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TIME TO CUT THE FAT: THE CASE FOR GOVERNMENT ANTI-OBESITY LEGISLATION

STEPHEN A. MCGUINNESS*

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I. INTRODUCTION

Rates of obesity and overweight in America have increased dramatically in recent decades, with no end to the increase in sight.¹ The obesity epidemic has brought with it severe social costs. Obesity is a known cause of numerous fatal diseases and is responsible for tens of thousands of preventable deaths every year.² It is also a contributing factor to the development of numerous non-fatal health and psychological conditions.³ Moreover, obesity significantly drains the public purse as a result of the billions of dollars it annually adds in increased government health care costs.⁴

Given the seriousness of the American obesity problem, there would appear to be good reasons for the government to implement aggressive new policies designed to curb, and even reverse, the national rate of obesity. For example, “full disclosure” laws requiring the conspicuous posting of nutritional information, and/or health risks, restrictions on the advertising of unhealthy foods, government subsidies for the production of nutritional staples, and the institution of a “fat tax” on particularly unhealthy foods.⁵

¹ *Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, Trends 1976-1980 Through 2005-2006*, NAT’L CTR. FOR HEALTH STATS. (2008), available at http://www.cdc.gov/nchs/data/hestat/overweight/overweight_adult.pdf.

² *Statistics Related to Overweight and Obesity*, NAT’L INST. OF HEALTH (2008), <http://www.win.niddk.nih.gov/statistics/#overweight>.

³ *Id.*

⁴ *Id.*; Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States* 9 (2010), http://www.brookings.edu/~media/Files/rc/articles/2010/0914_obesity_cost_hammond_levine/0914_obesity_cost_hammond_levine.pdf.

⁵ See, e.g., Kelly D. Brownell, *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, NEW ENG. J. MED. 1-7 (2009), available at <http://www.nejm.org/>

While there appears to be a *prima facie* case for the institution of such policies—based on the seriousness of the obesity epidemic—critics have repeatedly objected to these potentially effective policies on the grounds that government interference with the food industry would amount to government “big brother” forcing its vision of the good down Americans’ collective throats.⁶ Such critics argue that food choices are an entirely private matter, and that obesity is simply a matter of personal responsibility. In short, they conclude that the American obesity crisis is simply none of the government’s business.⁷

This Article examines—and ultimately rejects—this anti-paternalism argument against government anti-obesity policies. It argues that government intervention in the food industry for the purpose of stemming the American obesity epidemic is justified and survives paternalistic objections to the contrary.

This Article begins by briefly outlining the nature, severity, and causes of the obesity epidemic. It considers what can be done about the problem, finding that only government intervention is capable of effectively combating the crisis. It also outlines several types of potentially successful government anti-obesity strategies. Finally, it considers the primary topic of this Article: whether government anti-obesity policies constitute unjustified government paternalism.

In response to this anti-paternalism objection, this Article first notes that several anti-obesity policies can be justified entirely on non-paternalistic grounds. It then proceeds to confront the paternalism objection head-on, finding that whether Americans’ unhealthy food choices should be respected depends crucially on the extent to which such choices are voluntary.

If such food choices are to a significant extent less than voluntary, there is a strong argument for enlisting government aid in the fight against obesity. Finding that, contrary to common opinion, the unhealthy food choices of Americans fall significantly short of being fully voluntary, this Article concludes that there is a strong argument in favor of government intervention. This “soft” or “weak” paternalism strategy, which sanctions government interference only to the extent necessary to ensure the voluntariness of choices, supports government intervention into the food industry only to the extent necessary to mitigate the various factors that make the unhealthy food choices of persons less than fully their own. It acts in defense of gastronomical autonomy.

Having concluded that many anti-obesity policies are justified on both non-paternalism and soft paternalism grounds, this Article considers whether more aggressive anti-obesity policies that would override the voluntary choices of Americans (such as product bans) can be justified. To the extent that unhealthy food choices are voluntary, this paper finds that Americans can be said to have fully accepted the risks of their perhaps imprudent choices. In such cases, there are strong arguments in favor of respecting the choices made by competent adults, allowing individuals to bear the risks of their own choices for the greater good of individual

doi/pdf/10.1056/NEJMhpr0905723; *Soft Drink Taxes: A Policy Brief*, YALE CTR. FOR FOOD POLICY & OBESITY (2009), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportSoftDrinkTaxFall2009.pdf>.

⁶ See, e.g., David Boaz, *Obesity and Public Health?* (2004), http://www.cato.org/pub_display.php?pub_id=2746 (arguing that obesity is not properly termed a “public health” issue, and that it is instead purely a matter of personal responsibility).

⁷ *Id.*

freedom. Thus, this paper finds that anti-obesity polices supported by a hard paternalism rationale are generally unjustified, subject only to a narrow “defense of integrity” exception.⁸ In short, although the paternalism objection cannot be thought to prohibit government anti-obesity policies, it does function to limit the intrusiveness of such measures.

Finally, having found that a compelling case for the introduction of several anti-obesity policies exists, this Article considers a second common objection to their implementation, that of the slippery slope. This objection contends that the adoption of even relatively mild anti-obesity policies will start the government down a slippery slope towards ever more intrusive policies; thus, it is thought that the government should refrain from regulating obesity altogether. Finding this slippery slope argument to be most unconvincing, at least in the case of anti-obesity regulation, this Article concludes that the overall case for government anti-obesity regulation is very strong indeed.

II. THE NATURE AND CAUSES OF THE AMERICAN OBESITY EPIDEMIC

A. Rates of Obesity and Overweight Have Reached Crisis Proportions

A study released by the National Center for Health Statistics in 2008 found that 32.7% of American adults were overweight, that an additional 34.3% were obese, and that 5.9% were extremely obese.⁹ The figures for children are equally (if not more) alarming. In a recent study, 16.9% of American children were classified as obese, including 19.6% of the 6-11 age bracket.¹⁰ Given these staggering statistics, the Centers for Disease Control and Prevention (CDC) have classified the American obesity problem as an “epidemic.”¹¹

Americans have not always been so fat. On the contrary, the explosion of obesity rates has occurred primarily within the past few decades.¹² The percentage of obese adults has increased from 13.4% in the early 1960s, to 15.0% in the late 1970s, to 23.2% in the late 1980s and early 1990s, to 30.9% at the turn of the millennium, to 35.1% in the most recent estimate.¹³ For children, obesity rates have increased from

⁸ The “argument from integrity” exception contends that when an individual endeavors to make a choice (1) for trivial reasons, (2) that promises insignificant benefits, and (3) such a choice puts in jeopardy one’s core life projects, goals, or values, then (4) one may be justified in overriding that choice for that individual’s own good. *See, infra*, § IV(C)(4)(i); JOHN KLEINIG, PATERNALISM 63 (1984).

⁹ *Prevalence of Overweight*, *supra* note 1. Adults ages 20 years or older are included in the survey. An individual is defined as overweight if they have a Body Mass Index (“BMI”) greater than or equal to 25.0 and less than 30.0, obese if they have a BMI greater than or equal to 30.0, and extremely obese if they have a BMI greater than or equal to 40.0. *Id.* BMI is calculated by finding one’s weight in kilograms and dividing this number by the square of their height in meters. *Id.*

¹⁰ *Prevalence of Overweight*, *supra* note 1. Individuals are counted as children if they are under twenty years of age. *Id.*

¹¹ *Obesity and Overweight: A Public Health Epidemic*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2004), www.cdc.gov/nccdphp/dnpa/obesity/epidemic.htm.

¹² *Prevalence of Overweight*, *supra* note 1.

¹³ *Id.*

5.0% in the early 1970s, to 10.0% in the late 1980s and early 1990s, to 13.9% at the turn of the millennium, to 16.9% in the most recent estimate.¹⁴

The current rates of obesity in the United States are certainly unnerving, and there is no sign that the situation will improve any time soon.

B. The Obesity Epidemic Is Responsible for Severe Social Harms

The American obesity crisis has staggering social costs. A high body fat content significantly increases the likelihood of developing numerous health conditions, including type-2 diabetes, coronary heart disease, high LDL (“bad”) cholesterol, hypertension, stroke, nonalcoholic fatty liver disease, gallbladder disease, osteoarthritis, sleep apnea and other breathing problems, several forms of cancer, and menstrual irregularities.¹⁵

Because the obese and overweight are at a much greater risk of developing the various conditions outlined above, they also have a significantly greater risk of early death. Every year, at least 112,000 cardiovascular deaths, 15,000 cancer deaths, and over 35,000 non-cardiovascular, non-cancer deaths are attributed to obesity and overweight.¹⁶ In sum, obesity and overweight are jointly responsible for at least 160,000 preventable deaths per year.

The obese and overweight suffer from a variety of psychological problems as well, including depression, anxiety, low self-esteem, poor body image, and suicidal tendencies, with many of these stemming from widespread societal bias against the obese.¹⁷

Finally, obesity and overweight add billions of dollars to annual government health care spending at a time when government debt is steadily increasing. Currently, \$86-147 billion dollars per year in increased health care costs are attributed to the obesity crisis, with the government picking up approximately half of this inflated bill.¹⁸ Moreover, there are significant additional economic costs related to obesity, such as lost productivity and increased transportation costs (due, for example, to the increased fuel costs needed to transport heavier passengers).¹⁹ In sum, the total annual economic costs of obesity are estimated to exceed \$215 billion.²⁰

The costs of the American obesity epidemic are staggering, both in terms of individual well-being and in terms of economic dollars and cents.²¹ Unless effective anti-obesity action is taken, Americans will continue to suffer the widespread social and economic harms engendered by the obesity crisis.

¹⁴ *Id.* at 9.

¹⁵ NAT’L INST. OF HEALTH (2008), *supra* note 2.

¹⁶ *Id.*

¹⁷ See, e.g., *Weight Bias: A Social Justice Issue*, YALE RUDD CTR. FOR FOOD POLICY AND OBESITY (2009), <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddBriefWeightBias2009.pdf>.

¹⁸ Hammond & Levine, *supra* note 4, at 9.

¹⁹ *Id.*

²⁰ *Id.* at 10.

²¹ *Id.* at 9.

C. The Causes of the Crisis

At the most basic level, obesity and overweight are caused by an excessive consumption of food; specifically, by taking in more calories than can be burned off by physical activity.²² The explosion in obesity rates over the past few decades has therefore resulted from an ever-increasing caloric imbalance, caused by dramatic changes in both eating and exercise habits.²³

Widespread consumption of increasingly cheap and ubiquitous low-nutritional food has resulted in a greater caloric intake for the average American.²⁴ Indeed, the average daily caloric intake increased by 530 calories between 1970 and 2000, a 24.5% increase.²⁵ At the same time, the relative decrease in physically-demanding jobs and the concomitant increase in jobs requiring little exertion have led to a greater proportion of Americans leading sedentary lifestyles.²⁶

Increased consumption of foods with high caloric content and low nutritional value, in conjunction with ever-increasing sedentary lifestyles, makes for an environment anathema to a healthy lifestyle.²⁷ The ubiquity of cheap, convenient, perpetually available, and tasty low-nutritional food juxtaposed with the sedentary modern lifestyle makes for a volatile situation which should make the recent explosion of obesity rates no surprise.²⁸

Indeed, unhealthy eating and sedentary living has become the societal norm.²⁹ As a result, Americans can no longer simply assume that their daily life tasks will provide them with sufficient exercise; for most persons they will not.³⁰ Nor can an individual assume that eating the most popular, economical, or convenient foods will

²² NAT'L INST. OF HEALTH, *supra* note 2; *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVS., STRATEGIC PLAN FOR NIH OBESITY RES. (2004). The U.S. Department of Agriculture estimates that the average American consumes 2,700 calories per day, 700 more than recommended. U.S. DEP'T OF AGRIC., PROFILING FOOD CONSUMPTION IN AMERICA (2002), available at www.usda.gov/factbook/chapter2.pdf.

²³ *See, e.g.*, Amanda Spake & Mary Brophy Marcus, *Overeating and Lack of Exercise Cause Obesity*, OBESITY: OPPOSING VIEWPOINTS 65-72 (Andrea C. Nakaya, ed., 2006); Ellen Ruppel Shell, *The Government Should Take Action to Help Reduce Obesity*, OBESITY: OPPOSING VIEWPOINTS 154-57 (Andrea C. Nakaya, ed., 2006); *What Causes Overweight and Obesity?*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., (2010), available at http://www.nhlbi.nih.gov/health/dci/Diseases/obe/obe_causes.html.

²⁴ *See, e.g.*, Spake & Marcus, *supra* note 23, at 65-72; Shell, *supra* note 23, at 154-57.

²⁵ *Profiling Food Consumption in America*, U.S. DEP'T OF AGRIC. (2002), www.usda.gov/factbook/chapter2.pdf.

²⁶ *See, e.g., id.* Some additional causes of decline in levels of physical activity include advances in labor-saving technologies, the growing popularity of television, computers, and video games, and the marked decline of physical education in schools. KELLY BROWNELL, *FOOD FIGHT: THE INSIDE STORY OF THE FOOD INDUSTRY, AMERICA'S OBESITY CRISIS & WHAT WE CAN DO ABOUT IT* 74-79 (2004).

²⁷ *See, e.g.*, U.S. DEP'T OF AGRIC., *supra* note 25.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See, e.g.*, Spake & Marcus, *supra* note 23.

provide them with adequate nutrition and a reasonable caloric intake; almost assuredly, they will not.³¹ On the contrary, if a modern American desires a healthy lifestyle, she must make a conscious, determined, and sustained effort to do so.

It is because relatively few Americans take such difficult steps, preferring instead the default (and much easier) societal path, that obesity has become such a problem. In sum, the explosion of obesity rates in recent decades has been caused by a dramatic shift in America's background food and exercise environment in an aggressively obesogenic direction.³²

III. WHAT CAN BE DONE TO ADDRESS THE OBESITY CRISIS

A. *The Government, Not the Individual, Is the Best Place to Address the Problem*

As discussed above, the current obesity epidemic has been primarily caused by a dramatic change in the *background gastronomical and exercise context*; thus, heightened obesity levels can be blamed on the current "toxic" background environment.³³ As a result, nothing short of a significant environmental shift in a healthy direction is likely to curb, and/or reduce the incidence of obesity.

The government is very likely the only agent capable of effectuating the significant environmental changes required to successfully combat obesity. Individuals are unlikely to conquer obesity on their own, at least on the wide scale needed to substantially reduce obesity rates nationwide. Indeed, the obesity problem exists today precisely because large numbers of Americans have experienced considerable difficulty controlling their diets. There is no cogent reason to think that the situation will improve in the future without outside help.³⁴

Similarly, the private sector is unlikely to be effective in combating obesity, at least without government prodding. To understand why, it is first important to realize that many private businesses, such as fast-food, snack, and soft-drink companies, are a large part of the obesity problem.³⁵ The numerous private

³¹ See, e.g., U.S. DEP'T OF AGRIC., *supra* note 25.

