Paternalism and Health Law: Legal Promotion of a Healthy Lifestyle

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Research in lifestyle risks is becoming more and more important, particularly with reference to what is generally known as "unhealthy diets". The Law is now firmly established as a prominent instrument of Public Health. There are several distinctive methods of legal intervention targeted at counteracting overweight and promoting healthier lifestyles. In this paper we examine several measures that have been adopted and discuss whether Law should foster healthy diets. Our purpose is to examine the threats of falling into a paternalistic attitude when devising any regulatory intervention aimed at promoting a healthier lifestyle.

"Life is wasted on the living"
Nathaniel Sr., Six Feet Under (HBO, 2001–2005)

I. Regulation of lifestyle risks – the case of unhealthy diets

Living is a risk, as being alive is the only necessary condition for someone to die. From the moment we are born, we know that death is inexorably closer. Less metaphysically and more pragmatically, Ulrich Beck carried out a panoramic analysis of the different risks that characterize modern civilization, concluding that we live in the 'risk society'[1]. As the concept allows various meanings, several authors have sought to refine it. Lupton[2] and Gabe[3] put forward a distinction between environmental and lifestyle risks. 'Environmental risks' are those produced by industrial progress, such as pollution, toxic chemicals and nuclear waste. Differently, 'lifestyle risks', as the name implies, refer to several different ways of life that entail a risk potential. There are several differences between the two types of risks, the foremost being that environmental risks are due to *something that happens to a person* while lifestyle risks occur because of *something a person does or does not do*. In a society where life is regarded as something sacred but individual freedom is also seen as a fundamental value, the concept of lifestyle risks attracts a high amount of interest and controversy.

Even though our natural instinct is to preserve our existence, sometimes we (consciously or not) conduct our lives in a risky fashion. The concept of 'lifestyle risks' is related to certain problematic ways of conducting our life. It includes both substances (such as food, alcohol, tobacco or drugs) and generic behaviours (for instance, gambling, driving, doing extreme sport or using specific technologies or tools)[4]. In the Health Sciences, the concept of risk refers to the probability that members of a category will contract or develop a disease. The introduction of the concept of 'lifestyle risks' lead to considerable modifications in Public Health policy. Individuals identified as being at high risk of a certain disease are now encouraged to modify some aspects of their lives, checking their behaviour and engaging in a regime of self-care. People are increasingly required to control their own risks, 'to enter into a process of self-governance

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1 Ulrich Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992).

2 Deborah Lupton, "Risk as moral danger: the social and political functions of risk discourse in public health", 23 *International Journal of Health Services* (1993), pp. 425-435.

3 Jonathan Gabe, "Health, medicine and risk: the need for a sociological approach", *in* Jonathan Gabe (Ed.), *Medicine, Health and Risk: Sociological Approaches* (Oxford: Blackwell, 1995), pp. 1-17.

4 Simon Planzer and Alberto Alemanno, "Lifestyle Risks: Conceptualising an Emerging Category of Research", 4 *European Journal of Risk Regulation* (2010), at p. 335; Liana Giorgi, "Lifestyle Risk: The Challenging Marriage of Two Thorny Concepts", June 2011, available on the internet at <http://ssrn.com/abstract=1910570>, at p. 4 (last accessed on 5 August 2013).

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through processes of endless self-examination, self-care, and self-improvement'[5]. This 'project of the self' is targeted at maximizing one's health and minimizing one's burden on society[6].

Research in lifestyle risks is becoming more and more important, particularly concerning what are generally dubbed as "unhealthy diets". Our diet (what we eat and drink, in what amount and with what frequency) is of paramount importance for our well-being and, ultimately, for our subsistence. More than just a question of nutrition (supplying the body will the necessary elements so that it can perform its normal functions), our dietary regime is comprised of choices and preferences – in a word, our diet is part of our lifestyle. These are momentous options and not mere gastronomical inclinations. Food consumption patterns may affect the quality of life in profound ways, leading to overweight and obesity, generally identified as causes to a number of serious illnesses. Many of the so-called 'lifestyle diseases' or 'civilization diseases' are said to be chiefly caused by unhealthy routines. As countries industrialize, their populations begin to over-consume unhealthy foods, calories and alcohol. Some authors talk about an 'obesogenic environment', claiming that the physical, economic, social and cultural environments of developed worlds stimulate positive energy balance (calorie intake exceeding calorie output) and subsequently weight gain and obesity[7]. Diet-related diseases have reached to epidemic proportions in many countries, leading some to talk about 'over-nutrition'[8]. Even though there is no scientific consensus on this matter, as the nexus between obesity, disease and death is not always easy to establish, there is increasing social awareness that weight-related diseases may have a considerable effect on both the individual and the society as a whole. These problems are frequently referred to in the media, governmental documents and academic works and are intuitively understood by the population, but there is no consensus about which diseases and which behaviours can come under the umbrella term of 'lifestyle'[9].

In November 2006, the World Health Organization Regional Office for Europe organized a ministerial conference on counteracting obesity in the European region. As a consequence, the European Charter on Counteracting Obesity was adopted[10]. According to the document, "half of all adults and one in five children in the WHO European Region are overweight. Of these, one third are already obese, and numbers are increasing fast. Overweight and obesity contribute to a large proportion of non-communicable diseases, shortening life expectancy and adversely affecting the quality of life. More than one million deaths in the Region annually are due to diseases related to excess body weight. The trend is particularly alarming in children and adolescents, thus passing the epidemic into adulthood and creating a growing health burden for the next generation. The annual rate of increase in the prevalence of childhood obesity has been rising steadily and is currently up to ten times higher than it was in 1970"[11]. The Charter states that countries within the European region should be able to show results in slowing down and stopping the obesity epidemic, especially among children, and that the obesity prevalence trends should be reversed before 2015. To achieve this, the Charter explicitly calls for action beyond health education: changes in the physical, political, informational and social environments are needed to facilitate a healthy energy balanced lifestyle[12].

In the following year, the European Commission established a comprehensive Community Strategy to address the issues of overweight and obesity, by adopting the 'White Paper on a Strategy on Nutrition, Overweight, and Obesity-related health issues'[13]. According to the document, "the last three decades have seen the levels of overweight and obesity in the EU population rise dramatically, particularly among children, where the estimated prevalence of overweight was 30% in 2006"[14].

5 Anne Kavanagh and Dorothy Broom, "Embodied Risk: My Body, Myself?", 46 *Social Science & Medicine* (1998), at p. 438.
6 Alan Petersen, "Risk and the regulated self: the discourse of health promotion and the politics of uncertainty", 32 *Australian and New Zealand Journal of Sociology* (1996), pp. 44-57.
7 Boyd Swinburn, Garry Egger and Fezeela Raza, "Dissecting obesogenic environments: the development and application of a framework for identifying and prioritizing environmental interventions for obesity", 29 *Preventive Medicine* (1999), pp. 563–570.
8 Mickey Chopra, Sarah Galbraith and Ian Darnton-Hill, "A global response to a global problem: the epidemic of overnutrition", 80 *Bulletin of the World Health Organization* (2002), at p. 952.
9 Kathryn Thirlaway and Dominic Upton, *The psychology of lifestyle: promoting healthy behavior* (New York: Taylor & Francis, 2009), pp. 6-7.
10 World Health Organization European Ministerial Conference on Counteracting Obesity, "European Charter on counteracting obesity", November 2006, available on the Internet athttp://www.euro.who.int/__data/assets/pdf_file/0009/87462/E89567.pdf (last accessed on 5 August 2013).
11 European Charter on counteracting obesity, *supra* note 10, at p. 1.
12 *Ibid.*, pp. 2 *et sqq*.
13 White Paper on a Strategy on Nutrition, Overweight, and Obesity-related health issues, COM (2007) 279 final. For a critical assessment see Andrea Faeh, "Obesity in Europe: The Strategy of the European Union from a Public Health Law Perspective", 10 *European Journal of Health Law* (2012), pp. 69-86.
14 White Paper on a Strategy on Nutrition, *supra* note 13, at p. 2.

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Lifestyle risks result from actions or omissions, conscious or unconscious options. In this case, such risky behaviour increases the probability of someone harming its own health. Hence, inadequate or imprudent diets can be considered as 'lifestyle risks' to the extent that they refer to a way of life that entails a risk potential, as it may be the cause of disease and, eventually, death. Of course that such causal link is not always direct, as in some cases the negative health outcome (disease or death) is unavoidable and would occur even if the individual had adopted a different lifestyle. The concept of 'risk' implies that the probability of a negative outcome taking place is augmented, not that such result is certain; on the other hand, it does not exclude the possibility of occurrence of such result even without such behaviour. Simply put, healthy people (also) get sick and inevitably die; unhealthy people also die, probably (but not necessarily) sooner.

