaign would humiliate and disempower them, thereby having an adverse effect on their dignity and their autonomy. While marijuana smokers are sometimes ridiculed, they are not as stigmatized and despised as fat people. Marijuana smoking does not raise strong moralistic sentiments like obesity—a point on which I will elaborate. Additionally, while some people and sub-cultures are attached to smoking marijuana, this habit is not as integral to a person's everyday life and sense of self as eating practices, body size, and exercise habits. Food also occupies a different place in our

---

<sup>58</sup> See Friedman, *supra* note 1, at 1699 (defining “[s]trong-form debiasing” to include “truthful narratives of harm” in order to illustrate the downside effects of various biases”).

<sup>59</sup> See Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 800 (2001) (noting that being overweight is “severely stigmatized”). The depth and spheres of weight-based discrimination exist in diverse contexts, including medical, education, and employment settings. See generally *id.*

lives and our culture, by comparison to light drugs. Foodways are much richer, more diverse, and more related to culture, community, memory, trust, and identity than rituals and practices around cannabis-smoking.

Finally, eating is essential to survival—no one can live without eating. Marijuana is not indispensable, although some would say that it can be extremely helpful for relieving pain or adding flavor to life.<sup>60</sup>

Friedman frames obesity as a disease and argues that the overall financial impact of obesity justifies larger acceptance of stronger paternalistic means.<sup>61</sup> These stances merit more skepticism in light of the normative considerations raised here. It is disappointing that this is his conclusion, even though he recognizes that “the regulation of caloric intake and expenditure stands to interfere with some deeply personal trade-offs that individuals must make about their health, appearance, and instant enjoyment of life.”<sup>62</sup>

Cultural beliefs and intuitions play a role here as well. Horizontal surveys of paternalism miss the particular and contradictory “gut-feelings” and deeply entrenched standpoints many people have about obesity, fluoridation, or GMOs. Such gut-feelings may be inconsistent with endorsing or rejecting paternalism because they are shaped by the particular issue, not by principled positions on government intervention. Widely held views about fat people, their place in culture, and how they are represented in the media and in the medical discourse are deeper and more extensive than approaches toward marijuana smokers.<sup>63</sup> As Kathleen LeBesco contends, in the discourse about obesity, “a new kind of moralism” is at play, which legitimizes daily chiding of fat people “by mere acquaintances and passers-by.”<sup>64</sup> The constant framing of obesity as

---

<sup>60</sup> See Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 CONN. L. REV. 1701, 1707 (2009) (recognizing the growing support for marijuana use in the medical community, as it provides therapeutic value for some medical conditions); Scott Clement, *Marijuana Legalization Support Hits Milestone*, WASH. POST, Apr. 5, 2013, at A3 (noting that many people report smoking marijuana “just for fun”). A similar point is made about the difference between regulating tobacco smoking and regulating obesity. See Alberto Alemanno & Ignacio Carreño, “Fat Taxes” in *Europe: A Legal and Policy Analysis Under EU and WTO Law*, 2 EUR. FOOD & FEED L. REV. 97, 100 (2013) (“[T]axation structures that worked for tobacco (i.e. an excise tax on a single substance that is proven to be harmful) may not be automatically transferable to food, which is essential for life and as such tends to involve more complex choices.”); Ignaas Devisch, *Food Taxes: A New Holy Grail?*, 1 INT’L J. HEALTH POL’Y & MGMT. 95, 96 (2013) (“[F]ood is not readily comparable with alcohol and tobacco . . .”).

<sup>61</sup> See Friedman, *supra* note 1, at 1714 (arguing that the external costs of obesity may justify harder paternalism efforts).

<sup>62</sup> *Id.* at 1727.

<sup>63</sup> See, e.g., Kathleen LeBesco, *Fat Panic and the New Morality*, in *AGAINST HEALTH: HOW HEALTH BECAME THE NEW MORALITY* 72, 72–73 (Jonathan M. Metzl & Anna Kirkland eds., 2010) (discussing the widespread panic that popular rhetoric about obesity instills in people from various sects of American society).

