

Paternalism, Autonomy, & Food Regulation

1. Obesity Prevention

1.1 Contemporary Public Health

New York City Mayor Michael Bloomberg recently proposed legislation that bans the sale of sugary drinks in containers larger than 16 ounces.¹ The growth of the obesity epidemic suggests that proposals for similar measures will increase in coming years. As public health officials' focus shifts, campaigns against smoking are being replaced with campaigns against sugar, fat, and carbs. Governments may be quick to propose regulations that incapacitate our ability to make bad health choices.² *Prima facie*, it may seem that any inquiry into the justificatory grounding of Bloomberg's proposal or other 'food bans' would be nothing more than reengagement with familiar issues regarding paternalism, coercion, liberty, and respect for persons. Governments have a long history of approving legal mandates concerning smoking, narcotics, seatbelts, vaccinations and more. Philosophical discussions on the aforementioned have a prolific literature and Bloomberg's ban might seem like just an addition to the list. If so, we should simply reengage old arguments and apply them to the matter at hand. But this would be a mistake.

Although state promotion of public health is an old phenomenon, Bloomberg's latest statute introduces new concerns. One way in which Bloomberg's ban is *similar* to past public health statutes is in its justificatory appeal to harm. Those who advocate legal restrictions on smoking, for instance, argue that such statutes prevent harm to both smokers and non-smokers. Along similar lines, seatbelt laws protect riders from injurious automobile accidents and mandated vaccinations prevent disease. The purported aim

of Bloomberg's ban is to prevent obesity, ostensibly, because obesity causes harm. And certainly obesity is harmful in some sense. But this is where we first see Bloomberg's proposal depart from past public health statutes. For the way in which obesity harms differs in key respects from harm that justified government regulation in the past.

1.2 Then vs. Now

Suppose A and B are non-smokers selected randomly from the populace. Health professionals will likely agree that if either changes status from non-smoker to smoker, they will subject themselves to substantial health risks. We can make similar statements about the protective power of seatbelts and vaccinations: engaging in or refraining from such activities affects different persons in similar ways. On the other hand, suppose we asked health professionals about the effects of daily soda consumption. There is a reasonable possibility that such consumption would present great risk to A and little risk to B.³ These differing effects lead to justificatory problems which past health regulations avoided. Those who appealed to paternalistic justification for smoking, seatbelt, and vaccination legislation cannot easily appeal to the same for unhealthy food regulation because paternalistic efficacy varies greatly across persons. Food regulation might be justified nonetheless, but any such justification depends on contingencies irrelevant to past paternalistic legislation yet indispensable to this new health crisis.

Another distinguishing quality of Bloomberg's ban concerns the indirect way in which the prohibited activity causes harm to others. To compare, secondhand smoke harms bystanders close enough to inhale carcinogens. Similarly, the unvaccinated might carry viruses that impose harmful risks via close physical proximity. Obesity is not harmful in this way. There is no second-hand effect and even those in the closest physical proximity to obese persons face no direct risk. Harm prevented through obesity regulation

is contingent upon on an intermediary like socialized health care that distributes medical costs across the populace.

Because Bloomberg's proposed measure brings up the untrodden concerns just mentioned, a special justificatory review is warranted. This paper considers two distinct lines of arguments used by Bloomberg, those that appeal to paternalistic principles and those that depend on The Harm Principle. The arguments offered and the conclusions reached are only superficially directed toward Bloomberg's specific proposal. This particular ban on large soda cups is used because it is recognizable and illustrative of the more general justificatory status of food bans. Both arguments from harm and paternalism ground an attempt to justify various regularity measures on unhealthy foods, not just restrictions on soda. I conclude that these arguments are successful, but only under certain empirical conditions and alongside necessary provisos.

2. Theoretical Assumptions and Method

2.1 Liberalism and Public Justification

Before judging the justificatory grounds of state-limitations on soda, we must assume a minimal political theory. Bloomberg's proposal is clearly justified under some political conceptions: Assuming a legitimate monarchy, with Bloomberg as king, royal authority justifies his ban alongside any other decree. But Bloomberg was mayor, not king, and many who question the ban's legitimacy do so because they assume political liberalism. Political liberalism comes in various forms, but most endorse the following: (1) Society is composed of free and equal persons;⁴ (2) There is a presumption in favor of liberty: coercive state statutes are presumed unjustified until strong reasons show otherwise. Gerald Gaus has called (2) the

Fundamental Liberal Principle.⁵ Formally,

Fundamental Liberal Principle: coercive state statutes are unjustified until proven justified.

Not just anything can justify coercion. That some behavior, B, is against the tenants of Religion R, cannot justify B's prohibition to those who reject R. The justificatory scope must be restricted. Public reason liberalism, one of today's most prominent liberal schools, circumscribes liberty-limiting reasons to those that the coerced can reasonably be expected to endorse. This reason-restraining demarcation, sometimes known as the Public Justification Principle, comes in various forms.⁶ What seems common to all accounts is an appeal to the subjects own rationality, commitments and values. Coercion is justified only if the coerced agent, by her own perspective, has reason to endorse the relevant coercive measure.

