

LEGAL THEORETIC INADEQUACY AND OBESITY EPIDEMIC ANALYSIS

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INTRODUCTION

This Article explores crucial analytic and normative limitations in presently dominant and ascendant approaches to legal theory. The approaches' failure to provide a satisfying framework for analyzing the obesity epidemic presently raging undeterred in American society reveals these limitations.¹ Conventional law and economics scholars writing on the subject have deployed familiar frameworks to reach predictable conclusions that are neither intellectually nor morally justifiable.² This Article argues that recent theoretical innovations promulgated within the burgeoning law and behavioralism movement have thus far provided no more reliable a framework for legal analysis of the obesity epidemic than has conventional law and economics. This Article critiques in particular the behavioral law and economics concepts of "libertarian paternalism"³ and "asymmetric paternalism,"⁴ as well as the concept of "expressive overdeterminism," recently developed by proponents of "cultural cognition theory."⁵ This project is undertaken as part of a broader effort to develop an alternative approach to legal theory that previous co-authors and I call "critical realism."⁶ The theo-

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¹ See *infra* text accompanying notes 8-12 (describing the scale and implications of the obesity epidemic).

² See *infra* Part II (discussing conventional legal economists' assessment of the obesity epidemic).

³ See *infra* text accompanying notes 116-51 (discussing libertarian paternalism).

⁴ See *infra* text accompanying notes Part III.B (discussing asymmetric paternalism).

⁵ See *infra* Part IV (discussing cultural cognition theory).

⁶ See generally Jon Hanson & David Yosifon, *The Situation: An Introduction to The Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 176-92

retical arguments herein are broad, but this Article aims to also advance obesity epidemic analysis in particular. Part V briefly discusses specific public policy implications of my assessment, with special reference to a policy innovation based in the reform of corporate law.⁷

I. THE NATURE OF THE PROBLEM

A. *The Obesity Epidemic*

The number of Americans who are obese or overweight has risen dramatically over the last several decades. Today 33% of the population is obese and 66% overweight, up from just 15% obese and 47% overweight only two decades ago.⁸ This trend continues upwards and so far shows no signs of abating. The health consequences of the epidemic are calamitous—overweight and obesity are associated with increased risk of diabetes, heart disease, liver disease, kidney disease, various types of cancer, impotence, depression, and premature death.⁹ The latest research suggests that not only the obese, but also the merely overweight bear a significant risk of de-

(2003) [hereinafter *The Situation*] (providing an introduction and overview of critical realism); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 34-133 (2004) [hereinafter *The Situational Character*] (providing a comprehensive treatment of the social science on which the concept of human agency relied upon in critical realism is based); Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1675-88 (2004) [hereinafter *Broken Scales*] (applying the critical realist framework to analysis of the obesity epidemic).

⁷ See *infra* Part V.

⁸ National Center for Health Statistics, Prevalence of Overweight and Obesity Among Adults: United States 2003-2004, http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm. “Obese” and “overweight” are defined with reference to Body Mass Index (BMI), a measurement that captures a person’s weight in relation to their height—BMI equals weight divided by height squared. See <http://www.nhlbisupport.com/bmi> (last visited Feb. 26, 2008) (providing a user-friendly BMI calculator as well as explanation of the health implications of different BMI ranges). A BMI of twenty-five or higher is considered “overweight” and thirty or higher is considered “obese.” *Id.* These categories correspond with heightened health risks. National Heart Lung and Blood Institute Obesity Education Initiative, http://www.nhlbi.nih.gov/health/public/heart/obesity/lose_wt/risk.htm (last visited Feb. 26, 2008). BMI is useful as a measure of the health status of broad populations. For any given individual, a relatively high BMI might not indicate a heightened risk of adverse health consequence. See *id.* For example, because of their great musculature, many amateur and professional athletes will exhibit high BMI’s. *Id.* However, the high rates of BMI across the population as a whole do not reflect such athletic body types, indeed, they reflect the opposite. See *Broken Scales*, *supra* note 6, at 1675-88 (reviewing scientific findings concerning the scope, causes, and consequences of the obesity epidemic).

⁹ National Heart Lung and Blood Institute Obesity Education Initiative, http://www.nhlbi.nih.gov/health/public/heart/obesity/lose_wt/risk.htm (last visited Feb. 26, 2008).

creased life expectancy.¹⁰ The effect is so staggering and widespread that researchers are now predicting a general reversal of the long-term trend of human life expectancy increasing with each passing generation.¹¹ The economic costs are also enormous, with an estimated \$93 billion expended annually on health care in connection with the epidemic, half of which is accounted for by publicly funded health care programs such as Medicare and Medicaid.¹²

There is no simple solution to the obesity epidemic. The problem is polygenetic—stemming from many overlapping sources—including changed patterns of work and recreation, involving less continuous physical exertion and fewer calories burned, and changed patterns of food consumption, involving more frequent consumption of highly caloric foods, in larger portions.¹³ Because there is no single cause of the obesity epidemic, solutions to the problem are unlikely to be simple or singular in nature. Absent the appearance of some *deus ex machina*, such as a broadly effective anti-weight-gain pill with few side effects, which does not appear likely, remedies to this enormous social problem are going to have come from many angles and disciplines.¹⁴ The question that motivates the present inquiry is this: What aid can legal analysis provide to understanding and solving this social problem?

¹⁰ See Kenneth F. Adams et al., *Overweight, Obesity, and Mortality in a Large Cohort of Persons 50-71 Years Old*, 355 NEW ENG. J. MED. 763, 766 (2006) (in a study of more than 500,000 members of AARP, finding increased risk of death to baby boomers who are even modestly overweight, and substantially increased risk of death for the obese); Sun Ha Jee et al., *Body-Mass Index and Mortality in Korean Men and Women*, 355 NEW ENG. J. MED. 779, 784 (2006) (finding increase in mortality risk among the overweight in Korea).

¹¹ Stuart J. Olshansky et al., *A Potential Decline in Life Expectancy in the United States in the 21st Century*, 352 NEW ENG. J. MED. 1138, 1140-41 (2005). Cf. Christopher J. L. Murray et al., *Eight Americas: Investigating Mortality Disparities Across Races, Counties, and Race-Counties in the United States* 3 PLOS MED. 1513, 1522 (2006), http://medicine.plosjournals.org/archive/1549-1676/3/9/pdf/10.1371_journal.pmed.0030260-L.pdf (finding significant disparities between members of the same racial background who live in different social and geographic contexts of the United States and concluding that differences in alcohol and tobacco use, blood pressure, cholesterol and obesity were the most significant factors behind the disparities).

¹² Eric A. Finkelstein et al., *National Medical Spending Attributable to Overweight and Obesity: How Much, and Who's Paying?*, HEALTH AFFAIRS, May 14, 2003, <http://content.healthaffairs.org/cgi/content/full/hlthaff.w3.219v1/DC1>.

¹³ Press Release, National Center for Health Statistics, *Obesity Still a Major Problem* (Apr. 14, 2006), http://www.cdc.gov/nchs/pressroom/06facts/obesity03_04.htm; see *Broken Scales*, *supra* note 6, at 1675-88 (describing polygenetic nature of the obesity epidemic).

¹⁴ See M.A. Cawthorne, *Opportunities and Challenges for the Development of Pharmacological Therapies for Obesity Treatment*, 8 OBESITY REVIEWS 131, 135 (2007) (concluding that it is unlikely that comprehensive pharmaceutical remedies to the obesity problem will be available in the next ten years).

B. *The Analytic Problem: A Critical Realist Overview*

It is important to note that this inquiry is concerned with solving the obesity problem as it relates not just to children but to adults as well. There has been some real progress in developing arguments for regulating the food market as it relates to children, and policy responses built on these arguments are beginning to be deployed.¹⁵ But the focus on children is overemphasized; it is at least insufficient. Focusing only on children writes off much of the contemporary adolescent and adult population to obesity-related disease and premature death; legal analysts should not be resigned to rest easy with this result.

At one level it may seem strange, even silly, to attribute the obesity epidemic to anything other than the fact that people are eating too much and exercising too little. The epidemic may indeed be polygenetic, but it is difficult to see either responsibility or remedy lying anywhere other than with the overweight and obese themselves. After all, eating is something that human beings do for themselves; nobody forces anyone else to eat. Our own observations and intuitions clearly inform us of this truth, and it would be absurd to deny it. Yet if we resolve to see others and ourselves not by the flare of intuition alone, but more fully in the light of social science, among the first things that we learn is that our intuitions and common sense often betray us.¹⁶ They do so in particular with respect to our assessment of the sources of our own and others' behavior.¹⁷ Indeed, our intuitions and observations often leave us with an assessment of influences on human behavior that is not only incomplete, but misleading.¹⁸

As I have emphasized in previous work on critical realism—a principle finding from many related fields of social, cognitive, neural, and behavioral psychology—is that our intuitions and observations, together with

¹⁵ For example, under pressure from increased media attention, threatened litigation, and possible regulatory response from state and local governments, beverage companies have agreed to a phased elimination of the sweetened beverages, as well as sugary and fried snacks, from schools. Marian Burros & Melanie Warner, *Bottlers Agree to a School Ban on Sweet Drinks*, N.Y. TIMES, May 4, 2006, at A1. Connecticut has banned the sale of all soft drinks in its schools, as has New York City. *Id.* United States Senator Tom Harkin, Democrat of Iowa, has attracted bi-partisan support for his Child Nutrition Promotion and School Lunch Protection Act, which would authorize the updating of federal nutrition guidelines to ban from schools food with minimal nutritional value. S. 771, 110th Cong. (2007). *See generally*, C. M. Doak et. al., *The Prevention of Overweight and Obesity in Children and Adolescents: A Review of Interventions and Programmes*, 7 OBESITY REVIEWS 111, 125-29 (2006) (providing comprehensive assessment of obesity policies directed at children). My point is certainly not that the childhood obesity epidemic has been solved—it has not been—but rather to emphasize the absence of conceptual and programmatic work regarding obesity with respect to anyone *but* children, and thus the absence of adequate analysis of the epidemic in its true scope and scale.