<sup>64</sup> *Id.* at 72.

an epidemic and the resonance of television shows such as *The Biggest Loser* are indicative of a moral panic toward obesity.<sup>65</sup>

It is unsurprising, adds LeBesco, that the moral injunction is aimed mainly “against those we imagine to be indolent and undisciplined,” such as “women, the poor, and people of color.”<sup>66</sup> Anti-obesity messages, in other words, are a way of patronizing the poor and disempowered and distinguishing the upper classes as superior in their judgment, self control, and choices.<sup>67</sup> Jonathan Metzl acknowledges that health, combined with a focus on thinness, “is a concept, a norm, and a set of bodily practices whose ideological work is often rendered invisible by the assumption that it is a monolithic, universal good . . . [and] ideologically obfuscates the ways in which the good health of some . . . promotes purely political agendas under the guise of passion or concern.”<sup>68</sup>

Most of us, then, have strong “gut-feelings” about which bodies are beautiful, healthy, and worthy of envy, and which bodies are degenerative, inferior, and in urgent need of corrective transformation. Therefore, when considering the data on the risks of obesity we should take into account that this data is never purely scientific and objective, but rather inflated and distorted to some degree by deeply entrenched moralistic biases toward fat.<sup>69</sup> And when considering anti-obesity measures, we must factor in the

---

<sup>65</sup> See David Barboza, *Can Kraft Trim the Fat in an Oreo World?*, N.Y. TIMES, July 26, 2003, at C1 (discussing obesity as an “epidemic”). Professor Richard Epstein warns that we should not frame obesity as an epidemic because this legitimizes stronger paternalistic interventions that limit autonomy. See Richard A. Epstein, *What (Not) to Do About Obesity: A Moderate Aristotelian Answer*, 93 GEO. L.J. 1361, 1368 (2005) (explaining that framing obesity as a public health concern causes more harm than good because it limits personal and individual responses to obesity).

<sup>66</sup> LeBesco, *supra* note 63, at 75.

<sup>67</sup> Friedman recognizes the social disparity of obesity across gender, ethnicity, genetics, and socioeconomic status. Friedman, *supra* note 1, at 1716–17. But this does not lead him to doubt the motivation of anti-obesity measures. For an elaboration on class biases in the obesity debate, see Katy Waldman, *Uncle Sam Is Not Coming to Dinner*, SLATE (Feb. 8, 2012), [http://www.slate.com/articles/health\\_and\\_science/intelligence\\_squared/2012/02/obesity\\_is\\_not\\_the\\_government\\_s\\_business\\_how\\_paul\\_campos\\_and\\_john\\_stossel\\_won\\_the\\_slate\\_intelligence\\_squared\\_debate\\_on\\_feb\\_7\\_.html](http://www.slate.com/articles/health_and_science/intelligence_squared/2012/02/obesity_is_not_the_government_s_business_how_paul_campos_and_john_stossel_won_the_slate_intelligence_squared_debate_on_feb_7_.html).

<sup>68</sup> Jonathan M. Metzl, *Introduction: Why Against Health?*, in *AGAINST HEALTH*, *supra* note 63, at 1, 9. Richard Klein adds: “My concern is with the particular ways in which public health is used for moral edification and as an instrument of social control with political implications for individual freedom.” Richard Klein, *What Is Health and How Do You Get It?*, in *AGAINST HEALTH*, *supra* note 63, at 15, 17.

