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Limiting Liberty to Prevent Obesity: Justifiability of Strong Hard Paternalism in Public Health Regulation

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Limiting Liberty to Prevent Obesity: Justifiability of Strong Hard Paternalism in Public Health Regulation

Abstract
Because of the largely self-regarding nature of obesity, many current and proposed public health regulatory measures are paternalistic. That is, these measures interfere with a person's liberty with the primary goal of improving that person's own welfare.

Paternalistic public health measures may be effective in reducing obesity. They may even be the only sufficiently effective type of regulation. But many commentators argue that paternalistic public health measures are not politically viable enough to get enacted. After all, paternalism is repugnant in our individualistic culture. It is "wrong" for the government to limit our liberty for our own good.

In this Article, I argue that such pessimism is misplaced. Defeatist and despairing commentators are working with an impoverished conceptual framework. I offer a richer vocabulary. By linking current debates in public health ethics to classic work in normative jurisprudence and the philosophy of law, I distinguish ethically distinct types of hard paternalism. Each has its own unique conditions for justifiability. By focusing on these differences, I demonstrate that there are abundant opportunities for hard paternalistic regulatory measures to address obesity and other public health problems.

Keywords
Liberty, Obesity, Paternalism, Public health regulation

Disciplines
Civil Rights and Discrimination | Community Health and Preventive Medicine | Medical Jurisprudence

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THADDEUS MASON POPE

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In this Article, I argue that such pessimism is misplaced. Defeatist and despairing commentators are working with an impoverished conceptual framework. I offer a richer vocabulary. By linking current debates in public health ethics to classic works in normative jurisprudence and the philosophy of law, I distinguish ethically distinct types of hard paternalism. Each has its own unique conditions for justifiability. By focusing on these differences, I demonstrate that there are abundant opportunities for hard paternalistic regulatory measures to address obesity and other public health problems.

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Limiting Liberty to Prevent Obesity: Justifiability of Strong Hard Paternalism in Public Health Regulation

THADDEUS MASON POPE*

I. INTRODUCTION

Obesity is a major public health problem.[1] Fortunately, there is a wide range of regulatory efforts that federal, state, and local governments can take to address the problem.[2] But because of the largely self-regarding nature of obesity, many of the current and proposed regulatory measures are paternalistic.[3] That is, these measures may interfere with a person's individual liberty with the goal of improving his welfare.[4]

Will paternalistic regulatory measures be effective in reducing obesity? Are they politically viable enough to get enacted? In *Public Health Regulation and the Limits of Paternalism*, Professor Friedman is not optimistic that we can answer either of these two questions affirmatively. He argues that paternalism "has peaked" and "may have reached the

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[1] David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1711–14 (2014).

[2] Public health law experts identify seven distinct types of legal tools that regulators can use to promote public health: (1) taxation and spending; (2) altering the information environment (e.g., labeling, advertising); (3) altering the built environment (e.g., zoning to encourage physical activity); (4) altering the socioeconomic environment; (5) direct regulation; (6) deregulation; and (7) tort liability. *See, e.g.*, LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 35–40 (2000) (discussing public health regulation through taxation and spending); World Health Org., *European Charter on Counteracting Obesity*, EUR/06/5062700/8 (Nov. 16, 2006) (noting that it should be a priority to provide affordable, healthy choices to lower socioeconomic population groups); Julie Ralston Aoki et al., *Beyond the Code Book: Legal Tools for Accelerating Progress in Obesity Prevention*, 41 J.L. MED. & ETHICS 61, 61–65 (2013) (pointing out the possibility of tort liability as a way to promote public health); James G. Hodge et al., *New Frontiers in Obesity Control: Innovative Public Health Interventions*, 5 DUKE F. FOR L. & SOC. CHANGE 1, 1–2 (2013) (noting that altering the built environment and altering the information environment are two reforms considered by regulators); Robert MacCoun et al., *Assessing Alternative Drug Control Regimes*, 15 J. POL'Y ANALYSIS & MGMT. 330, 331–38 (1996) (discussing different types of drug control regimes ranging from prohibition to deregulation); Bryan Thomas & Lawrence O. Gostin, *Tackling the NCD Crisis: Innovations in Law and Governance*, 41 J.L. MED. & ETHICS 16, 19–21 (2013) (providing governmental strategies for addressing non-communicable diseases).

[3] *See generally* Friedman, *supra* note 1, Part III.B.2.

[4] *See* Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 660 (2004) ("Paternalism is the restriction of a subject's self-regarding conduct for the good of that same subject.").

natural limits of effectiveness."[5] Specifically, Friedman contends that paternalistic regulatory measures to address obesity suffer from two types of material limitations: efficacy problems and practicality problems.[6]

Friedman's argument proceeds in two stages. First, he argues that *soft* paternalistic measures are not sufficiently efficacious.[7] These measures, which alter the decision-making environment, yet do not wholly eliminate unhealthy choices, are usually too weak to adequately address the obesity problem.[8] They are insufficient to overcome human biases and change personal behavior.[9] Friedman contends that *hard* paternalistic measures are needed that ban the unhealthy choices and make them impossible.[10]

In the second stage of his argument, Friedman argues that we cannot have what we need.[11] Having already established the necessity for hard paternalism, Friedman argues that it is impractical because hard paternalism is too socially unpalatable to deploy.[12] It has, Friedman explains, "reached natural limits in terms of popular viability."[13]

I am more optimistic than Friedman. The Rolling Stones may be right that "you can't always get what you want."[14] But they are also right that "if you try sometime you find you get what you need."[15] This will be my overarching theme: We can get the hard paternalism that we need. For the sake of argument, I will accept Friedman's contention that only hard paternalistic measures are sufficient to adequately address the obesity problem.[16] I focus this responsive commentary on disputing the second part of Friedman's argument that hard paternalism is impractical and unacceptable.