All over the world, Public Health agencies are now dedicating their attention to the prevention of overweight and obesity. Since market forces tend to promote over-consumption and unhealthy habits, governmental intervention is thought to be necessary. The Law is now firmly established as a mighty tool of Public Health[15]. Indeed, legislation may be used as an instrument to promote healthier lifestyles. In the past few years we have witnessed a number of legislative proposals aimed at changing the dietary patterns of the population. However, any public intervention in this respect should take into account the different causes for the problem and should attempt to address them in a coherent manner. The European Commission's White Paper recognizes that any public action in this field should "take into account three factors. Firstly, the individual is ultimately responsible for his lifestyle, and that of his children, while recognising the importance and the influence of the environment on his behaviour. Secondly, only a well-informed consumer is able to make rational decisions. Finally, an optimal response in this field will be achieved by promoting both the complementarity and integration of the different relevant policy areas (horizontal approach), and of the different levels of action (vertical approach)"[16].

The European Charter on Counteracting Obesity also refers to the different policy tools that may be implemented. According to the Charter, they "range from legislation to public/private partnerships, with particular importance attached to regulatory measures. Government and national parliaments should ensure consistency and sustainability through regulatory action, including legislation. Other important tools include policy reformulation, fiscal and public investment policies, health impact assessment, campaigns to raise awareness and provide consumer information, capacity-building and partnership, research, planning and monitoring. Public/private partnerships with a public health rationale and shared specified public health objectives should be encouraged. Specific regulatory measures should include: the adoption of regulations to substantially reduce the extent and impact of commercial promotion of energy-dense foods and beverages, particularly to children, with the development of international approaches, such as a code on marketing to children in this area; and the adoption of regulations for safer roads to promote cycling and walking"[17].

There are several different methods of legal intervention aimed at preventing overweight and promoting healthier lifestyles[18]. Legislators worldwide have discussed measures to reduce weight-related problems, to educate individuals and influence their decisions. Those measures include public information campaigns, disclosure rules, advertising restrictions, taxation of unhealthy foods and even food prohibitions. Some of these actions have been confronted with resistance from citizens, public interest organizations and companies. Some refuse any public intervention in this respect, arguing that such measures restrain the gastronomical freedom of individuals, are an unacceptable invasion into people's personal lives and are blatantly paternalistic.

State's role in the promotion of healthy lifestyles is a hot topic in modern societies. There is an on-going ideological combat as regulators search for an appropriate balance between private liberty and public health[19]. The quantity of substances that we absorb and the degree of exposure to them are an

15 Lawrence Gostin, *Public Health Law: power, duty, restraint* (Berkeley: University of California Press, 2000); Michelle Mello, David Studdert and Troyen Brennan, "Obesity – The New Frontier of Public Health Law", 354 *The New England Journal of Medicine* (2006), at p. 2601.

16 White Paper on a Strategy on Nutrition, *supra* note 13, at p. 3.

17 European Charter on counteracting obesity, *supra* note 10, at p. 4.

18 See Lawrence Gostin, "Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity", 297 Journal of the American Medical Association (2007), pp. 87 *et sqq*.

19 Michelle Mello, David Studdert and Troyen Brennan, "Obesity – The New Frontier of Public Health Law", *supra* note 15, at p. 2602.

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important aspect of our lifestyle[20]. To a large extent, and not overlooking other relevant factors, we can say that *we are what we eat, and how much we eat*. Lifestyle risks occur along a line of abstinence – consumption – abuse – addiction. Thus, the question arises: how do we achieve an adequate balance? Using a benefit-risk approach to solve this dilemma depends upon ones' view on the battle between free choice and governmental regulation[21]. The State should play an active role in the promotion of healthier lifestyles, but to what extent? Is there an "official healthy lifestyle"? Which one? Should Law even promote any lifestyle? Who is the Law trying to protect?

II. Should law promote healthier lifestyles?

It cannot but cause some surprise to witness the legislator aspiring to regulate such apparently ordinary and intimate behaviours as eating and drinking. Traditionally food consumption and physical activity were seen as inappropriate subjects for government regulation, as these were taken as private matters for the individual – and only the individual – to ponder and decide on. However, with the evolution of scientific knowledge, there is increasing social awareness that weight-related diseases may have a considerable effect on both the individual and the society as a whole. What used to be a private matter is now a question of public interest. What once was a pure private behaviour is now seen as a public concern. The biggest problem is that this new field of regulatory intervention touches some of the values that define us as a society: personal freedom, choice and liberty. The exploration of the new frontiers of Health Law also illustrates the perennial tension between the Law and the citizen. We were used to see our parents intimidating us until we finally accepted to eat our soups. Should we allow the State to adopt a similar role?

Freedom, namely *freedom of choice*, is an eternal topic of philosophical interest. In the realm of Consumer Law, freedom of choice is frequently presented as a fundamental right[22]. The right to choose freely is viewed as priceless, a right that should be defended whenever possible and only subject to very narrow exceptions. European Consumer Law has long been based on the idea that the consumer has the right to free choice regarding the products and services offered on the Community market.

Unhealthy diets, as all other lifestyle risks, generally occur because of an action or omission: something a person does or does not do. In most cases, the person's behaviour, his food-related acts or omissions, might be considered as the proximate cause of the health problem. Individuals make personal choices about their diet, exercise and lifestyle. An unhealthy diet is the result of individual choices, conscientious or not, about what to eat and drink (or not), and in what quantity. This presents special challenges to policymakers. Should governmental entities regulate what and how much people eat and drink? What sort of criteria may be used to justify possible restrictions to dietary choices? If certain substances are deemed to cause serious health problems, should citizens be denied to freely keep on eating and drinking them? How far should the State go in protecting people from themselves?

Legal rules that eliminate or restrict lifestyle choices are not a novelty. Most countries have enacted laws prohibiting smoking in public places and driving under the influence of alcohol. These measures are generally justified by the need to protect "others" from harm (second-hand smokers and persons not under the influence of alcohol), and not to protect the individuals themselves. However, some believe that governments should go farther. Instead of just protecting "the others", legislators should protect the "individuals themselves", by restricting their access to unhealthy foods or beverages. There is substantial evidence that limiting the availability of alcohol would reduce its consumption. The same argument could be used regarding unhealthy foods[23].

This new approach has been christened "the new frontier of public health law"[24]. Health advocates say that legal rules can be used to create conditions that allow citizens to live healthier lives and that the government has both the power and the duty to regulate private behaviour in order to promote public health[25].

20 Simon Planzer and Alberto Alemanno, "Lifestyle Risks", *supra* note 4, at p. 335.
21 *Ibidem*, pp. 335-6.
22 Roger Straughan, "What's your poison?: The freedom to choose our food and drink", 97 *British Food Journal* (1995), at p. 13.
23 Kathryn Thirlaway and Dominic Upton, *The psychology of lifestyle: supra* note 9,at p. 261.
24 Michelle Mello, David Studdert and Troyen Brennan, "Obesity – The New Frontier of Public Health Law",*supra* note 15, at p. 2601.
25 Lawrence Gostin, *Public health law: power, duty, restraint*, *supra* note 15.

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The traditional view that food consumption and physical activity were inappropriate subjects for government regulation has been re-evaluated. Among the "triggers to action" that have catalysed government intervention in other areas of private behaviour, such as alcohol and tobacco use, are the development of a scientific base and social disapproval[26]. Both these triggers are now in play with regard to overweight and obesity.

Kersh and Morone use the concept of "politics of private regulation". They note that "public meddling in private lives is nothing new" and that "the political urge to regulate private behaviour extends to a growing array of issues"[27]. According to the authors, the tobacco case introduced two new features in American health policy. First, it turned the political focus onto what had previously been seen as purely private behaviour. Today, the political urge to regulate private behaviour extends to a growing array of issues: tobacco, obesity, abortion, the right to die, drug abuse, and even a patient's relationship with his or her managed care organization[28]. Second, regulating private behaviour prompts a distinctive political process. To place an issue on the political agenda, advocates must persuade others that private behaviour holds important public ramifications; that threshold puts a particular premium on demonizing either users or providers[29]. The question becomes whether the costs caused by unhealthy diets and physical inactivity cross the threshold to warrant action[30].