³² An alternative explanation of the causes of the obesity epidemic argues that rising rates have been primarily caused by a societal-wide decrease in personal responsibility over the past few decades. This claim, that millions of Americans have somehow lost their powers of appetitive self-control in recent years, is quite suspect as it appears both intuitively implausible, and, more importantly, has been contradicted by the empirical literature. See, e.g., Kelly D. Brownell et. al., *Personal Responsibility And Obesity: A Constructive Approach to a Controversial Issue*, 29 HEALTH AFFAIRS 378, 379-80 (2010), available at http://www.yaleruddcenter.org/resources/upload/docs/what/policy/PersonalResponsibility_H_A_3.10.pdf (explaining that trends in both adolescent and adult behavior indicative of personal responsibility have both shown "stable or improving patterns of personal responsibility" in recent years despite the concomitant explosion of obesity rates among both groups; hence, rising rates of obesity cannot be plausibly thought to be due to a general decrease in personal responsibility).

³³ See, e.g., U.S. DEP'T OF AGRIC., *supra* note 25.

³⁴ After all, individuals by themselves can do little to change the current unhealthy background context against which food and exercise decisions are made.

³⁵ See, e.g., *Menu Labeling in Chain Restaurants: Opportunities for Public Policy*, RUDD CTR. FOR FOOD POLICY & OBESITY (2008), <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf>.

companies that turn profits by selling unhealthy food products have every incentive to maintain the status quo.³⁶ Unless pressured by the government or the public, it is fanciful to expect action from such businesses.

But what about diet companies, whose business is to successfully reduce obesity? While many such companies exist,³⁷ there are several reasons to think that they will fail to significantly stem the obesity epidemic. First, despite being a multi-billion dollar industry that has been around for years, obesity rates remain at epidemic levels.³⁸ Second, not every obese American chooses to attempt to diet.³⁹ Third, because diet remedies are voluntary, “they are only successful with individuals who are very close to being able to exercise effective self-control.”⁴⁰ Thus, it is reasonable to assume that dieting will not be an effective anti-obesity strategy for a large segment of the population.

In addition, diets are, at best, only temporary solutions that do nothing to alter the underlying obesogenic eating environment. Even if a person successfully loses weight through dieting, upon reaching the diet goal, that person must then reenter the same obesogenic environment that most likely caused the problem in the first place. Back in such an environment, he or she is very likely to revert back to pre-diet unhealthy habits. This most likely explains why only 5% of Americans who lose weight through dieting keep it off in the long run.⁴¹ In short, the diet industry functions as a societal “band aid,” which treats the symptoms of American obesity, but does nothing to address its underlying causes.

In sum, if the war on obesity is to be successful, government involvement is necessary because the government seems to be the only agent capable of nudging or pushing the obesogenic environment in a significantly more healthful direction.

B. Potentially Effective Anti-Obesity Policies

If strong government action is warranted in an effort to contain the obesity “outbreak,” there are several potentially effective policies that could be implemented. These policies include: (i) “full disclosure laws” requiring the increased dissemination of nutritional information, such as the conspicuous posting

³⁶ See, e.g., *id.*

³⁷ The weight loss business is a multi-billion dollar industry. It is estimated that Americans spend between \$33 billion and \$55 billion annually on weight loss products and services including medical procedures and pharmaceuticals. Harvey Jones, *Profiting from America's Portly Population*, REUTERS (Apr. 21, 2008), <http://www.reuters.com/article/idUS107630+21-Apr-2008+PRN20080421>.

³⁸ The cynic might also point out that it is not in the economic interests of diet companies to permanently cure their patients as doing so will deprive themselves of repeat customers.

³⁹ A 1997 Conference Report estimated that, at that time, approximately 25% of men and 40% of women were actively attempting to lose weight. The report lamented the extreme dearth of reliable statistics with respect to the diet industry. *Commercial Weight Loss Products and Programs*, FED TRADE COMM'N (1997), <http://www.ftc.gov/os/1998/03/weightlo.rpt.htm#A>.

⁴⁰ Joseph Heath, *The Benefits of Cooperation*, 34 PHIL. & PUB. AFF. 313, 343 (2006).

⁴¹ *The Facts about Weight Loss Products and Programs*, U.S. FOOD & DRUG ADMIN (1993), <http://www.thefree library.com/The+facts+about+weight+loss+products+and+programs.-a014401286>.

of caloric and nutritional content at fast food and chain restaurants;⁴² (ii) restrictions on the advertising of certain low-nutritional foods, such as fast-food, snack, and soda products;⁴³ (iii) requiring unhealthy food purveyors to post conspicuous warnings concerning the dangers of consuming their products;⁴⁴ (iv) providing subsidies to growers and manufacturers of healthy foods;⁴⁵ (v) imposing a “fat tax” on foods containing an especially low nutritional content;⁴⁶ (vi) banning certain foods, and/or ingredients; and (vii) enacting special food policies for particular sub-groups, such as children and those living in poor and disadvantaged neighborhoods.⁴⁷

C. There Is a Strong Prima Facie Case for Government Intervention

Based on the magnitude of the American obesity epidemic, *ceteris paribus*,⁴⁸ strong government action is urgently needed to combat the crisis. When the American population has been threatened with other crises responsible for killing thousands of citizens—such as cancer, contagious diseases, war, and terrorism—the government has responded strongly to defend and preserve the lives of Americans. So why has the government done comparatively little to combat obesity—the “silent killer” responsible for more than 160,000 preventable deaths per year?⁴⁹

⁴² See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 35 (providing a general explication of the rationale and effectiveness of such policies); Christina A. Roberto et al., *Rationale and Evidence for Menu-Labeling Legislation*, 37 AM. J. PREV. MED., 546-51 (2009) (same).

⁴³ See, e.g., Jennifer L. Harris, *Television Viewing and Unhealthy Diet: Implications for Children and Media Interventions*, 24 HEALTH COMM. 660-673 (2009) (discussing the (unhealthy) food advertising industry and the effects of food advertising on unhealthy consumption patterns); *Trends in Television Food Advertising: Progress in Reducing Unhealthy Marketing to Young People?*, YALE RUDD CTR. FOR FOOD POLICY & OBESITY (2010), http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReport_TV_FoodAdvertising_2.10.pdf (same); Jennifer L. Harris et al., *Priming Effects of Television Food Advertising on Eating Behavior*, 28 HEALTH PSYCHOL. 404-13 (2009) (same).

⁴⁴ See, e.g., Roberto, *supra* note 42.

⁴⁵ See, e.g., *id.*

⁴⁶ For a discussion of the effectiveness of these policies, see, e.g., Brownell, *supra* note 5; YALE CTR. FOR FOOD POLICY & OBESITY (2009), *supra* note 5.

⁴⁷ It is well-known that persons in minority and disadvantaged neighborhoods have limited access to healthy foods. See, e.g., *Access to Healthy Foods in Low-Income Neighborhoods: Opportunities for Public Policy*, YALE CTR. FOR FOOD POLICY & OBESITY (2008), <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportAccessToHealthyFoods2008.pdf>. The above list of possible policy responses is not exhaustive. Nor should the inclusion of any policy be taken to mean that such policy is necessarily supported by the author. Rather, the purpose of the above adumbration of policies is merely to provide an illustrative list of the types of policies that have been considered as possible candidates in the fight against obesity.

⁴⁸ *Ceteris Paribus* is a Latin phrase that roughly translates as all other things being equal.

⁴⁹ NAT'L INST. OF HEALTH, *supra* note 2.

The answer appears to be that obesity is thought to be a matter of personal responsibility and therefore none of the government's business.⁵⁰ Unlike contagious diseases and terrorism, obesity is a harm that the individual is thought to bring upon himself; thus, it is believed that individuals must bear its costs in accordance with the common law maxim *volenti non fit injuria*.⁵¹ Intervening in the food industry to address the obesity problem would, according to this objection, constitute unjustified government paternalism.⁵² Consequently, it is thought that the costs of obesity must be borne by the individual for the greater good of individual freedom.⁵³

IV. THE PATERNALISM OBJECTION TO GOVERNMENT ANTI-OBESITY LEGISLATION

This Article now considers the question of whether government anti-obesity legislation can overcome the paternalism objection. This objection must be addressed, for, even assuming that government intervention is the most *effective* method of combating obesity, it does not follow that it is legitimate—that the government has the *right* to intervene. A worthwhile end does not justify all means.

This section begins by outlining the basic anti-paternalist objection against government intervention in the food industry, moving on to discuss possible responses to the objection. Ultimately, this Article concludes that the paternalism objection fails to put government anti-obesity regulation off-limits. Raised against some anti-obesity policies which, in reality, have a non-paternalistic basis, it is entirely beside the point. Put forth as an objection to policies supported by a soft or weak paternalism rationale (which sanctions government interference only to the extent necessary to ensure the voluntariness of choices), it fails. The objection generally succeeds, however, in prohibiting more intrusive measures supported only by a hard paternalism rationale (which endorses overriding voluntary choices for one's own good). Thus, while the paternalism objection cannot be said to prohibit anti-obesity legislation, it can be said to establish limits to such regulation.

A. *The Basic Anti-Paternalism Argument Against Government Intervention in the Food Industry*

In its most basic form, the anti-paternalism argument against government intervention in the food industry states that: (i) government anti-obesity policies are

⁵⁰ See, e.g., Boaz, *supra* note 6; Radley Balko, *Government Gets Fat Fighting Obesity* (2004), http://www.cato.org/pub_display.php?pub_id=4532; Jacob Sullum, *The War on Fat: Is the Size of Your Butt the Government's Business?*, REASON MAGAZINE (Aug./Sept. 2004); DAVID HARSANYI, NANNY STATE: HOW FOOD FASCISTS, TEETOTALING DO-GOODERS, PRIGGISH MORALISTS, AND OTHER BONEHEADED BUREAUCRATS ARE TURNING AMERICA INTO A NATION OF CHILDREN (2007); JAMES T. BENNETT & THOMAS J. DiLORENZO, THE FOOD & DRINK POLICE: AMERICA'S NANNIES, BUSYBODIES & PETTY TYRANTS (1999); Mario J. Rizzo & Douglas Glen Whitman, *Little Brother is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685-739 (2009).

⁵¹ See, e.g., *id.* *Volenti non fit injuria* is a Latin phrase that roughly translates as “to a willing person, no injury is done.”

⁵² See, e.g., Rizzo & Whitman, *supra* note 50.

⁵³ See, e.g., *id.*

paternalistic; (ii) paternalism is (always) wrong; and (iii) therefore, such legislation is unjustified.⁵⁴

To understand the first premise, which states that government anti-obesity policies are paternalistic, it is necessary to first define the term “paternalism.” While paternalism has been defined in a variety of different ways, the basic concept is clear enough; specifically, in the rather typical case in which we have two agents, X and Y, we can say that X acts paternalistically towards Y if, and only if, X: (i) performs (or refrains from performing) some action Z that interferes with the liberty of Y; (ii) for the explicit purpose of advancing the interests of Y; (iii) without obtaining the consent of Y.⁵⁵ Thus, government anti-obesity policies can be thought to be paternalistic if they (i) curtail the gastronomical (or other) liberty of Americans; (ii) with the goal of “forcing” upon them a healthy lifestyle; (iii) without their consent.

The second premise of the anti-paternalism argument states that paternalism is wrong. The supposed wrongness of paternalism is typically based upon one of two standard arguments: (1) the consequentialist anti-paternalism argument;⁵⁶ and (2) the “autonomy-based” anti-paternalism argument.⁵⁷ Because it is necessary to have at least a basic understanding of these two classic arguments to fully comprehend the force of the anti-paternalism objection, each of them is discussed in some detail below.

The first and most straightforward anti-paternalism argument is consequentialist in nature. In short, the argument is that an individual is both a better judge and securer of his own well-being than is an external agent.⁵⁸ Thus, *for the sake of his own good*, an individual should have free rein to follow his own path in life.⁵⁹ Provided that his conduct is purely self-regarding and does not harm others, an external agent should not interfere with his affairs.⁶⁰

There are two primary reasons why an individual is thought to be a better judge and securer of his own good than an external agent. First, an individual has an extremely strong motive or incentive to be concerned with his own good, as what happens to him affects him personally and directly.⁶¹ While others may be motivated

⁵⁴ This is typically the complaint of those who argue that government “has no business in the food industry,” even if it is not always explicitly stated in terms of paternalism.

⁵⁵ See, e.g., Gerald Dworkin, *Paternalism*, THE STANFORD ENCYCLOPEDIA OF PHIL. (2005), <http://meion.ong.stanford.edu/entries/paternalism/>; Gerald Dworkin, *Paternalism*, MORALITY AND THE LAW 271, 271 (Joel Feinberg & Jules Coleman, eds., Wordsworth 2000).

⁵⁶ See, e.g., John Stuart Mill, *On Liberty*, MORALITY AND THE LAW 259-70 (Joel Feinberg & Jules Coleman, eds., 2000)

⁵⁷ See, e.g., *id.*

⁵⁸ See, e.g., *id.*

⁵⁹ See, e.g., *id.*

⁶⁰ See, e.g., *id.*; William Glod, *How Not to Argue Against Paternalism*, REASON PAPERS 9 (Fall 2008); Richard J. Arneson, *Mill versus Paternalism*, 90 ETHICS 470, 472-73 (1980).

⁶¹ See, e.g., Mill, *supra* note 56, at 262. Mill states: “He is the person most interested in his own well-being: the interest which any other person, except in cases of strong personal attachment, can have in it, is trifling, compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional, and altogether indirect.” *Id.*

by benevolence to promote his good, such a motive is generally of much weaker intensity.⁶² Second, due to his intimate knowledge of his own person and circumstances, an individual is thought to possess better information than does an external agent as to what will promote his good.⁶³

In sum, the consequentialist anti-paternalism argument states that an individual is much better suited than an external agent to promote his own good due to both his superior incentive and information with respect to that good.⁶⁴ While government (or other) interference in an individual's life may be motivated by benevolence, it is thought to be bound to do more harm than good in terms of the individual's good that it purports to advance.⁶⁵

The second classic argument against paternalism contends that paternalism conflicts with autonomy.⁶⁶ The basic idea is that a paternalistic act, by overriding the preferences of the individual, disrespects and overrules her autonomy—an individual's ability to make her own choices.⁶⁷ This violation of autonomy disrespects the individual's standing as a rational, moral being, as an end in herself, depriving her of her dignity as a human being.⁶⁸ It disrespects her individuality.