Friedman contends that we cannot get the hard paternalism that we need.[17] But he fails to distinguish materially different *types* of hard paternalism. Admittedly, the public has rejected, and will continue to

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[5] Friedman, *supra* note 1, at 1693–94.

[6] *See id.* ("[F]inding viable opportunities to change consumption and physical activity patterns through hard paternalism proves difficult, and soft paternalism can prove ineffective.").

[7] *Id.* at 1694.

[8] *Id.* at 1701–03, 1768–69.

[9] *Id.* at 1768.

[10] *Id.* at 1769.

[11] *See id.* at 1694 ("Paternalism has peaked, for now, in the realm of public health regulation.").

[12] *Id.* at 1767–68.

[13] *Id.* at 1710.

[14] THE ROLLING STONES, *You Can't Always Get What You Want*, *on* LET IT BLEED (London Records 1969).

[15] *Id.*

[16] While I do not have space here to review the empirical research, this claim seems more than plausible. *See, e.g.*, *One in Three in the UK Can't Afford to Eat Healthily*, NUFFIELD HEALTH (Jan. 14, 2014), http://www.nuffieldhealth.com/fitness-and-wellbeing/news/One-in-three-in-the-UK-cant-afford-to-eat-healthily (finding twenty percent of obese people surveyed "would rather be overweight than watch what they eat").

[17] *See* Friedman, *supra* note 1, at 1767.

reject, many types of hard paternalistic regulation.[18] But they have not rejected *all* types of hard paternalism.[19] My primary objective in this Article is to draw some conceptual distinctions that light the path forward for justifiable hard paternalistic measures to address obesity.

In Part II, I summarize Friedman's argument regarding the necessity, yet impracticality, of hard paternalism. Then in Parts III and IV, I draw two sets of distinctions that help distinguish practical hard paternalism from impractical hard paternalism.

In Part III, I distinguish "weak" hard paternalism from "strong" hard paternalism. Friedman uses "hard paternalism" to focus on the degree of liberty interference.[20] He fails to consider the reason or motivation for the interference. By attending to this dimension, it becomes clear that the range of potentially practical and efficacious hard paternalism is actually broader than what Friedman concludes is viable.

Finally, in Part IV, I make two arguments for the justifiability of hard paternalism. First, weak hard paternalism is almost always justified because it entails only the restriction of conduct that is not substantially voluntary. Second, even strong hard paternalism is sometimes justified; while restricting an individual's self-regarding, substantially voluntary conduct is rarely justified, it can be under certain circumstances. Strong hard paternalism therefore should not be categorically dismissed as impractical and unacceptable. I defend seven conditions under which hard paternalistic public health measures are justified.

I conclude that Friedman is too pessimistic and parsimonious. He thinks that there is only a smattering of opportunities for hard paternalism to address obesity. By distinguishing ethically distinct types of hard paternalism, I demonstrate that there are abundant opportunities for hard paternalistic regulatory measures to address obesity and other public health problems.

II. SUMMARY OF FRIEDMAN'S ARGUMENT

Friedman argues that public health regulators are in a no-win situation. They can make material progress on attacking difficult problems like obesity only by using hard paternalistic interventions.[21] But hard paternalistic interventions are not politically viable.[22] So, regulators are in

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[18] *See id.* at 1692 (concluding, based on the examples of marijuana legalization, fluoridation, and genetically modified foods, that the public has definitely rejected "visible, hard paternalism").

[19] *See id.* at 1709 (suggesting that hidden hard paternalism may still be a viable option for regulating the public's behavior and choices).

[20] *See id.* at 1694–95 (adopting Gerald Dworkin's definition of paternalism).

[21] *See id.* at 1743–53 (stating that hard paternalism is difficult to implement, but that the alternative of soft paternalism is a weaker regulatory force).

[22] *See id.* at 1767 (arguing that the public's negative reaction to deprivations of autonomy makes

a "bind."[23] Paternalistic intervention "present[s] tradeoffs in terms of ease [of intervention] and effectiveness."[24] What is acceptable does not work. And what works is not acceptable.

I will unpack and explicate Friedman's argument in three stages. First, I clarify his terminology, distinguishing his use of soft paternalism and hard paternalism. Second, I explain his two-part contention—that hard paternalism is necessary to address obesity, yet impractical. Third, I discuss a small window of opportunity that Friedman leaves open for hard paternalism: two exceptions to his "rule" of impracticality.

A. *Soft Paternalism and Hard Paternalism*

By "soft paternalism," Friedman means regulatory measures that (a) attempt to improve individual welfare by altering the decision-making environment to lead people to make better choices, yet (b) do not wholly eliminate the unhealthy choices.[25] In other words, soft paternalistic measures enhance decision making while preserving individual autonomy and discretion.[26]

Friedman rightly observes that soft paternalism can be more or less interventional.[27] He maps out three tiers of soft paternalistic intervention.[28] First, starting at the low end of the spectrum, the government may provide raw factual information to consumers.[29] For example, the Food and Drug Administration mandates nutrition labeling on food packages.[30] This helps people make more informed purchasing and consumption decisions.