1. Liberty and gastronomical freedom

As is perfectly understandable, this "new frontier" of Health Law has sparked the debate. Some argue that regulatory measures amount to a limitation to the freedoms of individuals, namely, to their freedom of choice, freedom of speech and even freedom of contract. Some rights-oriented consumer groups have criticized some measures claiming that they intrude on civil liberties. According to the classic libertarian view, minimal state intervention is the only way to ensure the protection of individual freedom. This doctrine postulates that governments should not regulate private behaviour that does not directly cause any harm to a third party. How individuals behave, particularly what they eat or drink, belongs to their private sphere.

John Stuart Mill's theory of liberty is frequently called upon to limit state's intervention to cases where individuals cause harm to others. According to the author's "harm principle", the State should not exercise power to prevent or ameliorate harms that individuals inflict on themselves: 'over himself, over his own body and mind the individual is sovereign'[31]. Mill opposed paternalistic regulation of 'self-regarding' behaviour, which affects only or at least primarily the person concerned[32]. The theory of liberty takes the individual as the unit of measure for determining the utility of social policies. Individuals are self-interested and most informed about their own needs and value systems. Other individuals, and society itself, have no legitimacy to impose how a person should behave. On Mill's account of liberty, classical public health regulation would be out of bounds, including mandatory motorcycle helmet and seatbelt laws, gambling prohibitions, criminalization of recreational drugs[33].

According to this worldview, the state should only regulate actions that directly cause, or have a very high probability of causing, unacceptable harm to others. Therefore, governments should only intervene in individuals' lives when their behaviour is harming other persons. If we follow a classical liberal interpretation, unhealthy diets or lifestyles will probably be considered as private behaviours which, at worst, result in harm to the individuals themselves. Since there is no harm to others, it is not acceptable to impose any limits on individual freedom. The community or the government may attempt to inform, educate or persuade individuals, but no more than that. All other types of intervention would amount to an unbearable intrusion into individual freedom.

Personal freedom is one of the most popular arguments used in this discussion. The first response, as obesity reaches political consciousness, generally emphasizes the personal nature of the activity and the

26 Rogan Kersh and James Morone, "The politics of obesity: seven steps to government action", 21 *Health Affaires*, pp. 142-53.
27 *Ibidem*.
28 Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics of Public Health", 30 *Journal of Health Politics, Policy and Law* (2005), pp. 840-841.
29 *Ibidem*.
30 Kelly Brownell, "The Chronicling of Obesity: Growing Awareness of Its Social, Economic, and Political Contexts", 30 *Journal of Health Politics, Policy and Law* (2005), pp. 961-2.
31 John Mill, *Three Essays: On Liberty, Representative Government, the Subjection of Women* (London: Oxford University Press 1975), at p. 15.
32 John Mill, *On liberty* (New York: Penguin Books 1985).
33 Lawrence Gostin, "A Broader Liberty: JS Mill, Paternalism, and the Public's Health", 123 *Public Health* (2009), at p. 214.

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idea of free choice[34]. In this view, a 'nanny state' interfering with basic life choices, like dietary options, is a cure far worse than the disease[35]. Many commentators reject any public intervention in this regard, claiming that "government knows best" measures override the voluntary gastronomical choices of individuals, representing an insult to the dignity and independence of individuals with respect to their eating choices[36]. Some refer to advocates of government measures as 'grease police', 'calorie cops' and 'exercise radicals'[37]. Critics of such regulatory tools argue that they are a pointless interference with people's personal lives, claiming that they clearly paternalistic.

Paternalism has been defined as the interference of a state or an individual with another person, against their will, and defended or motivated by a claim that the person interfered with will be better off or protected from harm[38]. In other words, paternalism is the protection of competent adults irrespective of their expressed desires. According to McGuinness, in its most basic form, the anti-paternalism argument against government intervention states that: (i) government policies are paternalistic; (ii) paternalism is (always) wrong; and (iii) therefore, such legislation is unjustified. Thus, government health measures, namely anti-obesity policies, can be said to be paternalistic if they (i) curtail the gastronomical (or other) liberty of citizens; (ii) with the goal of "forcing" upon them a healthy lifestyle; (iii) without their consent[39].

2. Personal responsibility

Opponents to governmental intervention argue that Public Health measures, besides being paternalistic, weaken the idea of personal responsibility. From this standpoint, food choices are an entirely private matter, and obesity is simply a matter of personal responsibility. Therefore, the obesity crisis is simply none of the government's business. Unlike contagious diseases and terrorism, overweight is a harm that the individual is thought to bring upon himself; thus, individuals must bear its costs. Personal responsibility advocates claim that the first rule should be to protect freedom of choice, and little is more personal than the food choices we make. Accordingly, public health researchers have begun to explore the ethical and medical implications of personal responsibility arguments[40].

From this perspective, dietary decisions are essentially personal and an inappropriate field for legal regulation. This argument assumes that people have time and ability to make healthier decisions or that they do not care. Personal responsibility is emphasized, arguing that diet-related problems like obesity have a simple cause: overeating. Historically, overweight has been blamed on the individual. A failure of 'personal responsibility' is evoked as obesity's cause, and imploring individuals to change is often the implicit and explicit solution[41]. The overweight individual's struggle with obesity is depicted as a personal failure. Obesity is attributable more to physical inactivity than to food[42]. Avoiding unhealthy behaviours is primarily the concern of the individual. Consequently, the costs of obesity must be borne by the individual for the greater good of individual freedom.

Public intervention measures face strong opposition from some authors on the grounds that they constitute paternalistic intervention into lifestyle choices and weaken the notion of personal responsibility. Such arguments echo those made in the early days of tobacco regulation[43]. However, there are important differences between unhealthy foods and tobacco: people cannot abstain from eating; high-calorie foods may be beneficial to some people and harmful to others; there is no food-related equivalent to harm from second-hand smoke; and no one has shown that foods have physically addictive properties[44]. As Kersh and Morone point out, "food is meaningfully distinguished from private activities like drinking, drug taking, smoking or sexual behaviour (...) All people

34 Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics", *supra* note 28, pp. 846-7.
35 *Ibidem*, at p. 847.
36 See, *e.g.*, James Bennett and Thomas DiLorenzo, *The Food & Drink Police: America's Nannies, Busybodies & Petty Tyrants* (New Jersey: Transaction Publishers 1999).
37 Cynthia Baker, "Bottom Lines and Waist Lines: State Governments Weigh in on Wellness", 5 *Indiana Health Law Review* (2008), note 50, at p. 189.
38 Gerald Dworkin, "Paternalism", The Stanford Encyclopedia of Philosophy, Summer 2010 Edition.
39 Stephen McGuinness, "Time to cut the fat: the case for Government anti-obesity legislation", 25 *Journal of Law and Health* (2012), pp. 50-51.
40 Rogan Kersh, "The Politics of Obesity: A Current Assessment and Look Ahead", 87 *The Milbank Quarterly* (2009), at p. 299.
41 Marlene Schwartz and Kelly Brownell, "Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change", 25 *Journal of Law, Medicine and Ethics* (2007), at p. 79.
42 Kelly Brownell *et al.*, "The Need for Bold Action to Prevent Adolescent Obesity", 45 *Journal of Adolescent Health* (2009), at p. S9.
43 Michelle Mello, David Studdert and Troyen Brennan, *Obesity – The New Frontier of Public Health Law,supra* note 15, p. 2602.
44 *Id*.

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must regularly consume food (including at least some fat). Here is an important contrast to alcohol, drugs or tobacco. They are not essential to life, while food is"[45].

3. Limited capacity, information and willpower

Some authors reject the argument that public health interventions limit the individuals' freedom, using basically two arguments. First of all, it is important to ascertain how serious the limit on freedom is. It makes little sense, for example, to give the same relevance to a deprivation of liberty or invasion of bodily integrity and to the removal of a harmful ingredient in food[46]. Secondly, individual choices are not purely a matter of free choice and free will. Some support paternalism considering that individuals face constraints (both internal and external) on the capacity to pursue their own interests. The environment in which people live may limit their food choices, such as in neighbourhoods dominated by fast or convenience foods. As personal behaviour is heavily influenced and not simply a matter of free will, state regulation is sometimes necessary to protect the individual's health or safety[47].