¹⁶ *The Situational Character*, *supra* note 6, at 23-35.

¹⁷ *Id.*

¹⁸ *Id.*

deeply laden psychological motivations, lead us to attribute behavior largely to the dispositions of individuals (privately ordered preferences, interests, and intentions), to the exclusion of appreciating the powerful part that external situation plays in influencing human behavior.¹⁹ Situational influences tend to be opaque to our conscious thinking about the sources of our choices.²⁰ Many names in different literatures describe this core insight, and often refer to it as “the fundamental attribution error” or “dispositionism.”²¹ Critical realism contends that attending to the biases of dispositionism should be a central point of departure for legal theory concerned with addressing all of what we are as human beings, rather than just what we appear to be to others and ourselves.²²

One of the reasons it is so important for legal theory and social policy to develop a deeper perspective on the sources of human behavior is that other powerful institutions in our society already have.²³ Corporations, operating in a legal regime that facilitates their aggregation of capital, and insists on their pursuit of maximum profits for shareholders, have both the power and the incentive to discern and exploit this obscure but potent aspect of human reality.²⁴ Undoubtedly firms can profit by exercising situational influence over consumer behavior and decision-making.²⁵ One would thus expect profit-oriented firms to endeavor to do so.²⁶ Moreover, in robust markets, one should expect competitive pressures to push firms in the direction of exploiting opportunities to exercise situational manipulation of consumer behavior, even where individual firm managers are ignorant of the manipulative nature of the practices. The market will reward firms that move in this direction, or even that stumble accidentally into it, while punishing with losses, takeover, or failure firms that fail to do so.²⁷ Critical realism refers to this process as “power economics,”²⁸ and calls the result “market manipulation.”²⁹

These broad predictions are well evidenced by the behavior of corporations operating in various consumer markets for food. In previous work, I

¹⁹ *The Situation*, *supra* note 6, at 165-66.

²⁰ *The Situational Character*, *supra* note 6, at 23-24.

²¹ *The Situation*, *supra* note 6, at 136-37 & n.20; *see generally* *The Situational Character*, *supra* note 6 (developing the theory of dispositionism).

²² *See The Situation*, *supra* note 6, at 179-83.

²³ *E.g.*, *Broken Scales*, *supra* note 6, at 1689-91 (explaining how corporations have benefited from promoting dispositionism).

²⁴ *Id.* at 1689; *The Situation*, *supra* note 6, at 179-83.

²⁵ *The Situation*, *supra* note 6, at 179.

²⁶ *Id.* at 198.

²⁷ *Id.* at 197.

²⁸ *Broken Scales*, *supra* note 6, at 1689; *The Situation*, *supra* note 6, at 197-201.

²⁹ *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 724-27 (1999) (analyzing the problem of market manipulation).

have elaborated upon the critical but often underappreciated part that the food industry has played in contributing to the obesity epidemic.³⁰ This Article offers a brief summary as a necessary background to the analysis that follows. Readers skeptical about some of the following claims are urged to turn to previously published examinations for fuller evidence.³¹

First, it is important to appreciate that eating behavior appears to be a particularly grievous case of human behavior that our common sense, intuition, and observations tend to misconstrue.³² For example, while most of us understand the subjective experience of hunger as a signal of the body's imminent need for food, scientists have demonstrated that the experience of hunger and the body's need for energy are largely unrelated in the short-term. The symptoms that we often implicitly interpret as a need for food, such as a palpable drop in our blood sugar, are actually the body anticipating and preparing to receive food in conjunction with habitual eating patterns.³³ There are many other examples of surprising disparities between the way we think about our eating behavior and the reality of our eating behavior. In our dispositionism, most of us would think that our own subjective hunger, preferences for types and amount of food, and subjective experience of being full largely determine the amount of food we will consume in a given feeding.³⁴ Yet we endow such dispositions with more power than in truth they have, and fail to appreciate the influence of situation on how much we eat. Studies have shown that the physical experience of satiety that results in a cessation of feeding is correlated with the amount of food that is in front of the person eating.³⁵ In fact, our eating systems are generally oriented towards consuming highly caloric foods in amounts far greater than our short-term needs whenever such food is available.³⁶ These disjunctions between our intuitions and the reality of our eating systems functioned as a kind of noble lie throughout the eons of human history during which periodic food scarcity was a real threat, which could be overcome by the

³⁰ See generally *Broken Scales*, *supra* note 6; David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk Food Advertising to Children*, 39 LOY. L.A. L. REV. 507 (2006) (providing a critical realist examination of the wisdom and constitutional viability of a broad ban on junk food advertising).

³¹ See *supra* text accompanying note 30 and sources cited therein.

³² See Yosifon, *supra* note 30 at 516-17; *Broken Scales*, *supra* note 6 at 1675-88.

³³ See *Broken Scales*, *supra* note 6, at 1678-84.

³⁴ *Id.* at 1682-84.

³⁵ In one study, for example, subjects were seen to eat 30% more when served large portions than when served smaller portions. Barbara J. Rolls et al., *Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women*, 76 AM. J. CLINICAL NUTRITION 1207, 1207, 1211 (2002), cited in *Broken Scales*, *supra* note 6, at 1696 & n.165. "The finding that the ratings of hunger and fullness after the meal did not vary, although intake increased with the amount of food that was presented, suggests that portion size influences the development of hunger and satiety." *Id.*

³⁶ *Broken Scales*, *supra* note 6, at 1677-78.

stores of fat accumulated during times of food availability.³⁷ Food consumption behavior is thus far more related to the situational influence of food availability, and less related to individual disposition than our common sense leads us to believe.³⁸

Even as we natural persons entertain a dispositional conception of eating behavior, there is substantial evidence that market actors have discerned and exploited the situational reality of the matter.³⁹ Firms have accomplished this in numerous ways. One important approach advanced especially by junk food and fast food firms has been to make highly caloric food ubiquitously available to consumers in nearly all areas of the lived environment—in schools, at work, on the highway, at the gas station, in the shopping malls, at sports stadiums.⁴⁰ This expansion of food purveyance has paralleled the rise in overweight and obesity in our society. A dispositionist might aver that such purveyance merely represents market actors responding to and serving pre-existing consumer preferences, but the reality is that the external food situation shapes consumer eating behavior in ways consumers do not anticipate or appreciate.⁴¹

Another key method of situational influence deployed by food companies is marketing. Even a cursory examination of major fast food companies' advertising campaigns, such as Taco Bell's promotion of the "Fourth Meal" (which the firm describes as "The Meal Between Dinner and Breakfast")⁴² or the same company's promotion of the view that one has not consumed enough food in a meal until they are able to bellow "I'm Full!"⁴³ suggests that such promotional efforts are oriented towards exploiting, certainly not ameliorating, lay misconceptions about human eating. Other junk food and fast food advertisements generally associate the consumption of highly caloric, low-nutrition foods with health, vitality, sexuality, and happiness.⁴⁴ This kind of advertising is widespread, and the dramatic increases in overweight and obesity in the last several decades have tracked just as dramatic a rise in such marketing efforts.⁴⁵ Most of this kind of marketing is insulated from any kind of legal action based on notions of false or misleading advertising by the dubious doctrine of "puffery," which holds that general "bluster" and "boasting" in advertising is unactionable because no rea-

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 1693-94.

⁴⁰ *Id.*

⁴¹ *Id.* at 1694-95.

⁴² See Taco Bell, <http://www.tacobell.com> (last visited Feb. 26, 2008).

⁴³ *Id.*

⁴⁴ See Yosifon, *supra* note 3031, at 520-25 (reviewing the ubiquity and influence of junk food advertising to children); see also *Broken Scales*, *supra* note 6, at 1694-1707 (providing an overview of food marketing efforts).

⁴⁵ See Yosifon, *supra* note 30, at 520-21.

sonable person would be influenced by such claims.⁴⁶ Scholars from many disciplines have convincingly argued that the “puffery” doctrine is psychologically naïve; indeed, it is based on a highly dispositionist notion of human decision-making and behavior.⁴⁷ Much of what traditionally counts as puffery does in fact influence consumers, but this has not undercut the authority of the doctrine before courts and regulatory agencies.⁴⁸

A particularly important kind of influence that firms exercise through marketing and lobbying is a widespread effort to promote to consumers and regulators a particular conception of consumer behavior, one which resonates with and deepens our dispositionism while further obscuring our appreciation of situational influences on eating behavior.⁴⁹ Thus, even while food offerings, portions, and promotions influence consumers in ways they do not appreciate, firms assure both consumers and regulators that consumers are merely being provided with choices, and thus that if there is an obesity problem it is a problem of personal responsibility, not a failure of public policy.⁵⁰ Critical realism refers to this process as “deep capture.”⁵¹ Deep capture serves as a crucial correlate to, and explanation of, the notion that firms endeavor to “capture” regulatory institutions charged with watching over industry conduct.⁵² The success of such efforts is clearly evident in the obesity context.⁵³ For example, twenty-three state legislatures have already passed such so-called “hamburger bills,” formally insulating food companies from liability for the overweight and obesity-related harms connected with the consumption of their products.⁵⁴ Such efforts have also spurred federal legislation, such as the proposed “Personal Responsibility in Food

⁴⁶ See *id.* at 530-31; see also David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1400 (2006); Ivan L. Preston, *Puffery and Other ‘Loophole’ Claims: How the Law’s ‘Don’t Ask, Don’t Tell’ Policy Condone Fraudulent Falsity in Advertising*, 18 J.L. & COM. 49, 72-73 (1998).

⁴⁷ Yosifon, *supra* note 30, at 537.

⁴⁸ *Id.* at 533-37.

⁴⁹ See *Broken Scales*, *supra* note 6, at 1728-43.

⁵⁰ *Id.* at 1733.

⁵¹ *The Situation*, *supra* note 6, at 218 states:

By “deep capture,” then, we are referring to the disproportionate and self-serving influence that the relatively powerful tend to exert over all the exterior and interior situational features that materially influence the maintenance and extension of that power— including those features that purport to be, and that we experience as, independent, volitional, and benign.