Second, the government might offer "truthful narratives" to illustrate the risks from certain choices.[31] These concrete instances of harm can be more effective than simple informational disclosures.[32] Vivid and entertaining examples are more cognitively and emotionally compelling.[33]

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hard paternalistic interventions difficult to implement).

[23] *Id.* at 1769.

[24] *Id.* at 1726.

[25] *Id.* at 1696 n.38, 1701.

[26] *Id.*

[27] *See id.* at 1698–99 (providing examples of the varying degrees of intervention and defining a spectrum of paternalistic interventionism).

[28] *Id.*; *see also* Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 199–202, 210, 215, 225–27 (2006) (arguing that raw factual information should be given to consumers, the government should offer truthful narratives, and insulating strategies might sometimes be appropriate).

[29] Friedman, *supra* note 1, at 1698, 1701–03.

[30] 21 C.F.R. §§ 101.1–101.108 (2013).

[31] Friedman, *supra* note 1, at 1699, 1703–05.

[32] *See id.* at 1735, 1737 (providing an example of a movie that impacted young adults' attitudes toward fast food, but noting that "these delivery mechanisms for new and different types of narratives have yet to be exploited").

[33] *See id.* at 1703–04 (discussing the theory behind and examples of strong-form debiasing in the contexts of smoking and overconsumption of fast food).

For example, a recent Georgia advertisement campaign featured stark billboards and television commercials featuring sad, overweight children.[34] These images were designed "to shock families into recognizing that obesity is a problem."[35]

Third, in the hardest soft paternalistic regulation, the government might require certain "insulating strategies."[36] These conditional mandates impose certain restrictions on activities to make them safer and to insulate participants from harm. The classic examples are traffic laws mandating the use of automobile seatbelts and motorcycle helmets.[37] These regulations require use of a safety device. But, like all soft paternalistic measures, they still preserve the individual's choice to engage in the "core activity."[38] Similarly, while sin taxes may be coercive,[39] they do not wholly eliminate the choice, for example, to smoke or to drink soda.[40]

In contrast to soft paternalism, hard paternalism entails "outright bans."[41] By "hard paternalism," Friedman means regulatory measures that attempt to improve individual welfare by eliminating some choices and making them impossible.[42] In other words, hard paternalistic measures enhance decision making by removing autonomy and discretion.[43] They "completely substitute the regulator's judgment for that of the consumer."[44]

For example, contrast tobacco and marijuana. Government regulators

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[34] *See* Carrie Teegardin, *Grim Childhood Obesity Ads Stir Critics*, ATLANTA J.-CONST., Dec. 29, 2011, at 1A (reporting that some people did not approve of an Atlanta hospital's blunt advertising campaign against childhood obesity).

[35] Kathy Lohr, *Controversy Swirls Around Harsh Anti-Obesity Ads*, NPR (Jan. 9, 2012), http://www.npr.org/2012/01/09/144799538/controversy-swirls-around-harsh-anti-obesity-ads.

[36] Friedman, *supra* note 1, at 1699, 1705–07.

[37] *See* Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 435–38 (2000) (providing a history of the laws regarding automobile seatbelts and motorcycle helmets in terms of the gradual acceptance of paternalism in those areas).

[38] Friedman, *supra* note 1, at 1705. What constitutes the core activity is hardly an uncontroversial claim. *See* JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 122–23, 129, 276–77, 282, 294, 304–05 (1986) (providing examples from criminal law concerning deceit, voluntariness, consent, and false pretense where alternative interpretations and perspectives of an act may lead to different outcomes); *cf.* Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1858 (2013) (noting the difficulty of "identify[ing] the level of generality at which people's ends are to be described"). *See generally* CARL GINET, ON ACTION 45–71 (1990) (discussing key literature on individuation).

[39] *See* FEINBERG, *supra* note 38, at 23–25.

[40] *See* Friedman, *supra* note 1, at 1706–07 (explaining that with taxation the choice to smoke or drink "has merely been impeded by compelling the consumer to internalize the social cost of consumption").

[41] *Id.* at 1699.

[42] *Id.* at 1696 n.38, 1699, 1707.

[43] *Id.* at 1696 n.38.

[44] *Id.* at 1701.

impose all sorts of soft paternalistic measures to reduce tobacco use; the packaging is labeled with the health risks[45] and advertisement campaigns feature diseased and disfigured former smokers.[46] And tobacco products are subject to significant excise taxes.[47] But tobacco is still readily available, and millions continue to smoke.[48] In contrast, when it comes to marijuana and other recreational drugs, regulators do not stop at soft paternalism—these products are categorically banned.[49]

B. *The Necessity, Yet Impracticality, of Hard Paternalism*

Once we understand Friedman's vocabulary, grasping his argument is straightforward. Friedman argues that anything less than a "full-court press" against obesity will likely result in only "minimal returns."[50] Nutritional disclosures and other soft paternalistic measures have proven only mildly effective.[51] They just do not have enough "power" to put "significant dents" in the obesity problem.[52] Only with hard paternalistic regulatory measures can we change the eating and drinking habits of hundreds of millions of people.

But we cannot have the hard paternalism that we need. Friedman argues that in a "full-court press," regulators will encounter "political resistance to paternalistic endeavors."[53] There are, he contends, "limits to the types and degrees of regulatory intervention that the public" accepts.[54] We need hard paternalism to change the way people behave when they eat and drink. But the public generally rejects hard paternalism.[55] Its

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[45] 15 U.S.C. § 1333 (2012).