According to this perspective, the possibility for individuals to make informed decisions should be ensured. This requires proper prior information, and less regulation would not necessarily increase the freedom of the individual[48]. State paternalism has the power to alter the culture in a positive direction, making it easier for individuals to make healthier or safer choices. Taken together, arguments about limited capacity, information and willpower have force, particularly on matters of health[49].

A neighbouring argument is supported by theories of justice according to which the state has a special responsibility to protect the most vulnerable members of the community. This argument offers a further justification for risk regulation: financial solidarity. Welfare States depend on substantial financial transfers based on solidarity (transfers by taxation or insurance models). According to this perspective, the State has a claim to regulate lifestyle risks because the latter could increase the costs of social welfare[50].

4. Personal responsibility vs. toxic environment

Some authors answer to the "personal responsibility" theory with a different perspective on the problem, focusing on the "toxic environment". An unhealthy or obesogenic food environment at least partly contributes to rising obesity rates. We live in an age where portion sizes keep increasing, food stores are everywhere, fast-food is advertised non-stop, *etc*., leading some to talk about a "toxic" food environment[51].

Obesity is a sign of commercial success, but a market failure[52]. Dietary patterns across the world are being shaped by a food industry that continually strives to increase demand and sales. The food industry uses tactics that are similar to those used by the tobacco industry – supplying misinformation, use of supposedly conflicting evidence and hiding negative data[53]. The laissez-faire approach of leaving solutions for overweight solely to individuals is failing. Unless the power of the commercial drivers of obesity is modified through government interventions then we will witness a failure in promoting and protecting the health of the public[54].

Some Public Health experts focus on changing environmental factors. According to McGuinness, the current obesity problem can be blamed on the 'toxic' background environment. As a result, only a significant environmental change in a healthy direction is likely to curb the incidence of obesity. The government is very likely the only agent capable of effectuating the significant environmental changes required to successfully combat obesity[55]. When legis-

45 Rogan Kersh and James Morone, "How the Personal Becomes Political: Prohibitions, Public Health and Obesity", 16 *Studies in American Political Development* (2002), at p. 172.
46 Lawrence Gostin, "Trans Fat Bans and the Human Freedom: A Refutation", 10 *The American Journal of Bioethics* (2010), at p. 33.
47 Lawrence Gostin, "A Broader Liberty", *supra* note 33, pp. 216-7.
48 Simon Planzer and Alberto Alemanno, "Lifestyle Risks", *supra* note 4, at p. 336.
49 Lawrence Gostin, "A Broader Liberty", *supra* note 33, p. 217.
50 Simon Planzer and Alberto Alemanno, "Lifestyle Risks", *supra* note 4, atp. 337.
51 Rogan Kersh, "The Politics of Obesity: A Current Assessment", *supra* note 40, at p. 300; Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics", *supra* note 28, at p. 848.
52 Rob Moodie *et al.*, "Childhood obesity – a sign of commercial success, but a market failure", 1 *International Journal of Pediatric Obesity* (2006), pp. 134-136.
53 Mickey Chopra and Ian Darnton-Hill, "Tobacco and obesity epidemics: not so different after all?", 328 *British Medical Journal* (2004), pp. 1559-1560.
54 Rob Moodie *et al.*, "Childhood obesity – a sign of commercial success", *supra* note 52, p. 137.
55 Stephen McGuinness, "Time to cut the fat", *supra* note 39, at p. 47.

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lators trace the problem partially to the industry (or the "toxic environment") rather than overweight people themselves, an entirely different set of solutions comes into view[56]. From this standpoint, food choices are not merely a private problem, and obesity simply a matter of personal responsibility. Therefore, the obesity crisis is also a public concern, and governmental intervention is legitimate.

5. Social and economic costs

The main reason for public intervention in this regard is the impact of the cost of overweight-related diseases on the public health system. The economic analysis indicates that there are externalities associated with overweight and obesity. This takes the problem beyond the individual and makes it a legitimate focal point of public concern. The State has a reasonable interest in controlling the social costs of individuals' unhealthy behaviours that are borne by society at large. If overweight people consume more medical care, and if much of that medical care is paid for by society rather than the individual, or if obesity leads to reduced labour supply or productivity, then there is a negative externality associated with obesity[57].

Unhealthy diets impose a huge effort on countries' economies through health care costs, lost productivity, time off work and costs not yet quantified[58]. Rising health care costs mean that individuals' unhealthy behaviour raises taxes (for government health care) and increases premiums (for private insurance). In an age when no policy assessment is complete without a proper cost-benefit analysis, the struggle against obesity receives a lot of attention[59]. According to the European Charter on Counteracting Obesity, "obesity also strongly affects economic and social development. Adult obesity and overweight are responsible for up to 6% of health care expenditure in the European Region; in addition, they impose indirect costs (due to the loss of lives, productivity and related income) that are at least two times higher. Overweight and obesity most affect people in lower socioeconomic groups, and this in turn contributes to a widening of health and other inequalities"[60].

According to this perspective, there are valid justifications for intervention in the food industry beyond a minimalistic libertarian level. Obesity primarily affects the individual, but it also has high socioeconomic costs. The aggregate consequences of individual choices are countless preventable disabilities and deaths, affecting families and the entire community[61]. Hence, this seems like a natural point for government intervention, since "government officials ought to take action for the public good"[62].

Differently, some argue that the 'economic burdens' argument is not enough because it affirms that the main justification for public health regulation is cost savings rather than avoidance of human suffering and disability. Critics of public regulation argue that individuals absorb the cost of their own illness, so there is no 'public' issue at play[63]. However, some contend that taxpayers finance about half of all medical costs. Gostin asks the pivotal question: "does the government have a legitimate interest in controlling medical and social costs of individuals' unhealthy behaviours that are borne by society at large? Probably yes, but cost alone may not be a sufficient justification for over-riding personal liberty"[64].

In my opinion, simply justifying governmental intervention with public healthcare costs is an insufficient and dangerous argument. In an era of financial crisis, perceiving Public Health policy simply as a matter of accounting may seem rational but lacks democratic legitimacy. In fact, governments spend a lot of money in much more spurious activities than medical care. That type of expenditure should also be questioned. Furthermore, this type of financially-centred argument could easily slide, for instance, into a discussion about the purpose and justification of palliative medical care. Why should the State spend money on patients that are inevitably going to die? This is a dangerous argument, as it can be used to justify public savings with a number-centred logic that over-rides human dignity. In the limit, it would

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56 Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics", *supra* note 28, at p. 849.

57 Jørgen Jensen, Tove Christensen, Jonas Nordström *et al.*, "Food consumption and welfare economics – impacts of economic and political conditions", May 2007, Institute of Food and Resource Economics, University of Copenhagen,at p. 29.

58 Kelly Brownell, "The Chronicling of Obesity", *supra* note 30, p. 955.

59 Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics", *supra* note 28, p. 844.

60 European Charter on counteracting obesity, *supra* note 10, at p. 1.

61 Lawrence Gostin, "Law as a Tool to Facilitate Healthier Lifestyles", *supra* note 18, p. 87.

62 Rogan Kersh and James Morone, "Obesity, Courts, and the New Politics", *supra* note 28, p. 839.

63 Richard Epstein, "What (not) to do about obesity: a moderate Aristotelian answer", 93 *Georgetown Law Journal* (2005).

64 Lawrence Gostin, "A Broader Liberty", *supra* note 33, p. 216.

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be possible to create a public health system where patients where only be entitled to treatment after presenting evidence that they have not, in any way, contributed to their illness. Medical treatment would only be available for healthy citizens that pursue a healthy lifestyle but are, nonetheless, victims of inevitable diseases. Citizens that carry on unhealthy or risky lifestyles would be simply left on their own, bearing the fatal burden of their choices. This is a dreadful scenario, to say the least.

III. Are all public health tools paternalistic?

The introduction of the concept of 'lifestyle risks' lead to considerable modifications in Public Health policy. A wide arsenal of regulatory methods is now available for Public entities to choose from, in the hope of improving citizens' dietary choices and thus promoting public health. The problem is determining whether such mechanisms are an unbearable intrusion into individual freedom and are paternalistic; or if such accusations are exaggerated and such intervention is still justified or justifiable.