Grounding Public Justification is (1) liberalism's respect for all as free and equal and (2) the acknowledgment of 'reasonable pluralism'. The existence of (2) advises the proper approach to (1). Reasonable pluralism is the recognition that free persons exercising their reason inevitably arrive at serious disagreements over mores, values, and ideals. Because of these disagreements, a reason for A to endorse coercive Law L is not necessarily a reason for B. Respect for all demands that if L coerces both A and B, both should have reason for L's endorsement. But this may seem too strong; can any statute be acceptable to all? In response to these worries, Public reason liberals often appeal to idealization.⁷ Persons need only to endorse coercive measures when idealized as informed and reasonable – this leaves room for the coerced rejecting reasons in practice. Suppose we are considering whether states might justifiably impose mandatory vaccinations. It may seem unlikely that the state justify this mandate to Jeramiah who opposes vaccinations on religious grounds. But we might surmise that if Jeramiah was informed and reasonable, he would recognize that because of the many risks he himself wants protection from, he cannot ask for an

exception when similar demands are placed on himself. Of course, it is difficult to agree on what reasonable persons would endorse. Nonetheless, from the perspective of public reason liberalism, we must accept this difficulty and make our best effort in spite of it. For what is clear is that coercive measures forced on those who cannot endorse them violate liberalism's commitment to universal respect.

Even after idealization, Public Justification may still seem too strong. If coercion is minimal, and the good done to the public at large great, perhaps the public good can outweigh the small coercive harm that falls upon a single person. Moreover, idealization might encourage construing persons as unreasonable whenever there is cause for coercion. Rather than stretching the scope of irrationality, Public Justification can be moderated. We need not say that regulation is never justified if rejected by the coerced. Instead, in exceptional circumstances, great public good might outweigh minor coercion against those who reasonably object. Let us assume a political liberalism that accepts a modified Public Justification principle. Doing this avoids criticism of illiberalism while maintaining a realist perspective.

2.2 Degrees of Coercion

In judging degrees of coercion, we must consider both quantity and quality: the greater the number of persons coerced and the more severe the coercion, the greater the coercive degree. Moreover, the greater this degree of coercion the higher we should set the justificatory standards for its legal implementation. If, for instance, policies impose unwanted liberty restrictions on most of the populace, the expected positive consequences must be quite strong. If coercive policies affects only a small number, yet greatly infringes those people's liberty, the consequential justification must be equally strong. The strongest of consequential justification is needed when a policy's coercive force is both widespread and severe.

Coercion's severity can present even greater justificatory problem than the total number of those

coerced. Suppose only one person is coerced. If the coercion is oppressive enough, many will argue that no amount or degree of good consequence can justify the liberty infringement. Suppose, for instance, that in order to save millions we must tie Bob to his bed for 10 years. Would this be justified? It is a difficult case. Thankfully, we can put this particular dilemma aside. The issues involved when considering food bans are probability games, not imminent catastrophe. For instance, what policy or policies will increase the chance that persons will live healthier lives? Maybe we need to coerce some to improve the chances of healthier lives for others. Evaluating the justificatory status of food bans demands considering whether these strategies could ever be justified, and if so, how to compare chances of improved health to degrees of coercion.

3. The Paternalism Argument

3.1 Bloomberg Makes his Case

The Fundamental Liberal Principle implies that the burden of proof remains on Bloomberg to justify his soda prohibition, and to the Mayor's credit, he has indeed tried just this. Consider the following from Bloomberg:

- (1) "[S]ugary drinks are helping to drive the obesity epidemic ... Obesity is killing more than 5,000 New Yorkers each year and demands bold steps to fight this crisis..."⁸
- (2) "Obesity-related health care expenditures in New York City now exceed \$4.7 billion annually ... Medicare and Medicaid programs funded by tax dollars, pay approximately 60 percent of those costs".⁹

Statement (1) appeals to the health of sugary drink consumers. In other terms, (1) is a paternalistic justification. Argument (2) is grounded in a distinct theoretical principle. Rather than appealing to the health of soda drinkers, it aims to protect third parties that subsidize soda drinkers' medical expenses. In other terms, (2) is an argument grounded in The Harm Principle. We can consider (1) the paternalistic argument and (2) the harm argument. Let us first consider the paternalistic argument. Here are some further statements from Mayor Bloomberg, this time arranged in a relaxed argumentative structure.

- (1) "Obesity is killing more than 5,000 New Yorkers each year and demands bold steps to fight this crisis; this week New York City will do precisely that".¹⁰
- (2) "[S]ugary drinks are helping to drive the obesity epidemic ..."¹¹
- (3) "[Y]ou look at where obesity is in the country, it tends to be in people at the lower end of the economic ladder, who don't have the ability to take care of themselves as well".¹²
- (4) "It would be irresponsible not to try to do everything we can to save lives".¹³

The mayor's quotes, taken together and interpreted charitably, can be reformulated as follows:

- (1) The government has a responsibility to prevent premature death.
- (2) Obesity causes premature death.
- (3) Some individuals (low-income individuals in particular) become obese when left to their own care.
- (4) Therefore, government is justified in using coercive means to prevent obesity.