<sup>69</sup> Many critics make this point. See PAUL CAMPOS, *THE OBESITY MYTH: WHY AMERICA’S OBSESSION WITH WEIGHT IS HAZARDOUS TO YOUR HEALTH* 38–40 (2004) (explaining that anti-obesity policies are motivated by myriad financial interests and other foreign considerations); MICHAEL GARD & JAN WRIGHT, *THE OBESITY EPIDEMIC: SCIENCE, MORALITY AND IDEOLOGY* 105–06 (2005) (proposing that viewing obesity as an epidemic is unwarranted by scientific findings, but shaped by deeply entrenched bias against fat); GINA KOLATA, *RETHINKING THIN: THE NEW SCIENCE OF WEIGHT LOSS AND THE MYTHS AND REALITIES OF DIETING* 197–98 (2008) (positing that science has not yet succeeded in finding a way to make people lose weight for the long term, but that the recommendation to lose weight persists because scientists, doctors, and the diet industry depend on this market);

cost of denouncing and isolating fat people, as well as alienating them from their bodies and from society.<sup>70</sup>

Another reason why these harms to autonomy often go unnoticed, besides the moral panic toward being fat, is that we are culturally destitute with respect to a vocabulary delineating somatic and sensory experience. As I explained elsewhere,<sup>71</sup> the dualism toward mind and body, which shaped Western culture, renders it close to impossible to represent embodied experience and convey and conceptualize the importance of this experience.<sup>72</sup>

Humbleness and self-reflexivity about our motivations in regulating eating, driving, or smoking, and about their effect on individual well-being, are therefore immanent. The obesity regulation debate lacks such humbleness and reflexivity, to a great extent because obesity is discussed comparatively, alongside other public health issues that do not touch on such fierce convictions and deeply held intuitions.<sup>73</sup> This insight is true, of course, for analyzing any other health policy issue. For example, the social denouncement of people who consume GMOs is much softer than the denouncement of tobacco smokers. Smoking and GMO-consumption are also different in their location at the core or the periphery of dignity and autonomy. Narrative strategies, shaming strategies, and mandates would therefore work differently in each context.

---

ABIGAIL C. SAGUY, WHAT'S WRONG WITH FAT? 48–49 (2013) (postulating that efforts to reduce obesity rates are nourished by a moral panic about fat).

<sup>70</sup> For Friedman's apt citation of Puhl and Heuer's discussion of the harsh social injustice caused by weight bias, see Friedman, *supra* note 1, at 1721 (quoting Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941, 941 (2009)).

<sup>71</sup> See Tirosh, *supra* note 25, at 295–99 (arguing that the dualism of the body and the mind is a main cause for the continuing lack of recognition of one's body size as a significant basic right); see also Yofi Tirosh, *Weighty Speech: Addressing Body Size in the Classroom*, 28 REV. EDUC., PEDAGOGY, & CULTURAL STUD. 267, 274–75 (2006) (discussing the lack of vocabulary to talk about body size in a way that does not reproduce medical or moralistic frameworks).

<sup>72</sup> See Klein, *supra* note 68, at 23 ("In the historical debate between mind and matter, mind won and silenced the voice of the body; it interpreted the body in terms of mind and considered it a mute machine that only reason could discover. It is time to recover that corporeal voice, to recast the Epicurean thinking that puts pleasure in the place of thought, that imagines bodily pleasure to be a kind of thinking. Good health will then be understood as a consequence of good pleasure, and adult pleasure will be prized, not tabooed, moderated not censored, indulged not feared."); see also Donald Moss, *Obesity, Objectification, and Identity: The Encounter with the Body as an Object in Obesity*, in *THE BODY IN MEDICAL THOUGHT AND PRACTICE*, 43 PHIL. & MED. 179, 180 (Drew Leder ed., 1992) (using phenomenology to develop accounts of the experience and meanings of living with a fat body).

<sup>73</sup> Friedman recognizes the contradictory data on obesity prevention—data that suggest, for example, that there is no direct correlation between reducing caloric consumption or increasing physical activity and weight loss. Friedman, *supra* note 1, at 1715–16. Nevertheless, Friedman does not conclude that this lack of clarity about the causes entails hesitation in encouraging individuals to eat less and exercise more. Moreover, Friedman ignores the harmful effects of repeated failed attempts to diet on one's health, as well as to one's attempts to lose weight. For more on this point, see Tirosh, *supra* note 25, at 288–91.