Id.

⁵² *Id.* at 229-35.

⁵³ See *Broken Scales*, *supra* note 6, at 1691-1707, 1720-21, 1734-57 (analyzing industry conduct with respect to the obesity epidemic).

⁵⁴ David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress’s Response to the Obesity Epidemic*, 14 VA. J. SOC. POL’Y & L. 357, 365 (2007); see also *Broken Scales*, *supra* note 6, at 1776-1781 (discussing these legislative efforts).

Consumption Act,” which would provide firms federal protection from liability.⁵⁵

This brief discussion of consumer and corporate behavior has been intended only to illuminate an important aspect of the obesity epidemic that must be addressed in any satisfying legal analysis of the problem.

II. CONVENTIONAL LAW AND ECONOMICS ANALYSIS OF THE PROBLEM

Conventional law and economics is not up to the analytic challenge posed by the obesity epidemic. Richard Epstein’s recent article on the obesity problem exemplifies well the basic law and economics approach to legal analysis, as well as that approach’s flaws.⁵⁶ After referencing statistics on the scale of the obesity epidemic roughly as depicted above,⁵⁷ Epstein concludes that present uses of “taxation scheme[s],” “programs of regulation,” “systems of liability,” and even “education program[s]” are *all* already “exhausted” in terms of what may usefully be done with them in response to the obesity epidemic.⁵⁸ “[F]urther interventions,” he determines, “are likely to be both costly and counterproductive.”⁵⁹ This is a striking assessment: that *no* further contribution to the amelioration of this enormous and still growing social problem can be had from any alteration of these fundamental mechanisms of social organization.

And yet, while striking, it is not at all unexpected. Epstein is merely keeping true to the general law and economics view that where markets appear to be operating in a robust and competitive fashion, regulation is likely to be inefficient, and make us all worse-off.⁶⁰ The rational actor model at the heart of the conventional law and economics approach inexorably leads to this kind of conclusion. Rational actors bring their own privately ordered, stable preferences with them to different behavioral and decision-

⁵⁵ *Broken Scales*, *supra* note 6, at 1777 & n.9 (citing H.R. 339, 108th Cong. (2003) (protecting “[t]he manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption” from state and federal civil liability)).

⁵⁶ See generally Richard A. Epstein, *What (Not) To Do About Obesity: A Moderate Aristotelian Answer*, 93 *GEO. L.J.* 1361 (2005). Despite the title, the work takes a straightforward law and economics approach—it is clearly not Epstein’s purpose to undertake an Aristotelian analysis of the obesity problem. Instead, the title is meant to ring true with the maxim “moderation is all things” as a the best approach to the obesity problem (though as he means it, “all things” applies only to human behavior—as stated in the text, he urges government to do nothing, and there is nothing that he urges food corporations to stop doing). *Id.* at 1366.

⁵⁷ Epstein, *supra* note 56, at 1361; see *supra* text accompanying notes 8-12.

⁵⁸ Epstein, *supra* note 56, at 1374-75.

⁵⁹ *Id.*

⁶⁰ See *The Situation*, *supra* note 6, at 159-65 (analyzing the limited parameters of policy analysis within the economic analysis of law).

making circumstances.⁶¹ They accumulate and process information in such a manner as will enable them to maximize the satisfaction of their preferences through the behaviors and decisions they engage.⁶² Those behaviors and decisions that actors actually make reveal and express to the rest of the world, including policymakers, what the actors' preferences were, and are.⁶³ Market actors, such as profit-maximizing corporations, have the incentive to discern and respond to those preferences, lest other firms do so in their stead.⁶⁴ Robust markets thus serve consumer interests by making it more likely that their preferences will be satisfied at competitive prices.⁶⁵ In this script, the market is agent to the consumer, and profits, so long as they are taken in competitive markets, are the consummate sign of consumer satisfaction.⁶⁶ Indeed, this story of consumer preference satisfaction is a crucial justification in back of the profit-maximization principle at the heart of contemporary corporate law.⁶⁷ Regulatory "intervention" can only muck up the simple elegance and felicitous results of such market transactions.⁶⁸ Striving outside of the disciplining contours of the market, regulators are likely to produce outcomes that are worse than even imperfect market outcomes.⁶⁹ Indeed, regulators may not even be genuinely motivated by the public interested at all, but rather may pursue their own personal or ideological interests in their regulatory efforts.⁷⁰ Deploying this script in the obesity context,

⁶¹ See, e.g., Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 L. & SOC'Y REV. 973, 976-77 (2000) (compiling citations to sources espousing this view).

⁶² See, e.g., *id.* at 977.

⁶³ See, e.g., Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475 (1998) [hereinafter *A Behavioral Approach to Law and Economics*] (noting that conventional economic analysis focuses on "social welfare," which is measured and maximized by their preferences as revealed in the market).

⁶⁴ *The Situation*, *supra* note 6, at 197-201, 225-26.

⁶⁵ See, e.g., John Cirace, *A Synthesis of Law and Economics*, 44 SW. L.J. 1139, 1149 (1990) (noting that "voluntary transactions by individuals acting in free, competitive markets best served consumers' interests" because such transactions allow individuals to satisfy their preferences). A transaction will not be voluntary unless at a competitive price. *Id.*

⁶⁶ See, e.g., Amy Sinden, *The Tragedy of the Commons and the Myth of the Private Property Solution*, 78 U. COLO. L. REV. 533, 542 (2007) (describing such a relationship between producer profits and consumer satisfaction as "productive efficiency").

⁶⁷ *The Situation*, *supra* note 6, at 199 n.254; see also Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 83-84 (2004). See also *infra* Part IV (examining the propriety of the profit-maximization rule for firms operating in the food market).

⁶⁸ See *The Situation*, *supra* note 6, at 227-28.

⁶⁹ See *id.*

⁷⁰ See *id.* at 203-06 (discussing the development of the theory of regulatory capture); see *id.* at 227-28 (noting that regulators have their own concerns about job security and career advancement and may be attempting to impose their personal vision of an orderly society rather than serving the public interest).

Epstein finds it relatively easy to conclude that “the sound background presumption against government intervention has not been overcome.”⁷¹

Epstein does propose one policy response to the obesity epidemic. He suggests that perhaps those suffering from overweight or obesity should be dropped from insurance rolls, such that they will no longer be able to externalize the cost of their condition to everyone else:

If we let insurers and employers have the right to draw distinctions on the grounds of weight . . . then the cross subsidy problem will be largely eliminated because each person’s rate will depend more on individual performance and not on the performance of others. The prices will not only change the distribution of burdens, but should create incentives to reduce the total size of the problem It is only when universal access is the cardinal principle of health care that markets are sure to fail.⁷²

This macabre suggestion, that the best thing policymakers can do to help with the obesity epidemic is to isolate the obese and leave them to their own devices, again follows inevitably from the basic legal economist script. Epstein assumes that people’s food consumption will shift towards optimal once they can no longer externalize the health costs associated with consumption, because consuming to the point where the costs to *oneself* is greater than the gains to oneself would be irrational, and the abiding, uncriticized presumption is that people are rational actors who maximize their own utility.

Now, it turns out, of course, that “universal access” is not presently the “cardinal principle” with respect to health insurance coverage in the United States. Indeed, at least 33 million American adults have no health insurance at all.⁷³ And it further turns out that those without insurance are suffering from untreated obesity related illnesses at higher rates than are their insured counterparts, exactly the opposite of what one would expect following the logic of Epstein’s cost externalization argument.⁷⁴ It is the falsity of the

⁷¹ Epstein, *supra* note 56, at 1364.

⁷² Epstein, *supra* note 56, at 1369; *see also*, Jayanta Bhattacharya & Neeraj Sood, *Health Insurance and the Obesity Externality* 2, 26 (Nat’l Bureau of Econ. Research Working Paper No. W11529, 2005), <http://www.nber.org/papers/w11529> (deploying the basic rational actor model in a conventional economic analysis of cost externalization in the obesity epidemic and concluding that “as long as insurance premiums are not risk related for obesity, health insurance coverage systematically shields those covered from the full costs of physical inactivity and overeating These reduced incentives lead to inefficient increases in body weight, and reduced social welfare.”).

⁷³ Carmen DeNavas-Walt, Bernadette D. Proctor, & Jessica Smith, *Income, Poverty, and Health Insurance Coverage in the United States: 2006*, 27 fig. 6 (Aug. 2007), <http://www.census.gov/> (follow “People and Households: Health Insurance” hyperlink; then follow “Health Insurance Coverage: 2006” hyperlink; then follow “Income, Poverty, and Health Insurance Coverage in the United States:2006” hyperlink).

⁷⁴ *See* John Z. Ayanian et al., *Unmet Health Needs of Uninsured Adults in the United States*, 284 J. AMER MED. ASS’N 2061, 2061 (2000) (finding much greater unmet health needs, including treatment of obesity, among the uninsured than among the insured); *see also* Jennifer S. Haas et al., *The Associa-*

classic rational actor model and its inability to grapple with the complex conception of human agency developing in the social sciences that leads to the errors witnessed here.⁷⁵ Indeed, insurance companies already routinely exclude coverage for the treatment of overweight and obesity, which is further evidence that Epstein's prescription is unlikely to seriously address the obesity problem currently being witnessed in our society.⁷⁶ Epstein's argument, that the obesity crisis may be ameliorated by relying on unrealistic rational-actor-like behavioral responses to the upending of a predicate that clearly does not exist (universal coverage and universal pooling), might be described as embracing an illusion within a delusion.