Quotes (1)–(4) imply support for what Joel Feinberg has called Legal Paternalism: “The principle of legal paternalism justifies state coercion to protect individuals from self-inflicted harm, or in its extreme version, to guide them, whether they like it or not, toward their own good”.¹⁴ Bloomberg’s ban meets Feinberg’s criteria. It (1) attempts to justify a coercive state measure (prohibiting soda sales over 16 ounces). And it (2) attempts to so justify via an appeal to protect individuals from self-inflicted harm, for the sake of their own good (whether they like it or not).

Depending on the liberal asked, legal paternalism may or may not speak against a statute’s justification. Some liberals like Feinberg oppose paternalism in principle, arguing that it interferes with a cherished liberal value: personal autonomy. Very generally, those that have personal autonomy live self-governing lives according to their own reasons. These reasons must arise from the free exercise of thought rather than coercion or manipulation. We return to Feinberg who has argued, “[R]espect for a person’s autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions”.¹⁵ All liberals, not just anti-paternalist liberals, hold autonomy in high esteem. Respect for all as free and equal can be seen as universal respect for personal autonomy. Disagreements arise over whether or not, or to what extent, paternalistic policies interfere with autonomy and whether or not other values can override this interference.

If anti-paternalist liberals like Feinberg are right, paternalism cannot justify the Bloomberg ban and we can ignore justificatory attempts grounded in paternalistic principles. But whatever the merits, many liberals will continue to appeal to paternalistic justifications. For that reason, we should assume that laws are potentially justified via paternalistic policies, and then consider whether Bloomberg’s proposal fits the justificatory criteria. If it can be justified to those who accept paternalism, we will know that food bans are potentially justified to at least one school of liberal thought.

3.2 Balancing Tests

Even if coercion absent compelling reason is unjustified, paternalism may remain viable, for paternalistic reasons are potentially compelling. Richard Arneson, for instance, has argued that paternalism might be justified if the liberty rights infringed are insignificant in comparison to the benefits produced by the infringement.¹⁶ This fits with the spirit of the Fundamental Liberal Principle, insofar as there is an overridable assumption in favor of liberty. Paternalism is just a particular type of coercive force that strong reasons might show necessary and justifiable. Call this the Balancing Test.

Balancing Test: Paternalistic measure M is justified if and only if M's beneficial consequences outweigh the negativity of liberty infringement.

Simplified Balancing Test: liberty infringement < beneficial consequences

The first prong requires assessing coercive degree. How does this play out with Bloomberg's proposal? To what degree does the inability to purchase large sodas infringe upon our liberties? Prima facie, it seems coercive force is minimal. Few would argue that soda consumption is on par with freedom of speech, religion, association, etc. We might distinguish liberties essential to an autonomous life, (or at least very important), to other less fundamental liberties. On one end of the spectrum are liberties most critical to autonomy, such as the freedom of speech, and on the other end are less essential liberties like the freedom to eat strawberries on Thursdays. The closer liberties are to the significant end of the spectrum, the greater the degree of coercion and the more stringent the justificatory demands. This does not mean an absolute prohibition on the most significant liberties nor does it justify arbitrary coercive measures for liberties considered less significant. Most liberals, after all, recognize some restrictions on even our cherished

freedom of speech. Contrastingly, justifying state restrictions on Thursday strawberry consumption might be difficult because it could be hard to find any justificatory reason.

Suppose we agree that Bloomberg's ban infringes liberty, but only to a small degree. This is just half the justificatory story. The ban's potential benefits are the other part of the equation. In this respect, we can helpfully appeal to John Rawls's and his conception of primary goods. According to Rawls, primary goods are 'things that every rational man is presumed to want'.¹⁷ Modifying Rawls's account, we might see benefits on a spectrum of reasonable wants, so that the more the reasonable person would want a good, benefit, privilege, or liberty, the greater its significance. The purported benefits of Bloomberg's proposal are obesity prevention that leads to saved lives. This may seem significant: most reasonable persons value a long-life over an early death. But some qualifications are in order. Bloomberg's stated goal of 'saving lives' is best understood as lowering the risk of death. And reductions in risk can be great or small. Suppose eliminating excessive soda consumption from the average diet reduces risk of obesity-related death by 001%. Such a small reduction would do little to speak to significant benefits. On the other hand, suppose the reduction was 80%; this great reduction is arguably significant. Without settling on an exact value, we might suppose that if reducing large soda consumption reduces death risk by $p\%$ or more, then benefits should be considered significant.