## IV. IT'S THE STRUCTURE, STUPID!

Discussions of paternalism in public health often fail to grant enough weight or consideration to structure—such as the prevailing or legal framework, economic conditions, and technological developments. This is natural, for it is much harder to change structure than to design a policy for a narrowly-defined goal. Structure, moreover, is often invisible or self-evident; challenging it thus requires deeper intellectual investment and imaginative power.

The valuable data presented in Friedman's article illustrate that anti-obesity policies place too much focus on changing individual behavior. In the case of New York City's soda size limitation, "the excessive consumption [of sugary drinks] . . . was only engaged in by a small part of the public,"<sup>74</sup> so limiting drink volume would have only a marginal effect on soft drink consumption and on consumer weight. Similarly, regulators can only hope for negligible changes in food consumption by calorie-count disclosure mandates.<sup>75</sup> Friedman's quotation of Loewenstein is worth repeating here, as it poignantly expresses my current point:

Calorie labeling, in effect, puts the onus of weight reduction on consumers, but consumers have not grown fat because they have stopped paying attention to what they eat; they have grown fat because processed food has become cheaper (both in terms of money and time), whereas fresh food has become more expensive. The most serious risk associated with calorie labeling, therefore, is not its effect on consumers themselves, which is likely to be minimal; the real danger is that it will substitute for, or delay, more substantive policies that get at the root cause of the problem.<sup>76</sup>

The uneven social distribution of obesity should also be educational in this context. It is highly unconvincing to assume that urban people, people of color, and people of low income have, at some point, begun to make poor decisions about eating and physical activity<sup>77</sup> and that this is why they

---

<sup>74</sup> Friedman, *supra* note 1, at 1740.

<sup>75</sup> *See id.* at 1731 (noting that early studies on New York City's caloric disclosure law suggested that it did not have a significant effect on consumers' caloric consumption). *But see id.* ("However, some data emerging from mandatory caloric disclosures support the notion that such programs may prove mildly effective in some zones.")

<sup>76</sup> Friedman, *supra* note 1, at 1734 (quoting George Loewenstein, *Confronting Reality: Pitfalls of Calorie Posting*, 93 AM. J. CLINICAL NUTRITION 679, 680 (2011)).

<sup>77</sup> However, recent research indicates that the poor may be lacking the cognitive resources required for making good decisions due to their many poverty-related concerns. *See* Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 980 (2013) ("The poor . . . are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity."). Indeed, more should be studied about these dynamics before deciding that the

have become fatter than the rest of the population.<sup>78</sup>

#### A. *Background Conditions Matter*

Let me elaborate on what I mean by saying that structural considerations should play a more substantial role in the debate about paternalism.

We should not treat dilemmas about paternalism as if they emerge from empty space and operate outside of the existing social, economic, and legal contexts. Any analysis of paternalism must take into account the background conditions in which a paternalistic policy, if deployed, would operate. Friedman uses the example of the lifeguard's dilemma: A lifeguard who "knows that broken glass has presented hazards on her beach" wonders whether to warn, or even stop, beach-goers from walking barefoot.<sup>79</sup> What is overlooked, however, is the fact that the lifeguard will have different considerations and conclusions depending on factors such as the frequency of beach-cleaning by authorities, the availability of emergency medical services in the event that someone is injured, and whether she would be immunized from tort liability or from disciplinary proceedings if the beach-goers indeed get hurt.