Within the concept of paternalism, it is usual to distinguish between 'soft' and 'hard' paternalism. When we talk about 'soft paternalism' this means that the only conditions under which state paternalism is justified is when it is necessary to determine whether the person being interfered with is acting voluntarily and knowledgeably. 'Strong' or 'hard' paternalism, as defined by Feinberg, refers to interventions that are intended to benefit a person whose choices and actions are voluntary and autonomous[65]. Feinberg argues that paternalism is an offensive word: "paternalism is something we often accuse people of. It suggests the view that the state stands to its citizens as a parent stands to his children. This sounds so outrageous that we would expect hardly anyone to confess to paternalistic tendencies"[66].

According to Gostin, 'weak' or 'soft' paternalism is so uncontroversial that it needs no particular defence. Such forms of paternalism have deep historical and jurisprudential support under the ancient doctrine of *parens patriae*[67]. Gostin claims that policy makers should at least be open to the idea of paternalism to prevent or ameliorate harms in the population. In his opinion, public health paternalism that clearly improves public health and well-being offers a 'broader freedom'. This concept is used to mean that when people have better opportunities for health and longevity, and live in more vibrant, productive communities, they have enhanced prospects for life and a wider range of choices for now and into the future[68].

This perspective emphasizes a 'population-based' perspective on paternalism. According to this view, it is not correct to think of public health paternalism as directed at the individual at all, but instead directed towards overall societal welfare. Public health paternalism is concerned primarily with overall societal welfare rather than individual preferences. It is intended to benefit the community as a whole rather than any given person[69]. Government's responsibility is to the collective, as well as the individual, so it may be just as important to safeguard the population from chronic disease as infectious disease[70].

Several authors support 'weak' forms of paternalism, in the sense that the intervention is not 'too' coercive[71]. Fabrizio Turoldo distinguishes between non-coercive interventions and coercive interventions. The question has to do with the degree of coercion that is imposed on citizens. Non-coercive interventions are those interventions that simply monitor the situation, that provide information, that enable individuals to change their behaviours by offering psychological or material support, or that guide choices through changing the default policy[72]. Highly coercive interventions, on the other hand, are those that eliminate choice (e.g., through compulsory isolation of patients with infectious diseases). These are strong measures that involve a large degree of coercion and limit personal freedom but that are sometimes necessary to protect other people from contagious diseases[73].

In our opinion, determining whether a Public Health tool can be accused of paternalism depends upon a case-by-case analysis. We should not put all

65 Joel Feinberg, *Rights, justice, and the bounds of liberty: essays in social philosophy* (Princeton: Princeton University Press 1980).
66 *Ibidem*.
67 Lawrence Gostin, "A Broader Liberty", *supra* note 33, pp. 214-5.
68 *Ibidem*, at p. 215.
69 Lawrence Gostin, "A Broader Liberty", *supra* note 33, at p. 217.
70 *Ibidem*.
71 See, *e.g.*, Thaddeus Pope, "Is paternalism really never justified? A response to Joel Feinberg", 30 *Oklahoma City University Law Rev* (2005), pp. 121–207.
72 Fabrizio Turoldo, "Responsibility as an Ethical Framework for Public Health Interventions", 99 *American Journal of Public Health* (2009), p. 1199.
73 *Ibidem*, p. 1201.

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of the same mechanisms in the same bag. In fact, not all regulatory measures can be automatically said to restrain the liberty of citizens, by forcing upon them a lifestyle without their consent, just because they aim at promoting healthier habits. Not all measures limit individual freedom: there are different levels of intrusiveness. Consequently, Public Health measures should be analysed and discussed separately, focusing on their purported advantages. What is the seriousness of the harm to be avoided? Is the intervention effective? What opportunity costs are incurred by the State's decision to act or not to act? What level of burden is imposed on the individual or business in exchange for the collective good to be achieved?[74] In my opinion, we cannot immediately assume that each and every type of proposed legislation is subject to the anti-paternalist objection. We should adopt a case-by-case approach. In fact, some legislation can be justified entirely on non-paternalistic grounds[75].

There are two necessary conditions for a law to the accused of paternalism. First, a paternalistic law is one that "curtails the liberty of individuals". Second, a paternalistic law is one that is implemented without the consent of its target individuals. Some anti-obesity legal rules can be realistically believed to be welcomed by the vast majority of the population. Hence, not all anti-overweight policies can be considered as lacking consent. Legislation that is accepted by its addressees can be justified entirely on non-paternalistic grounds.

In the next pages we will analyse several different measures that have been adopted by different jurisdictions and discuss whether the Law should promote a healthy diet. Our aim is to discuss the dangers of falling into a paternalistic attitude when designing any regulatory intervention aimed at promoting a healthier lifestyle.

1. Public information campaigns

Public information campaigns are the preferred policy approach to curb unhealthy practices. The right to information is often referred to as the key to all consumer rights, as it is the necessary condition for consumers to exercise all of the other rights. Only an informed consumer can make informed and reasonable choices. Public awareness is a powerful mechanism, as it can encourage citizens to consciously change their behaviour. Education and information are the cornerstones of many public health initiatives, generally supported by media communication and other social marketing tools. Well-informed and educated individuals will probably decide to take the necessary changes for a healthy life without the need to resort to more "coercive" measures.

In our opinion this type of measures cannot seriously be said to be paternalistic. It is obvious that measures that only aim at educating or informing consumers do not "curtail the liberty of individuals". In fact, legislation that only aims to inform and educate consumers does not interfere with individual liberty. Rather, it promotes the exercise of individual freedom by enabling informed decision-making. Such laws do not limit the freedom of citizens to eat whatever they choose, so gastronomical freedom is not constrained[76]. All rational consumers can be safely assumed to be interested in knowing material health information with respect to the products that they consume. Hence, there is a good reason to presume that such policies have the consent of the people. If the public can be presumed to consent to these education-focused policies, then they are not paternalistic[77].

Of course that consumers are not necessarily willing to be informed and – more importantly – to act properly upon that information. However, this is a problem of efficacy, not of legitimacy. The simple provision of information does not limit the citizen's choice, and therefore cannot be accused of paternalism. Individuals are free to refuse such information, to ignore it or not to change their behaviour. In any case, their options remain untouched.

2. Disclosure rules

'Full disclosure laws' require the diffusion of nutritional information, such as the noticeable placement of caloric and nutritional content of products. Consumers often acquire and eat foods without being aware of its nutritional content or damaging effects. Labels on packaged products are often too technical, unintelligible, confusing. By means of "full disclosure

74 Lawrence Gostin, "A Broader Liberty", *supra* note 33, p. 219.
75 Stephen McGuinness, "Time to cut the fat", *supra* note 39, pp. 54 *et sqq*.
76 *Idem*, p. 54.
77 Stephen McGuinness, "Time to cut the fat", *supra* note 39, p. 55.

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laws", producers are required to disclose the nutritional content of foods and provide health warnings. Unhealthy food suppliers have to post conspicuous warnings about the dangers of consuming their products. Disclosure rules help consumers make more informed choices, and thus benefit the public's health. Nutrition labels increase the information that is available to consumers, enabling them to make mindful decisions.

Another measure that has been set forward as a tool to help consumers improve their dietary choices is restaurant menu labelling. This method takes into consideration an important alteration in the culture of food: people are increasingly having more meals away from home. Rules on restaurant menu labelling seek to inform consumers about the nutritional contents of foods served in restaurants and fast food chains in the hope that having that information will lead consumers to make healthier choices[78]. This type of legislation requires chain restaurants to provide nutritional information on menus or menu boards so that it is clearly visible at the time of purchase.

Disclosure rules survive any accusations of paternalism. "Full disclosure laws' require the diffusion of nutritional data, providing more information about the content of products. Disclosure is consistent with the value of consumer autonomy. Thus, informing personal choices rather than restricting them is most likely to find political acceptance[79]. On the other hand, menu labelling also helps consumers to make healthier food choices. Menu labelling is entirely consistent with the legal tradition of requiring producers to disclose product information. However, some doubts remain about the effects in practice of this measure. We may question whether consumers see or understand labelling information and whether, once absorbed, the information makes any difference in their consumption practices. In any case, none of these measures restricts the freedom of citizens, or limit their gastronomical freedom. All options are open. By simply providing more information to individuals, and letting them decide freely, we are increasing choices and not limiting them. There is no paternalism here.

3. Advertising restrictions

Individual preferences about what to eat and drink are, as with many other aspects of modern life, deeply moulded by advertising. The food industry has colossal amounts of money available to spend with the purpose of shaping consumers' decisions. Advertising aimed at children has been recognized as a major cause of childhood obesity[80]. There are several different methods of advertising aimed at children and teenagers, often using innovative devices such as Internet advertising, Internet 'advergames' and product placement on television shows. Children are bombarded with advertisements on a daily basis, the majority of which are for unhealthy foods. The fact that young children are more naïve, less critical towards information than adults and unable to view advertising critically raises public concern and calls for further regulation.