[46] *See Tips from Former Smokers*, CENTERS FOR DISEASE CONTROL & PREVENTION (Mar. 3, 2014), http://www.cdc.gov/tobacco/campaign/tips/resources/videos (describing the individuals featured on campaign advertisements who lost limbs, hair, and teeth due to smoking).

[47] *See State Cigarette Excise Taxes: 2011 and 2012*, NAT'L CONF. ST. LEGISLATURES (July 25, 2013), http://www.ncsl.org/research/health/2011-state-cigarette-excise-taxes.aspx (showing the tax on cigarettes in each state).

[48] *See* U.S. DEP'T OF HEALTH & HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL 703 (2014), *available at* http://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf (explaining that despite progress being made in the United States, there is still "persistence of high prevalence of tobacco use among segments of the population").

[49] *Marijuana Resource Center: State Laws Related to Marijuana*, OFF. NAT'L DRUG CONTROL POL'Y (Mar. 3, 2014), http://www.whitehouse.gov/ondcp/state-laws-related-to-marijuana.

[50] Friedman, *supra* note 1, at 1719.

[51] *Id.* at 1731.

[52] *Id.* at 1769.

[53] *Id.* at 1719. "A full effort or total war on obesity would run into two distinct categories of obstacles: (1) hostility toward paternalism; and (2) the complexity of the problem . . . ." *Id.* at 1767.

[54] *Id.* at 1691.

[55] *Id.*

"appetite for hard paternalism . . . can be uneasy."[56] Friedman is hardly alone in this assessment.[57]

Accordingly, if regulators prudently targeted their resources and focused on those strategies that the "public will support, or at least not aggressively oppose," then they would focus on soft paternalistic measures.[58] They would eschew hard paternalistic strategies.[59] But those are precisely the sorts of efforts that are needed to effectively combat obesity. Soft paternalism is practical but inefficacious. Hard paternalism is efficacious but impractical.

C. *Small Window for Hard Paternalism*

But all is not lost. Friedman argues that "hard paternalism can still be deployed effectively under the right circumstances."[60] There may be "spots" where hard paternalism can provide opportunities for high impact interventions.[61]

Friedman argues that there are two such "spots" for hard paternalism. First, he argues that hard paternalism can work "[i]f the zone of the regulation already falls within natural control of the regulator."[62] Second,

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[56] *Id.* at 1720. "[T]he public attitude toward paternalism in contexts involving private consumption . . . may be trending negative." *Id.* at 1744. "Hard paternalism may prove difficult to implement . . . because of the public's reaction to the complete deprivation of autonomy." *Id.* at 1753. Friedman bolsters this argument by looking to marijuana, fluoride, and GMOs. *See id.* Part III.C (using regulation marijuana and fluoridation as examples of the political resistance to hard paternalism and GMOs as an example of the expansion of choice by regulators).

[57] *See, e.g.*, GOSTIN, *supra* note 2, at 497 ("[A] person's decision about what to eat . . . affects only him- or herself, so many do not see government intervention as justifiable."); PEW RESEARCH CTR., PUBLIC AGREES ON OBESITY'S IMPACT, NOT GOVERNMENT'S ROLE 1–2 (2013) (presenting statistics on the public's opposition to government regulation as a way to combat American obesity); Aoki et al., *supra* note 2, at 62 (describing the concerns that decision makers may have with vending or supplier contracts that promote healthy options because they are focused on immediate budget concerns instead of long term health benefits); Lawrence O. Gostin, *Limiting What We Can Eat: A Bridge Too Far?*, 92 MILBANK Q. 173, 173 (2014) (noting that the public is comfortable with the government controlling other sectors, such as the economy or infectious diseases, but "often draws a line at limiting dietary choices"); Rick Mayes & Thomas R. Oliver, *Chronic Disease and the Shifting Focus of Public Health: Is Prevention Still a Political Lightweight?*, 37 J. HEALTH POL. POL'Y & L. 181, 185–86 (2012) (arguing that it is difficult to advocate, from a political perspective, for the imposition of immediate burdens in exchange for uncertain, long-term benefits); Thomas & Gostin, *supra* note 2, at 17 ("[P]revention strategies often have a whiff of paternalism, and this can be a distinct political liability.").

[58] Friedman, *supra* note 1, at 1720 ("The political feasibility of disclosure may indeed tempt policymakers. But many are still skeptical about whether this easier form of regulation . . . will prove effective."); *see also* PEW RESEARCH CTR., *supra* note 57, at 5 ("[V]iews on what government *should* do are closely linked to perceptions of what the government *can* do.").

[59] *See* Friedman, *supra* note 1, at 1692, 1767–68 (describing the public's uneasiness and general dislike for hard paternalism).

[60] *Id.* at 1744.

[61] *Id.* at 1753.

[62] *Id.*

Friedman contends that hard paternalistic measures might be acceptable if they are inoffensive.[63] I will focus on this second opportunity for hard paternalism.