The same point should be made about obesity. In considering the paternalism level of anti-obesity policies, we must account for the context in which those policies operate. Perhaps caloric information in fast food restaurants would not be needed if corn farming was not so heavily subsidized and corn syrup made so cheap, boosting the caloric density and shrinking the price of fast food.<sup>80</sup> Perhaps, still, obesity would not have been a problem for policymakers if neighborhoods were designed for pedestrians and not for cars and if the labor structure enabled parents to

---

poor make irrational choices that make them fatter, since it is noteworthy that the study clarifies that the findings "are not about poor people, but about any people who find themselves poor." *Id.*

<sup>78</sup> As a cautionary note, arguments that focus on structure often do not overcome the prejudice or erroneous assumptions sometimes underlying paternalistic policies. Take, for instance, LeBesco's skepticism of arguments that focus on structure. LeBesco argues that structural arguments might reinforce patronizing and victimizing fat people, as well as an approach that "may make the individual less morally suspect, but . . . does nothing to dismantle the overarching and oppressive moral framework of health." LeBesco, *supra* note 63, at 77–78. In other words, LeBesco argues that focusing on infrastructure issues, such as a lack of time and financial means to live healthily, does not challenge underlying assumptions such as the axiomatic imperative to lose weight or the ingrained bias against fat people. Still, there are other structural factors, with which I think LeBesco would agree, that we should take into account. Consider, for example, background conditions about the legality of weight-based discrimination. LeBesco also surely sides with the need to tone down the blame game against fat individuals.

<sup>79</sup> Friedman, *supra* note 1, at 1697.

<sup>80</sup> See Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112 ENVTL. HEALTH PERSP. A820, A821–22 (2004) (noting that agricultural subsidies in general, and corn subsidies in particular, are driving down the cost of fast food).

have time to shop and prepare food at home for their families. Then again, had the welfare system and the taxing scheme created more distributive justice and lowered socio-economic gaps, more people could afford healthful food and we would not witness urban “food deserts” where consumers have no access to a fresh tomato or whole-wheat bread.<sup>81</sup>

As noted above, paternalistic policies against obesity are aimed at shaping individual behavior (e.g., requiring indications of the caloric values on menus so each consumer can make her own decision or designing a campaign of diet success stories to encourage obese people to diet). Focusing on such policies diverts attention and resources from policies that aim to change the scenery of choices and the structure of the food market. For example, such individually focused policies detract from societal policies like subsidies and taxing schemes or urban planning measures that are designed for pedestrians.<sup>82</sup> Additionally, these policies make us forget that structural changes may render paternalistic means unnecessary.

#### B. *Considering What Regulators Do Not Do*

Discussions about paternalism, including Friedman’s analysis, often focus on the things that the government does actively, while ignoring the ways governments act by omission. Non-state-intervention is a form of intervention. In the case of obesity, for example, we must consider not only active policies such as taxing junk food or banning trans fat, but also that it is currently not illegal to discriminate against employees or potential employees based on weight, to strike down jurors because they are fat,<sup>83</sup> or to require double airfare from large passengers. These forms of non-intervention by the state send private actors and public institutions the

---

<sup>81</sup> See *USDA Defines Food Deserts*, AM. NUTRITION ASS’N., <http://americannutritionassociation.org/newsletter/usda-defines-food-deserts> (last visited Mar. 24, 2014) (defining “food deserts” as areas that lack access to fresh fruits and vegetables). Food deserts are particularly common in impoverished areas. *Id.*

<sup>82</sup> See Friedman, *supra* note 1, at 1717 (noting that “obesity rates vary widely by neighborhood” and that they fluctuate in accordance with the availability of supermarkets, walking pavements, fitness facilities, commercial land use, and area income).

<sup>83</sup> See Maggie Elise O’Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN. J. C.R. & C.L. 47, 51, 53–55, 61 (2011) (surveying and criticizing cases in which a juror’s weight passed muster as grounds for an attorney’s striking him or her down through peremptory challenges). Weight-based bias also exists in criminal procedure. See, e.g., Natasha A. Schvey et al., *The Influence of a Defendant’s Body Weight on Perceptions of Guilt*, 37 INT’L. J. OBESITY 1275, 1279 (2013) (“The results of the present study indicate that body weight and sex of a defendant have an interactive effect on juror perceptions of guilt and responsibility. Importantly, obese female defendants were judged significantly more harshly than lean female defendants among the male participants, whereas weight incurred no penalty for the male defendants.”); see also Valena Elizabeth Beety, *Criminality and Corpulence: Weight Bias in the Courtroom*, 11 SEATTLE J. FOR SOC. JUST. 523, 524 (2013) (“Weight bias also prevails in the courtroom . . .”).

message that it is okay to exclude, tax, and humiliate fat individuals. Insofar as paternalism regulates to shape people's behaviors and preferences, failure to regulate is also an act of paternalism.