Law and economics stalwart Richard Posner has also written on the obesity epidemic, and has reached conclusions similar to Epstein. Posner even ups the ante on Epstein's claim that there is nothing government can do to improve on obesity matters—for Posner, there is no obesity crisis. For example, he states that “in a model of human behavior in which people are assumed to be rational actors, there is no such thing as being overweight. A person's weight is the result of personal choices along such dimensions as occupation, leisure-time activity or inactivity, residence and, of course, food intake.”⁷⁷ This claim begins a frequently cited paper by Posner dedicated to constructing a formal economic model reflecting such a characterization of the obesity epidemic.⁷⁸ More recently, on his blog with Nobel

tion of Race, Socioeconomic Status, and Health Insurance Status with the Prevalence of Overweight Among Children and Adolescents, 93 AMER. J. PUB. HEALTH 2105, 2107 (2003) (“[L]ack of health insurance is positively associated with the prevalence of overweight among adolescents.”). The insurance externality or “moral hazard” problem of pooling risk-takers with non-risk takers, a familiar law and economics prediction, has also been proved wrong in the case of smoking. One study tracking changes in smoking status over a seven-year period found that those *without* health insurance were *more* likely to smoke than were their insured counterparts, the opposite of what a conventional economic analysis would predict. Catarina I. Kiefe et al., *Health Care Access and Seven-Year Change in Cigarette Smoking*, 15 AM. J. PREV. MED. 146, 146 (1998); see also Jon D. Hanson & Kyle D. Logue, *The First Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 189-90 (1990) (arguing that in many circumstances enterprise liability will be a more efficient response to first-party insurance externalities than would be insurance pool segregation). Below I will return to a consideration of this correlation between health insurance and obesity rates, suggesting how law and behavioralism can help explain it. See *infra* text accompanying notes 147-156.

⁷⁵ Indeed, Epstein's claim that it is only when universal coverage is guaranteed that markets are certain to fail, does not even, as a matter of logic, lead to the conclusion that market's are certain to succeed where universal coverage is not guaranteed. It is only once the behavioral assumptions backing the rational actor model are taken as major premises that such a conclusion follows.

⁷⁶ See Louis F. Martin et al., *Socioeconomic Issues Affecting the Treatment of Obesity in the New Millennium*, 18 PHARMACOECONOMICS 335, 337 (2000).

⁷⁷ See Tomas J. Phillipson & Richard A. Posner, *The Long-Run Growth in Obesity As a Function of Technological Change*, 46 PERSP. IN BIOLOGY & MED 87, 88 (2003).

⁷⁸ As of Feb. 8, 2008, the Posner's article, *supra* note 77, has been downloaded 1,096 times from SSRN.

Prize winning economist Gary Becker, Posner pans regulatory “intervention” to curb the epidemic:

[S]uch measures are from an economic standpoint justifiable only if the growth in obesity represents a market failure It is possible that being fatter than doctors think healthy is optimal People trade off health costs for benefits in other currencies; food high in calories tends to be both delicious and cheap. The health effects of [being] overweight are highly publicized. In addition, in our society fat people are generally considered much less attractive than thin people, and there is a considerable premium in the job market for attractive people Given all the negatives of [being] overweight, it is difficult to believe that obese people have underestimated the costs of being overweight The main costs of obesity . . . are borne by the obese themselves, which greatly weakens the economic case for intervention.⁷⁹

There is no need for “intervention” because there is no market failure; therefore, while there may be obesity, there is no obesity problem. But the “economic case for intervention” is only “weaken[ed]” by virtue of the fact that the obese bear the costs of their condition themselves if it turns out that it is not just “possible,” the proposition Posner begins with, but that it is *actually true*, the conclusion he seems to end with, that “being fatter . . . is optimal.”⁸⁰ That is, the obese really have chosen their condition from among a set of privately ordered preferences.⁸¹ We can see the fundamental law and economics leap of faith between the supposition and the conclusion. The exegesis he actually makes between the two would seem to be more an argument that if people were rational they would not be fat, rather than an argument that people are fat because they are rational. Yet Posner concludes that for fat people the benefits of their condition must outweigh the burdens. The only thing that holds this argument together is the background presumption, unexamined, that people’s choices reveal their preferences, and that no other influences are essential to the analysis. Posner’s belief in the integrity of market outcomes in this context rests entirely on his faith in the rational actor.⁸²

⁷⁹ Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/12/advertising_and.html (Dec. 11, 2005, 06:22PM).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² There is little evidence that people appreciate the health consequences of food consumption behavior, and growing evidence that people do not. One study found that 40% of overweight/obese wives and 45% of overweight/obese fathers did not consider themselves overweight or obese. A.N. Jeffrey et al., *Parents’ Awareness of Overweight in Themselves and Their Children*, 330 BRIT. MED. J. 23, 23 (2005). Studies also indicate that people tend to fail to recognize that their own children are overweight; in one study, only 36% of parents of overweight children described their children as being overweight. Kathryn C. Eckstein, *Parents’ Perceptions of Their Child’s Weight and Health*, 117 PEDIATRICS 681, 681 (2006); see also Costas Pangagopoulos, *Obesity*, 70 PUB. OPINION Q. 249, 251 (2006) (“Clear and growing discrepancies appear between government estimates of the degree of obesity and public perceptions about personal weight It would be safe to say that Americans’ perceptions of their weight are different from reality.”). Many people also have difficulty interpreting food labels. See generally Russell L. Rothman et al., *Patient Understanding of Food Labels: The Role of*

It is no doubt “difficult to believe,” as Posner writes,⁸³ that something other than preference-driven choices are important in accounting for consumer behavior in the obesity epidemic. Yet the reason that it is so difficult relates more to the strength of our intuitions about the dispositional sources of our own and other people’s behavior, than it does to the actual strength of arguments and evidence that environmental factors, including market manipulation, are important in analyzing the obesity epidemic.⁸⁴ Once the pre-commitment to intuition-based reasoning is suspended, and social science enters to aid the analysis of the underlying question of human agency, then it becomes easier to see, and easier to believe, that obesity *does* represent a market failure in need of remedy.

Yet it is important to emphasize the consonance between the law and economics approach to the obesity problem, exemplified here by Epstein and Posner, and popular resistance to a robust regulatory response to it.⁸⁵ The rational actor model, far from being an unfamiliar abstraction, is actually a simple reflection of intuitive, common-sense conceptions of the sources of human behavior. As reviewed above, all humans, to greater or lesser degrees, tend to view both their own and other people’s behaviors as the manifestation of individual preferences, and they fail to appreciate the ways in which situation influences behaviors and decisions.⁸⁶ It is the manifestation of informal ways of thinking about human behavior in the formal exegeses of law and economics analysis, and not scientific rigor, which is the source of the persuasive power that the economic approach enjoys in legal analysis and policymaking. While law and economics makes claims to being scientific, its starting assumptions about the driving forces behind human behavior are based on the same unexamined intuitions that stand in back of a shared common sense which turns out to be wrong in crucial ways.⁸⁷ In Epstein and Posner, two highly influential thinkers, we have seen the first evidence of the persuasive but misleading power of dispositionism operating in legal theoretic assessment of the obesity epidemic. As we shall

Literacy and Numeracy, 31 AM. J. PREV. MED. 391, 394 (2006) (finding that food label literacy highly correlates with underlying literacy but that “even patients with higher levels of education can struggle to interpret current food labels.”) Earlier, I cited the life-expectancy losses associated with obesity, *supra* text accompanying notes 8-12; a presumption of optimality would have to encompass not only that reality but also the effects of obesity on quality of life before demise, such as hypertension, depression, sexual dysfunction, and discrimination. While the Centers for Disease Control estimates that 7% of Americans have cancer, 15% of survey respondents considered cancer to be the most urgent health problem facing the country, with just 9% considering obesity to be the most important, despite the fact that overweight and obesity rates among adults are today 60% and 30% respectively. Pangopolous, *supra* at 250, 256.

⁸³ *Supra* text accompanying note 79.

⁸⁴ *See supra* text accompanying notes 32-41.

⁸⁵ *See infra* text accompanying notes 231-33 (discussing public opinion on the obesity epidemic).

⁸⁶ *See generally The Situational Character*, *supra* note 6, at 37-85 (reviewing studies).

⁸⁷ *See id.* at 138-52 (elaborating this claim).

see, this problem persists even in purportedly advanced versions of the basic economic approach.

III. BEHAVIORAL LAW AND ECONOMICS AND OBESITY EPIDEMIC ANALYSIS

A. *The Behavioral Challenge and the Rise of Libertarian Paternalism*

Legal scholars have challenged mainstream law and economics for decades. Critical legal scholars, feminist legal scholars, critical race theorists, and others launched early assaults from outside of the economic tradition.⁸⁸ In the last decade, scholars working to expand or explode the conventional economic model from within have advanced a distinct second wave of criticism using the same basic terms and adhering to the same basic purposes as the economic approach.⁸⁹ This second wave has been committed to advancing its critique by exploiting insights from behavioral science, in particular social, cognitive, and behavioral psychology.⁹⁰ These scholars have dubbed their movement “behavioral law and economics.”⁹¹ Their work is becoming increasingly influential in legal scholarship,⁹² posing a significant challenge to more conventional economic approaches, and drawing the attention of scholars working outside of economic analysis altogether.⁹³ This Section briefly introduces behavioral law and economics and then argues that the most recent developments in this legal theoretic movement offer no more satisfying an approach to the legal analysis of the obesity epidemic than does the conventional law and economics paradigm that it seeks to replace.

⁸⁸ See MARK KELMAN, A GUIDE TO THE CRITICAL LEGAL STUDIES MOVEMENT 114-85 (1987); see also *The Situation*, *supra* note 6, at 140-42 (collecting references to decades of criticism of law and economics from numerous kinds of legal scholars).

⁸⁹ See Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663 (2003).

⁹⁰ See Robert A. Prentice, “Law &” *Gratuitous Promises*, 2007 U. ILL. L. REV. 881, 882 (2007) (behavioral law and economics “draws its inspiration . . . from the empirical findings generated by behavioral psychology, cognitive psychology, evolutionary psychology, cognitive science, and related fields.”).

⁹¹ *A Behavioral Approach to Law and Economics*, *supra* note 63, at 1476-89 (describing and defining “behavioral law and economics”).

⁹² Cf. Terrence Chorvat, Kevin McCabe, & Vernon Smith, *Law and Neuroeconomics*, 13 S. CT. ECON. REV. 35, 42 (2005) (“[B]ehavioral law and economics has also become very influential in legal scholarship.”).