Regulation of the advertising of food is one of the policy tools most regularly proposed to restrain unhealthy patterns in young people, but it is also one of the most controversial[81]. Some jurisdictions have enacted laws restricting food advertising during television programs that target young children. Others have prohibited marketing to children less than 12 years old or banned companies from sponsoring children's television programming[82]. Some laws require broadcasters to provide equal time for messages that promote good nutrition and physical activity. In France, for instance, each food advertisement must be accompanied by a public health message[83].

Some authors support restrictions on the advertising of certain foods, such as fast-food, snack, and soda products[84]. Others suggest that legislators should

78 See Brent Bernell, "The History and Impact of the New York City Menu Labeling Law", 65 *Food and Drug Law Journal* (2010), pp. 839-872.

79 Lawrence Gostin, "Law as a Tool to Facilitate Healthier Lifestyles", *supra* note 18, p. 87.

80 Margaret McCabe, "The Battle of the Bulge: Evaluating Law as a Weapon Against Obesity", 3 *Journal of Food Law and Policy* (2007), at p. 141.

81 Corinna Hawkes, "Regulating Food Marketing to Young People Worldwide: Trends and Policy Drivers", 97 *American Journal of Public Health* (2007), at p. 1962.

82 Corinna Hawkes, "Marketing food to children: the global regulatory environment", World Health Organization, 2004, available on the internet at <http://whqlibdoc.who.int/publications/2004/9241591579.pdf>, pp. 19 and 43 (last accessed on 27 August 2012).

83 Sara Capacci, Mario Mazzocchi, Bhavani Shankar *et al.*, "Policies to promote healthy eating in Europe: a structured review of policies and their effectiveness", 70 (3) *Nutrition Reviews* (2012), at p. 191.

84 Jennifer Harris and John Bargh, "Television Viewing and Unhealthy Diet: Implications for Children and Media Interventions", 24 *Health Communication* (2009), pp. 660-673.

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require disclosures about health information in the commercials, arguing that such disclaimers should be explained in language that children can understand in order to reduce the misleading nature of the message[85]. Some authors go even further, defending that legislators should ban the use of cartoon characters and celebrities in children's commercials. In fact, studies have shown that the use of cartoon characters or celebrities increases the influence of advertisements over children.

On this regard, the White Paper refers: "Advertising and marketing are powerful sectors that aim to influence consumer behaviour. There is evidence that advertising and marketing of foods influence diet, and in particular those of children. Between October 2005 and March 2006 the Commission conducted an Advertising Round Table to explore self-regulatory approaches and the way that law and self-regulation can interact and complement each other. As a result, a best practice model (or standards of governance) for self-regulation was set out in the Round Table report. These standards should apply to the specific area of the advertising of food to children. In doing so, voluntary efforts should complement the existing and different approaches being taken in Member States, such as Spain's PAOS code and the recent Office of Communication initiative in the UK. (...) The Commission's preference, at this stage, is to keep the existing voluntary approach at EU level due to the fact that it can potentially act quickly and effectively to tackle rising overweight and obesity rates"[86].

The discussion about policy measures aimed at limiting the effects of advertisement on children is sometimes converted into an argument over who is most to blame for obese children: the food industry or parents. While Public Health promoters focus on the power of advertising, the food industry points to parents who refuse to set limits for their children or who simply do not understand enough about health to teach their children the importance of a healthy lifestyle[87].

A good example of this sort of argument is provided by the following case.In the United States, Monet Parham, mother of two children, filed a suit claiming that McDonald's unfairly uses toys to lure children into its restaurants. The plaintiff, who was represented by the Center for Science in the Public Interest, a nutrition advocacy group, claimed that the company's advertising violates California consumer protection laws. In the lawsuit, Parham admitted she frequently tells her children "no" when they ask for Happy Meals. A lawsuit that seeks to stop McDonald's from selling Happy Meals must be dismissed because parents can always prohibit their children from eating them, the hamburger giant said in a court filing. "She was not misled by any advertising, nor did she rely on any information from McDonald's". "In short, advertising to children any product that a child asks for but the parent does not want to buy would constitute an unfair trade practice," the company said. A judge from the San Francisco Superior Court dismissed the case[88]. As far as we can see, parents cannot argue that they had no choice but buy "Happy Meals", as if their children were victims of an irresistible appeal, and the poor progenitors were slaves to such desire. Who is being childish, after all?

In the words of an author, "humans possess an innate preference for sweet, high-fat, and salty foods, and a reluctance to try unfamiliar foods; however, early experiences are critical in shaping individual food preferences. Children learn about foods they like or dislike by being exposed to a variety of foods and observing and experiencing the consequences and rewards of consuming those foods"[89]. Of course that the dietary experiences of children should be supervised by their parents, who cannot step down from their responsibilities. It is a rare event to find a child that enjoys soup and hates burgers. Should the innate preference of children for sweet and high-fat food automatically release parents from their duties? I don't think so.

How should persons be treated when they are less than fully rational? We can only truly talk about paternalism when measures encompass the protection of competent adults irrespective of their expressed desires. Restricting advertising targeted at children cannot be accused of paternalism. In the case of chil-

85 William Ramsey, "Rethinking Regulation of Advertising Aimed at Children", 58 *Federal Communications Law Journal* (2006), pp. 384-386.

86 White Paper on a Strategy on Nutrition, *supra* note 13, at p. 6.

87 Jennifer Harris and John Bargh, "Television Viewing and Unhealthy Diet", *supra* note 84, at p. 660.

88 Daily Mail Online, "Let there be toys! Judge throws out lawsuit brought against McDonald's Happy Meals by concerned mom", 5 April 2012, available on the internet at <http://www.dailymail.co.uk/news/article-2125756/Judge-dismisses-suit-McDonalds-Happy-Meals-concerned-mom-Monet-Parham-California.html#ixzz24GkYvA4u> (last accessed on 27 August 2012).

89 Corinna Hawkes, "Regulating Food Marketing to Young People Worldwide", *supra* note 81, at p. 1962.

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dren and teenagers, we should not forget that they are more naïve and less critical towards advertising. Hence, most public measures aimed at limiting advertising directed at youngsters pass the paternalistic test.

This being said, we should also stress that parents have the duty to set limits for their children, as they are also responsible for their children's healthy lifestyle. The industry, obviously, tries to blame parents, as they have special duties, but that argument does not capture the whole picture. Obesity and overweight result from different factors. There have always been obese people, even before the dawn of advertising. The 'blame game' decontextualizes the question, assuming that there is only one direct cause for childhood obesity (ubiquitous and persuasive advertising / careless and irresponsible parents). Legal regulation of advertising takes into account the persuading power of marketing strategies vis-à-vis the importance of well-informed and rational consumers. By limiting the marketing of certain products that are especially unhealthy, the legislator is not removing them from the market – it is just 'hiding' them from the curious eyes and eager taste of children. Chocolates are still accessible on the shelves of any supermarket: public entities are just trying to limit its promotion and, hence, its consumption by children. Of course, children will, sooner or later, discover the irresistible appeal of chocolate. That is when their parents have to assume an active position, forbidding, controlling or moderating the consumption of such products.

4. Taxation of unhealthy food

One of the most debated and divisive public health proposals is the taxation of unhealthy foods[90]. These are basically fiscal measures designed to change the relative prices of specific foods that are considered as healthy or unhealthy. The idea is to provide consumers with economic incentives to adopt healthy food consumption habits, thus reducing the probability of being exposed to overweight and other health risks.

There are basically two different types of approaches. First, the reduction of taxes on healthy goods or ingredients, sometimes referred to as 'thin subsidies', for instance, a VAT reduction on selected groups of food like fruits and vegetables. Such a policy would encourage consumers to increase their intake of fruits and vegetables at the cost of other food groups and thus lead to a healthier diet. Supporters of these measures argue that the cost of healthy foods should be subsidized, or that growers and manufacturers of healthy foods should receive subsidies[91].

A diametrically different approach is the imposition of taxes on specific unhealthy foods or ingredients, for instance, junk food or sugar. Colloquially known as a 'fat taxes' or 'twinkie taxes', such levies would provide a disincentive for purchasing unhealthy ingredients or products. Taxation has been suggested as a means of decreasing the intake of certain foods, thus lowering health care costs, as well as a means of generating income that governments can use for healthy lifestyle programs[92].