### C. *Complicating the Utility Calculus*

Paternalistic policies may seem beneficial at first but counter-productive in hindsight. Indeed, Friedman recognizes the tricky nature of such policies.<sup>84</sup> He recognizes that paternalistic policies to prevent obesity may be ineffective,<sup>85</sup> but he fails to address key reasons for their unsuccessfulness.

Friedman interchangeably uses utility in terms of financial public cost and in terms of extending life expectancy.<sup>86</sup> However, these considerations are different and may call for distinct policies. More importantly, both considerations are limited proxies for what public health should promote—namely, quality of life. How much remains in the public budget is not a sufficient proxy for the public's welfare. Similarly, according to a utility calculus the number of years lived must be analyzed alongside the quality of life during those years. Fewer years of a life of dignity and less self-hatred may result in more happiness than more years of a life full of repeated attempts to lose weight and ongoing feelings of bodily inferiority.

Even if we remain strictly within the utilitarian framework as Friedman understands it, we may discover that obesity concerns are inflated (as there are growing indications that some health measures *improve* the heavier one is).<sup>87</sup> We may also discover that common-sense measures to prevent obesity may work in unexpected directions—and even backfire.

Current assessments of anti-obesity policies should be wary of common-sense assumptions that encouraging people to lose weight is helpful, or at least can do no harm. Such encouragements, however, may be not only a waste of money and energy, but they actually produce the opposite outcome.<sup>88</sup> This is so in light of the astonishing failure of

---

<sup>84</sup> See Friedman, *supra* note 1, at 1696, 1698–99, 1719 (noting the nuanced approach that paternalistic policies require in regulating obesity).

<sup>85</sup> See *id.* at 1711 (“It also appears that certain factors driving obesity rates may prove difficult for regulators to change.”).

<sup>86</sup> *E.g., id.* at 1714, 1721, 1753.

<sup>87</sup> See, e.g., CAMPOS, *supra* note 69, at 41–54 (surveying research that shows that weight risks are inflated); Katherine M. Flegal et al., *Aim for a Healthy Weight: What Is the Target?*, 131 J. NUTRITION 440S, 449S (2001) (“[W]eights outside the healthy weight range may be healthy and . . . weights inside the healthy weight range may not be healthy.”).

<sup>88</sup> See Angelina R. Sutin & Antonio Terracciano, *Perceived Weight Discrimination and Obesity*, 8 PLOS ONE 1, 2 (2013) (finding that people were more likely to become obese if they were subjected to weight-based discrimination).

scientists and doctors to find a way to maintain weight loss over time.<sup>89</sup> Other inefficiencies should be factored in, such as the billions of dollars invested in diet products and services; the inefficiency of the labor market, which may miss apt job candidates due to weight bias; the inefficient medical care provided to many fat people by biased doctors who focus on weight; the lack of access to medical facilities that fit larger bodies; and more.<sup>90</sup>

Moreover, shaming people about their body weight is more likely to increase obesity rates, not decrease them. One recent study found that overweight women who watched a video containing negative messages on obesity consumed three times more snacks afterward than overweight women who watched a neutral video.<sup>91</sup> Another study found that, initial weight notwithstanding, the chances of teenagers who diet to become overweight are bigger than the chances of teenagers who do not diet.<sup>92</sup> In other words, even teenagers with no weight problem will gain weight due to weight loss attempts.