⁹³ See, e.g., Jonathan H. Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006) (applying behavioral law and economics to counterterrorism).

The behavioral law and economics critique begins by emphasizing the divergence between the “rational actor” model⁹⁴ and the picture of human decision-making that has emerged within social psychology, cognitive psychology, and allied disciplines.⁹⁵ It turns out that humans do not consistently make rationally optimal decisions; indeed, in some decision-making contexts we consistently make sub-optimal decisions. Social psychologists and other social scientists have conducted hundreds of experiments that richly demonstrate this fact.⁹⁶

Most behavioral law and economics literature is dedicated to cataloging and examining the implications of particular findings of specific departures from the rational actor model.⁹⁷ A number of specific kinds of “anomalies” have become familiar in legal scholarship. For example, social psychologists have demonstrated that humans are subject to what has been deemed an “endowment effect,” such that we tend automatically to value something more if we have it or are endowed with a right to it, while valuing that same thing less if we do not already have or are not entitled to it.⁹⁸ This phenomenon is usually presented in legal academic literature with reference to what is quickly becoming a favorite old chestnut (or at least an agreeable reread), the Cornell coffee mug experiment.⁹⁹ Cornell coffee mugs were randomly distributed to half of a group of students. The students who were endowed with the mug were then asked to specify a price they would require in order to sell their mug to a student without one, while the students without mugs were asked to specify a price they would be willing to pay to buy a mug from a student with one. Students who were endowed with the mugs specified a price that was roughly twice what students who were not endowed with a mug were willing to pay for one. Absent the endowment effect, one would have expected different valuations of the mugs to have been distributed randomly among students, but by operation of the endowment effect, students who had the mugs predictably valued them

⁹⁴ *A Behavioral Approach to Law and Economics*, *supra* note 91, at 1476 (“The task of behavioral law and economics simply stated is to explore the implications of actual (not hypothesized) human behavior for the law. How do “real people” differ from homo economicus.”).

⁹⁵ *Id.* at 1476-89 (describing behavior law and economics as the product of bounded rationality, bounded will-power, and bounded self-interest and asserting that “[a]ll three bounds are well-documented in the literature of other social sciences”).

⁹⁶ For comprehensive summaries of relevant social scientific literature, *see generally* *The Situational Character*, *supra* note 6; *A Behavioral Approach to Law and Economics*, *supra* note 63; Hanson & Kysar, *supra* note 29.

⁹⁷ *See, e.g.*, Michael A. McCann, *It's Not About the Money: The Role of Preferences, Cognitive Biases, and Heuristics among Professional Athletes*, 71 BROOKLYN L. REV. 1459 (2006).

⁹⁸ *See, e.g.*, Jennifer Arlen, Matthew Spitzer, & Eric Talley, *Endowment Effects Within Corporate Agency Relationships*, 31 J. LEGAL STUD. 1 (2002).

⁹⁹ *See, e.g.*, Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 195-97 (1991).

more than those who did not.¹⁰⁰ The coffee mug experiment is a simple illustration of a broadly influential tendency in human thinking. The implications of the endowment effect, however, become both complicated and important when one considers that by its operation humans may value many kinds of interests (e.g., property rights or civil rights) differently if such rights are construed as something they already have, and might give up for a price, or as something they do not have, but might acquire at a price.¹⁰¹ The reality of the endowment effect certainly undermines a key feature of the “rational actor” model: the presumption that people endeavor to maximize a set of privately ordered preferences. What people endeavor to maximize, it turns out, depends upon a key situational factor—the distribution of entitlements.

There are many examples of this kind of phenomena. Another familiar study is one demonstrating that if women are told that *getting* yearly breast exams will *increase* their chances of surviving breast cancer, far fewer women will actually get the breast exams than would if they were told that *failing to get* yearly breast exams will *decrease* their chances of surviving breast cancer.¹⁰² The breast cancer study exemplifies the impact of both loss-aversion and framing effects. Both effects are important deviations from the conventional rational actor model of decision-making. People tend to dislike losses more than they enjoy gains; in economic terms, they would be willing to pay more to reduce their chances of losses than they would be willing to pay for a similar increase in their chances of achieving gains. Where breast cancer exams are framed as loss avoidance, more women will reveal a “preference” for breast exams than where breast exams are framed as a “gain” with respect to the chances of surviving breast cancer.¹⁰³

Many other “anomalies” of this nature have been identified by social scientists and put to use in behavioral law and economics.¹⁰⁴ In an important early riposte to the behavioral law and economics challenge, Judge Posner

¹⁰⁰ *Id.* at 195-97.

¹⁰¹ Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U.L. REV. 1227, 1228 (2003) (assessing use of the endowment effect in legal scholarship).

¹⁰² See Tracy Williams et al., *Effects of Message Framing on Breast-Cancer-Related Beliefs and Behaviors: The Role of Mediating Factors*, 31 J. APPLIED SOC. PSYCH. 925, 931-32, 938 (2001).

¹⁰³ See *The Situational Character*, *supra* note 6, at 37-44 (describing further studies that illustrate these phenomena). Status quo bias, risk aversion, and framing effects are all recurring themes in the behavioral law and economics literature. *E.g.*, Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). I have found the breast cancer example to be an especially powerful way of describing this aspect of the basic behavioral critique to students. Nevertheless, one of my criticisms of behavioral law and economics is its tendency to focus too exclusively on the biases and heuristics literature and its failure to more comprehensively incorporate the broader array of situational influences over human thought and behavior revealed by social science, which call for a more substantial departure from the basic law and economics model than behavioral legal economists have accepted. See *infra* text accompanying notes 276-296 (developing this claim in the obesity context).

¹⁰⁴ See *supra* text accompanying notes 99-101.

claimed that the approach was under-theorized and, indeed, was not a theory at all.¹⁰⁵ Posner argued that behavioral law and economics was little more than a list of “quirks” which could not be deployed in systematic critical analysis.¹⁰⁶ The theoretical architecture of behavioral law and economics is indeed too limited, and the approach is inapt to the kind of legal analysis that must be undertaken in light of what the behavioral critique has revealed about human behavior and decision-making.¹⁰⁷ In terms of frameworks for analysis, early behavioral law and economics introduced to legal theory the construct of “bounded rationality,” which might replace the “rational” actor used in canonical economic analysis, giving legal theory a more accurate picture of the limitations of human decision-making.¹⁰⁸ The theory also introduced the concept of “bounded self interest,” which is meant to provide behavioral law and economics a framework for responding to the robust findings making clear that in many circumstances people predictably make decisions in a manner that evinces concern with values or interests other than their own narrow self-interest (as the basic rational actor model conventionally assumes).¹⁰⁹ Finally, behavioral law and economics introduced the notion of “bounded will power” as a way of attending to the reality that we often find it difficult to conform our decisions and behavior even to that which we *know* to be in our own best interest.¹¹⁰ The typical behavioral law and economics law review article focuses on the implications of one or more of these “bounded” conceptions for the economic analysis of given doctrinal or institutional topics.¹¹¹

The trouble with behavioral law and economics begins with these constructs. They completely fail to capture the most critical lesson of the behavioral critique, which is that human beings are far more subject to situational *influence*, in our thinking and in our behavior, than we anticipate or appreciate. The three “bounds” of the behavioral law and economics ap-

¹⁰⁵ Richard A. Posner, *Rational Choice, Behavioral Economics, and The Law*, 50 STAN. L. REV. 1551, 1552, 1559-60 (1999).

¹⁰⁶ *Id.* at 1557-58. Hanson and I take issue with Posner’s general defense of conventional law and economics against the behavioral critique in *The Situational Character*, *supra* note 6, at 152-59. See also Jolls, Sunstein, & Thaler’s response to Posner’s critique in *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593 (1998) (arguing that behavioral law and economics promises predict human behavior better than the conventional rational actor model does and that Posner’s defense of the rational actor model is non-falsifiable).

¹⁰⁷ See *infra* text accompanying notes 126-36.

¹⁰⁸ See *A Behavioral Approach to Law and Economics*, *supra* note 63, at 1477-78 (discussing “bounded rationality”).

¹⁰⁹ See *id.* at 1479 (discussing “bounded self interest”).

¹¹⁰ See *id.* (defining “bounded will power”).

¹¹¹ See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1290-95 (2003); Russell Korobkin, *The Efficiency of Managed Care “Patient Protection” Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 47-48 (1999); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 548-60 (2002).

proach maintain the basic dispositional perspective at that heart of the conventional rational actor model. The “bounded” actor may be less capable of discerning and pursuing her preferences (some of which might concern people or matters other than herself), but the basic picture of an insulated, private preference satisfier is unadulterated. What is absent in the “bounded” approach is a way of capturing and attending to the ever-present but unseen power of external situation, and the manipulation of external situation, to move us and others in ways that we mistakenly attribute to individual disposition. This limitation constrains the analytic power and undermines the normative authority of behavioral law and economics.¹¹²

Lately, behavioral law and economics scholars have become more ambitious in their formulation of the theoretical implications of their project.¹¹³ This Section focuses on recent claims concerning the normative implications of behavioral law and economics for longstanding debates about “paternalism” in policymaking. This angle provides a useful vantage from which to grasp the implications of behavioral law and economics for obesity epidemic analysis. Traditional law and economics has long been “anti-paternalistic” in nature, committed as it is to individual choice as the faithful engine of allocative efficiency.¹¹⁴ A strong anti-paternalism was clearly reflected in the basic law and economics assessment of the obesity problem discussed above.¹¹⁵ But the law and behavioralism movement has introduced a confounding new puzzle into conventional paternalism debates. In recent work, leading behavioral legal economists Cass Sunstein and Richard Thaler excellently pose that puzzle, but do not adequately solve it.