Public health advocates believe that food costs are out of balance, with healthy foods costing more than unhealthy ones. The creation of "fat taxes" is seen as a response to a food industry and consumer culture that increasingly promotes unhealthy foods as the cheapest, tastiest, and most available dietary options[93]. The World Health Organization's "Global Strategy on Diet, Physical Activity and Health" does not prescribe any specific tax or subsidy, but it notes that "several countries have adopted fiscal measures to promote availability of and access to various foods, and to increase or decrease consumption of certain types of food". Furthermore, "public policies can influence prices through several measures including tax policies and subsidies. The text of the Strategy acknowledges that decisions on such policy options are the responsibility of individual Member States, depending upon their particular circumstances"[94].

In the United States, 30 States have implemented small taxes on some types of unhealthy food. The low level of these taxes, combined with a rather inelastic demand, makes them ineffective as a tool to curb obe-

90 Kelly Brownell, "The Chronicling of Obesity", *supra* note 30, at p. 957.
91 Katherine Horgen and Kelly Brownell, "Policy change as a means for reducing the prevalence and impact of alcoholism, smoking, and obesity", in William Miller and Nick Heather (eds.) *Treating addictive behaviours*, 2nd ed. (New York: Plenum Press, 1997), pp. 105–118.
92 Cynthia Baker, "Bottom Lines and Waist Lines", *supra* note 37, at p. 190.
93 Michael Jacobson and Kelly Brownell, "Small taxes on soft drinks and snack foods to promote health", 90 *American Journal of Public Health* (2000), pp. 854-857.
94 World Health Organization, "Frequently asked questions about the WHO Global Strategy on Diet, Physical Activity and Health", available on the internet at <http://www.who.int/dietphysicalactivity/faq/en/index.html>, last accessed on 27 August 2012.

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sity. However, they generate very large tax revenues that have been used to sponsor public health programs[95]. In Europe, the Danish government increased taxes on a range of products and decreased taxes on sugar-free soft drinks. In January 2011, Finland reintroduced a sweets tax that had been in force in 1999-2000. In January 2010, Romania proposed a fat tax on fast food, soft drinks and sweets, but the tax has not been implemented[96].

Several interested parties have voiced firm opposition to this type of fiscal measures[97]. Firstly, most consumers are unwilling to pay more for some of their favourite foods. Secondly, such taxes are seen as discriminating against those on low incomes. In fact, the economic ability and/or the nutritional need vary across different consumer groups, so the use of a tax instrument may lead to undesired distributional effects[98]. Furthermore, some argue that such taxes are rarely aimed at affecting consumer behaviour, but merely a source of revenue[99]. Finally, critics question how is it possible to decide which foods should be taxed or subsidized, and why.

Tax increases on tobacco products, with a resultant rise in their prices, have been shown to reduce tobacco consumption. However, food is not like tobacco, which is never beneficial. People need food to survive, and any food may be acceptable when eaten in moderation[100]. Furthermore, there is no direct evidence that taxes on food affect rates of obesity, while studies have linked food pricing with consumption patterns and cigarette taxes with tobacco use[101].

"Fat taxes" are frequently said to be paternalistic and regressive because poor people are the primary consumers of high-fat foods. However, we can also argue that they are justified by a desire to recover some of the health care costs associated with unhealthy behaviours. A "fat tax" could therefore be justified without reference to any kind of paternalistic argument. Overweight citizens would simply be asked to pay for the harm which they inflict upon society in the form of higher health care costs, actually promoting personal responsibility[102].

The decisive factor has to do with ascertaining whether individuals really absorb the cost of their own illness. As already mentioned, simply justifying governmental intervention with public healthcare costs is an insufficient and dangerous argument. This type of legal tool should be used carefully, based not only on financial grounds but also on a comprehensive vision capable of justifying heavier taxes. Citizens are especially sensitive to the increase of taxes, and it is particularly hard to persuade them that they should pay for their gastronomical choices. What we eat and drink, and in what amount, is still considered as a space of privacy and freedom. Any intervention in this regards has to be especially supported and justified.

Furthermore, it is easier to justify the introduction of 'thin subsidies' than 'fat taxes'. If the government decides to tackle the problem in a positive manner, by offering a wider set of options (cheaper healthy foods like fish, fruits and vegetables), a fiscal intervention cannot be accused of paternalism. Faced with two products (one healthy and one unhealthy) with equal prices, consumers would not have to be concerned about the price, and would be free to consciously think about nutrition and dietary richness. This type of intervention would not raise controversy, as it would reduce the price of some products, instead of increasing them. People are always in favour of lowering taxes, regardless of the specific policy behind the decision.

On the contrary, adopting a negative approach, by increasing taxes on specific unhealthy foods or ingredients, would raise the global price of food (assuming that healthy food prices remained the same) and thus harden the access of less affluent people to healthy products. Furthermore, as goes without saying, people do not accept tax rises quietly, especially when taxation is imposed on essential products like food. By making unhealthy products more expensive, the government would be narrowing options instead of broadening them. Arguing that overweight citizens would simply be asked to pay for the harm which they inflict upon society overlooks income disparities and assumes that all citizens have enough means to afford their dietary choices. We all know that is an unreal assumption.

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95 Sara Capacci, Mario Mazzocchi, Bhavani Shankar *et al.*, "Policies to promote healthy eating in Europe", *supra* note 83, at p. 194.
96 *Ibidem*.
97 See, e.g., Richard Epstein, "What (not) to do about obesity", *supra* note 63.
98 Jørgen Jensen, Tove Christensen, Jonas Nordström *et al.*, "Food consumption and welfare economics", *supra* note 57, at p. 39.
99 Michael Jacobson and Kelly Brownell, "Small taxes on soft drinks", *supra* note 93.
100 Lawrence Gostin, "Law as a Tool to Facilitate Healthier Lifestyles", *supra* note 18, at p. 89.
101 Michelle Mello, David Studdert and Troyen Brennan, *Obesity — The New Frontier of Public Health Law,supra* note 15, at p. 2604.
102 Stephen McGuinness, "Time to cut the fat", *supra* note 39, p. 56.

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Besides unfair and regressive, 'fat taxes' can also be considered paternalistic as they curtail the gastronomical liberty of citizens with the goal of forcing upon them a healthy lifestyle without their consent. Governments might have a hard time trying to justify that some types of food are going to cost harder because they are unhealthy, when citizens are concerned with putting food on the table in the first place. One could argue that all taxes are imposed (they are not directly consented by tax payers and may even be forcibly collected). However, taxes have to be reasonable and equitable – that is the foundation of their legitimacy. Tax payers may argue that their taxes should be directed for other social purposes like Justice and Education, instead of being used as a tool to reduce the number of big bellies on the beach. A paternalistic tax policy would be, as far as I can see, very hard to explain, as Tax Law is built on principles such as legitimacy, proportionality and fairness. A paternalistic tax would probably be the worst form of paternalism.

5. Food prohibitions

Perhaps the most powerful and disruptive tool of public health regulation is a complete prohibition of foods or ingredients thought to be especially harmful. Law has played a long-standing and accepted role in regulating products known to pose health risks. Such measures impose added costs on food processors but public health benefits seem to overweight the burden.

A good example of this type of legal tool is 'trans fat'. 'Trans fat' is a kind of fat created by adding hydrogen to vegetable oils and making them into solid fats. It is attractive to corporations because it extends shelf life and adds taste to products[103]. A growing body of scientific evidence links trans fatty acids to coronary heart disease. In Europe, in 2003, Denmark became the first country to introduce strict regulations on trans fat usage. Three years later, the Danish Health Ministry was already announcing a 20% decline in the rate of cardiovascular disease. The Board also noted that the Danish restrictions did not affect the quality, cost or availability of food[104].

Supporters believe that eliminating products or ingredients that are known for their health risks will decrease morbidity and premature mortality in the population. However, some argue that if replacing trans fats is expensive and raises the cost of specific foods, consumers may switch to cheaper alternatives[105]. The food industry also claims that legal prohibitions undermine competitive markets and free trade.