An additional study found that participants responded to negative remarks about their weight by refusing to go on a diet, rather than by starting one.<sup>93</sup> In Richard Klein's words, "It appears that the epidemic of dieting may actually be worse for our health than the obesity epidemic. . . . The more we diet, the fatter we seem to become."<sup>94</sup>

## V. CONCLUSION

As a closing remark, I would like to make a point about the temporal dimension of the paternalism debate. Paternalistic steps are often framed

---

<sup>89</sup> For a discussion of research supporting the claim that weight is immutable, see Tirosh, *supra* note 25, at 285–88.

<sup>90</sup> *Id.* at 291–94.

<sup>91</sup> Natasha A. Schvey et al., *The Impact of Weight Stigma on Caloric Consumption*, 19 OBESITY 1957, 1961 (2011).

<sup>92</sup> Dianne Neumark-Sztainer et al., *Dieting and Unhealthy Weight Control Behaviors During Adolescence: Associations with 10-Year Changes in Body Mass Index*, 50 J. ADOLESCENT HEALTH 80, 84 (2012).

<sup>93</sup> See Rebecca M. Puhl & Kelly D. Brownell, *Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults*, 14 OBESITY 1802, 1807–10 (2006) (“[A] frequent coping strategy reported by participants to deal with stigma was eating more food. Seventy-nine percent of the total sample reported using this strategy more than once or multiple times, and only 10% reported never using this strategy.”).

<sup>94</sup> Klein, *supra* note 68, at 16. Klein points to another inefficiency in the message that obesity is bad, saying, “Not only is health the *sine qua non* of pleasure (that without which there is none), but pleasure improves your health. Put another way, if you inhibit the body’s pleasure, you provoke disease.” *Id.* at 19; see also Anna Mollow, *Sized up: Why Fat Is a Queer and Feminist Issue*, BITCH MAG., Summer 2013, at 17, 17, available at [bitchmagazine.org/article/sized-up-fat-feminist-queer-disability](http://bitchmagazine.org/article/sized-up-fat-feminist-queer-disability) (“The small differences in life expectancies between average-size and very large people are most likely not *caused* by being fat but are instead the result of factors *correlated* with fatness: social stigma, economic discrimination, and the harmful effects of weight-loss dieting and diet drugs.”).

as helping people take their future preferences into account.<sup>95</sup> These steps are intended to encourage people to avoid giving themselves a big discount for their current harmful behavior, a discount that would come at the expense of their future self, who will be less suited for closing the significant discount gap.<sup>96</sup> Friedman refers to this instinct for instant gratification as the “present bias” in the temporal valuations of behavior,<sup>97</sup> which is suggested to create “internalities” that effect efficiency.<sup>98</sup> However, there are contexts in which our understanding of the direction of the temporal axis should be entirely reversed. As I argued elsewhere, this is the case regarding obesity.<sup>99</sup> Fat individuals often focus on a transformative, post-diet future in which they will be thin and all their problems in life will be solved. This causes them to *deny* the present. Every diet that fails in the early evening becomes a reason to binge eat at night. What matters is the life they imagine they will live after the diet succeeds. Therefore, they often avoid taking ambitious steps in their careers, opening themselves to intimate relationships, or going out to public places where appearance is accentuated, such as the beach or a dance club.<sup>100</sup> It is not the present self that is damaging the future self; it is the imagined and unrealistic future self that is oppressing the present self.

If the government wants to promote health, it needs to undo the seemingly self-evident but erroneous link in public perception between

---

<sup>95</sup> See GLEN WHITMAN, CATO INST., POL’Y ANALYSIS NO. 563: AGAINST THE NEW PATERNALISM: INTERNALITIES AND THE ECONOMICS OF SELF-CONTROL 11 (Feb. 2006) (suggesting that a tax should be set equal to the future costs of eating [unhealthy food], so that the present self will take exactly those costs into account”).