The roots of the puzzle can be traced to an earlier inquiry that Sunstein and Thaler left lingering at the end of their seminal Stanford Law Review article (with Christine Jolls), *A Behavioral Approach to Law and Economics*.¹¹⁶ At the end of that piece, the authors claimed that the many psycho-

¹¹² See *infra* text accompanying notes 115-61. There are, beyond peradventure, a wealth of incredibly interesting and important new studies that have recently advanced our understanding of many fundamental areas of legal inquiry by application of the concept of “bounded rationality.” The studies cited in the previous note are just the tip of the iceberg. Nevertheless, I believe that legal theory must expand its appreciation of the behavioral critique in order to grapple with its implications more fully. This is especially so with respect to obesity epidemic analysis, where these concepts have proved inadequate. See *infra* text accompanying notes 214-30.

¹¹³ *The Situational Character*, *supra* note 6; *The Situation*, *supra* note 6.

¹¹⁴ Cf. *A Behavioral Approach to Law and Economics*, *supra* note 63, at 1475 (“In its normative orientation, conventional law and economics is often strongly antipaternalistic. The idea of “consumer sovereignty” plays a large role; citizens, assuming they have reasonable access to relevant information, are thought to be the best judges of what will promote their own welfare.”).

¹¹⁵ See *supra* text accompanying notes 56-87.

¹¹⁶ *A Behavioral Approach to Law and Economics*, *supra* note 63. The Jolls, Sunstein, and Thaler article has become a touchstone, usually a starting place, for legal scholars making use of “behavioralism.” See, e.g., Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007) (building on the Jolls, Sunstein, and Thaler article by adding emotional biases to the “behavioralist” analysis); Alex Stein, *A Liberal Challenge to Behavioral Economics: The Case of Probability*, 2 N.Y.U. J. L. &

logical studies referenced in their article lead to a social policy perspective that “pushes toward a sort of anti-anti-paternalism—a skepticism about anti-paternalism, but not an affirmative defense of paternalism.”¹¹⁷ This was so, the authors argued, because although evidence of “bounded rationality” and “bounded will power” on the part of individual human actors in their capacity as citizens or consumers might seem to counsel in favor of paternalistic social policies, “government actors . . . themselves may face the same cognitive or motivational problems as everyone else.”¹¹⁸ Because of the supposed “wash” between the implications of the behavioral critique as applied to consumer decision-makers in unregulated markets on the one hand, and government regulators on the other, the paternalism questions raised by the behavioral critique were shrugged off as a tie, with uncertain implications.¹¹⁹

In their more recent effort to advance the behavioral law and economics project, however, Sunstein and Thaler abandon this agnostic “anti-anti-paternalism” and introduce the concept of “libertarian paternalism,” a theory which they argue answers the normative questions raised by the behavioral critique in a more decisive manner, and in a fashion that is both responsive to behavioralism and palatable to anti-paternalists.¹²⁰ I argue that “libertarian paternalism” is analytically and normatively problematic, as a general matter, and that it fails in particular to provide a satisfactory approach to legal analysis of the obesity epidemic.¹²¹ Despite these shortcomings, the budding popularity of libertarian paternalism threatens to lend unjustified intellectual support to opponents of a strong regulatory response to the obesity epidemic.

Sunstein and Thaler’s argument begins by recognizing, as social psychology teaches, that the “design features” of decision-making or behavioral circumstances “have surprisingly powerful influences on people’s choices.”¹²² This axiom derives from robust findings across many areas of the social sciences, but it can be illustrated and understood quickly with reference to specific studies like those described above.¹²³ Sunstein and

LIBERTY 531, 531 (2007) (arguing that “behavioralism” “needs to be liberally inclusive in formulating the criteria for rationality against which to evaluate people’s cognitive ability and performance.”). The Jolls, Sunstein, and Thaler article is also available in a useful collection, *BEHAVIORAL LAW AND ECONOMICS* (1997) (Cass Sunstein, Ed.).

¹¹⁷ *A Behavioral Approach to Law and Economics*, *supra* note 63, at 1541.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1546-47.

¹²⁰ Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1160 (2003).

¹²¹ *See infra* text accompanying notes 214-30.

¹²² Sunstein & Thaler, *supra* note 120, at 1161.

¹²³ *See supra* text accompanying notes 32-55 (describing situational influence on human eating behavior); text accompanying notes 99-103 (describing the “endowment effect” and “framing effect” studies).

Thaler emphasize a now-famous retirement savings study in which James Choi and his collaborators demonstrated the following: when employees are given an employment compensation package that automatically deducts a certain percentage of their salary and puts it in a 401(k) savings plan, with an *opt-out* right not to participate in such a plan, employees participate in the savings plan at significantly higher rates than they do when the default is no savings-plan participation, with employees having the right to *opt-in* to one at their own election.¹²⁴ The savings behavior studied by Choi and others is an example of what social psychologists call the “status quo bias,” which is a finding that defaults alter people’s “preferences”—other things equal, given a choice between sticking with A or choosing B instead, more people will prefer A, unless the choice is between sticking with B or choosing A instead, in which case more people will prefer B. This reality of human decision-making is no small matter. As the savings example demonstrates, depending on the default, people will “reveal” significantly different “preferences” for either more present consumption and less future consumption, or less present consumption and more future consumption.¹²⁵

Sunstein and Thaler argue that findings of this nature should make it clear to anti-paternalists that in many circumstances the “social planner” cannot simply allow or insist that people be free to make their own choices about what is in their best interest.¹²⁶ The “social planner,” it turns out, very often cannot help but influence people’s decisions through the design features structuring a given behavioral circumstance.¹²⁷ Critical realism refers to such features as “situational” influences, which, though often unseen, are ubiquitous in human affairs.¹²⁸ Facing the predicament as they understand it, Sunstein and Thaler next formulate what they describe as the “libertarian paternalist” position:

¹²⁴ Sunstein & Thaler, *supra* note 120, at 1159-60. The underlying study referenced by Sunstein and Thaler is James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, 16 TAX POLICY & ECON. 67 (2002).

¹²⁵ See Hanson & Kysar, *supra* note 29, at 673-76 (discussing the “status quo bias”). The reader will clearly see the similarity between “status quo bias” and the “endowment effect.” Many psychological mechanisms or patterns described by social psychologists are overlapping in their definition and effect. Cf. Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?* 46 HARV. INT’L L.J. 295, 307 (2005) (“Some of the effects may seem to overlap or shade into each other because they represent therapists’ and psychologists’ attempts to describe complex psychological conditions that defy simple explanation.”). The crucial point for legal analysis is that what is common about these findings is the hard evidence they provide that we are far more subject to influence in our cognition than we appreciate in our common sense understanding of ourselves. This is the promising unified perspective that is missing in the behavior law and economics efforts critiqued in the text.

¹²⁶ Sunstein & Thaler, *supra* note 120, at 1194-95.

¹²⁷ *Id.*

¹²⁸ See generally *The Situational Character*, *supra* note 6, at 7-8, 33.

[T]he design features of both legal and organizational rules have surprisingly powerful influences on people's choices. We urge that such rules should be chosen with the explicit goal of improving the welfare of the people affected by them. The libertarian aspect of our strategy lies in the *straightforward insistence* that, in general, people should be free to opt out of specified arrangements if they choose to do so. To borrow a phrase, libertarian paternalists urge that people should be "free to choose." Hence we do not aim to defend any approach that blocks individual choices.¹²⁹

The social planner is to orient bounded decision-makers in a maximizing direction, but provide them the freedom to opt-out and go their own way if they so desire.¹³⁰ With this formula in place, the libertarian-paternalist project is up and running, and Sunstein and Thaler spend the balance of their article cataloging positive law that corresponds to their vision, and sketching the implications of their idea for policymaking in various arenas.¹³¹

Sunstein and Thaler's formulation no doubt succeeds in presenting a theory of paternalism that is at least somewhat palatable to anti-paternalists, but it does so at the expense of analytic coherence and prescriptive power. The central analytic problem in Sunstein and Thaler's treatment is this: The authors claim that in many circumstances the "social planner" *cannot avoid* shaping choice; if that is so, then how can the social planner possibly provide for people to be "free to choose"? The social planner cannot avoid shaping choice in the provision of opt-outs any more than she can in the status quo predicament that presented the problem to begin with. Requiring an opt-out does not present an occasion different in nature from the predicament we began with, wherein choosers may now act "freely," uninfluenced by the social planner. Sunstein and Thaler accept a crucial axiom of decision-making theory at the initial stage of the decision-making context, but they abandon it just as quickly when they posit by implication the existence of some pure ground, or some pure moment in the choosing life of the individual, in which people are "free to opt out of specified arrangements"¹³² if the individual finds that the social planner's design does not maximize her own welfare. In truth, the opt-out condition does not satisfy the libertarian requirement, it merely reintroduces the problem that started the whole project: the inevitability of (often unseen) situational influence over human choosing. Sunstein and Thaler's problem, analytically, is that they must confront this reality at every turn, *including* in the opt-out world. The theory is not coherent; the libertarian paternalism escape hatch is a mirage. What is pivotal about the behavioral critique is the powerful, pervasive, and too little seen influence of situation over choice. Call this, in critical realist terminology, the problem of "unbounded situation," a phrase

¹²⁹ Sunstein & Thaler, *supra* note 120, at 1161 (emphasis added) (footnote omitted).

¹³⁰ *See id.*

¹³¹ *Id.* at 1172-95.

¹³² *Id.* at 1161.

which perhaps better describes our predicament than does “bounded rationality.”