Once a numerical range for significance is determined, it can only be meaningful with a *ceteris paribus* clause. Any change in diet might be offset by some other change, and so a nutritional alternation that by itself might make a positive difference could end up doing little at all. This clause is both necessary and potentially troublesome, because in the actual world all things are rarely equal. If persons are forced to drink less soda, for instance, they might respond by changing other parts of their diet. Hence the *ceteris paribus* death-risk reduction may diverge from the all things considered reduction. Gerald Dworkin voiced this concern many years before Bloomberg proposed his prohibition:

It is a good reason for rejecting some proposed change to be brought about by paternalistic measures that we cannot, in fact, bring about the change in that fashion. One cannot, say, make people healthier by forcing them to exercise, perhaps because they make up for it by eating more fatty foods.¹⁸

Dworkin's words are apt. We must have reason to believe the purported benefits of Bloomberg's regulation will materialize in order to justify its coercive means. And at first glance, we have reason for skepticism. Junk food is elastic; it can be easily substituted with another similar product. Because consumers can substitute, banning just a few unhealthy products is unlikely to change harmful dietary practice. When consumers are prohibited from consuming J they can instead consume J'. Soda can be replaced with candy, cookies, ice cream, etc. If consumers respond to Bloomberg's soda ban with this kind of substitution, then it will fail to achieve the desired results and the benefits will be insignificant. One bad consumption choice is replaced with another and overall health remains stagnant. This, in turn, leads to balancing test failure: freedom is infringed for the sake of insignificant results. However, even if Bloomberg's soda ban proves ineffective as it stands, some might argue that we can expand the prohibition. With a wide enough scope, legal prohibitions are indeed likely to bring about significant gains. We can call this new measure extreme Bloomberg (X-Bloomberg), distinguished from traditional Bloomberg (T-Bloomberg). To clarify terms:

X-Bloomberg: Legal prohibitions on most foods considered unhealthy.

T-Bloomberg: Legal prohibitions on soda in containers larger than 16 ounces.

Suppose we agree that X-Bloomberg prevents obesity. It still might fail the balancing test. The scales have

turned, and while we have significant gains, the liberties infringed are no longer insignificant. We make choices about what to eat several times a day every day, and X- Bloomberg would restrict all these choices. Food not only keeps us alive, it is a way to socialize, relax, and for some, it is even a means to express creativity. Food regulation with a wide scope is likely to result in great benefit, but only at the expense of great liberty infringement.

4. The Harm Argument

4.1 How Obesity Harms

The Harm Principle is less controversial than paternalism; nearly all political liberals acknowledge its legitimacy in some form. Here is one version:

Harm Principle: The state is prima facie justified in coercing A if such coercion prevents harm to others.

Let us accept The Harm Principle without further argument. Of course, to fully understand it, we need some working definition of harm. Harm is ill-defined in the philosophical literature, and offering an analysis is a paper unto itself. For our purposes here, it makes sense to understand harm broadly. We can simply think of harm as setting back interests. So if A sets back B's interests, A harms B. Utilizing The Harm Principle, if coercion exercised through food regulation prevents harm to others, we have *prima facie* justificatory grounds for its permissibility. Recall that Bloomberg himself appealed to the justificatory spirit of The Harm Principle: "Obesity- related health care expenditures in New York City now exceed \$4.7 billion annually ... tax dollars pay approximately 60 per cent of those costs".¹⁹ The use of this statistic

suggests that the indirect harm obesity poses to taxpayers justifies Bloomberg's regulation. Put formally, the argument looks something like this

- (1) Drinking sugary drinks leads to obesity.
- (2) Obese persons need expensive medical care.
- (3) Taxpayers are harmed when their money is spent on medical care for the obese.
- (4) Therefore, the state is justified in using coercion to prevent such harm.

The previous justificatory discussion grounded in paternalism focused on harm to soda drinkers, with The Harm Principle, the focus shifts to the harm that soda drinkers inflict. This inflicted harm can be thought of in terms of negative externalities: harm imposed by those who escape the cost. For instance, suppose Chevron releases pollutants. Pollution's negative costs fall on the public at large and are therefore negative externalities. Similarly, sugary food consumption results in expensive medical care (a cost) paid by third parties (taxpayers). Many argue that negative externalities justify regulatory measures to prevent innocent third parties from harm. Hence, Bloomberg's proposal might be justified on the grounds that it protects third parties from just this type of harm.

Another economic comparison, perhaps more apt than externalities, are moral hazards. Economist Paul Krugman has defined a moral hazard as "any situation in which one person makes the decision about how much risk to take, while someone else bears the cost if things go badly".²⁰ Moral hazards often motivate support for legislation to discourage the risky behavior and minimize the moral hazard. This is known as internalizing externalities. When nations collectivize health care, consuming sugary foods becomes hazardous. B may live a health conscious lifestyle, while A never exercises, smokes, and eats salty, sugary, and buttery foods. When A needs heart surgery, B pays the cost (at least in part).