Based largely upon these two arguments, which purport to show that paternalism is, in general, unwarranted, anti-obesity legislation critics conclude that anti-obesity legislation is unjustified.⁶⁹ They argue that legislation that curtails the liberty of Americans to eat whatever they choose is objectionable for exactly the same sorts of reasons showing paternalism to be generally unattractive.⁷⁰ The fact that anti-obesity

⁶² Mill, *supra* note 56, at 262. We might imagine an immediate family member such as a spouse having an incentive of similar strength as the individual; however, it is still likely to be less. Moreover, the incentive will become increasingly diminished the further abstracted an individual or agent becomes from the particular individual.

⁶³ *Id.* Mill states: “[W]ith respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else. The interference of society to overrule his judgment and purposes in what only regards himself, must be grounded on general presumptions; which may be altogether wrong, and even if right, are as likely as not to be misapplied to individual cases, by persons no better acquainted with the circumstances of such cases than those are who look at them merely from without.”; *see also* Glod, *supra* note 60, at 9.

⁶⁴ Mill, *supra* note 56, at 262.

⁶⁵ *See, e.g.*, Mill, *supra* note 56, at 262; Glod, *supra* note 60, at 9-13; Arneson, *supra* note 60, at 472-73.

⁶⁶ *See, e.g.*, Arneson, *supra* note 60, at 475-77; Glod, *supra* note 60, at 13-17; Douglas N. Husak, *Paternalism and Autonomy*, 10 PHIL. & PUB. AFF. 27, 27-46 (1981); KLEINIG, *supra* note 8, at 18-37.

⁶⁷ *See, e.g.*, Arneson, *supra* note 60, at 475-77; Glod, *supra* note 60, at 13-17; Husak, *supra* note 60, at 27-46; KLEINIG, *supra* note 8, at 27-37.

⁶⁸ *See, e.g.*, Arneson, *supra*, note 60, at 475-77; Glod, *supra* note 60, at 13-17; Husak, *supra* note 60, at 27-46; KLEINIG, *supra* note 8, at 18-38.

⁶⁹ *See, e.g.*, Gregory Mitchell, *Libertarian Paternalism is an Oxymoron*, 99 NW. U. L. REV. 1, 1245-77 (2005); Rizzo & Whitman, *supra* note 50, at 686-87, 700, 711-39; Boaz, *supra* note 50; Balko, *supra* note 50; Sullum, *supra* note 50.

⁷⁰ *See, e.g.*, Mitchell, *supra* note 69.

policies are benevolently motivated by a desire to improve the good of Americans does nothing, they argue, to make anti-obesity legislation more palatable.⁷¹

Appealing to the general consequentialist anti-paternalism argument, critics typically claim that the incentive that the government has to promote the health of a particular average American individual is considerably weaker than the incentive that an individual has to promote his own health.⁷² Moreover, they claim that an individual is a better judge than the government as to whether the pleasure he derives from eating particular foods (for example, a diet of daily cheeseburgers) will, *on balance*, make him better off.⁷³ Following the logic of the general consequentialist anti-paternalist objection, the anti-paternalism critic argues that, due to superior incentive and knowledge, the individual is better placed than the government to make decisions regarding his own health and eating habits.⁷⁴

Critics of government intervention also appeal to the autonomy-based general anti-paternalism objection, arguing that such “government knows best” legislation overrides the voluntary gastronomical choices of individuals, constituting a deep affront to the dignity and rightful independence of individuals with respect to their eating choices.⁷⁵ One convinced that this autonomy-based anti-paternalism argument shows the wrongness of government anti-obesity legislation might utter the phrase, “who does the government think they are, telling me what to eat?” to succinctly sum up their general sentiment.

In sum, opponents of anti-obesity legislation typically base their opposition to such policies on the belief that such intervention would constitute government paternalism. Since paternalism is thought to be wrong, anti-obesity policies are deemed to be unjustified.⁷⁶

It is important to note, however, that merely assuming that paternalism is, *in general*, objectionable (as most do) is *not enough* to conclude that the types of anti-obesity policies that we have been considering are unjustified, even assuming all of them to be paternalistic. This is because, unless one holds that there is a *conclusive* objection against all paternalistic legislation, *prima facie* unwarranted paternalistic legislation may sometimes be overridden by countervailing considerations.

In the topic under consideration, the justifiability of anti-obesity policies, there are such countervailing considerations. Specifically, there are strong arguments in *favor* of government intervention, to wit, the need to address the high societal costs of obesity and overweight previously discussed.⁷⁷ Thus, even assuming that anti-

⁷¹ See, e.g., Boaz, *supra* note 50; Balko, *supra* note 50; Sullum, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69, at 31-35.

⁷² See, e.g., Boaz, *supra* note 50; Balko, *supra* note 50; Sullum, *supra* note 50; BENNETT & DiLORENZO, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69, at 31-35.

⁷³ See, e.g., Boaz, *supra* note 50; Balko, *supra* note 50; Sullum, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69, at 31-35.

⁷⁴ See, e.g., Balko, *supra* note 50; Sullum, *supra* note 50; BENNETT & DiLORENZO, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69, at 31-35.

⁷⁵ See, e.g., Balko, *supra* note 50; Sullum, *supra* note 50; BENNETT & DiLORENZO, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69, at 31-35.

⁷⁶ See, e.g., Rizzo & Whitman, *supra* note 50.

⁷⁷ See, e.g., Hammond & Levine, *supra* note 4.

obesity policies are paternalistic, such policies cannot be dismissed by the casual remark that paternalism is in general undesirable.

On the contrary, the anti-intervention activist has a substantially heavier burden to fulfill. If they object to intervention on consequentialist grounds, they must either: (1) show specifically why each and every type of proposed legislation would make individuals worse off (instead of relying on a general anti-paternalist objection); or (2) devise an argument that shows that there is a more general consequentialist reason for abstaining altogether from health-promoting paternalistic legislation, notwithstanding the fact that a particular piece of paternalistic legislation might make an individual better off.

If their objection is non-consequentialist in nature, (i.e., based upon the claim that paternalism conflicts with autonomy), they must show either why such an objection mandates the proscription of paternalistic legislation in all cases, or why anti-obesity policies do not come within any legitimate exceptions to the general paternalism prohibition.

B. Some Legislation Can Be Justified Entirely on Non-Paternalistic Grounds

Recall that, for a government policy to be accurately classified as paternalistic it must: (i) curtail the liberty of individuals; (ii) without their consent; (iii) for the purpose of advancing their own good.⁷⁸ As (i), (ii), and (iii) are all necessary conditions of paternalism, a policy will not be properly considered paternalistic if *any* of these three prongs are absent.⁷⁹ Several policies that have been considered lack one or more of these conditions; thus, they can be justified entirely on non-paternalistic grounds.

The first necessary condition of a paternalistic law is that it “curtails the liberty of individuals.”⁸⁰ Some of the policies that have been considered do not satisfy this condition; specifically, those that would merely educate or inform consumers. Consider, for example, “full disclosure laws” that would require the conspicuous posting of nutritional information at fast-food and chain restaurants, or compelled speech legislation that would require unhealthy food advertisers to warn consumers of the health risks of their products. Such legislation, with the sole goal of informing and educating consumers, would not interfere with individual liberty. Rather, it would promote the exercise of individual liberty by facilitating informed decision-making.

Notably, under such laws persons would remain free to eat *whatever* they chose; these laws would not restrict their gastronomical liberty. One might argue that such legislation would prevent an individual from enjoying his artery-clogging meal in blissful ignorance, but this does not seem to be a freedom worth protecting; moreover, it is not the type of liberty that Mill and other traditional opponents of paternalism had in mind. Indeed, even John Stuart Mill himself, a staunch anti-paternalist, did not oppose reasoning, remonstrating, persuading, or entreating an individual to choose a course of action thought to be in furtherance of his own good.⁸¹

⁷⁸ See Dworkin, *supra* note 55.

⁷⁹ See, e.g., *id.*

⁸⁰ *Id.*

⁸¹ Mill, *supra* note 56, at 259.

The second necessary condition for genuinely paternalistic legislation requires that it be implemented without the consent of its target individuals.⁸² Because some anti-obesity legislation can be reasonably presumed to be welcomed by most persons, it is not the case that all anti-obesity policies are accurately characterized as lacking consent. Legislation that is consented to is not paternalistic, and hence, can be justified entirely on non-paternalistic grounds.

Consider the education-focused legislation just discussed.⁸³ Because all rational consumers can be safely assumed to be interested in knowing material health information with respect to the products that they consume, there is a good reason to presume that such policies have the consent of the people; at any rate, it would be odd for persons to have a considered position against such policies. Importantly, if the public can be presumed to consent to these education-focused policies, then they are not paternalistic.⁸⁴

Additional policies can similarly be thought to have the consent of the individuals whose good they aim to promote. Consider, for example, policies to increase the availability, affordability, and quality of healthy foods in minority and disadvantaged neighborhoods. In these areas, healthy food is typically relatively expensive, scarce, and of poor quality.⁸⁵ The target individuals for such a policy would of course be the individuals living in those neighborhoods; the purpose of the program would be to improve their well-being.⁸⁶ It seems fanciful to suggest that such a program would be forcing a good upon these individuals that they do not accept. Instead, it is reasonable to presume that such a policy would be met with consent.⁸⁷ After all, the program would simply expand their options. Even given the greater availability, affordability, and quality of healthy foods, individuals living in the neighborhood would still be free to choose not to consume healthier goods.

Finally, consider the large class of individuals who desire to control their diets yet find that despite their best efforts, they are unable to do so. Many of these individuals would surely welcome government (or other) external help in their quest to live a healthy lifestyle. To the extent that such persons welcome or request external help, a government that provides it will not be acting paternalistically, for it will be acting with consent.

⁸² See, e.g., *id.* Dworkin, *supra* note 55.

⁸³ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 35; Roberto et al., *supra* note 42.

⁸⁴ Gerald Dworkin makes a similar point when he states: “[M]easures such as ‘truth-in-advertising’ acts and Pure Food and Drug legislation . . . are often attacked as paternalistic but . . . should not be considered so. In these cases all that is provided—it is true by the use of compulsion—is information which it is presumed that rational persons are interested in having in order to make wise decisions.” Dworkin, *supra* note 55, at 272-73.

⁸⁵ YALE CTR. FOR FOOD POLICY & OBESITY, *supra* note 47.

⁸⁶ *Id.*

⁸⁷ This is especially true if, which would most likely be the case, that they would not pay any additional taxes for such goods. While other taxpayers would of course be charged with bearing the costs of these subsidies, this would not render such legislation *paternalistic* for the purpose of the legislation would not be to interfere with the liberty of these taxpayers for their own good.

There is good reason for thinking that there are a substantial number of people in this situation. Considering that health and the absence of obesity are goods desired by virtually everyone and that numerous people experience considerable difficulty controlling their current diet, it is by no means a stretch to suppose that many would welcome external aid that enables them to better achieve their goals.

The third requirement of genuinely paternalistic legislation is that it be motivated or justified by a desire to improve the good of its target individuals.⁸⁸ While a desire to improve the health of Americans certainly provides much of the impetus behind anti-obesity legislation, not all such policies can be supported only by an appeal to benevolence. On the contrary, some anti-obesity legislation can be justified by the uncontroversial Millian harm principle, which contends that government action is justified to prevent and/or redress harm to others.⁸⁹

For example, consider a proposal to institute a “fat tax” on unhealthy fast-food, snacks, and soda. While a proponent might justify such a proposal based upon a desire to improve the health of Americans, it could also be supported by a desire to recoup the staggering health care costs currently associated with obesity.⁹⁰ As previously discussed, obesity adds \$86-147 billion per year in increased health care costs, and about half of these costs are picked up by the American taxpayer.⁹¹ A “fat tax” could therefore be justified without reference to any kind of paternalistic argument. Obese and overweight Americans would simply be asked to pay for the harm which they inflict upon society in the form of higher health care costs. Thus, the “fat tax” would actually promote personal responsibility.

In addition, relying on Mill’s harm principle, one could put forth an argument to end the current subsidies of unhealthy food products, such as the billions of dollars in annual subsidies to grain farmers “whose crops feed animals for meat, milk, and eggs and become cheap ingredients in processed food.”⁹² The idea would be that such subsidies artificially distort food preferences in an unhealthy direction, leading individuals to consume greater quantities of unhealthy food than they otherwise would, causing them consequent harm.⁹³ A policy ending such subsidies would not have to answer the paternalism objection.

In sum, several anti-obesity policies that are often characterized as paternalistic are, in fact, nothing of the sort. An advocate of those policies need not engage the paternalism objection at all. Of course, because certain policies are not paternalistic, it does not follow that they are thereby justified. Nonetheless, because obesity and overweight are jointly responsible for staggering social costs, there are powerful reasons of a straightforwardly consequentialist sort arguing in favor of the implementation of aggressive anti-obesity legislation. For those policies that do not have to deal with the paternalism objection, their overall justification should not be hard to demonstrate. One would simply need to show that they promise to be

⁸⁸ See, e.g., Dworkin, *supra* note 55.

⁸⁹ See, e.g., Mill, *supra* note 56, at 259.

⁹⁰ See Hammond & Levine, *supra* note 4 (explaining the costs).

⁹¹ Hammond & Levine, *supra* note 4.

⁹² *Farm Subsidies Not in Sync with Food Pyramid*, ASSOC. PRESS (Aug. 11, 2005), <http://www.msn.bc.msn.com/id/8904252/ns/health-fitness/>.

⁹³ *Id.*

effective in fighting obesity and that any negative side-effects fail to outweigh the promised gains.

C. Can Anti-Obesity Legislation Be Justified on Paternalistic Grounds?

1. The Case for Paternalistic Anti-Obesity Legislation Depends Crucially on the Extent to Which the Food Choices of Americans Are Voluntary

Assuming that at least some types of anti-obesity legislation cannot be supported on non-paternalistic grounds,⁹⁴ can we turn to paternalism for help? Is it possible to justify interfering with the food choices of Americans for paternalistic reasons?

The answer, in large part, depends upon the *voluntariness* of American's unhealthy food choices. If such choices are fully voluntary, then Americans can be said to have voluntarily accepted the risks concomitant to an unhealthy diet. Moreover, we may be happy to have them bear the costs of those risks that they have accepted with eyes wide open, with informed consent. If, however, their unhealthy food choices are less than fully voluntary, there may be reason for the government to intervene.

i. Whether an External Agent Should Respect the Choice of an Adult Depends Importantly on the Extent to Which That Choice Is Voluntary

There is good reason for the government to defer to the voluntary self-regarding choices of competent adults.⁹⁵ By contrast, those choices made on the basis of inadequate information, coercion, material misunderstanding, or some other significant volitional or cognitive defect, merit considerably less respect.⁹⁶ In support of this claim, consider that the two standard arguments against paternalism⁹⁷ apply, if at all, with considerably diminished force against prospective paternalist interference with this impaired class of choices.⁹⁸

First, recall the consequentialist anti-paternalism argument previously discussed which claims that, due to superior incentive and information with respect to her own

⁹⁴ For example, fat taxes and product bans. It is worth pointing out that even if taxing particular products is supported by a non-paternalistic rationale (such as Mill's harm principle), the non-paternalistic ground may support only relatively low levels of taxation. We may need to turn to paternalism to justify more robust levels of taxation aimed at curbing consumption rather than merely recouping societal costs.