Consider, for example, a hypothetical employee savings program. The “social planner” knows that she cannot avoid influencing savings behavior through the design of the program. Specifically, she knows that most employees tend to stick with their employer’s default plan. Not desiring to try to make workers worse off, nor to let things lie randomly, she endeavors to design the program in such a manner as she in good faith believes will be welfare-maximizing to employees: the default program will allocate 5% of an employee’s salary to a 401(k) plan, with savings allocated equally among conservative, moderate, and aggressive investment funds. However, as a committed libertarian paternalist, the policymaker further wants to provide employees the opportunity to “opt-out” of her default design. But how does she do this? If she sends new employees an email, say, one month after their start date with the subject header “Need More Cash Now?” and explains in the body of the email that employees can increase present consumption if they opt-out of the company’s default savings plan, she will likely induce far more to opt-out than if she sends an email one month after the employee’s start date that reads “Want Less Consumption Later?” explaining that if employees opt-out of the default plan they will enjoy less consumption during retirement than they would if they stuck with the default.¹³³ The libertarian paternalist might prefer that the opt-out condition be presented in a neutral fashion, but the social psychological insight that sparked the inquiry to begin with is that there is no neutral presentation available—the manner of presentation *will* influence choice behavior, and in predictable ways. And even as the situation will shape whether opt-outs occur, the situation will further shape what opt-outers do in the opt-out condition. For example, the email or memo tucked deep within the employee benefits binder describing the “Default Savings Opt-Out” might describe opt-out options that included complete opt-out to an all cash salary, or simply a different kind of savings allocation, as between aggressive and conservative funds.¹³⁴

My students and I manifested a simple allegory of the analytic problem examined here at the start of a meeting of our Law and Behavioralism

¹³³ This would be another example of “framing effects,” as well as an example of time-variant preferences and hyperbolic discounting. See *The Situational Character*, *supra* note 6, at 39-49.

¹³⁴ In describing these options the plan designer must further determine whether or not to present information regarding historical returns of each fund type over the short-term or the long-term. It has been shown that if the plan designer presents information about savings options in a short-term framing (of fund returns over a one-year period, for example), it turns out, opt-out employees will be more likely to choose conservative funds; if the designer presents the information in a long-term frame (of fund returns over a 20 year period, for example), opt-out employees will opt for more aggressive funds. See Sunstein & Thaler, *supra* note 120, at 1160 (discussing differences in savings allocations depending on the frame with which results are presented to plan participants).

Seminar.¹³⁵ Often I bring apples to the seminar, and sometimes donuts or even chocolate on a holiday. On the morning we were to engage “libertarian paternalism,” my student facilitators and I conceived the following scheme: we met in the seminar room before anyone arrived and placed an apple on most of the desks, in front of some of the desks we placed both an apple and a donut, and in front of others we placed neither. Then we placed the open box of donuts and the open bag of apples on a table at the front of the room, which we told students were available to them as they entered the classroom. A basic rational actor model would have predicted that students entering the behavioral circumstance would have chosen to consume apples or donuts in a manner that maximized the satisfaction of the stable, privately ordered apple-donut preferences that they brought with them into the room. Actual consumption patterns reflected the central truth of the behavioral critique—situation matters. Students with an apple and a donut in front of their desk were more likely to consume a donut than were students with just an apple in front of them. Students with nothing placed in front of them were also more likely to consume donuts than apples.

This little scene illustrates the analytic problem with libertarian paternalism. At first glance it may appear as if we had satisfied the libertarian paternalist agenda by orienting the students (or most of them anyway) towards apples, but ensuring that they were “free to choose” donuts if they wanted to opt out of our effort to orient them in a maximizing direction. The problem is that all of the students were “free to choose” donuts, but we as the social planner influenced whether they would exercise the opt-out option, either by placing the donut option right in front of them, or placing it at the front of the room. Further, we had to decide whether to leave the box of donuts opened or closed. Indeed, we had to decide whether to put the donuts at the front of the room, or in the hallway, or a classroom next door, or in the supermarket where we found them. Each of these situations would substantially affect whether the students chose to stick with the “paternalist” path or opted-out for the “libertarian” option.¹³⁶ Despite the libertarian paternalist’s promises to the contrary, the influence of situation over individual choice is unavoidable at any turn.

This analytic problem in the libertarian paternalism project results from Sunstein and Thaler approaching “choice” as an abstract, un-situated phenomena, and endowing that concept of choice with a power that has no regard for the situated realities of human choosing behavior. We might call this choice fetishism—the conception and valuation of choice in a manner

¹³⁵ The following scenario makes no pretense at all to social science; it is merely an effort to usefully illustrate a reality of human behavior and decision-making that has been well established in social scientific research. *See supra* text accompanying notes 96-103.

¹³⁶ As will be seen *infra*, text accompanying notes 152-57, the problem becomes much more difficult when we leave co-operative settings, such as the classroom or an in-house cafeteria, an example we will see Sunstein and Thaler take up, *infra*, text accompanying notes 147-51.

that is abstracted away from the situated nature of choosing.¹³⁷ Where choice, divorced from situation, is given power and value as an end in itself, and as a normative guidepost, it is fetishized. We desire choice and seek the feeling of it. Choice fetishism provides the promise, the idea, and the experience of choice, which serves our abiding motives to view ourselves in a self-affirming manner as being in control and making good choices.¹³⁸ The conflation of choice with power maintains choice fetishism. But the *experience* of choice does not represent the real operation of power in the behavior concomitant to the choice experience. The central lesson of the behavioral critique is that this conflation is illusory, no less in our theories than in our self-conceptions. We do not see the influence of framing effects on our choice behavior; we experience choice as being wholly free.¹³⁹ When permitted to operate in legal theory, choice fetishism creates a blindness to human vulnerability, in particular a blindness with respect to the power of market actors to engage in market manipulation. As Michael Paulson has put it, “[t]he vice of fetishization is abdication.”¹⁴⁰

This choice fetishism is evident in the libertarian paternalist positivism that discerns “free choice” in the “opt-out” conditions in their designs, rather than continuing to see the influence of situation. And it is this choice fetishism that yields what Sunstein and Thaler identify as a crucial normative principle of the behavioral law and economics approach: “The libertarian paternalism that we are describing and defending here attempts to ensure, as a general rule, that people can easily avoid the paternalist’s sug-

¹³⁷ My use of the term “fetishism” is here inspired by its use in a number of different intellectual traditions; the “accepted definition [holds that] ‘fetishism occurs when the mind ceases to realize that it has itself created the outward images or things to which it subsequently posits itself as in some sort of subservient position.’” Robert Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 543 (1988) (quoting DAVID SIMPSON, *FETISHISM AND IMAGINATION* xiii (1982)). See also the use of this concept in class analysis, 1 Karl Marx, *CAPITAL* 83 (Random House 1906) (1867) (explaining “the Fetishism which attaches itself to the products of labour, so soon as they are produced as commodities, and which is therefore inseparable from the production of commodities”), cultural anthropology, Clifford Geertz, *THE INTERPRETATION OF CULTURES* 126-27 (1973) (describing the power of religious symbols in terms of their “presumed ability to identify fact with value at the most fundamental level, to give to what is otherwise merely actual, a comprehensive normative import.”), and psycho-analysis, Sigmund Freud, *Fetishism in SEXUALITY AND THE PSYCHOLOGY OF LOVE* (1927). See also *infra* text accompanying note 319 (discussing Roberto Unger’s notion of institutional fetishism as applied to corporate law).

¹³⁸ See *The Situational Character*, *supra* note 6, at 90-115 (reviewing the powerful, but often unseen, influence of self, group, and system-affirmation motives in human thinking and behavior).

¹³⁹ See *id.* at 124-33 (reviewing studies that indicate that the *experience* of will, or the “phenomenal will” as researchers call it, is not co-extensive with the empirical will, that is, the actual exercise of will).

¹⁴⁰ Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 344 (1994) (criticizing what he identifies as “unhealthy court-worship” in our legal system).

gested option.”¹⁴¹ It is obviously a strong desire of libertarians, indeed, of freedom loving peoples everywhere, for it to be easy for people to do as they desire in a given situation. But again, the positive analysis that prompted the inquiry to begin with was precisely that it is *not* easy for people to avoid being influenced by the social planner’s design of the decision-making context.¹⁴² The libertarian paternalist cannot make it easy by fiat.

Rather than free choice itself, what the easy-opt-out injunction engenders is an impulse to remove obvious restraints or strong explicit influences on choice, but which will fall short of attending to more subtle, but powerful, situational forms of influence. The libertarian paternalist must strive for the *appearance* of unfettered choice and will insist on programs that can satisfy the charade. It is this key limitation which keeps libertarian paternalist analysis from extending its inquiries into the power of market actors to exercise unseen situational influence over consumers. Market choices will continue to be viewed as dispositional, and the situational influences that actually continue to shape the behavior will go unexamined. Libertarian paternalism requires this limitation because the escape-hatch must be put somewhere, and wherever it is put, the chooser will be construed to be choosing freely. The libertarian paternalist will likely limit her attention to salient government restraints, the traditional and highly visible scourge of the libertarian, and will not sufficiently explore situational influences on choice that are deployed by market actors, whose influences are, absent critical inquiry, difficult to appreciate.¹⁴³ This threat of exploitation and manipulation slips right past the libertarian paternalist’s gaze, which is fixated on choice.

This analysis of choice fetishism, like the critical realist critique more generally, should not be misread as suggesting that people do not choose, or that choice is only ever a chimera. We choose constantly and decisively, but we choose situationally to a greater degree than we appreciate.¹⁴⁴ At stake is not whether we have choice or not, but rather whether choice will be understood in situated or fetishized fashion. We must in the end choose how to behave—to eat a hamburger or not, to supersize the order or not. In truth, that choice is subject to profound situational influences, oftentimes manipulated by market actors with a stake in our choosing.¹⁴⁵ The choice fetishist analyzes and attaches value to the choice to eat or not to eat the hamburger, irrespective of the situation of that choosing. Choice fetishism robs from us

¹⁴¹ Sunstein & Thaler, *supra* note 120, at 1186.

¹⁴² Cf. Sunstein & Thaler, *supra* note 120, at 1194-95.

¹⁴³ See *supra* text accompanying notes 85-87 (discussing consonance of basic rational actor view of consumer behavior, and common, intuitive views of consumer behavior).

¹⁴⁴ *The Situation*, *supra* note 6, at 167; see also *The Situational Character*, *supra* note 6, at n.6 (discussing social psychology research which notes that people erroneously tend to conclude a person’s behavior results from a unique disposition, and fail to recognize the important situational factors affecting behavior).