If we accept The Harm Principle, and we accept that soda drinking is hazardous, we can argue that Bloomberg's proposal is a justified regulation that the state can implement to prevent the harm caused to third parties who pay for soda drinkers' medical expenses. However, upon further reflection justification is more complicated. Most activity either causes or risks some harm to some third parties. For instance, unattractive persons may cause some sort of harm to onlookers – we might say a harm of aesthetic displeasure. Yet coercion to prevent this kind of harm seems unjust. Harm has to meet some minimal threshold before it can serve as justificatory grounds for state regulation. Moreover, we must consider the risk of harm in addition to its severity. For instance, motor boats risk severe harm: the boat may hit water skiers resulting in death or permanent injury. Nonetheless, many would object to prohibiting boating because the risk of these kinds of accidents is relatively small.

Since both risk and harm must reach minimal thresholds before justifying liberty restrictions, it makes sense to combine these concerns and consider justificatory standards in terms of expected harm. Let us call this the harm/risk threshold (HrT). We might say that regulatory measures are justified only if the probability of harm multiplied by its potential severity rises above some minimal level. Suppose that the likelihood activity A will cause harm H is 0.5. Further suppose that the severity of harm (on a 10-point scale) is seven. Then the $HrT = 3.5$. If the minimal HrT justifying regulation is three, then we might regulate activity A. But imagine that we miscalculated the risk. It is actually two. In this case the $HrT = 1.4$ and regulation is unjustified.

Consider Sally, a 37-year old vegetarian who exercises regularly, drinks sparingly, and eats sweets rarely. She has the misfortunes of slow metabolism and troublesome family genetics. The lifestyle she lives is difficult; she would rather eat cake than broccoli but goes with the latter for the sake of her health. Sally's coworker Scott is less circumspect. He eats a diet high in sugar, saturated fats, and artificial preservatives. He drinks regularly and to excess, failing to think much about the consequences even though

he was warned of the dangers. Sally disapproves of Scott's lifestyle. Notwithstanding, the state takes money from Sally's paycheck and indirectly distributes it to Scott to pay for his blood pressure medication. Arguably, Sally suffers harm from such distribution and Bloomberg's ban would prevent Scott from engaging in the unhealthful activities that result in a price Sally is forced to pay. To determine if this scenario warrants state intervention to protect Sally, we must calculate the Hrt: multiply the degree of harm she would suffer by the likelihood that something like the above might occur. And even at this point more weighting games remain. We only considered Sally's perspective; we must also look at things from Scott's view. Bloomberg's ban would infringe on his liberty to drink large sodas. This gives us a new weighting game with the following competing interests: (1) Sally's right against harm, V., (2) Scott's right to consume any substance he wants. Weighing (1) and (2) is contentious and the proper result depends on many contingencies. One is the extent of state-sponsored medical care. The more medical costs are collectivized, the more weight is afforded option (1).

4.2 Negative Externalities & Moral Hazards

Let us take for granted the following hypothetical: the benefits of the Bloomberg ban externality/hazard protection outweigh liberty restrictions. It will soon become clear, however, that past regulatory measures justified via an appeal to externalities and hazards will not necessarily apply when it comes to food regulation. For instance, arguments from negative externalities are commonly used to regulate pollution. Legislatures justify coercive state statutes by considering the harm that pollutants cause third parties. Because company A* harms the public at large, the state may coerce A* to minimize harm. Theoretically, the Bloomberg ban functions analogously. Suppose A (the consumer) drinks soda to excess. This causes health problems requiring expensive medical care, hence A harms those who pay for his health care. The

state may then coerce A to minimize harm. Yet we should note that A's behavior results in negative externalities only in virtue of his participatory role in nationalized health. Without this contingency, A himself bears the burden of bad health and the associated costs. There is nothing analogous for company A*, for regardless of governing system or policies, pollutants pollute.

We can look at smoking for more comparisons. The 1990s saw a flood of regulations as second-hand smoke dangers became public knowledge: cigarettes release toxins that harm innocent bystanders. Hence, regulating smoking is justified to protect those bystanders from harm. Soda drinking differs from smoking because there is no second-hand effect. Close physical proximity to obese persons poses no risk in itself. Sugary drinks harm third parties only to the extent that health care costs are collectivized. Nationalized health can justify otherwise unjustified or tenuously justified liberty restrictions.

Much of what was just argued about externalities could be said of moral hazards, but we can point to a few distinctions. Moral hazards are often discussed in regard to insurance. Because drivers know costs of accidents are insured, some drive carelessly. This is hazardous to other participants in the program who pay for the consequences of careless driving. Companies attempt to account for these hazards with higher premiums for poor drivers. This may seem analogous to sugary drink consumption. The soda drinker, like the careless driver, continues to engage in dangerous behavior knowing others inevitably pay. But we are missing an analogue to high premiums – in most cases, those who eat carelessly face no surcharge for their bad habits. In some ways, Bloomberg's ban might function as a type of premium. Drinking sugary sodas could be thought the analogue to careless driving, and rather than a premium to control risky behavior, we have a prohibition. This prohibition on sodas, like the premium for bad drivers, protects the responsible from the irresponsible.