⁹⁵ The primary arguments in favor of doing so mirror the two standard anti-paternalism arguments previously discussed. First, there is the consequentialist argument that, due to superior incentive and information concerning her own good, an individual will better promote that good than will an external agent. Second, there exists the autonomy-based argument that states that one has the right to find one's own mode in life, and hence to have one's voluntary choices respected.

⁹⁶ See, e.g., Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121, 122-23 (2005); JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 12-16, 98-99 (1986).

⁹⁷ Specifically, the consequentialist anti-paternalism argument and the anti-paternalism argument that claims that paternalism conflicts with autonomy.

⁹⁸ It is important to note, however, that an interference with even an impaired class of choices would still be *paternalistic* as long as the intervention: (i) curtailed an individual's liberty, (ii) without her consent; (iii) for the purpose of advancing her own good.

good, an individual will better promote that good than will an external agent.⁹⁹ While this argument may have force with respect to her substantially voluntary choices, it is not at all clear that an individual's substantially non-voluntary "choices" will tend to promote her own good better than some path chosen for her by an external agent. This is because, *ex hypothesi*,¹⁰⁰ an individual's substantially non-voluntary choices are *defective* in one of two primary ways.¹⁰¹ They are either: (1) tainted by a significant cognitive or volitional impairment;¹⁰² or (2) made on the basis of seriously limited or inaccurate information.¹⁰³ This being the case, there is no longer any reason to put an extraordinary amount of faith in the individual's supposed superior decision-making ability with respect to her own good.¹⁰⁴ Thus, it may often be the case that an external agent will better promote an individual's own good than will that individual's own substantially non-voluntary choices.¹⁰⁵

Second, consider the argument against paternalism which states that paternalism is wrong because it conflicts with autonomy.¹⁰⁶ This standard anti-paternalism argument may prove to be an important shield against attempts to interfere with an individual's substantially voluntary self-regarding choices; however, it is at best of limited significance when utilized as protection against interference with one's

⁹⁹ See, e.g., Mill, *supra* note 56, at 262.

¹⁰⁰ *Ex hypothesi* means according to the proposed hypothesis.

¹⁰¹ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16, 98-99.

¹⁰² For example, made while intoxicated, under severe mental distress or disease, under coercion, the pressures of addiction, etc.

¹⁰³ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16, 98-99.

¹⁰⁴ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16, 98-99.

¹⁰⁵ For an illustrative example, consider the case of a cancer patient who values life and wants to be cured of his disease. Suppose he speaks to his doctor and demands to be prescribed cyanide as *he believes* that it will instantly cure him and do him no harm (perhaps he claims that he had a purported "vision" telling him so, or maybe a popular media figure endorsed such a cure). Here, the patient's "choice" to take the fatal drug is premised on obviously incorrect information and for that reason his choice can be said to be both deficient and less than voluntary. Should the doctor nevertheless heed the patient's request and administer the fatal dose in order to give effect to the patient's instructions? (Ignoring for now any professional, ethical, and/or legal duties that would of course militate against her doing so). On consequentialist grounds, the answer appears to be clearly no. Here, the doctor who paternalistically disregards her patient's expressed wishes, and instead prescribes chemotherapy, say, will almost assuredly make her patient better off, and by his own standards! After all, we have been assuming that the patient does not wish to die, and that his request for the fatal drug would not have been made *but for* his false information. In such a case any assumption that the individual has *superior information* with respect to his own good is plainly false. Indeed, the opposite is true, for it is the doctor who is in possession of the superior information with respect to the individual's own good. In such circumstances, the consequentialist calculus must argue in favor of paternalistic intervention. A similar analysis would follow if the deficiency making the patient's choice significantly less than voluntary were not a lack of accurate information but a cognitive or volitional defect. Imagine, for example, that the patient asked to be prescribed with cyanide while intoxicated.

¹⁰⁶ See, e.g., Arneson, *supra* note 60.

primarily non-voluntary choices.¹⁰⁷ Why this is so flows from the very meaning of autonomy.

While autonomy is variously defined, the basic idea is clear enough; specifically, an agent possesses autonomy to the extent that she is capable of governing herself through the exercise of voluntary choices.¹⁰⁸ This being so, substantially non-voluntary choices contribute little to the exercise of autonomy, while fully non-voluntary “choices” add nothing at all.¹⁰⁹ Since non-voluntary choices are not autonomous, an individual’s autonomy is not usurped by the overriding of such choices.¹¹⁰ Thus, the paternalist who seeks only to interfere with an individual’s choices to the extent that they are non-voluntary does not usurp her autonomy as one cannot take from another what she does not have.¹¹¹ On the contrary, by seeking to increase the incidence and the degree of autonomy-conferring voluntary individual choices, the paternalist who seeks merely to mitigate the ruinous consequences of one’s non-voluntary choices should be seen as a promoter and friend of autonomy, if anything.¹¹²

In sum, the two standard anti-paternalist arguments apply with greatly diminished force against the paternalist who only seeks to interfere with an individual’s choices to the extent that such choices are non-voluntary. In general, the more voluntary an adult’s choices are, the heavier the burden becomes for intervention and vice versa.

ii. Are the Food Choices of Americans Wholly Voluntary?

Many assume that the unhealthy food choices of Americans are wholly voluntary.¹¹³ As a result, the current obesity crisis is often characterized as simply the result of an aggregate of poor personal, fully autonomous, choices.¹¹⁴ There is good reason to question this assumption.

Before examining the extent to which the unhealthy food choices of Americans are voluntary, it is necessary to at least adumbrate the concept of a voluntary choice. While we often tend to think of a “voluntary choice” as a threshold concept, conceiving of any particular choice as *either* voluntary or non-voluntary, this way of thinking is somewhat inaccurate; in truth, there is a continuum of voluntariness.¹¹⁵ On one end of the spectrum, there is the perfectly voluntary choice, one made with full information, completely functioning cognitive abilities, and made in a sober state

¹⁰⁷ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16, 98-99.

¹⁰⁸ For a discussion of some of the various ways autonomy has been understood, see Husak, *supra* note 66, at 35-40; FEINBERG, *supra* note 96, at 27-52.

¹⁰⁹ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16.

¹¹⁰ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16.

¹¹¹ See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16.

¹¹² See, e.g., Pope, *supra* note 96, at 122-23; FEINBERG, *supra* note 96, at 12-16.

¹¹³ See, e.g., Boaz, *supra* note 6.

¹¹⁴ See, e.g., Balko, *supra* note 50; Sullum, *supra* note 50; BENNETT & DiLORENZO, *supra* note 50; Rizzo & Whitman, *supra* note 50; Mitchell, *supra* note 69.

¹¹⁵ See, e.g., FEINBERG, *supra* note 96, at 113-17.

of mind in the absence of any sort of coercion, etc.¹¹⁶ Such a “perfectly voluntary choice” is an ideal that will “hardly ever be satisfied” fully in practice.¹¹⁷ At the other end of the spectrum, there is an entirely non-voluntary “choice,” one made with a complete lack of agential control.¹¹⁸ For example, a muscle spasm, an involuntary tick, or a seizure would constitute a perfectly non-voluntary “choice.”

While the extremes on the continuum of voluntariness are clear, they are also (at least for present purposes) much less interesting than those choices that fall in between. For example, choices that are made under the influence of a volitional or cognitive defect,¹¹⁹ based upon limited or inaccurate information, or made with inadequate understanding,¹²⁰ With all such choices on the continuum, the closer one lies to the “perfect voluntariness” pole, the more it is entitled to respect, and the heavier is the burden for the would-be interferer (and vice versa).¹²¹

Turning to the question of the voluntariness of the unhealthy food choices of Americans, there are several reasons to think that such choices are less than fully voluntary. First, the voluntariness of unhealthy food choices is diminished by a lack of transparency regarding the nutritional content of particular foods, particularly those prepared at fast-food and other restaurant outlets.¹²² As the nutritional and caloric content of particular foods is far from obvious, there is good reason to believe that Americans often choose unhealthy food options without knowing their true nutritional value.¹²³ Indeed, even purportedly “obvious” common sense judgments concerning what is healthy and what is not are often wrong.¹²⁴ Thus, it is not always the case that ordering the salad instead of the hamburger and fries is the healthier choice.¹²⁵ In fact, even nutritional experts have been found to consistently

¹¹⁶ See, e.g., *id.* In brief, Feinberg states that one makes a perfectly voluntary choice if: “[i] the chooser is ‘competent’ . . . [ii] he does not choose under coercion or duress . . . [iii] he does not choose because of more subtle manipulation . . . [iv] he does not choose because of ignorance or mistaken belief . . . [v] he does not choose in circumstances that are temporarily distorting.” *Id.* at 115.

¹¹⁷ *Id.* at 115-16.

¹¹⁸ See, e.g., *id.* at 114-15.

¹¹⁹ For example, while intoxicated, under heavy medication, under mental distress or disease, or simply emotionally upset.

¹²⁰ See, e.g., FEINBERG, *supra* note 96, at 115. .

¹²¹ See *id.*

¹²² See, e.g., *Menu Labeling in Chain Restaurants: Opportunities for Public Policy*, RUDD CTR. FOR FOOD POLICY & OBESITY (2008), [http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport 2008.pdf](http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport%202008.pdf); Christina A. Roberto et al., *Rationale and Evidence for Menu-Labeling Legislation*, 37 AM. J. PREV. MED. 546-51 (2009).

¹²³ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 122; Roberto et al., *supra* note 122, at 546-51.

¹²⁴ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 122; Roberto et al., *supra* note 122, at 546-51.

¹²⁵ See, e.g., John H. Banzhaf III, *Lawsuits Against Fast Food Restaurants Are an Effective Way to Combat Obesity*, in OBESITY: OPPOSING VIEWPOINTS 126-32 (Andrea C. Nakaya ed., 2006). Quoting a *Wall Street Journal* article, Banzhaf states: ‘HERE’S A FAST-FOOD nutrition quiz. Which has the fewest calories: a McDonald’s Quarter Pounder with Cheese,

underestimate the caloric content of unhealthy foods.¹²⁶ To the extent that an individual chooses a food based in part on a mistaken belief as to its nutritional content, her choice is to that extent non-voluntary.

A second factor that diminishes the voluntariness of food choices is misleading advertisements.¹²⁷ Currently, the great majority of food ads promote unhealthy food products.¹²⁸ Such advertisements do not contain any warnings about the harmful nature of the advertised food; rather, companies implicitly push the message that their unhealthy product is entirely compatible with a healthy lifestyle.¹²⁹ They do this in a number of ways—for example, by employing Olympic and professional athletes as spokespeople for their products.¹³⁰ Moreover, “[a]dvertising for food and beverages communicates potentially powerful food consumption cues, including images of attractive models eating, snacking at non-meal times, and positive emotions linked to food consumption.”¹³¹ Thus, advertising may, by way of subconscious cues and otherwise, push individuals to ingest unhealthy products that they would not otherwise consume.

The unavailability of healthy foods in particular areas is a third factor that may diminish the voluntariness of unhealthy food choices, for many individuals might prefer to eat healthy diets, but refrain from doing so because they have little or no access to healthy foods.¹³² Lack of access to healthy food is particularly a problem in minority and impoverished neighborhoods, where, unsurprisingly, obesity rates tend to be highest.¹³³ If healthy food is hard to come by, an individual, who of course must eat, has little choice but to consume whatever food is available. To the extent that an individual would prefer to live a healthy lifestyle, and only chooses to

Panera’s Smoked Ham and Swiss sandwich, or Baja Fresh’s grilled chicken salad? Surprisingly, it’s a Quarter Pounder...the truth is that these and other wraps, salads and sandwiches being hyped as a healthy alternative to fast food are loaded with calories and fat...While the restaurant chains don’t make any specific claims about the healthfulness or calorie content of their menu items, they nonetheless give consumers the impression that they are offering healthier food....But consumers are being fooled.” *Id.* at 128.

¹²⁶ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 122; Roberto et al., *supra* note 122, at 546-51.

¹²⁷ For a general discussion of the (unhealthy) food advertising industry and the effects of food advertising on unhealthy consumption patterns, see, e.g., Jennifer L. Harris & John A. Bargh, *Television Viewing and Unhealthy Diet: Implications for Children and Media Interventions*, 24 HEALTH COMM. 660-73 (2009); *Trends in Television Food Advertising: Progress in Reducing Unhealthy Marketing to Young People?*, RUDD CTR. FOR FOOD POLICY & OBESITY (2010), http://www.yaleruddcenter.org/resources/upload/docs/what/reports/Rudd_Report_TVFoodAdvertising_2.10.pdf; Jennifer L. Harris et al., *Priming Effects of Television Food Advertising on Eating Behavior*, 28 HEALTH PSYCHOL. 404-13 (2009).

¹²⁸ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 35, at 5.

¹²⁹ See, e.g., *id.*

¹³⁰ See, e.g., *id.*

¹³¹ Jennifer L. Harris et al., *supra* note 127, at 405.

¹³² See, e.g., YALE CTR. FOR FOOD POLICY & OBESITY, *supra* note 47.

¹³³ *Id.*

consume nutritionally poor foods because healthy options are not available, his unhealthy food choices are less than fully voluntary.

The current subsidies of certain *unhealthy* foods are a fourth voluntariness-reducing factor. Consider, for example, the billions of dollars annually spent on subsidies to grain farmers “whose crops feed animals for meat, milk and eggs and become cheap ingredients in processed food.”¹³⁴ Such subsidization artificially lowers the prices of these foods, and thus, makes their healthy counterparts comparatively expensive. This artificially distorts food preferences towards these subsidized foods and reduces the voluntariness of their purchase and consumption.¹³⁵

The dramatic increase in standard portion sizes is a fifth factor that may function to decrease the voluntariness of current food consumption habits.¹³⁶ Studies show that standard portion sizes have increased dramatically in the past few decades.¹³⁷ This fact, taken together with research showing that persons typically eat in “units” (in food outlets, the standard/default portion size), functions to reduce the voluntariness of overeating decisions.¹³⁸

Imagine, for example, a regular patron of the local fast-food joint who frequently orders the standard hamburger and fries special, and has been doing so for years. His or her fast-food preferences may show perfect diachronic stability, and the individual may have consumed fast-food at equal intervals for years, say every Friday and Saturday night. This being so, he or she would have nonetheless consumed more and more calories from fast-food over the years, due simply to the steady increase in the default portion size.