<sup>96</sup> See *id.* at 2 (“Although your choice to eat Twinkies or smoke cigarettes or skip exercising today doesn’t harm anyone else, it does harm your *future* self. If we think of a person as consisting of multiple selves—the present self who wishes to indulge the transient pleasures versus the future self who wishes to be healthy—then arguably the present self’s choices can force externalities on the future self.”).

<sup>97</sup> Friedman, *supra* note 1, at 1728–29. For further discussion of the regulatory response to this temporal bias, see Saul Levmore, *From Helmets to Savings and Inheritance Taxes: Regulatory Intensity, Information Revelation, and Internalities*, 81 U. CHI. L. REV. 229 (2014).

<sup>98</sup> See Levmore, *supra* note 97, at 234 (“[C]onsider the possibility that helmet laws (or contractual requirements) are driven by internalities. A skier, for example, may recognize the safety value of a helmet but decline to acquire one because it will look uncool. Perhaps it will signal a lack of daring, or disrupt a desired après-ski hairstyle.”).

<sup>99</sup> Tirosh, *supra* note 25, at 301–04 (“The discourse around fat people is, then, past-centered and future-centered, while neglecting the present. It leaps from the paradise lost onto the idealized post-diet transformation.”).

<sup>100</sup> See Samantha Murray, *(Un)Be)Coming Out? Rethinking Fat Politics*, 15 SOC. SEMIOTICS 153, 155 (2005) (“One is waiting to become ‘thin’, to become ‘sexual’, waiting to *become*.”); Mandy Katz, *Tossing Out the Diet and Embracing the Fat*, N.Y. TIMES, July 15, 2009, at E3 (“For many dieters, ‘the pursuit of thinness as a dream is a place holder,’ . . . . ‘It gets in the way of asking, What is it I am dreaming of?’”).

weight and health.<sup>101</sup> It should not encourage fat people to reject their current bodies and focus on achieving svelte figures.

Friedman suggests defining obesity as a disease and using a more concrete narrative to describe obesity's effects on one's health.<sup>102</sup> I suggest something different: fostering an environment that embraces diverse bodies that come in every shape and size. We must build this environment by implementing structural reforms aimed at reducing the cost of healthy food, by providing opportunities for everyone to exercise and by encouraging people to resist the anti-obesity atmosphere. We must endorse what Kathleen LeBesco describes as "well-being without trotting out the old canards that reinforce body prejudices and encourage eating disorders and yo-yo dieting."<sup>103</sup>

Similarly, marijuana users who are often beset by the assumption that they will move on to harder drugs may lose faith in anti-marijuana public health campaigns because they do not reflect their experience. Remedying the "present bias" might then result in an unintended outcome, perhaps even a complete reversal of the objective.

I would like to close this Article with a paragraph from Richard Klein, whose rich writing on overeating, smoking, and other vices implores us to imagine subjects who are not only healthy, but also happy—even if this happiness is achieved through pleasurable behaviors that are suboptimal to health:

In America, we have become strangely divorced from our bodies, counting calories on every product in the supermarket, watching blood pressure, measuring cholesterol, and sacrificing pleasure for prudence. These days, we do not eat for pleasure, but to lower our numbers. Yet we are one of the fattest nations in the world and growing every day more obese. But what do we stand to lose if we lose the enjoyment and pleasure that we derive from good eating and drinking? We may stand to lose everything. The epidemiologist cannot tell us what the Epicurean wants to know: What should I choose to love without guilt? What is good for me? What keeps me happy? What, in the best sense, keeps me healthy?<sup>104</sup>

---

<sup>101</sup> For more on the exaggerations and inaccuracies of the scientific argument that fat is bad for health, see Tirosh, *supra* note 25, at 288–91.

<sup>102</sup> See Friedman, *supra* note 1, at 1711–12 (discussing obesity as a disease).

<sup>103</sup> LeBesco, *supra* note 63, at 78.

<sup>104</sup> Klein, *supra* note 68, at 22.