In one respect, moral hazards explain Bloomberg's ban better than externalities do. The cost to third parties in traditional moral hazard schemes and the costs of sugar consumption harm only in virtue of

collective cost sharing. But externality producers cause harm regardless of a formal system.

Notwithstanding, there is another sense in which soda drinkers are more like polluters than bad drivers.

Neither soda drinkers nor polluters choose to participate in a collective enterprise, while those who purchase insurance do make such voluntary agreements. Unlike careless drivers, polluters cannot opt out. Even so, fines imposed upon polluting companies are thought to be justified because the pollutants harm innocent third-parties regardless. Soda drinkers fit in an uncomfortable medium between careless drivers and polluters. Like polluters, some soda drinkers are involuntary participants in collective cost sharing. But like the driver, soda drinkers harm third parties in virtue of participation. With Bloomberg's Ban, the soda drinker bears responsibility for third-party costs even though such costs are dependent on participation in a contingent yet mandatory collectivized system.

4.3 Opting Out

We saw that arguments from externalities and hazards offer strong reasons to support the Bloomberg ban or other similar legislation. (assuming such legislation proves effective.) But we must consider how Public Justification fits into this scheme. Public justification easily applies to those who voluntarily take part in collectivized health. These willing participants want both the assurance of medical care and low costs; food regulation is part of such control, and coerciveness measures that support this end. But suppose someone partakes in the state health care system unwillingly. She insists she wants out. She is told of the risks of soda consumption and the risks of the uninsured. She persists and claims she wants to assume both. Feinberg has discussed a similar case. In his example, a rational agent tells his doctor he wants to risk the dangers of drug use. The protagonist argues as follows:

I don't care if it causes me physical harm. I'll get a lot of pleasure first, so much pleasure in fact, that it is well worth running the risk of physical harm. If I must pay a price for my pleasure I am willing to do so.²¹

Feinberg concludes that voluntary drug takers must be allowed to engage in their chosen risky behavior. Likewise, suppose Y wishes to engage in pleasurable soda consumption and willingly forgoes the security of assured medical care. It seems her choice must be respected. Y can argue that she is willing to assume the given risks and that her behavior will cause no harm if she removes herself from collectivized health. In order to reconcile Bloomberg's ban with Public Justification, community members should have the option of opting out of collectivized health. If they choose this, then they become free to eat or drink obesity inducing products. But this comes at a cost. If their bad habits cause illness, the state is under no obligation to provide care. Given the costs of forgoing insurance, perhaps few opt out. What matters is that liberty restrictions are justified for those who choose to partake in the system, and those who opt out have no grounds for complaint.

5. A Salient Proviso

5.1 All Things Considered

With both arguments discussed thus far, those that rely on The Harm Principle and those that rely on paternalism, we see that Bloomberg's ban might be prima facie justified. But prima facie justification can, of course, diverge from all things considered justification. This might be the case with Bloomberg's proposal. To see why, let us remember these words from Bloomberg: "It would be irresponsible not to try to do everything we can to save lives." Perhaps meant something else, but any political liberal must object

to his words, which inevitably violate The Fundamental Liberal Principle. Lives are saved if citizens are under house arrest, forced to exercise, and served meals with only fruit, lean proteins, and leafy vegetables. But the lives saved fail to justify the coercive means—the liberties lost are too great. Bloomberg’s ban falls short of doing everything it can, but it still might go too far. We can think of the potential consequences of either implementing Bloomberg’s ban or not doing so as consequence A and consequence B, respectively. Suppose A is some improvement in public health and some liberty infringement and B is no improvement in public health and no liberty infringement. Imagine that all things considered, A is more desirable than B. Note that this does not mean that B is best, or even good. There may be a third option, C, which is more desirable than both A and B. If so, C is preferable. Applied to the matter at hand, C is an option more desirable than Bloomberg’s ban and also more desirable than the poor health consequences in its’ absence.

5.2 Strict Scrutiny and Alternative Regulation

When the US Supreme Court considers statutes under strict scrutiny, they pass constitutional muster only if shown to use the least restrictive means to achieve their purported ends. The reasoning is straightforward. Laws subject to strict scrutiny are those deemed to infringe upon fundamental rights and so the government must have a compelling interest before infringing. Yet, a compelling interest is not enough. The constitutional protection afforded fundamental rights overrides laws that infringe more liberty than necessary (even when the laws protect compelling interests). In other words, the interest in protecting fundamental rights is more compelling than ends achieved via overreaching legislation.

Rights that the US Supreme Court have deemed fundamental are limited. It is unlikely that Bloomberg’s ban would face strict scrutiny. But some legal scholars criticize the US classification for stopping short. Robert Alexy, for instance, has suggested that liberal societies should respect a basic right

to liberty.²² Those who accept the Fundamental Liberal Principle should be inclined to agree. If liberty itself is fundamental (as opposed to specific liberties), then every liberty-infringing statute should only infringe using the least restrictive means available. However, there might be pragmatic arguments against the least restrictive means criterion. Finding the superlative least restrictive means might be painfully time consuming, expensive, or politically unfeasible. In order to avoid this difficulty, we can replace the least restrictive means test with a modified principle. Consider:

No Easy Alternative (NEA): Statute S which restricts liberty is unjustified if there is an easy alternative S' that is (1) less restrictive than S, and (2) achieves the same or similar ends.