Consider that, in 1954, for example, a hamburger and fries meal at one of the standard fast-food chains might be expected to total 412 calories, whereas the standard burger and fries meal in 2004 would be expected to total 920 calories.¹³⁹ Simply consuming the updated default portion size would lead our fast-food patron to consume an excess 508 calories per meal, 1016 per week, over 52,000 per year, and over 260,000 over five years. This would lead to a weight-gain of over a pound a month, over 15 pounds per year, and over 75 pounds in five years.¹⁴⁰ Our loyal fast-

¹³⁴ *Farm Subsidies Not in Sync with Food Pyramid*, ASSOC. PRESS (Aug. 11, 2005), <http://www.msnbc.msn.com/id/8904252/ns/health-fitness/>.

¹³⁵ *Farm Subsidies*, *supra* note 92.

¹³⁶ See, e.g., Barbara J. Rolls, *Large Portion Sizes Play a Role in Rising Obesity Rates*, in *OBESITY: OPPOSING VIEWPOINTS* 87-96 (Andrea C. Nakaya ed., 2006).

¹³⁷ *Id.*

¹³⁸ Studies have shown that an individual will typically consume whatever constitutes a standard or default serving of food, instead of eating a particular *amount* of food, regardless of the serving size given to him. In addition, in experiments where participants were randomly given different portion sizes, those who were given (and consumed) the larger portion size did not report being more sated than those who consumed smaller portions. Moreover, those given the larger portion sizes did not compensate for their relative overeating by consuming relatively less at their next meal. *Id.* at 93-95.

¹³⁹ *Id.* at 91.

¹⁴⁰ Given that one pound of fat contains approximately 3,500 calories. See, e.g., Vincent Iannelli, *How Many Calories are in a Pound of Fat?* (2006), http://pediatrics.about.com/od/obesity/a/06_calpound_fat.htm (one pound of fat is equivalent to approximately 3,500 calories).

food patron did not voluntarily change her eating habits year after year, progressively preferring larger portions. Nor did she carefully weigh the risks for and against consuming larger quantities of unhealthy food. Rather, she was merely “acted upon” by outside forces that changed the standard portion size without her consent.

Our evolutionary history may be a sixth factor that reduces the voluntariness of our unhealthy food choices.¹⁴¹ There has been significant research that suggests evolutionary development has made us inclined to high-fat, high-salt, and high-sugar diets.¹⁴² Such a preference for many years provided humans with a useful evolutionary adaptation. When food was scarce, meals might be few and far between; moreover, one might expect to exert a considerable amount of energy to procure dinner.¹⁴³ Hence, a high-fat, high-salt, high-sugar meal was once a prudent choice.¹⁴⁴ In the modern world, however, where cheap fast food is both plentiful and ubiquitous, such a diet is no longer the sensible option. Nonetheless, our evolutionary instincts continue to push us to eat such unhealthy foods.¹⁴⁵ Indeed, there has been significant work done to suggest that certain unhealthy foods are addictive in just the same ways as are tobacco and other drugs.¹⁴⁶ If all of this is true, there may be reason to suggest that, *in general*, our preferences for unhealthy, high-fat, high-sugar, and high-salt foods are less than fully voluntary.

A seventh reason to question whether unhealthy food choices are fully voluntary flows from the fact that there is reason to question whether many Americans fully appreciate the risks and causes of overweight and obesity.¹⁴⁷ There certainly exists, among the majority of the population, a generalized notion that such conditions are disabling. But there is a real question as to the extent to which persons are aware of the specific health risks associated with obesity and overweight, such as the significantly increased risk of stroke and type 2 diabetes, the serious symptoms associated with these specific conditions, and the causal relationships between eating particularly unhealthy foods and the likelihood of developing obesity and overweight.

Moreover, there is certainly a difference between knowing that eating hamburgers and fries every day is bad for you and an emotional “gut” understanding that such a diet is not in the interests of one’s long-term health and vitality.¹⁴⁸ Thus,

¹⁴¹ See, e.g., Michael D. Lemonick, *Obesity Is a Result of Human Evolution*, in *OBESITY: OPPOSING VIEWPOINTS* 97-104 (Andrea C. Nakaya ed., 2006).

¹⁴² See, e.g., *id.*

¹⁴³ See, e.g., *id.*

¹⁴⁴ See, e.g., *id.*

¹⁴⁵ See, e.g., *id.*

¹⁴⁶ See, e.g., Ashley N. Gearhardt et al., *Preliminary Validation of the Yale Food Addiction Scale*, 52 *APPETITE* 430-36 (2009). The report states: “There is now considerable evidence that food and drugs of abuse exploit similar pathways in the brain, namely the dopamine and opiate systems.” *Id.* at 430.

¹⁴⁷ See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 35.

¹⁴⁸ Robert Goodin has a good discussion of the important difference between a vague intellectualized understanding and a visceral, “gut” comprehension. See Robert E. Goodin, *The Ethics of Smoking*, in *SOCIAL AND PERSONAL ETHICS* 244-55, at 247-48 (William H. Shaw

Americans may not fully appreciate the extent to which obesity and overweight are bad for their health. To the extent that one does not know the risks of obesity and overweight, and/or that unhealthy food causes these conditions, his decision to indulge in unhealthy food is less than fully voluntary.

An eighth reason suggesting that the unhealthy food choices of Americans are less than fully voluntary is that such choices are known to be subject to the well-known cognitive defect of hyperbolic discounting.¹⁴⁹ The basic idea of hyperbolic discounting is that persons tend to have stronger preferences for immediate payoffs relative to later payoffs, with the discount rate increasing sharply the closer the payoffs are to the present.¹⁵⁰ This can lead to preference-reversals.¹⁵¹ For example, one might strongly prefer \$100 on January 2, 2013 over \$90 on January 1, 2013 yet prefer \$90 today to \$100 tomorrow.¹⁵² Such individuals are likely to make choices today that their future self will come to regret.¹⁵³ When making food selection decisions, individuals that exhibit hyperbolic discounting are likely to heavily discount long-term health risks and come to regret those decisions later.¹⁵⁴ If the phenomenon of hyperbolic discounting leads individuals to make rather impulsive food choices, the voluntariness of those choices will be diminished.

There is a ninth and final reason to think that unhealthy food choices may be less than voluntary. Consider that “[m]any scientists agree that lifelong taste preferences and eating habits are directly linked to what and how we eat in our early years, possibly as early as within the womb.”¹⁵⁵ If this is true, then adult preferences for food have largely developed and solidified during years of childhood, and what an adult prefers to eat today would thus be, to a significant extent, determined by what he consumed in his formative years.¹⁵⁶ It is clear, however, that he had little control over the food that he was given as a child; hence, the fact that he prefers hamburgers, fries, and other high-fat foods today may be due to the fact that he was fed such things as a child.¹⁵⁷ Consequently, such unhealthy preferences may have been

ed., 1993). Goodin notes: “there is the distinction between ‘knowing intellectually’ some statistic and ‘feeling in your guts’ its full implications. Consent counts—morally, as well as legally—only if it is truly informed consent, only if people know what it is to which they are consenting. That, in turn, requires not only that we can state the probabilities but also that we ‘appreciate them in an emotionally genuine manner.’” *Id.* at 247-48.

¹⁴⁹ See, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167-71(2003); Heath, *supra* note 40, at 343.

¹⁵⁰ See, e.g., Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 ECON. LETTERS 201-07 (1981).

¹⁵¹ See, e.g., *id.*

¹⁵² See, e.g., *id.*

¹⁵³ See, e.g., *id.*; Sunstein & Thaler, *supra* note 149, at 1167-71.

¹⁵⁴ See, e.g., Thaler, *supra* note 150; Sunstein & Thaler, *supra* note 149, at 1167-71.

¹⁵⁵ Natalie Kennedy, *Learning to Taste and Food Preferences Begin in the Early Years of Childhood* (2005), http://articles.sfgate.com/2005-01-12/food/17354174_1_amniotic-fluid-breast-milk-preferences.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

formed, to a certain extent, by factors entirely outside of his control. Moreover, as an adult, it might be exceptionally difficult for him to change his unhealthy, substantially non-voluntarily acquired food preferences, at least without external help. This is another sense in which unhealthy food choices can be seen to be less than fully voluntary.

The above explication of factors that reduce the voluntariness of unhealthy food choices are not exhaustive.¹⁵⁸ On the contrary, the purpose of the list is simply to demonstrate that the decisions of countless Americans to indulge in unhealthy diets may be significantly less than fully voluntary. As we have seen, unhealthy food selections may frequently be the result of: (i) partial or incorrect information with respect to the health risks; (ii) an inadequate understanding of those risks; (iii) inertia; (iv) a dearth of alternative options; or (v) other cognitive and volitional defects. In sum, there is good reason to think that the unhealthy food choices of Americans are substantially less than fully voluntary.

2. If the Unhealthy Food Choices of Americans Are to a Significant Extent Non-Voluntary, Does this Sanction Paternalistic Interference?

If the unhealthy food choices of Americans are significantly less than fully voluntary, the paternalism objection to anti-obesity legislation loses a lot of its bite. The paternalism objection will not hold up if food choices are substantially non-voluntary because the two standard anti-paternalism arguments apply with little force if this is the case. Recall once more the consequentialist anti-paternalism argument which states that, due to superior information and incentive with respect to her own good, an individual is better placed than an external agent to promote that good.¹⁵⁹ This paternalism objection is not particularly worrisome if unhealthy food choices are substantially non-voluntary, for a variety of reasons.

First, there is reason to believe that (in the case of food choices) it is the government, and not the individual, that possesses superior information about the individuals' own good.¹⁶⁰ In making any food choice, the best choice with respect to an individual's own good must be the choice that maximizes that good. In determining the best choice, one must balance various goods, such as the short-term pleasures derived from consuming a particular product, against the costs of doing so, such as health risks, economic costs from purchasing the product, and inconvenience costs from procuring the food.¹⁶¹

Importantly, there is good reason to think that the government possesses superior knowledge concerning the health risks, and/or benefits of various foods, which is one of the important variables in the decision-making process of deciding what to

¹⁵⁸ Moreover, some factors may reduce the voluntariness of food choices only marginally while others may substantially do so.

¹⁵⁹ See *supra*, § IV(A).

¹⁶⁰ For example, the FDA, with its cadre of food scientists, has access to the most accurate and up to date information concerning the nutritional content of various foods. The average person, by contrast, can hardly be said to possess such a sophisticated understanding of nutrition.

¹⁶¹ Some of these costs are short term, such as inconvenience costs, whereas others, such as health and economic costs, are long term.

eat.¹⁶² Indeed, due to the effects of manipulative advertising, a dearth of conspicuous nutritional information, inertia, and general ignorance, there is reason to believe that individuals make their food choices based on a seriously inadequate understanding of health risks and/or benefits. In contrast, the government possesses detailed information about the risks of unhealthy eating, the nutritional content of various foods, etc.¹⁶³ One might conclude that the government, with its superior information, will often make better food choices in terms of an individual's own good than will that individual herself.

One might object here that, as we have seen, health is not the only variable that one considers in deciding what to eat. For example, one must also evaluate the short-term pleasures derived from consuming unhealthy food. Further, the individual, not the government, certainly has superior information with respect to what foods give her the most satisfaction. Thus, it might be argued that, for the sake of her own good, the individual should be the one to balance the pleasures she receives from eating unhealthy foods against the associated health risks.

While the individual may be better equipped than the government at balancing the short-term pleasures against *the true long-term health costs*, she is in no position to do so if she makes her decisions based upon a seriously distorted view of these health risks or fails to take them into account at all. Thus, due to its superior knowledge of the health risks and benefits of particular foods, there is reason to think that at least certain types of government anti-obesity policies will improve an individual's food decisions, according to her own standards.

Second, in the present context of food choices, there is even reason to question the assertion (made by the consequentialist anti-paternalism argument) that the individual has a better incentive than the government to promote her own good. While the individual, of course, has very strong reasons to promote her own health, as we have seen, a number of pressures exist that work to substantially weaken her natural inclinations to do so.¹⁶⁴ These include inertia, implanted evolutionary drives to prefer high-fat, high-salt, and high-sugar diets, and the well-known phenomenon of hyperbolic discounting.¹⁶⁵ Moreover, to the extent that an individual does not fully know or understand the risks of eating an unhealthy diet, she will not possess an appropriate incentive to refrain from unhealthy foods, as she will not be aware that doing so is in the interests of her long-term health. For all of the above reasons, one might question whether an individual has a better incentive to care for her interests, including her health, than does the government. On the contrary, anti-obesity legislation, which is not subject to such forces as evolutionary urges and cognitive biases, may very well do a better job at promoting the individual's own good.

If the unhealthy food choices of Americans are substantially non-voluntary, then there is reason to think that the government may have both (i) superior information and (ii) superior incentive with respect to an individual's best food choices. If so, the consequentialist anti-paternalism argument cannot serve as a bar to government intervention in the food industry.

¹⁶² Health can be relatively uncontroversially presumed to be a good that everyone wants.

¹⁶³ See generally *Foods*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Food/default.htm> (last visited Dec. 20, 2011).

¹⁶⁴ See *supra*, §IV(C)(1)(ii).

¹⁶⁵ See *supra*, §IV(C)(1)(ii).

But does the second anti-paternalism argument, which claims that paternalism conflicts with autonomy, serve as a bar to government anti-obesity legislation supported on paternalistic grounds? It has already been demonstrated that the force of this objection is considerably diminished when the paternalist only attempts to intervene with choices that fall significantly short of being fully voluntary. If our unhealthy food selections are, to a large extent, based upon non-voluntary factors outside of our conscious awareness and control, then, to the extent that government policy interferes with such choices merely to mitigate the effects of these voluntariness-reducing factors, the champion of autonomy should not be concerned. Indeed, government policy that seeks merely to counter the various voluntariness-reducing factors will in fact enhance autonomy, for the soft or weak paternalist does not wish to override another's voluntary choices; on the contrary, she merely hopes to ensure that an individual's choices are truly her own.¹⁶⁶

With respect to anti-obesity regulation specifically, the goal of the soft or weak paternalist is to ensure that unhealthy food choices are not made *by reason of ignorance*, or *only* because one fails to adequately grasp the associated health risks.¹⁶⁷ In addition, she attempts to prevent persons from being pressured into making unhealthy choices because such unhealthy options are the *only* or *only realistic choice*. She thus advocates for the increased availability of healthy options in restaurants, for subsidies of healthy options in impoverished neighborhoods, etc. She also advocates for the altering of the background food milieu in a decidedly healthy direction, so that persons who make food choices based upon little or no thought, will *no longer choose the unhealthy option by default*. Persons who still prefer to eat unhealthy foods would need to make a voluntary, active choice to do so. Finally, she seeks to minimize the extent to which persons are coerced into their unhealthy eating habits by manipulative advertising, early childhood socialization, or implanted evolutionary drives.