Even though outright bans eliminate choice, the public may experience no "perception of loss."[64] Friedman provides two main examples: the banning of lead paint and the banning of trans-fats.[65] In both cases the bans were implemented with "little protest or notice."[66] Friedman argues that these hard paternalistic measures were accepted by the public because they did not "*visibly* reduce choice."[67] The public was "shield[ed]" from the autonomy deprivation.[68] They accepted these hard paternalistic measures because they were "hidden" bans.[69]

But Friedman argues that this "hidden paternalism" exception is narrow.[70] He explains, "[T]he opportunities for deploying paternalism effectively in the public health arena may prove limited."[71] It is difficult to identify food restrictions that prove "intangible or negligibly detectible."[72] People may not mind the absence of trans-fats, but they certainly noticed New York Mayor Bloomberg's ban on sugary drinks larger than sixteen ounces.[73]

Friedman is probably correct that "regulators can intervene somewhat more easily . . . [if] *their paternalistic presence is not felt.*"[74] But he is equally correct that people are unlikely to disregard or ignore most hard paternalistic regulatory measures aimed at combatting obesity.[75] In short, it may be quite a challenge to find "hidden paternalism" opportunities where regulators can eliminate unhealthy choices without people noticing.

In sum, Friedman has carved out two narrow instances where hard

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[63] *Id.* at 1747–51.

[64] *Id.* at 1747.

[65] *Id.* at 1707–09.

[66] *Id.* at 1709.

[67] *Id.* (emphasis added). Again, this is a potential individuation problem because it could be described as a soft paternalistic insulting measure. *See id.* ("When a paternalistic move does not visibly reduce choice but enhances individual welfare, the ban may prove to be a practical and effective prescription for a problem, even if a narrow one.").

[68] *Id.* at 1737–38.

[69] *Id.* at 1709, 1749.

[70] *Id.* at 1709.

[71] *Id.* at 1769.

[72] *Id.* at 1747.

[73] *See id.* at 1690 (noting that a "broad segment of the population objected" to the ban); *see also* Kara Marcello, Note, *The New York City Sugar-Sweetened Beverage Portion Cap Rule: Lawfully Regulating Public Enemy Number One in the Obesity Epidemic*, 46 CONN. L. REV. 807, 851 (2013) (noting that a poll conducted prior to the ban's passage found that six out of ten New York City residents opposed it).

[74] *See* Friedman, *supra* note 1, at 1747.

[75] *See id.* (noting that redesigning the SNAP subsidy "to directly displace bad choices like soda would . . . generate an outcry that is reminiscent of the Big Gulp ban").

paternalism might be practical. Are they enough? Even Friedman himself concludes that they probably are not.[76] But, as I will argue below in Part IV, there are further situations in which hard paternalistic measures to combat obesity are practical.

III. VOCABULARY OF PATERNALISM

Unfortunately, contemporary legal and philosophical literature on paternalism employs a different vocabulary than the literature of the preceding three decades. Confusingly, today's writers in normative jurisprudence and public health ethics are using many of the same terms that were used by writers in the 1970s, 1980s, and 1990s. But they are using those terms to mean different things.

For example, while Friedman claims to "adopt Gerald Dworkin's . . . definition of paternalism," he does not.[77] In distinguishing "hard" and "soft" paternalism, Friedman focuses on the type or manner of the intervention. For Friedman, the difference between "hard" and "soft" paternalism depends on the *amount* of liberty restricted.[78]

In contrast, Dworkin, like most philosophers and public health ethicists during the last third of the twentieth century, distinguishes "hard" and "soft" paternalism by instead focusing on the *motivation* or reason for the intervention.[79] On this ground we can distinguish three separate liberty limiting principles: the harm principle, weak paternalism, and strong paternalism.

A. *Harm Principle*

Friedman rightly observes that "in addition to concerns about individual health, the external costs of obesity are pressing."[80] Indeed, in 2008, estimated health care costs related to obesity were $147 billion.[81] By 2030, medical costs associated with obesity are expected to increase by at least $48 billion annually, with the annual loss in economic productivity totaling $390 billion to $580 billion.[82]

Friedman notes that these significant negative externalities may

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[76] *See id.* at 1693–94 ("[V]iable opportunities to change consumption and physical activity patterns through hard paternalism proves difficult, and soft paternalism can prove ineffective.").

[77] *Id.* at 1694. Friedman recognizes that various definitions of "hard paternalism" and "soft paternalism" are in circulation. *Id.* at 1694 n.38.

[78] *Id.* at 1696–97.

[79] *See* Pope, *supra* note 4, at 678–79 (discussing the role of motivation in soft paternalism).

[80] Friedman, *supra* note 1, at 1714.

[81] Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer-and Service-Specific Estimates*, 28 HEALTH AFF. w822, w828 (2009).

[82] TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE 28 (2012).

"render[] the label of paternalism less pejorative."[83] That is a huge understatement. If the primary motivation for liberty limitation (whether of Friedman's soft or hard variety) is to prevent harm to *others*, then the regulation is not paternalistic at all.[84] It would, instead, be ethically grounded on the harm principle.

The harm principle, or prevention of harm to others, has traditionally been recognized as having the greatest moral legitimacy of all liberty-limiting principles, because preventing or reducing harm to others is a classic and core function of government and a traditional exercise of police power.[85] Liberty limitation on this ground is publicly accepted.[86]

Public health regulators seem to have more than enough data to credibly defend even total bans on the basis of preventing harm to others or harm to society. So, it is worth noting that while government interference with the eating and drinking decisions of individuals might *look* paternalistic, it need not be defended or perceived as paternalistic. To the extent that the harm principle can be plausibly invoked, public health regulators can avoid hard paternalism's efficacy-practicality bind.[87]

B. *Weak Paternalism*

While the harm principle is infinitely malleable, at some point the negative externalities become too small and distant to credibly ground liberty limitation on the basis of harm to others. Therefore, some public health regulation will be paternalistic.