We can see that even supposing Bloomberg's ban wins the balancing test, it might still be unjustified due to the possibility of less restrictive alternatives. In light of NEA, justifying food regulation demands showing no easy alternative promotes health equally well. But is there a potential alternative? We might turn to past regulations and externalities and hazards for an answer. And when we do, we see that legislators rarely propose an outright prohibition on a first attempt. When it comes to the externalities, the preferred method is a tax on to the producer of the externality roughly equal to its social cost designed to 'internalize' the relevant externality. These Pigovian taxes are commonly defended on the grounds that they are the least restrictive means of controlling undesirable social costs.¹² Similarly, moral hazards, as mentioned, are usually controlled through higher insurance premiums, not outright prohibitions. Such taxes or other surcharges like premiums are both less coercive than prohibitions, even the simple prohibition on large cups; the state ought to tax before they ban. Depending on the relevant governmental health system, it might charge something similar to a premium to persons with records of dangerous dietary habits. As long as feasible alternatives remain, it is hard to justify food prohibitions of any sort. In

the end, alternatives might prove unfeasible and food prohibitions could be justified after all. Nonetheless, government has the responsibility to consider less restrictive options before legislating choice-eliminating prohibitions. Hence, even when paternalism or The Harm Principle justifies food regulation, they do so only upon conforming to a salient proviso: there are no easy less restrictive alternatives.

6. Conclusion

Many governments have been experimenting with legislative means to curb the rising obesity epidemic. Former New York Mayor Michael Bloomberg offers a case in point with his proposed ban on sugary drinks in extra-large containers. This paper considered if this ban or similar measures might ever be justified from the perspective of a political liberalism that respects all as free and equal and accepts a prima facie presumption against coercion. We see that if food bans are limited to particular items of consumption, effectiveness is questionable and hence so is justification. Bans with wider scopes are more likely to be effective, but they might restrict liberty to such a degree that the benefits fail to outweigh the costs.

In spite of the above concerns, it is conceptually possible that some bans are justified if the gain to public health overcomes the liberty lost via coercive means. But even assuming this obtains, more must be said. First, if there is any viable opt-out option, this should be made available. Moreover, coercive forms of legislation should be implemented only after non-coercive measures prove ineffective. As things now stand, we should first turn to empirical research, and then experiment with non-coercive legislation before resorting to Bloomberg's ban or similar regulations.

Notes

¹ Grynbaum, “New York plans to ban sale of big sizes of sugary drinks.” *New York Times*, May, 30, 2012.

² Mello, Studdert, & Brennan, "Obesity—the new frontier of public health law." *New England Journal of Medicine* 354, no. 24 (2006).

³ Doug Muzzio, a public affairs professor, notes this contrast: “There was irrefutable statistical evidence that smoking is bad for people in innumerable ways ... With sugary sodas, the causal chain is less clear. Everybody who smokes suffers some adverse consequences. Not everyone who drinks 16 ounce sodas has a health problem” (Ahmed, 2013). For some empirical studies on the matter see Gieger, C., Geistlinger, L., Altmaier, E., De Angelis, M. H., Kronenberg, F., Meitinger, T., ... & Suhre, K. (2008), and Clément, K., Vaisse, C., Manning, B. S. J., Basdevant, A., Guy-Grand, B., Ruiz, J., ... & Strosberg, A. D. (1995).

⁴ Rawls, John. *Political liberalism: Expanded Edition*, 23.

⁵ Gaus, *Justificatory liberalism: An essay on epistemology and political theory*, 162.

⁶ Reasonable Pluralism was first introduced by Josh Cohen (1999) and later used by John Rawls (2013) as a critical foundation for his political theory. Here are some words from Rawls, “[P]olitical Liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines... This pluralism is not seen as a disaster but rather as the natural outcome of the activities of human reason under enduring free institutions” (p. xxiv).

⁷ Idealization comes in two forms: moderate and full. Gerald Gaus’s (2010) defends the former. According to Gaus’s account, when we idealize we should consider what would be an agent’s perspective after they have engaged in a ‘respectable amount’ of reasoning (p. 250).

⁸ Susman, “Soda war looms as judge blocks NYC ban on large sugary drinks” *Los Angeles Times*, May 13, 2013.

⁹ Supreme Court State of New York, *Supreme Court State of New York N.Y. State Coalition v. N.Y.C. Department of Health*, 2012.