In sum, the soft or weak paternalist does not wish to coerce *anyone* to eat a healthy, government-approved diet. By looking to minimize the various factors that reduce the voluntariness of one's diet, she actually wishes to *promote and further* one's gastronomical autonomy. The soft or weak paternalist is the true defender of one's right to eat what one wants.

As already demonstrated, there is a strong *prima facie* case for government anti-obesity legislation due to the severe social costs of obesity and the fact that the government is the agent best-placed to address the epidemic. The one obstacle standing in the way of aggressive government action is the paternalism objection. If, however, the unhealthy food choices of Americans are substantially non-voluntary, then the two classic anti-paternalism arguments are unlikely to bar all paternalistic government anti-obesity policies.

¹⁶⁶ Just as physical coercion or threats of such coercion function to reduce the voluntariness of one's choices, factors such as manipulative advertising, lack of accurate information, and evolutionary predisposition can diminish one's ability to make voluntary choices. Indeed, such factors can be just as powerful and debilitating as applied external pressures.

¹⁶⁷ Even if individuals continue to make such choices *in ignorance* (i.e., persons continue to make seemingly foolish decisions, despite knowing the risks).

3. What Kinds of Anti-Obesity Policies Would Be Justified on Paternalistic Grounds?

It may both be true that Americans' unhealthy food choices are substantially non-voluntary and that the standard anti-paternalism arguments do not justify prohibiting all forms of paternalistic interference with our food choices. This does not mean, however, that any and all paternalistic anti-obesity policies are thereby justified. For example, no one would support jailing fast-food patrons, even if it was for their own good. So what kinds of anti-obesity policies can be justified on paternalistic grounds?

As an initial matter, we might support policies that aim to directly counteract one or more of the specific voluntariness-reducing factors enumerated earlier. For example, full disclosure laws could be implemented to counteract informational deficiencies, or compelled speech advertising laws (or advertising bans) could be passed to counter the effect of manipulative advertising.¹⁶⁸ Assuming such policies are not unduly intrusive, they should be relatively uncontroversial as they would only look to counter the effects of a specific voluntariness-reducing factor.

Indeed, such policies promote individual autonomy by eliminating voluntariness-reducing factors that threaten it.¹⁶⁹ The "paternalism conflicts with autonomy" objection should not bar such policies. Moreover, by looking to neutralize voluntariness-reducing factors that lead to unreflective food choices, they should be thought to further the good (especially the health) of individuals better than would an absence of legislation.¹⁷⁰ Therefore, neither should the consequentialist anti-paternalism objection bar such measures.

If many of the voluntariness-reducing factors discussed cannot be directly neutralized, it is nonetheless possible to mitigate the influence of these voluntariness-reducing factors on our food choices. This can be done by enacting policies that make unhealthy food choices relatively less attractive overall, and, by extension, healthy food choices comparatively more attractive.

For example, we might institute a "fat tax," and/or health food and exercise subsidies.¹⁷¹ A "fat tax" would not directly attack any particular voluntariness-reducing factor. Instead, it would attempt to tilt the scales of the overall food environment in favor of a healthy diet. This would vitiate the various voluntariness-reducing factors that increase the probability of an individual choosing an unhealthy

¹⁶⁸ As previously discussed, full disclosure laws and compelled speech regulation could most likely also be justified on non-paternalistic grounds as such policies are arguably not paternalistic at all; however, even assuming them to be paternalistic in nature, they could nonetheless be justified. As for advertising bans, they are certainly paternalistic, and thus, could not be justified on non-paternalistic grounds.

¹⁶⁹ Thus, the "paternalism conflicts with autonomy" objection should not bar such policies.

¹⁷⁰ Hence, the consequentialist anti-paternalism objection should not bar such policies.

¹⁷¹ See, e.g., Tatiana Andreyeva et. al., *The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food*, 100 AM. J. OF PUB. HEALTH, 216-22 (2010); Kelly D. Brownell, *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, NEW ENG. J. MED. 1-7 (2009); *Soft Drink Taxes: A Policy Brief*, YALE CTR. FOR FOOD POLICY & OBESITY (2009), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportSoftDrinkTaxFall2009.pdf>.

option. Taxes and subsidies would do this by making unhealthy food relatively more expensive (and thus less desirable), and healthy food relatively less expensive (and thus more desirable). Such measures have been shown to be effective.¹⁷²

These policies would mitigate the effect of voluntariness-reducing factors and allow persons to make maximally autonomous food decisions. The purpose would be merely the elimination of voluntariness-reducing factors in an attempt to promote genuine autonomy. Hence, such policies show *respect for autonomy and choice*, if anything. Therefore, such policies should not be defeated by the “paternalism conflicts with autonomy” objection. Because there is good reason to think that individuals significantly discount the health risks associated with eating unhealthy food, as previously discussed, there is good reason to believe that anti-obesity policies that shift the eating environment in a less obesogenic direction will promote the good of individuals better than in the absence of such legislation. Thus, the consequentialist anti-paternalism objection should likewise be thought not to bar policies of this kind.¹⁷³

4. Can More Heavy-Handed Anti-Obesity Policies Be Justified on Hard Paternalism Grounds?

This Article has argued that several anti-obesity policies (including educational and full disclosure laws, subsidies of healthy products, and taxes on particularly unhealthful foods) can be justified based upon: (1) the harm principle; (2) other non-paternalistic principles, such as reasonably presumed popular consent or approval; and/or (3) soft or weak paternalism. If such policies are implemented, Americans will become well aware of both the serious risks of an unhealthy lifestyle and of the nutritional content of the particular foods that they consume. Moreover, healthy options would be made widely available, and the background gastronomical context would be shifted in a decidedly healthful direction so that healthy eating could increasingly become the default choice. These policies would diminish the frequency of unhealthy eating by, *inter alia*, reason of ignorance, lack of choice, and inertia. Taken together, such changes promise to significantly reduce the incidence of obesity.

¹⁷² See, e.g., Andreyeva et. al. *supra* note 171; Brownell, *supra* note 171; YALE CTR. FOR FOOD POLICY & OBESITY, *supra* note 171.

¹⁷³ An anticipated objection to such a policy is that “fat taxes” or health food subsidies would push everyone’s food preferences in a healthy direction, including those who are not significantly compromised by voluntariness-reducing factors.. Hence, it would punish those fully informed and fully competent adults for their completely voluntary self-regarding decisions. In answering such a critic one could concede that with respect to this particular class of individuals they may well be correct that such a law would be unjustified. However, that being said, the administrative and other costs associated with finding and exempting such individuals would likely be too high to include such an exception. This would be a cost a government planner would simply be forced to bear.

Another question a government planner would have to consider is that of how much to tax unhealthy products, or how much to subsidize healthy options. While settling the exact amount is not a question that is appropriate to answer in this Article, theoretically, the combination of taxes and subsidies would be justified if together they changed the food landscape enough towards a healthy direction to mitigate all of the effects felt from the various voluntariness-reducing factors described.

Even if such policies turn out to be effective, it is nonetheless extremely implausible to suppose that they would entirely eliminate the obesity problem.¹⁷⁴ If so, some anti-obesity advocates might call for the implementation of further, more intrusive, measures to stem obesity. For example, they could push for: (1) more aggressive “fat taxes” aimed at completely destroying the market for (and preventing the consumption of) unhealthy products; (2) the rationing of unhealthy food; (3) the medicalization of such foods (i.e. requiring that unhealthy food be obtained via prescription); (4) outright bans on certain products; and/or (5) criminal penalties for selling or possessing particular foods.

It is clear that such heavy-handed measures could *only* be justified by a hard paternalism rationale. A ban on hamburgers, for example, could not be justified by either the harm principle or by weak paternalism. While the harm principle would justify requiring the hamburger-eater to pick up the costs due to his over-indulgence (as previously discussed), he could simply be made to pay these costs in the form of a tax on his unhealthy consumption (or otherwise). A ban would go well beyond the mere recoupment of societal costs.

Moreover, such a ban could not be supported on weak or soft paternalism grounds. Even if all of the previously-discussed voluntariness-reducing factors were eliminated or neutralized, many persons would nonetheless *voluntarily* choose to eat unhealthy foods. Any attempt to alter this voluntary behavior would exceed the scope of the soft paternalism mandate and cross the line into hard paternalism.

In sum, the only cogent reason for instituting such a complete ban would be to subordinate one’s voluntary choice to his supposed good, the *raison d’être* of the hard paternalist. Similarly, policies such as excessive taxation designed to destroy the market for (and consumption of) unhealthy products, and the rationing, medicalization, and criminalization of unhealthy products could only be supported by a hard paternalism rationale.¹⁷⁵

Since the above-mentioned heavy-handed policies can only be justified by appealing to hard paternalism, whether they are in fact justified will depend upon: (1) whether hard paternalism is *ever* justified and (2) assuming that it is, whether it justifies the types of anti-obesity policies that the committed hard paternalist may want to bring to bear, such as the banning of particular food products.

¹⁷⁴ Undoubtedly many persons will, entirely voluntarily, choose to habitually consume unhealthy food.

¹⁷⁵ Excessive taxation designed to destroy the market for (and consumption of) unhealthy products would be equivalent to a ban. Moreover, any level of taxation above that permitted by the harm principle, reasonably presumed societal consent, and soft paternalism should be seen to be only justifiable on hard paternalism grounds for such taxation would look to override one’s voluntary choices for one’s own good.

Rationing would prevent individuals from voluntarily “over-consuming,” and thus, would require a hard paternalism basis. Medicalization, assuming that unhealthy products would only be dispensed based upon the wisdom and consent of one’s physician, would also require a hard paternalism basis as one’s voluntary decision to consume unhealthy products would be both cumbersome and subject to veto by one’s doctor. Finally, criminal prohibitions would potentially punish individuals for their voluntary food choices and hence would require a hard paternalism grounding.

i. Is Hard Paternalism Ever Justified?

Several commentators have argued that hard paternalism, paternalistic interference that overrides an individual's voluntary choice for the purpose of furthering his own good, is *never* justified.¹⁷⁶ This antipathy towards hard paternalism is based chiefly upon the two anti-paternalism arguments previously considered: the consequentialist and the "autonomy-based" anti-paternalism arguments.¹⁷⁷

The consequentialist anti-paternalist argument may very well succeed in establishing a strong presumption against any proposed hard paternalistic interference.¹⁷⁸ After all, it seems that an individual who is informed of all of the relevant risks and benefits of his proposed course of action, and who is free of significant volitional or cognitive defects, is much more likely, due to his superior knowledge and motive with respect to his own good, to promote that good than would an external agent.¹⁷⁹ Indeed, this may be so in the vast majority of cases. If so, there should be a strong presumption against any proposed hard paternalistic interference.

Nonetheless, the consequentialist anti-paternalism argument cannot reasonably be thought to support an absolute ban on hard paternalism, as it is in the very nature of consequentialist reasoning to provide for exceptions. Consider, for example, one who voluntarily, knowing all the risks, decides to sell himself into slavery to a known brutal master for no articulated reason. Such a choice, regardless of how voluntary it is, would seem to result in negative consequences overall. To deny this would be to dogmatically cling to the belief that an individual who acts voluntarily *necessarily* best promotes his own good. If hard paternalism is never justified, it cannot be on the strength of the consequentialist anti-paternalism argument.

Another consequentialist argument has been employed against hard paternalism; specifically, the "argument from the developmental value of choice."¹⁸⁰ This argument recognizes that making one's own choices is essential to the development of one's ability to function effectively as a rational chooser.¹⁸¹ The argument contends that, like the mollycoddled child unable to function effectively in college away from the protective family nest, or the released institutionalized prisoner who does not know how to function in the absence of prison structure, the coddled citizen

¹⁷⁶ Perhaps the most prominent recent opponent of hard paternalism has been Joel Feinberg. See JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 24, 98, 119 (1986).

¹⁷⁷ See, e.g., *id.* at 58-60; KLEINIG, *supra* note 8, at 28-30.

¹⁷⁸ Recall that the consequentialist anti-paternalist argument states that, due to both superior information and motive with respect to one's own good, a paternalistic interference for the sake of that good is most likely to backfire, resulting in negative consequences overall. See section IV(A). As we have seen, when an individual's choice is significantly non-voluntary, this anti-paternalist argument is quite weak. It has considerably more bite when employed against the hard paternalist.

¹⁷⁹ See, e.g., Mill, *supra* note 56.

¹⁸⁰ See, e.g., KLEINIG, *supra* note 8, at 30-32.

¹⁸¹ *Id.*

will lose the ability to function effectively without the guiding hand of the state.¹⁸² While such concerns are legitimate, the argument only seems plausible if the state's paternalistic interference is wide in scope, covering many areas of one's life. For example, in a hypothetical theological state where the lives of citizens are regulated in minute detail, the worry that persons may lose their capacity to function effectively as rational choosers might be a pressing concern. If the state's hard paternalistic interference is strictly limited in scope, however, (i.e., to only some activities), the argument loses its plausibility. For example, seatbelt laws and other similar safety regulations justified on a hard paternalist rationale should not give much cause for concern that citizens will lose their ability to effectively think for themselves or to plan their lives.

The "autonomy-based" anti-paternalist argument holds the most promising justification for an absolute ban against hard paternalism. According to this objection, the hard paternalist, by disregarding and overriding one's voluntary choices, usurps and thereby ignores that person's autonomy, and his individuality.¹⁸³ Hard paternalism disrespects autonomy.¹⁸⁴

Most people appear to at least implicitly subscribe to this objection, as persons do not typically appreciate even a well-meaning individual purporting to deny them the right to make their own decisions.¹⁸⁵ Neither do they appreciate the paternalist's contention that he knows what is best for them.¹⁸⁶ They might state that the prospective paternalist has no business telling them what to do with their own life, communicating their belief that an external agent has *no right* to interfere with their own voluntary self-regarding behavior.¹⁸⁷ In sum, their objection is that hard paternalism disrespects their autonomy.¹⁸⁸

Importantly, the argument that hard paternalism disrespects autonomy applies in *every* case of hard paternalistic interference because, in *every* hard paternalistic interference, the hard paternalist usurps the target individual's autonomy by ignoring and overriding her voluntary choice(s).¹⁸⁹ Thus, in any proposed hard paternalistic intervention the prospective paternalist must demonstrate *why* the planned interference merits the overriding of the target individual's autonomy.¹⁹⁰

While overcoming the autonomy-based anti-paternalism argument is certainly not an easy task, many scholars have argued that it can be successfully done in certain circumstances.¹⁹¹ Four of the most prominent justifications include: (1) the

¹⁸² *Id.*

¹⁸³ See, e.g., KLEINIG, *supra* note 8, at 28; FEINBERG, *supra* note 176, at 57-62.

¹⁸⁴ See, e.g., KLEINIG, *supra* note 8, at 28; FEINBERG, *supra* note 176, at 57-62.