But not all paternalism (not even all soft and hard paternalism) has the same ethical and moral status. One must look not only to the *degree* of intervention (which distinguishes hard and soft paternalism) but also to the *reason* for the intervention. Paternalism is most justified on the basis that the individual lacks the requisite decision-making capacity.

This "weak paternalism" justifies intervention on the basis that the individual has assumed a risk without adequate information, without sufficient maturity, or without adequate freedom from coercion. The classic example, from John Stuart Mill, is detaining someone who is about

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[83] Friedman, *supra* note 1, at 1714. He later asks "whether regulators should be concerned with the aggregate social problem as opposed to individual personal choice." *Id.* at 1727.

[84] *See* Sunstein, *supra* note 38, at 1863 (noting that it is possible to justify governmental limitations without reference to paternalistic considerations).

[85] *See* Pope, *supra* note 37, at 428.

[86] *See* Eric Crampton et al., *The Cost of Cost Studies* 7–9 (Dept. of Econ. & Fin., Col. of Bus. & Econ., Univ. of Canterbury, Working Paper No. 29, 2011), *available at* http://www.econ.canterbury.ac.nz/RePEc/cbt/econwp/1129.pdf (noting policymaker-driven harm reduction in the context of alcohol abuse).

[87] Thaddeus M. Pope, *The Slow Transition of U.S. Law Toward a Greater Emphasis on Prevention*, *in* PREVENTION VS. TREATMENT: WHAT'S THE RIGHT BALANCE? 223 (Halley S. Faust & Paul T. Menzel eds., 2012).

to unknowingly cross a dilapidated, dangerous bridge.[88]

Under these circumstances it cannot fairly be said that the individual was free or autonomous in the first place because she did not understand what she was doing.[89] Therefore, restricting the individual's liberty does not impinge her autonomy. For these reasons, weak and strong paternalistic measures combatting obesity have met with "positive" responses.[90]

C. *Strong Paternalism*

While weak paternalism overrides an individual's choices because they are not informed or voluntary, "strong" paternalism overrides choices *even when* they are informed and voluntary.[91]

Strong paternalism is the position that it is morally justifiable to protect adults, against their will, from the harmful consequences of their choices, even when those choices are informed and voluntary and do not harm others.[92] Thus, hard paternalism holds that autonomy can be trumped by beneficence. The welfare of an individual can outweigh her right to self-determination.[93]

IV. JUSTIFIABILITY OF HARD PATERNALISTIC PUBLIC HEALTH REGULATION

When Friedman concludes that hard paternalism is impractical and unacceptable, he seems to assume that hard paternalism is necessarily strong. This is wrong on two counts. First, hard paternalism can be weak and, therefore, well-justified. Second, even strong hard paternalism is justified under some conditions.

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[88] *See* John Stuart Mill, *On Liberty*, *in* JOHN STUART MILL: A SELECTION OF HIS WORKS 1, 123 (John M. Robson ed., 1966) ("[T]hey might seize him and turn him back without any real infringement of his liberty; for liberty consists in doing what one desires, and he does not desire to fall into the river.").

[89] Pope, *supra* note 37, at 430.

[90] *See* Hodge et al., *supra* note 2, at 36–37 (noting that mostly positive responses followed restriction of soda in public schools); *cf.* Bijan Fateh-Moghadam & Thomas Gutmann, *Governing [through] Autonomy. The Moral and Legal Limits of "Soft Paternalism,"* 17 ETHICAL THEORY & MORAL PRAC. 383 (2014) (providing a critique of paternalism generally).

[91] *See* Pope, *supra* note 4, at 717 (describing the elements of hard paternalism, which include "the agent disregard[ing] the subject's contemporaneous preferences"); Pope, *supra* note 37, at 430 ("'[H]ard' or 'strong' paternalism . . . constrains individuals' decisions even when those decisions are informed and voluntary." (footnote omitted)).

[92] *See* Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121, 123 (2005) (defining hard paternalism).

[93] *See* Pope, *supra* note 4, at 683–84 ("[T]he agent must limit the subject's liberty primarily because she believes that intervention will contribute to the subject's welfare . . . [and] the agent's benevolent motive must be independent from the subject's contemporaneous preferences.").

A. *Weak Hard Paternalism*

Weak paternalism is usually soft paternalism. If decision making is distorted by ignorance and biases, then the most appropriate regulation is that designed to correct for the informational deficits and biases.[94] Indeed, the substantial overlap between weak and soft paternalism probably explains why the public accepts soft paternalism.[95] They accept it not because it is soft, but because it is weak.

While weak paternalism is usually soft, it is sometimes hard. The classic example is public health regulation for the protection of children. Contrast the new IRS excise tax on tanning beds[96] with state bans on minors using indoor tanning.[97] The excise tax is soft paternalism, because it leaves the individual free to choose indoor tanning. The total ban is hard paternalism, because it completely removes the option. But since these bans are directed only at minors (who are presumed unable to make substantially voluntary decisions), the hard paternalism is weak.

In short, a significant range of hard paternalism is weak. And weak paternalism is almost always justified and acceptable.[98] So, by distinguishing weak from strong hard paternalism, we find already that the opportunities for hard paternalistic public health regulation are not as meager as Friedman concludes they are.