Food prohibitions, like the 'trans fat' ban, are often perceived as paternalistic. In fact, this is the most intrusive or coercive form of intervention, as it can result in the elimination of ingredients or products. Some argue that this type of measures constitute an unjustifiable restriction on the freedom to decide what one eats. Actually, this type of measure curtails the gastronomical liberty of citizens, forcing upon them a healthy lifestyle without their consent, and probably against their will. In this case the 'chocolate' is not hidden or more expensive: it is not on the shelf anymore, as it is forbidden (and probably only accessible on the black market...). As in other situations, the temptation to just prohibit something is sometimes too big, as if that would just erase the problem. We should have a full understanding of the causes of obesity and address unhealthy diets globally, not by erasing parts of the problem (eliminating unhealthy products from the market) but rather by widening the options that citizens face and enhancing their knowledge about such options. Obesity is not only caused by fat ingredients: it can also be caused by overeating healthy products. What will the next step be – to control the ration that each citizen is entitled to? Will the 'war on obesity' go that far?

Food prohibition measures should be the *ultima ratio*: in fact, the ability to decide what one eats, though not important as freedom of speech or religion, is an important freedom nonetheless[106]. All of the other legislative measures should be considered and discussed before deciding to engage in such a radical tool. Along with "fat taxes", this type of intervention calls for an enhanced legitimacy and justification. Taxation of unhealthy foods pose special problems as it limits the access of individuals to certain types of ingredients or food, by increasing their price, thus restricting the dietary freedom. Food prohibitions go even further, by simply barring the ac-

103 Gabriel Edelman, "The New York City Trans Fat Ban: A Healthy Law", 17 *Journal of Law and Policy* (2008), at p. 271.
104 *Ibidem*, at p. 291.
105 Sara Capacci, Mario Mazzocchi, Bhavani Shankar *et al.*, "Policies to promote healthy eating in Europe", *supra* note 83, at p. 195.
106 David Resnik, "Trans Fat Bans and Human Freedom", 10 *The American Journal of Bioethics* (2010), at p. 29.

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cess to some ingredients or foods, thus reducing that same dietary freedom[107].

Again, the question has to do with legitimacy. The legitimacy of public health tools depends on individuals' acceptance of such policies. Citizens should not be treated as infants. However, even adults are legally protected from their own behaviour in certain instances. The difference between rigid paternalism and a lenient attitude is to be found somewhere in between, respecting the freedom to choose and enhancing the conditions for citizens to make informed decisions. Health decision-making largely rests on the significance of individual responsibility for one's decisions and choices. Health policy cannot be simply about directing healthy behaviour but must aim for an understanding of how individuals reason and decide[108]. Only when all other measures fail should we resort to *ultima ratio* measures like taxing unhealthy foods or banning certain types of ingredients as these measures, more than limiting choice, may eliminate the right to choose. There is no informed choice when you are denied the right to choose.

IV. Concluding remarks

Research in lifestyle risks is becoming increasingly important, particularly concerning what are generally dubbed as "unhealthy diets". Our diet is an essential part of our lifestyle, as food consumption patterns may affect the quality of life. Inadequate or imprudent diets can be considered as 'lifestyle risks' as they refer to a way of life that entails a risk potential, as it may be the cause of disease and, eventually, death. Worldwide, regulators and legislators are concerned with the battle against unhealthy habits. Indeed, legislation may be used as an instrument to promote healthier lifestyles. There are several different methods of legal intervention aimed at preventing overweight and promoting healthier lifestyles. Those measures include public information campaigns, disclosure rules, advertising restrictions, taxation of unhealthy foods and even food prohibitions.

State's role in the promotion of healthy lifestyles is a hot topic in modern societies. Traditionally food consumption and physical activity were seen as inappropriate subjects for government regulation, as these were taken as private matters for the individual – and only the individual – to ponder and decide on. However, with the evolution of scientific knowledge, there is increasing social awareness that weight-related diseases may have a considerable effect on both the individual and the society as a whole. The biggest problem is that this new field of regulatory intervention touches some of the values that define us as a society: personal freedom, choice and liberty.

This "new frontier" of Health Law has sparked the debate. Some argue that regulatory measures amount to a limitation to the freedoms of individuals, namely, to their freedom of choice, freedom of speech and even freedom of contract. According to the classic libertarian view, minimal state intervention is the only way to ensure the protection of individual freedom. Paternalism has been defined as the protection of competent adults irrespective of their expressed desires. Government health measures can be said to be paternalistic if they curtail the gastronomical (or other) liberty of citizens; with the goal of "forcing" upon them a healthy lifestyle without their consent.

Some authors reject the argument that public health interventions limit the individuals' freedom, arguing that the possibility for individuals to make informed decisions should be ensured. This requires proper prior information, and less regulation would not necessarily increase the freedom of the individual. State paternalism has the power to alter the culture in a positive direction, making it easier for individuals to make healthier or safer choices. A neighbouring argument is supported by theories of justice according to which the state has a special responsibility to protect the most vulnerable members of the community. Some authors answer to the "personal responsibility" theory with a different perspective on the problem, focusing on the "toxic environment". An unhealthy or obesogenic food environment at least partly contributes to rising obesity rates.

The main reason for public intervention in this regard is the impact of the cost of overweight-related diseases on the public health system. The economic analysis indicates that there are externalities associated with overweight and obesity. This takes the problem beyond the individual and makes it a legitimate focal point of public concern. According to this perspective, there are valid justifications for intervention in the food industry beyond a minimalistic libertarian level. Differently, some argue that the 'eco-

107 *Ibidem*.
108 *Ibidem*.

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nomic burdens' argument is not enough because it affirms that the main justification for public health regulation is cost savings rather than avoidance of human suffering and disability. In my opinion, simply justifying governmental intervention with public healthcare costs is an insufficient and dangerous argument. In an era of financial crisis, perceiving Public Health policy simply as a matter of accounting may seem rational but lacks democratic legitimacy.

Within the concept of paternalism, it is usual to distinguish between 'soft' and 'hard' paternalism. Several authors support 'weak' forms of paternalism, in the sense that the intervention is not 'too' coercive. Determining whether a Public Health tool can be accused of paternalism depends upon a case-by-case analysis. Not all regulatory measures can be automatically said to restrain the liberty of citizens, by forcing upon them a lifestyle without their consent, just because they aim at promoting healthier habits. Not all measures limit individual freedom: there are different levels of intrusiveness. Consequently, Public Health measures should be analysed and discussed separately, focusing on their purported advantages.

Public information campaigns cannot seriously be said to be paternalistic. It is obvious that measures that only aim at educating or informing consumers do not "curtail the liberty of individuals". Disclosure rules also survive any accusations of paternalism. By simply providing more information to individuals, and letting them decide freely, we are increasing choices and not limiting them. Regulation of the advertising of food is one of the most controversial policy tools. Advertising aimed at children has been recognized as a major cause of childhood obesity. However, the discussion about policy measures aimed at limiting the effects of advertisement on children is sometimes converted into an argument over who is most to blame for obese children: the food industry or parents. The industry tries to blame parents, as they have special duties, but that argument does not capture the whole picture. Obesity and overweight result from different factors. The 'blame game' decontextualizes the question, assuming that there is only one direct cause for childhood obesity (ubiquitous and persuasive advertising / careless and irresponsible parents).

One of the most debated and divisive public health proposals is the taxation of unhealthy foods.It is easier to justify the introduction of 'thin subsidies' than 'fat taxes'. If the government decides to tackle the problem in a positive manner, by offering a wider set of options (cheaper healthy foods like fish, fruits and vegetables), a fiscal intervention cannot be accused of paternalism. On the contrary, adopting a negative approach, by increasing taxes on specific unhealthy foods or ingredients, can be considered paternalistic as it curtails the gastronomical liberty of citizens with the goal of forcing upon them a healthy lifestyle without their consent. A paternalistic tax policy would be very hard to explain, as Tax Law is built on principles such as legitimacy, proportionality and fairness. A paternalistic tax would probably be the worst form of paternalism.

The most powerful and disruptive tool of public health regulation is a complete prohibition of foods or ingredients thought to be especially harmful. This type of measure curtails the gastronomical liberty of citizens, forcing upon them a healthy lifestyle without their consent, and probably against their will. The temptation to just prohibit something is sometimes too big, as if that would just erase the problem. We should have a full understanding of the causes of obesity and address unhealthy diets globally, not by erasing parts of the problem (eliminating unhealthy products from the market) but rather by widening the options that citizens face and enhancing their knowledge about such options. Only when all other measures fail should we resort to *ultima ratio* measures like taxing unhealthy foods or banning certain types of ingredients as these measures, more than limiting choice, may eliminate the right to choose. There is no informed choice when you are denied the right to choose.

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