¹⁸⁵ See, e.g., FEINBERG, *supra* note 176, at 98.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Richard Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, 11 LEGAL THEORY 259, 263-65 (2005).

¹⁹⁰ *Id.*

¹⁹¹ See, e.g., KLEINIG, *supra* note 8, at 67-74; Arneson, *supra* note 189.

argument from freedom maximization; (2) the argument in defense of one's future self; (3) the argument based upon hypothetical rational consent; and (4) the argument from integrity.¹⁹²

One purported justification of hard paternalism, the argument from freedom maximization, states that a particular hard paternalistic interference may be justified if (in the unusual case) it functions to *increase* one's overall freedom.¹⁹³ For example, bans on smoking and fatty foods might increase freedom in the long-run by substantially improving both the health and number of the individual's later years. The problem with this response is that it misconstrues the autonomy-based objection against hard paternalism. The objection does not protest against the usurpation of freedom per se; rather, it objects to the usurpation of one's *autonomy*, the right to make one's own voluntary decisions *now*, even if such choices might, in some sense, limit one's freedom in the long-run.¹⁹⁴ Banning smoking and fatty foods would seriously limit one's ability to make one's own lifestyle decisions now, even if such measures would increase his long-term freedom. Thus, such policies would run afoul of the "autonomy-based" objection.¹⁹⁵

A second supposed defense of hard paternalism, the argument in defense of one's future self, also fails.¹⁹⁶ This argument contends that the usurpation of one's voluntary choices for one's own good may be justified where one's "future self" would (or at least can be reasonably expected to) consent to such interference.¹⁹⁷ We might imagine, for example, that a motorcyclist who opts not to wear a helmet would change his mind were he to become seriously injured.¹⁹⁸ Thus, his "future self" might be said to consent to a mandate that he wear a helmet *now*.¹⁹⁹ Although such an argument is superficially appealing, it is rife with problems. What one's future self would actually consent to is highly speculative, and even if one's future self later regretted an earlier foolish action, she might still object to some busybody's forceful interference with her earlier self. Moreover, the argument would seriously limit the *scope* of one's autonomy, one's capacity to choose for oneself, as one's decisions would consistently be threatened with the veto of a future, unknown, and alien being.²⁰⁰

A third prominent strategy has been to contend that hard paternalism may sometimes be justified based upon "hypothetical rational consent."²⁰¹ The idea here

¹⁹² See, e.g., KLEINIG, *supra* note 8, at 51-73.

¹⁹³ KLEINIG, *supra* note 8, at 53-55.

¹⁹⁴ *Id.* at 54-55.

¹⁹⁵ Another problem with this argument is that it would seem to prove too much. If accepted, it would seem to justify a whole range of intrusive measures regulating one's lifestyle, from the prohibition of pub crawls to sunbathing.

¹⁹⁶ See, e.g., KLEINIG, *supra* note 8, at 45-48.

¹⁹⁷ See, e.g., *id.*

¹⁹⁸ *Id.* at 47.

¹⁹⁹ *Id.*

²⁰⁰ For a summary of some of these, and other, problems, see *id.* at 46-47.

²⁰¹ *Id.*, at 63-67; see also FEINBERG, *supra* note 176, at 184-86.

is that if a *rational person would consent* to a particular action (or inaction), then a paternalistic interference to ensure that one performs that action (or not) is justifiable.²⁰² This response is also deeply troubling, as it sanctions the ignoring and overriding of the real, expressed wishes of an individual in favor of the desires of a mythical rational person.²⁰³ Thus, it sanctions *forcing* an individual to be rational. This defense of hard paternalism disrespects one's autonomy by, *inter alia*, rejecting one's right to take certain risks or to live what may be deemed to be an unjustifiably risky lifestyle. Moreover, because "there is a tendency for the rational individual to reflect the understanding and values of upholders of power or the dominant ideology . . . [hypothetical rational consent is] prey to idiosyncrasy and partisan constructions."²⁰⁴ In sum, it hardly seems a viable defense of hard paternalism.

The most promising defense of hard paternalism is the "argument from integrity," which contends that when an individual endeavors to make a choice (1) for trivial reasons;²⁰⁵ (2) that promises insignificant benefits; and (3) such a choice puts in jeopardy one's core life projects, goals, or values; then (4) one may be justified in overriding that choice for that individual's own good.²⁰⁶ As John Kleinig states:

Where our conduct or choices place our more permanent, stable, and central projects in jeopardy, and where what comes to expression in this conduct or these choices manifests aspects of our personality that do not rank highly in our constellation of desires, dispositions, etc., benevolent interference will not constitute a violation of integrity. Indeed, if anything, it helps to preserve it.²⁰⁷ It is not to voluntary choices as such that liberalism is committed, but to the persons who express themselves in their choices. Where choices having marginal significance to a person's settled life-plans and values threaten serious disruption to their realization, we do not violate their integrity in interfering with them.²⁰⁸

Consider, for example, seat belt laws criminalizing (albeit with a modest fine) all those who refuse to wear seat belts. The argument from integrity would defend these laws on hard paternalistic grounds because: (1) those who do not wear seatbelts typically do so for trivial reasons, such as laziness; (2) not wearing a seatbelt provides, at best, relatively insignificant benefits, such as a marginal increase in comfort; and (3) failing to buckle-up dramatically increases the risk of serious injury or death, putting in jeopardy one's life projects and goals.²⁰⁹ In such a case, a paternalistic interference is thought to be justified because the purpose of the

²⁰² KLEINIG, *supra* note 8, at 63-67; FEINBERG, *supra* note 176, at 184-86.

²⁰³ KLEINIG, *supra* note 8, at 63-67; FEINBERG, *supra* note 176, at 184-86.

²⁰⁴ KLEINIG, *supra* note 8, at 63.

²⁰⁵ For example, from laziness, lack of discipline, impulsiveness, or a "tendency to rationalize the risks involved." *Id.* at 68.

²⁰⁶ *Id.* at 67-73.

²⁰⁷ *Id.* at 68.

²⁰⁸ *Id.* at 72.

²⁰⁹ *Id.* at 73.

intervention is to preserve and protect one's cherished values, goals, and life projects. The intervention is in defense of one's integrity.²¹⁰

A particular strength of this justificatory strategy is that it both enables the paternalist to prevent an individual from making especially dangerous and foolish decisions lacking any sort of redeeming value, and, at the same time, forces the paternalist to respect an individual's voluntary choices made in furtherance of any significant individual end, regardless of how risky, foolish, or irrational those decisions may appear to be.²¹¹ For example, we might conclude that the death-defying motorcycle stunts performed by the late Evel Knievel were indefensibly risky, foolish and even irrational; nonetheless, because such stunts were performed by the daredevil in furtherance of ends that he found to be important, we would be unable to interfere.

While it is true that such a paternalist would limit one's ability to make trivial, potentially life-destroying decisions, she would maximize one's ability to live the life that she wants and would not get in the way of her decision to achieve any of her even mildly important ends.²¹² On the contrary, the paternalist would be a supporter and defender of her integrity.

ii. Can Hard Paternalism Justify More Aggressive
Anti-Obesity Policies Such as Product Bans?

It has been argued above that the consequentialist anti-paternalism argument is incapable of justifying an absolute ban on hard paternalism, but that it may succeed in establishing a strong presumption against hard paternalistic interference. Turning to the specific case of anti-obesity legislation, a strong presumption against anti-obesity legislation is warranted based upon such consequentialist reasoning. To see why, consider an illustrative case of hard paternalistic interference: a ban on hamburgers.

It seems very likely that a ban on hamburgers or other fatty food products would result in an overall diminishment of one's good. While it is true that the banning of particular unhealthy foods might marginally (or even significantly) improve one's health, the negative effects flowing from such a ban are very likely to outweigh any positive benefits. *Inter alia*, banning such foods may: (1) deprive individuals of the various pleasures associated with consuming these foods, such as the pleasures of taste, smell, anticipation, and psychological comfort; (2) lead to feelings of deep resentment from being told what to do; (3) reduce one's ability to properly regulate her own diet; (4) result in the increased use of other harmful products, such as alcohol or drugs in an effort to compensate for the lack of comforting fatty foods; (5) lead to the creation of a black market for fatty foods and a concomitant increase in criminal activity and disrespect for the law; and (6) result in decreased tax revenues.

In sum, a ban on unhealthy products that individuals enjoy, such as hamburgers and doughnuts, would likely have very negative consequences. While one must be open to the possibility that, in particular cases of hard paternalistic food regulation,

²¹⁰ *Id.* at 72-73.

²¹¹ *Id.*

²¹² *Id.* at 68.

the consequentialist calculus would come out positive,²¹³ it seems that this would not typically be the case. Thus, it may be prudent to adopt a strong presumption against bans and other aggressive anti-obesity policies underwritten by hard paternalism. At the very least, it seems legitimate to put the burden of proof on the one arguing in favor of such regulation.

While a strong presumption against hard paternalistic food regulation may be justified, as discussed above, this can merely be a presumption and cannot rule out every possible case of food regulation supported by hard paternalism. Can the argument from autonomy rule out every such policy?

Although the “argument from autonomy” does rule out most instances of hard paternalism, it is subject to the “argument from integrity” exception, and thus it cannot rule out *all* cases of hard paternalistic interference. However, it may nonetheless proscribe the great majority of anti-obesity policies underwritten by such a rationale as most anti-obesity policies supported by hard paternalism cannot be seen to fall under the exception. For example, the integrity exception would not support bans of popular products such as hamburgers, fries, sugar, and salt. For even if the various voluntariness-reducing factors discussed earlier were eliminated or neutralized, such that food choices could be deemed to be sufficiently voluntary, many persons would likely continue to consume these foods for non-trivial reasons. Many individuals would continue to voluntarily consume unhealthy snacks and meals because they greatly enjoy, *inter alia*, the taste of these foods, the anticipation of eating such foods, or the psychological comfort that these foods provide.

In more extreme cases, eating particular unhealthy foods may constitute part of one’s core identity or life-plan. For example, the immigrant who continues to eat a diet of her local dishes typically does so because she has become accustomed to the taste and doing so provides a link to her home country. Thus, it helps to sustain her original identity. Similarly, the gourmand may make a lifestyle out of tasting and consuming delectable (and very likely unhealthy) foods.

When persons *voluntarily* consume unhealthy foods, they typically do so for reasons related to their particular conception of the good. While the choice to eat fast food three times a day is surely imprudent, and possibly even irrational, to deny one the opportunity to voluntarily do so would seriously limit one’s autonomy, one’s ability to make one’s own life decisions. The hard paternalist, who denies an individual the opportunity to eat poorly, disrespects her autonomy, and expresses contempt for her chosen conception of the good—her chosen life-plan. Thus, a paternalistic intervention that ignores and overrides the individual’s desire to eat a particular diet threatens, rather than supports, her integrity. Hence, it is not justifiable under the integrity exception.

Is any type of aggressive food regulation backed by hard paternalism justifiable? Could any food product be justifiably banned? The answer is yes, *if* the banning of the particular food product would promise positive consequentialist results and would find shelter under the integrity exception to the “autonomy-based” objection to hard paternalism. As discussed previously, fatty and otherwise unhealthy foods that persons enjoy would not meet these criteria; certain products such as trans-fatty acids (“trans-fats”) and spoiled food, however, may qualify.

²¹³ It is in the nature of consequentialist reasoning to provide for exceptions and it would be presumptuous to simply assume that no exceptions exist.

Consider the recent trans-fats bans instituted in several cities.²¹⁴ It has been alleged both that trans-fats are extremely dangerous to one's long-term health and that they have no distinctive taste.²¹⁵ If this is true, there is a strong argument for the banning of trans-fats on hard paternalism grounds because the consumption of trans-fats would simultaneously provide no benefits, result in virtually no loss to one's freedom, and seriously threaten one's health and one's values, goals, and life projects. Trans-fats could be banned in defense of one's integrity. On similar grounds, currently prohibited products, such as spoiled milk and contaminated meat, can be justifiably banned.

In sum, hard paternalism does not provide a convincing ground for much anti-obesity regulation. A policy supported only by hard paternalism, such as a ban on hamburgers or doughnuts, would go significantly beyond an attempt to merely mitigate the several voluntariness-reducing factors that decrease the extent to which unhealthy food choices are voluntary. Indeed, assuming that Americans were fully aware of the risks of unhealthy food and did not suffer from any of the voluntariness-reducing factors that have been enumerated, some would still fully voluntarily choose to indulge in unhealthy foods from time to time.

Any sort of ban on popular unhealthy products would completely override the voluntary self-regarding choices of individuals, and thus, would constitute an extreme interference with liberty. The consequences of such a ban are also very likely to be dire; hence, there should be a strong presumption against such a blunt policy instrument. Moreover, such a ban or other similar heavy-handed policy would need to overcome the "autonomy-based" objection to hard paternalism. While some food policies might overcome both the consequentialist presumption and the autonomy-based objection, such policies would be the rare exception, and would essentially only justify the banning of high-risk, no-utility products. Such limited bans would hardly be enough to win the war on obesity.

In sum, few potentially effective anti-obesity policies justified exclusively by hard paternalism can be thought to be legitimate. Progress in fighting obesity must come primarily from the alternative rationales previously discussed. Fortunately, those rationales sanction the implementation of numerous policies that are likely to effectively reduce the incidence of American obesity.

V. THE SLIPPERY SLOPE OBJECTION TO GOVERNMENT ANTI-OBESITY REGULATION

The paternalism objection to government regulation of obesity contends that anti-obesity legislation constitutes unjustified paternalism.²¹⁶ While this objection should be taken seriously and should be seen to prohibit the implementation of many more aggressive and heavy-handed policies, such as bans on or the rationing of fatty foods, the force of the objection should not be overstated. *Inter alia*, anti-obesity education policies, advertising restrictions, full-disclosure laws, subsidies, and taxes can all be justified. These measures are either supported on non-paternalism grounds, and thus avoid the paternalism objection entirely, or can be otherwise justified notwithstanding the paternalism objection. This Article has argued that the case for

²¹⁴ See, e.g., *Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils*, BANTRANSFATS.COM (2011), <http://www.bantransfats.com/>.

²¹⁵ See, e.g., *id.*

²¹⁶ See, e.g., Rizzo & Whitman, *supra* note 50.

these sorts of policies is compelling. Before making a final recommendation, however, this paper will examine one last prominent objection to government anti-obesity legislation—that of the “slippery slope.”

The slippery slope objection, in the context of anti-obesity regulation, concedes that some anti-obesity policies (for example, full disclosure laws) might be unobjectionable (or even beneficial) by themselves; it contends, however, that the institution of even relatively mild government policies will lead to ever increasing regulation of one’s diet and life.²¹⁷ The idea is that through a series of small, similar or analogous steps, the first and relatively modest regulation A will lead to a slightly more intrusive regulation B, which will lead to C, then to D, and so forth.²¹⁸ While A may be beneficial, D is quite objectionable; therefore, A should be opposed in the first place to avoid bringing about D.²¹⁹

Thus, while requiring fast-food outlets to post nutritional information may be relatively benign, since doing so would purportedly lead to much more draconian restrictions later (such as total fast-food bans), the first, relatively mild, step should be opposed now to avoid the highly undesirable consequences that await us at the bottom of the slope.