B. *Strong Hard Paternalism*

While Friedman does not distinguish between weak and strong hard paternalism, he seems to assume that hard paternalism is necessarily strong. On this assumption, he concedes that strong hard paternalism is sometimes justified and acceptable.[99] He focuses on the situation in which "[t]he forgone autonomy is invisible or simply has no value."[100] In this section, I argue that strong hard paternalism may be ethically and politically acceptable apart from when it is just "stealthy in implementation."[101]

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[94] Recognize that under such regulations consumers are not only "free to choose" but "more equipped" to make accurate decisions. *Id.* at 1730.

[95] *See id.* at 1733 (noting that "the positive reaction to the soft paternalism of mandatory calorie disclosure has not been overwhelmed by any noticeable popular backlash").

[96] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10907, 124 Stat. 119 (2010) (codified at 26 U.S.C. § 5000B (2012)); 26 C.F.R. § 49.5000B–1T (2013).

[97] *Indoor Tanning Restrictions for Minors—A State-by-State Comparison*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/health/indoor-tanning-restrictions.aspx (last updated Feb. 2014).

[98] *See* Pope, *supra* note 92, at 122–23 ("[S]oft paternalistic regulation actually helps to protect and promote [autonomy] by ensuring that an individual's choices reflect her true preferences.").

[99] Friedman, *supra* note 1, at 1697, 1709.

[100] *Id.* at 1709.

[101] *Id.*

I argue that strong hard paternalistic liberty limitation (SHP) is justified when: (1) there is strong evidence that each of the following six conditions is satisfied; (2) the objective of the SHP is to protect the subject from significant harm; (3) the subject has either a low autonomy interest or an irrational high autonomy interest in the restricted conduct; (4) the SHP is imposed only if no morally preferable, less autonomy restrictive alternatives are available; (5) the SHP has a high probability of success/effectiveness; (6) the harms from which the SHP protects the subject outweigh any harm caused by the SHP intervention itself; and (7) the SHP is designed to be as least restrictive as necessary.[102]

1. *There Must Be Strong Evidence that These Conditions Are Satisfied*

The first necessary condition for justified strong hard paternalism requires that the regulator limit the subject's liberty only where it has strong evidence that the other six conditions are satisfied. As with any liberty limitation, there is a presumption against strong hard paternalism.[103] The regulator's burden to overcome this presumption applies not only to the cogency of the reasons for the interference but also to the evidentiary basis for believing that those reasons are applicable.[104]

In short, because the stakes (the restriction of substantially voluntary self-regarding conduct) are so high and because we are very interested in avoiding mistakes, the regulator must have high confidence and a reliable basis that the following conditions are satisfied.

2. *Strong Hard Paternalistic Liberty Limitations Must Have the Objective of Protecting the Subject from Significant Harm*

The second necessary condition for justified strong hard paternalism requires that the regulator limit the subject's liberty only in order to protect the subject from significant harm. The severity and magnitude of harm surely factors into the justifiability of hard paternalism. If it is too low, then it is just not worth interfering with the subject's liberty.

Only where the harm at issue is significant are the stakes high enough to warrant (and outweigh) the intrusion on the subject's autonomy.[105] This

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[102] *See* Thaddeus M. Pope, A Definition and Defense of Hard Paternalism: A Conceptual and Normative Analysis of the Restriction of Substantially Autonomous Self-Regarding Conduct 299–400 (June 10, 2002) (unpublished Ph.D. dissertation, Georgetown University), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087383 (expanding on and defending each of the listed conditions); *see also* James F. Childress & Ruth Gaare Bernheim, *Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health*, 55 FLA. L. REV. 1191, 1202–06 (2003) (offering six similar conditions).

[103] *See* Pope, *supra* note 4, at 663–67 (discussing the "presumption of noninterference with individual liberty").

[104] *See* Pope, *supra* note 102, at 299–309 (collecting authority).

[105] *See id.* at 309–33 (collecting authority).

entails two corollaries. First, only "negative" strong hard paternalism (avoiding harm) is justifiable.[106] As Friedman himself observes, cases of "positive" strong hard paternalism (conferring a benefit), such as forcing couch potatoes to live more active lifestyles, are not justified.[107] Second, the harm at stake must constitute a significant setback to the subject's critical interests (our more permanent, central, or life-defining projects) or welfare interests (physical health and vision, integrity, and normal functioning of one's body).[108]

3. *Strong Hard Paternalistic Liberty Limitations Must Restrict Only That Conduct in Which the Subject Has a Low Autonomy Interest*

While the second condition focuses on the content of the beneficence side of the equation (i.e., which interests of the subject are impacted and by how much are they impacted by the consequences of her conduct), the third condition focuses on the autonomy side of the equation (i.e., what interests does the subject have in the conduct that the regulator aims to restrict).[109]

The third necessary condition for justified strong hard paternalism requires that the subject have a low autonomy interest in the restricted conduct.[110] Most people do not engage unhealthy behaviors such as poor diet or unbuckled driving out of any deep and settled convictions as to what is valuable for them. Consequently, restricting such conduct only trivially disrespects their autonomy.[111]

4. *Strong Hard Paternalistic Liberty Limitations Must Be Imposed Only Where No Morally Preferable, Less Autonomy Restrictive Alternatives Are Available*

The fourth necessary condition for justified strong hard paternalism requires that it be a "last resort," the only available liberty limiting principle which the regulator can use to protect the subject from significant harm.[112]

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[106] *See id.* at 312–20 (collecting authority).