¹⁰ Chasmar, Jessica. “N.Y. Mayor Michael Bloomberg: Cola ban will help the poor ‘take care of themselves’” *Washington Times*.com, March 11, 2013

¹¹ Susman, Tina. “Soda war looms as judge blocks NYC ban on large sugary drinks” *Los Angeles Times*, May 13, 2013

¹² Chasmar, Jessica. “N.Y. Mayor Michael Bloomberg: Cola ban will help the poor ‘take care of themselves’”

Washingtontimes.com, March 11, 2013

¹³ Keller, Karen. "Mayor Fumes As Judge Blocks Ban on Mega Sodas" ABC News, May 11, 2013

¹⁴ Feinberg, "Legal paternalism." *Canadian Journal of Philosophy* 1, no. 1 (1971): 105-124

¹⁵ Feinberg, *Harm to self: The moral limits of the criminal law*, 68. This is a simplistic representation of Feinberg's view. In his complete theory of autonomy, Feinberg (1989) delineates four conceptual variations. (1) Capacity for self-governance; (2) The actualization of (1); (3) Rights that express self- sovereignty; (4) A personal ideal. We might say that an overlapping feature of (1)

¹⁶ Arneson, Richard J. "Joel Feinberg and the justification of hard paternalism." *Legal Theory* 11, no. 03 (2005): 259-284

¹⁷ Rawls, *A Theory of Justice*, 54.

¹⁸ Dworkin, Gerald. "Moral paternalism." *Law and Philosophy* 24, no. 3 (2005): 305-319

¹⁹ Supreme Court State of New York *N.Y. State Coalition v. N.Y.C. Department of Health*, 2012

²⁰ Krugman, *The return of depression economics*, 66.

²¹ Feinberg, Joel. "Legal paternalism." *Canadian Journal of Philosophy* 1, no. 1 (1971): 105-124

²² Alexy, Robert. *A theory of constitutional rights*

Reference

Ahmed, Sakib. "Bloomberg's Soda Ban Struck Down, Headed To Court On Appeal." NYU local.com, March 12, 2013.

Arneson, Richard J. "Joel Feinberg and the justification of hard paternalism." *Legal Theory* 11, no. 03 (2005): 259-284.

Alexy, Robert. *A theory of constitutional rights*. Cary, NC: Oxford university press, 2009.

Dworkin, Gerald. "Moral paternalism." *Law and Philosophy* 24, no. 3 (2005): 305-319.

Chasmar, Jessica. "N.Y. Mayor Michael Bloomberg: Cola ban will help the poor 'take care of themselves'" *Washingtontimes.com*, March 11, 2013.

Clément, K., Vaisse, C., Manning, B. S. J., Basdevant, A., Guy-Grand, B., Ruiz, J., ... & Strosberg, A. D. (1995). Genetic variation in the β -adrenergic receptor and an increased capacity to gain weight in patients with morbid obesity. *New England Journal of Medicine*, 333(6), 352-354.

Cohen, Joshua. "Reflections on Habermas on democracy." *Ratio Juris* 12, no. 4 (1999): 385-416.

-
- Feinberg, Joel. *Harm to others*. Oxford University Press, Cary, NC: Oxford University Press, 1984.
- Feinberg, Joel. "Harm to self: The moral limits of the criminal law." *Harm to self: The moral limits of the criminal law*. Cary, NC: Oxford University Press, 1986.
- Feinberg, Joel. "Legal paternalism." *Canadian Journal of Philosophy* 1, no. 1 (1971): 105-124.
- Gaus, Gerald F. *Justificatory liberalism: An essay on epistemology and political theory*: Cary, NC: Oxford University Press 1996.
- Gaus, Gerald. *The order of public reason: A theory of freedom and morality in a diverse and bounded world*. New York, NY: Cambridge University Press, 2010.
- Gieger, Christian, Ludwig Geistlinger, Elisabeth Altmaier, Martin Hrabé De Angelis, Florian Kronenberg, Thomas Meitinger, Hans-Werner Mewes et al. "Genetics meets metabolomics: a genome-wide association study of metabolite profiles in human serum." *PLoS genetics* 4, no. 11 (2008): e1000282.
- Grynbaum, Michael. "New York plans to ban sale of big sizes of sugary drinks." *New York Times*, May, 30, 2012.
- Harris Jr, Robert N. "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality." *UCLA L. Rev.* 14 (1966): 581.
- Keller, Karen. "Mayor Fumes As Judge Blocks Ban on Mega Sodas" *ABC News*, May 11, 2013.
- Krugman, Paul R. *The return of depression economics*. New York, NY: WW Norton & Company, 2000.
- Mello, Michelle M., David M. Studdert, and Troyen A. Brennan. "Obesity—the new frontier of public health law." *New England Journal of Medicine* 354, no. 24 (2006): 2601-2610.
- Rawls, John. *Political liberalism: Expanded Edition*. New York, NY: Columbia University Press, 2013.
- Rawls, John. *A Theory of Justice*. Cambridge, MA: Belknap Press, 1999.
- Supreme Court State of New York N.Y. *State Coalition v. N.Y.C. Department of Health*, 2012.
- Susman, Tina. "Soda war looms as judge blocks NYC ban on large sugary drinks" *Los Angeles Times*, May 13, 2013.