There are two versions of the “slippery slope,” argument, both of which are employed to argue against government anti-obesity regulation: (1) the conceptual or quasi-logical version; and (2) the causal version.²²⁰

The conceptual or quasi-logical version of the argument contends that if there is no principled dividing line between two cases, A and D, then either A and D must both be accepted or both rejected.²²¹ Allegedly, if A is accepted, then B must also be accepted, assuming that there is no principled distinction between A and B.²²² Once B is accepted, C must also be recognized, since there is no principled distinction between B and C, and so on. In sum, sooner or later, one must accept D.²²³

As applied to anti-obesity regulation, this conceptual slippery slope argument is completely unconvincing. First, even assuming that this argument has some weight, in the case of government anti-obesity regulation, *there is a principled dividing line* that distinguishes between legitimate and non-legitimate regulations. As this Article has argued in detail, a regulation based upon the harm principle, another non-paternalistic principle, or soft or weak paternalism can be justified.²²⁴ On the other hand, a regulation that is supported only by hard paternalism is generally not

²¹⁷ See, e.g., HARSANYI, *supra* note 50, at 11, 30, 38, 128, 228; JAMES T. BENNETT & THOMAS J. DILORENZO, *THE FOOD & DRINK POLICE: AMERICA’S NANNIES, BUSYBODIES & PETTY TYRANTS* 131-35 (1999); Rizzo & Whitman, *supra* note 50.

²¹⁸ See, e.g., Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1028-30 (2003); Hugh Lafollette, *Living on a Slippery Slope*, 9 J. OF ETHICS 475, 477 (2005).

²¹⁹ Volokh, *supra* note 218, at 1028; Lafollette, *supra* note 218, at 477.

²²⁰ See, e.g., Rizzo & Whitman, *supra* note 50.

²²¹ See, e.g., FALLACY FILES, SLIPPERY SLOPE (2011), www.fallacyfiles.org/slipslop.html.

²²² *Id.*

²²³ *Id.*

²²⁴ It would also have to promise to effectively fight obesity without the imposition of counteracting costs that would overtake the gains brought about by obesity reduction.

supportable, subject only to a very limited “integrity” exception. In short, there is no significant principled line-drawing problem.

Second, even if there was no principle dividing line to distinguish between good and bad anti-obesity regulations, the argument still would not be convincing for it is a logical fallacy.²²⁵ Just because there is no clear dividing line between two concepts, A and D, it simply does *not* follow that there is no significant difference between the two.²²⁶ Indeed, a great enough difference in degree can amount to a difference in kind.²²⁷

Consider a man with 10,000 hairs on his head.²²⁸ Such a man is not bald, and neither would he be bald if he had 9,999 hairs on his head. There is no significant difference between the two cases. Similarly, there is no significant difference between having 9,999 hairs on one’s head and having 9,998, and so forth. Having one more hair *never* makes a significant difference such that a man would be bald in one case and not bald in the other. There is no significant or principled dividing line between being bald and not being bald. Nonetheless, there is a very significant difference between the bald man and the man with 10,000 hairs on his head.²²⁹ One man is bald, the other is not. This simply illustrates that a big enough difference in degree can come to constitute a difference in kind.²³⁰

Here, even if no principled line existed between relatively modest anti-obesity policies and severe food regulations—intrusive regulations governing in strict detail every aspect of one’s diet—it does not follow that draconian regulations would have to be accepted, such as bans on doughnuts, merely because more modest proposals were previously adopted. It would not be required any more than accepting that Mill’s uncontroversial harm principle justifies the criminalization of murder would necessitate criminalizing every single behavior that harms another, such as rudeness or inane conversations. In sum, the conceptual or quasi-logical slippery slope argument is completely unconvincing.

In addition to appealing to the conceptual or quasi-logical version of the slippery slope argument, anti-regulation activists have also appealed to a “causal” variant of the argument.²³¹ This version concedes that taking a first, relatively mild, step into anti-obesity regulation, such as requiring fast-food outlets to post nutritional information, would not logically require accepting more draconian regulations; nonetheless, it argues that taking such a step will very likely lead to the later implementation of highly intrusive measures through some sort of causal mechanism.²³²

²²⁵ See, e.g., FALLACY FILES, *supra* note 221.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ This example is found in FALLACY FILES, *supra* note 221.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See, e.g., HARSANYI, *supra* note 50, at 11, 30, 38, 128, 228; BENNETT & DILORENZO, *supra* note 217, at 131-35; RIZZO & WHITMAN, *supra* note 50, at 717-22.

²³² See, e.g., HARSANYI, *supra* note 50, at 11, 30, 38, 128, 228; BENNETT & DILORENZO, *supra* note 217, at 131-35; RIZZO & WHITMAN, *supra* note 50, at 717-22.

For example, perhaps taking that first step will have an “attitude-altering effect.” It might change persons’ attitudes towards the propriety of anti-obesity regulations, perhaps inuring them to the idea, and thus, making them willing to countenance more intrusive regulations later on.²³³ Or maybe the phenomenon of “small change apathy” would lead to even stricter regulations. The idea here is that it is not worth one’s limited time and energy to oppose small changes in regulation, so one may not oppose seemingly mild and non-intrusive regulation, but, through the continued ratcheting up of regulations, a very intrusive result may eventually come to pass.²³⁴ Or perhaps health advocates, upon achieving a small victory, will gain political momentum and parlay this momentum into establishing ever more draconian policies.²³⁵ Finally, it is possible that these relatively modest regulations will do little to affect obesity rates; having already accepted the premise that it is the government’s business to be involved in the war on obesity (and confronted with the failure of relatively benign regulations), however, the public might be tempted to support significantly more aggressive policies designed to solve the problem.²³⁶ Whatever the precise causal process, the idea is that through *some* mechanism, adopting relatively mild regulations now will lead to much more intrusive measures later.

Although widely employed, this “causal” slippery slope argument is rife with problems, the most pressing being its highly speculative nature. It is important to note that the strength of the argument is inversely proportional to the number of causal chains in the argument and directly proportional to the strength of each of the chains.²³⁷ To wit, the more causal chains in the argument, the weaker the argument, and the weaker the empirical evidence associated with each chain (i.e. the evidence purporting to show that A leads to B), the weaker the argument.²³⁸ If a causal slippery slope argument is to be convincing, one must carefully lay out all of the steps and put forth reasonable evidence that each step will lead to the next.²³⁹

Unfortunately, causal slippery slope arguments are frequently, if not typically, used to mask the lack of such hard evidence.²⁴⁰ For example, instead of outlining specific evidence as to *why* and *how* implementing A will lead to B, proponents of such arguments typically simply assert that A and B are on a slippery slope.²⁴¹ Such a response, however, is just to make the conclusory statement that B will follow from A. The mention of the slippery slope between A and B, by itself, adds absolutely nothing to the argument; the reference to a “slippery slope” is merely rhetorical.²⁴²

²³³ See Volokh, *supra* note 218, at 1077-80 (discussing the attitude-altering effect).

²³⁴ See Volokh, *supra* note 218, at 1104 (discussing small change apathy).

²³⁵ *Id.* at 1118.

²³⁶ *Id.* at 1050.

²³⁷ See, e.g., Lafollette, *supra* note 218; FALLACY FILES, *supra* note 221.

²³⁸ See, e.g., *id.*

²³⁹ See, e.g., *id.*

²⁴⁰ Lafollette, *supra* note 218, at 481.

²⁴¹ *Id.*

²⁴² *Id.*

There is good reason to be suspicious of causal slippery slope arguments in general, and, as applied to anti-obesity regulation, the causal slippery slope argument is hardly convincing. There is little reason to think that implementing modest anti-obesity proposals (such as the conspicuous posting of nutritional information) will lead to bans of fatty foods, a Spartan-like regime regulating minute aspects of one's health and diet, or other similar types of heavy-handed policies.

For some initial assurance, recall that in the case of anti-obesity legislation, principled lines exist to prevent such legislation from becoming all-encompassing. Specifically, anti-obesity policies will be justified if they are supported by either non-paternalistic or soft paternalistic reasons, they promise to be effective in reducing obesity, and they do not carry with them countervailing costs sufficient to destroy their benefits.²⁴³ In contrast, measures supported only on hard paternalism grounds will not be justified unless they come within the very narrow "defense of integrity" exception.²⁴⁴ Thus, highly intrusive policies such as bans and the rationing of popular comfort foods would be prohibited in principle.

Nonetheless, many assume that such principled lines would be ignored and that any sort of government anti-obesity regulation would inevitably lead to ever-more intrusive and burdensome regulations later.²⁴⁵ This argument seems fanciful. Notably, the government is already deeply involved in the food industry in numerous ways; for example, in regulating food safety. Anti-obesity regulations would hardly be the government's first foray into the food industry; thus, approving such policies would not create a vast new sphere of government regulation. Consequently, the mere approval of some government anti-obesity policies would not open the flood gates to all sorts of intrusive food regulations. Indeed, the government has been regulating what Americans eat for years, and such a parade of horrible has not yet occurred.

Moreover, implementing any of the anti-obesity policies advocated in this Article would not create a great risk of draconian food regulations later on. Consider the various educational and "full-disclosure" policies previously discussed. Once the government requires nutritional and caloric information to be clearly and effectively communicated, further action would not seem to be required on this front; thus, there appears to be little risk of educational and full-disclosure laws becoming increasingly more intrusive.

Subsidies and taxes might be thought to be the types of policies giving rise to the greatest risk of indefensible regulatory expansion. Once the propriety of taxing unhealthy foods is accepted, one might worry that tax rates would steadily increase to the point where a Twinkie costs \$20, \$200, or even \$2000. Even with taxes, however, there is little cause for concern of out of control regulation. As discussed earlier, principled reasons argue against the excessive taxation of unhealthy foods. Doing so would constitute unacceptable hard paternalism.

Although such principles might be ignored, it seems unlikely that Americans would support such "excessive" taxes. While some interest groups may push for an increasingly aggressive level of taxation, they would have to overcome the powerful

²⁴³ See *supra*, Part IV(B) and IV(C)(3).

²⁴⁴ See *supra*, Part IV(C)(4)(ii).

²⁴⁵ See, e.g., HARSANYI, *supra* note 50, at 11, 30, 38, 128, 228; BENNETT, *supra* note 217, at 131-35; RIZZO & WHITMAN, *supra* note 50, at 717-22.

(and much better funded) food lobby interest groups on the other side; this would be difficult without the support of the public. While concededly there is some risk that taxes on unhealthy foods could get out of control, this is a risk associated with all taxes. Any type of tax may be increased to unjustified levels. For example, it is conceivable that average income taxes could rise to 70, 80, 90, or even 100%. The mere possibility of such abuse hardly seems a convincing reason not to impose an income tax. Unless it can be shown that fat taxes specifically carry a great risk of abuse, the argument against such taxes is unconvincing.

Finally, are the anti-obesity policies advocated in this Article likely to lead to complete bans of unhealthy foods? Such a scenario seems unlikely. Such bans are not supported by any significant segment of the American public. In addition, product bans appear unlikely to gain widespread support in the future because Americans will likely continue to enjoy the pleasures associated with eating unhealthy foods. Moreover, a future ban would have to overcome the powerful interests of the food lobby. For all of these reasons, future bans of popular products should not be a pressing cause for concern.

In conclusion, the causal slippery slope argument appears to have little to show for it. The idea that implementing rather modest anti-obesity policies would lead to such heavy-handed policies as food bans and criminal penalties appears to be rather fantastic. There is no clear explanation that would bring about the slippage, and it is not clear why the principled limits to food regulation would not prevent the unjustified expansion of the government's anti-obesity mandate.²⁴⁶ In sum, the causal slippery slope argument seems to be little more than fear-mongering.

VI. CONCLUSION

The American obesity crisis is responsible for staggering social costs, including at least 160,000 deaths per year, heavy physical and psychological costs, and an estimated \$215 billion a year in economic expenses.²⁴⁷ Given that the government is the best-placed actor to address the problem, there seems to be a very strong *prima facie* case for government intervention. As we have seen, however, there is a major objection. Specifically, critics argue that government anti-obesity legislation constitutes unjustified government paternalism; therefore, the government is thought to lack the right to implement anti-obesity policies.²⁴⁸

Although the paternalism objection establishes important limits to government intervention,²⁴⁹ it cannot be seen to proscribe *all* government anti-obesity measures. First, many anti-obesity policies, often incorrectly thought to be paternalistic, are in

²⁴⁶ The argument would no doubt be that persons would ignore such principled distinctions. Therefore, because of the public's ignorance, the public should be denied the benefit of justified anti-obesity policies now because they may later abuse the power of government anti-obesity regulation. It is ironic that the supporter of the causal slippery slope argument must appeal to this decidedly paternalistic argument to argue against paternalistic anti-obesity legislation on the grounds of the slippery slope objection.

²⁴⁷ NAT'L INST. OF HEALTH, *supra* note 2; Hammond & Levine, *supra* note 4.

²⁴⁸ See, e.g., Boaz, *supra* note 6.

²⁴⁹ Specifically, the paternalism objection bars most anti-obesity policies supported exclusively on hard paternalistic grounds (subject only to a very limited "defense of integrity" exception).

fact nothing of the sort, and can be justified entirely on non-paternalistic grounds. Second, even some policies that are genuinely paternalistic can nonetheless be justified on soft paternalistic grounds.²⁵⁰ Indeed, several anti-obesity policies based upon either non-paternalistic or soft paternalistic grounds are justified. For example, full disclosure laws, advertising restrictions, healthy food subsidies, and “fat taxes.”

The government would be wise to implement such policies because they promise real progress in the war on obesity. In doing so, policymakers need not pay much attention to the so-called slippery slope argument, as the risk of slippage is in reality more chimerical than real. Moreover, there are severe costs associated with doing nothing. As long as the government fails to directly address the obesity crisis, more Americans will die from obesity-related conditions, more Americans will suffer debilitating physical and psychological impediments, and substantial economic resources will be lost. There is no principled reason for the government not to become involved in the war on obesity, and such intervention promises great benefits. The time for action is now.

²⁵⁰ Moreover, many policies will be supported by both rationales and will receive even further support. For example, fat taxes may be justified both on a harm to others rationale (i.e., to recoup increased taxpayer-funded medical costs due to overweight and obesity) and on a soft paternalistic rationale to counter the effect of voluntariness-reducing factors. To the extent that policies can be supported on multiple grounds, their justification is further strengthened.