[107] *See* Friedman, *supra* note 1, at 1752 (noting that such "mandated behavior will likely prove impractical, even when directed against a serious contributor to a health problem" such as obesity).

[108] *See* Pope, *supra* note 102, at 320–34 (noting that hard paternalism can be justified where it is beyond "a minimum threshold of necessity" and the subject's interest is "setback to a consequential degree").

[109] *Cf.* SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM 150–52 (2013) ("Interference is justified on paternalistic grounds only when it reflects individuals' actual values, not the values we might like them to have.").

[110] Pope, *supra* note 102, at 333–35.

[111] In contrast, this condition may not be satisfied by strong paternalism that bans religiously motivated body piercing or mountain climbing. *See id.* at 347–48 (noting the difference between the impact on liberty between regulation of these activities and cigarette smoking).

[112] *Id.* at 368.

As compared to soft paternalism and weak hard paternalism, strong paternalism is the most morally troubling. Accordingly, we must be sure that we really need it before we use it. If the regulatory desired ends can be accomplished in a way that avoids conflict with individual liberty or that interferes with liberty pursuant to a less controversial liberty-limiting principle, then that alternative must be adopted.

5. *Strong Hard Paternalistic Liberty Limitations Must Very Probably Be an Effective Means for Achieving Its Objective*

The foregoing four conditions demand both that the end or objective of the strong hard paternalism is legitimate and that it cannot be achieved through morally preferable (non-strong paternalistic) alternatives. The fifth necessary condition focuses on the particular methods or means of liberty limitation used. The fifth condition requires that the strong hard paternalistic intervention very probably be an effective means for achieving the objective (i.e., protecting the subject from significant harm).[113] In short, strong hard paternalism must "have a reasonable prospect of achievement."[114]

Unless there is a tight causal connection between the objective of the strong hard paternalistic intervention and the intervention itself, the intervention will be pointless. Why interfere with individual liberty when doing so will not even achieve the benevolent objective? It is this intuition that explains the failure of the New York City Big Gulp container size limits.[115]

As Friedman observes, the evidence "did not support the notion that this regulation would have any concrete effect."[116]

6. *Strong Hard Paternalistic Liberty Limitations Must Protect the Subject from Harm that Outweighs Any Harm Caused by the Intervention Itself*

Even if the foregoing five conditions are satisfied, we must still ensure that strong hard paternalism will not cause more harm than it prevents. The sixth necessary condition for justified strong hard paternalism requires

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[113] *Id.* at 378–83.

[114] *Id.* at 378.

[115] *See* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 701 (2014) (enjoining enforcement of the rule and holding that the Board of Health had exceeded its authority in promulgating it). *But see* Marcello, *supra* note 73, at 845–46 (arguing that "[t]he regulation's alleged 'loopholes' [were] reasonable" as they, for example, allowed consumers to buy drinks that were not "devoid of nutritional value" in containers larger than sixteen ounces).

[116] Friedman, *supra* note 1, at 1739. While Friedman considers the large soda ban to be soft paternalism, *see id.* at 1740, it could easily be characterized as hard paternalism. While the New York City regulation did not ban any and all "consumption of sugary drinks," it did ban a discrete product. *See id.* (noting that the container size, rather than the drink itself, was limited).

that the significant harm that the agent intends to reduce or prevent through limiting the subject's liberty be greater than the harm caused by the liberty limitation itself.[117]

In other words, not only must agents intervene for hard paternalistic reasons only to save the subject from significant harm, but agents must also intervene for hard paternalistic reasons only where they can probably prevent more harm than they themselves cause.

7. *Strong Hard Paternalistic Liberty Limitations Must Be as Least Restrictive as Necessary.*

We saw that hard paternalism should be the operative liberty limiting principle only when no other alternative is available (per the fourth condition).[118] But this is not enough. Even when strong hard paternalism is justified on the other six conditions, the scope of the strong hard paternalistic intervention must be as narrow as possible, commensurate with achieving the primary objective of the liberty limitation.

The seventh necessary condition for justified hard paternalism requires that the agent interfere with the subject's liberty no more than is required to achieve the objective.[119] The presumption against interference with individual liberty demands not only strong moral reasons for strong hard paternalism (conditions one to six) but also demands that the particular means, methods, and scope of strong hard paternalism be necessary.[120]

V. CONCLUSION

The public health challenges that we face are enormous. Regulators have a broad array of legal tools to address these challenges.[121] But, increasingly, the required regulatory tools are (and must be) hard paternalistic.

Professor Friedman argues that, while efficacious, most hard paternalistic regulation is impractical and unacceptable. In contrast, I have demonstrated that there are wider opportunities for hard paternalism. My promising conclusion is that regulators can have their cake and eat it too. They must simply ensure that they enact only those hard paternalistic measures that are weak or justified strong.

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[117] *See* Pope, *supra* note 102, at 385–87 (explaining the concept of proportionality and focusing on the need to "avoid solutions that are worse than the problem").

[118] *See supra* text accompanying note 112; *see also* Pope, *supra* note 102, at 368 (noting that "justified hard paternalism requires that the agent intervene . . . only where no morally preferable, less autonomy restrictive alternatives are available").

[119] *See* Pope, *supra* note 102, at 389–400 (describing the presumption against interference with individual liberty and the requirement that "hard paternalism . . . employ the least restrictive alternative").

[120] *Id.* at 396.

[121] *See supra* note 2.