¹⁴⁵ *The Situation*, *supra* note 6, at 198.

an appreciation of the deep situational nature of, and influences on, our choosing. It then robs from us too the reformative impulse that might otherwise be inspired in light of such an appreciation.¹⁴⁶

The problem of choice fetishism is apparent in the turn that Sunstein and Thaler briefly take to describe a libertarian paternalist approach to food consumption behavior.¹⁴⁷ Their approach here is typical of other examples in their article, in that where they examine conduct by non-governmental entities such as corporations at all, they focus on the internal governance of such entities, rather than the entity's operation in external markets. In such settings, Sunstein and Thaler argue, cafeterias (like savings plans) should be organized in a manner that would orient people towards good eating decisions, but allow them to opt-out if they so desire. Sunstein and Thaler write:

Of course, market pressures will impose a discipline on the self-interested choices of those cafeteria directors who face competition. To that extent, those directors must indeed provide people with options they are willing to buy. A cafeteria that faces competition and offers healthy but terrible-tasting food is unlikely to do well *But profit maximization is not the appropriate goal for cafeterias granted a degree of monopoly power*—for example, those in schools, dormitories, or some companies. Furthermore, even those cafeterias that face competition will find that *some of the time*, market success will come not from tracking people's ex ante preferences, but from providing goods and services that turn out, in practice, to promote their welfare, all things considered Would anyone object to putting the fruit and salad before the desserts at an elementary school cafeteria if the result were to increase the consumption ratio of apples to Twinkies? Is this question fundamentally different if the customers are adults? Since no coercion is involved, we think that some types of paternalism should be acceptable to even the most ardent libertarian.¹⁴⁸

This slight passage reveals well the analytic and prescriptive limitations of the libertarian paternalist approach. Sunstein and Thaler begin by accepting that profit-maximizing market actors might have an incentive to sell unhealthy foods, rather than healthy foods, because that is where the money is. But they skip past this problem by remarking that profit-maximization is not the appropriate goal for cafeterias with “a degree of monopoly power.”¹⁴⁹ But why would Sunstein and Thaler write that profit maximization is not appropriate for firms with monopoly power? It can only be that Sunstein and Thaler ultimately remain committed to the view that so long as markets are operating competitively, market pressure will force firms to be responsive to consumer preferences, and because consumers will ultimately prefer their own welfare, markets will provide it. Sunstein and Thaler note that even if consumers do not have ex ante prefer-

¹⁴⁶ Cf. *The Situational Character*, *supra* note 6, at 101-06 (exploring system-justification theory and the palliative function that the system justification motive serves with respect to dissonance that might otherwise be induced in witnessing the disjunction between our social values and our social reality).

¹⁴⁷ Sunstein & Thaler, *supra* note 120, at 1165-67.

¹⁴⁸ *Id.* at 1165-66 (emphasis added).

¹⁴⁹ *Id.* at 1165.

ences for healthy foods, “cafeteria owners” might be able to induce such preferences.¹⁵⁰ Yet having granted that market actors have the ability to induce preferences, Sunstein and Thaler leave no reason to believe that market actors will have the incentive to induce healthy consumption rather than deleterious consumption. All evidence, in fact, is to the contrary.¹⁵¹

The critical question, then, is not whether anyone would “object”¹⁵² to putting apples before the Twinkies in schools or corporate cafeterias—the question is whether market actors, outside the context of the inner workings of such organizations, should put the apples before the Twinkies, or the apple stores in front of the Twinkie stores. And the real question behind that debate is whether or not market actors operating in competitive markets should always have the sole goal of maximizing shareholder value.¹⁵³ Again, this story of competitive markets ever more efficiently and effectively satisfying consumer preferences is a crucial component to the dominant corporate law paradigm of shareholder primacy.¹⁵⁴ The behavioral critique, in particular the problem of market manipulation, undercuts this central justification for the shareholder primacy norm—the very norm which propels the kind of dubious, yet largely unseen, situational influence that firms selling food exercise.¹⁵⁵ It may be true that libertarian paternalist policies in a non-market cafeteria design will have the felicitous effect of inducing preferences for healthy foods. But a great deal of evidence shows that profit seeking market actors find it more profitable to induce unhealthy ones.¹⁵⁶ Indeed, firms that miss such profit opportunities will be eclipsed in competitive markets by firms that find them.¹⁵⁷ This fundamental problem is squarely presented by the behavioral critique, but is left un-theorized by behavioral law and economics, which seems to contentedly rest on the abid-

¹⁵⁰ *Id.* at 1164-65.

¹⁵¹ *See supra* text accompanying notes 15-28 (noting extensive literature documenting problem of situational manipulation in the food market).

¹⁵² Sunstein & Thaler, *supra* note 120, at 1186.

¹⁵³ *See supra* text accompanying notes 56-71 (reviewing the basic law and economics policy script and the signifying part that profit plays in it).

¹⁵⁴ *See supra* text accompanying notes 60-71 and accompanying text. *See also, infra* text accompanying notes 310-318 (suggesting an alternation to this corporate law paradigm in light of the behavioral critique).

¹⁵⁵ *See supra* text accompanying note 28 (discussing the problem of “power economics”).

¹⁵⁶ This is not to gainsay that the food market for health foods has not expanded dramatically in recent years. It clearly has. Jeannine DeFoe, *Food Makers Get on a Health Kick: PepsiCo, Kraft, and Others are Making Strides in Reducing Trans Fats and Producing Healthier Foods to Meet Consumer Demand*, BUS. WK. ONLINE, Dec. 14, 2006, http://www.businessweek.com/print/investor/content/dec2006/pi20061214_187559.htm. But it is just as clear that this development has not begun to stem the tide of the obesity epidemic, which continues to grow, not lessen. *Id.* Although obesity rates continue to climb among all social classes, it may be that markets for health foods will develop among more affluent consumers. I address the class problem in obesity epidemic analysis *infra*, text accompanying notes 214-19.

¹⁵⁷ *See supra* text accompanying note 28 (discussing the problem of “power economics”).

ing presumption that competition for profit serves consumers by responding to their preferences.¹⁵⁸

Libertarian paternalism discourse, like broader paternalism debates, views paternalism as the exercise of power to make people do something that society (or the “social planner”¹⁵⁹) believes is in people’s best interest, but which people would not choose for themselves, absent the coercion.¹⁶⁰ This is compared to or set against “anti-paternalism,” in which people are free to choose for themselves what is in their own best interest. What is typically not squarely examined in conventional or libertarian paternalism discourse is the problem of coercion being exercised not by government on behalf of the subject of the influence, but by market actors on behalf of their shareholders. This pernicious form of influence lurks too often unseen in the background of paternalism debates that are focused on the legitimacy of government’s regulation of behavior. It is a problem that Sunstein and Thaler’s analysis reveals but does not name. Behavioral legal economists take the view that people may sometimes need social planners to protect them from themselves because they sometimes make poor or “boundedly” rational choices.¹⁶¹ But these scholars do not appreciate that the real concern may be that people need protection not from their own poor choices, but from the exercise of power over their choices by interested third parties in ways that are often unseen and unappreciated.

The libertarian paternalist framework is gaining influence within legal scholarship.¹⁶² M. Gregg Bloche’s recent Georgetown Law Journal piece,

¹⁵⁸ Robin Paul Malloy, *Framing the Market: Representation of Meaning and Value in Law, Markets, and Culture*, 51 BUFF. L. REV. 1, 32 (2003) (“At the same time, we observe that sellers have no power, since perfect competition means that sellers must respond to consumer demands and preferences or lose market share to others who will gladly step in to meet the need. This system means that countless individual consumers drive the allocation of resources by pursuing their own self-interest in the marketplace.”).

¹⁵⁹ In Sunstein & Thaler’s usage. See *supra* text accompanying notes 125-31.

¹⁶⁰ See Sunstein & Thaler, *supra* note 120, at 1160-61. Classic law review articles on the problem of paternalism, which space precludes me from engaging here, include Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law*, 41 MD. L. REV. 563 (1982) (claiming that there is a strong strain of paternalism in much of the extant law) and David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988) (disputing Kennedy’s claim, and advocating a strong anti-paternalist outlook in legal analysis and policymaking). But see *The Situation*, *supra* note 6, at 336-40 (critiquing Shapiro’s approach).

¹⁶¹ Sunstein & Thaler, *supra* note 120, at 1200 (“We happily grant that planners are human, and thus are both boundedly rational and subject to the influence of objectionable pressures.”).

¹⁶² See, e.g., Samuel R. Bagenstos, *Disability, Life, Death, and Choice*, 29 HARV. J.L. & GENDER 425 (2006) (discussing libertarian paternalism); Jennifer A. Drobac, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007) (making use of libertarian paternalism); James Fanto, *Paternalistic Regulation of Public Company Management*, 58 FLA. L. REV. 859 (2006) (applying libertarian paternalism); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007) (exploring application of libertarian paternalist to antitrust); Bradley S. Fiorito, Comment, *Calling a Lemon a Lemon: Regulating*

Obesity and the Struggle Within Ourselves, while not using the neologism “libertarian paternalism,” nevertheless exhibits all of the elements of the approach.¹⁶³ The article, which was meant to serve as a counterpoint to Richard Epstein’s writing on obesity referenced above,¹⁶⁴ swears an allegiance to behavioralism, but like Sunstein and Thaler, fails to deliver on the promise:

I shall reject “black box” accounts of personal choice that treat consumers’ current eating habits as sovereign expressions of preference. But I will eschew government measures that would override people’s expressed preferences and thus be experienced by Americans as oppressive. Instead, I will urge efforts to encourage healthier eating and exercise choices by better informing consumers and sharpening their awareness of risks and benefits.¹⁶⁵

Bloche purports to eschew “black box” accounts of personal choice, but by bending over backwards to patronize a particular account of the “black box”—a dispositionist account in which expressed preferences are granted privileged status—he collapses the coherence and utility of his enterprise. While he accepts the analytic point that preferences are situational, he nevertheless promises to respect choice as the manifestation of preference and, indeed, American freedom. This patronization of the dispositional delusion keeps the policy discussion wedded to what Roberto Unger has called “the categories of the newspapers.”¹⁶⁶ The only acceptable policy responses are those that pertain to better “informing” consumers. I am not arguing that informational campaigns would have no effect. But the behavioral critique begins with the understanding that our minds are limited, that we have limited cognitive capacity. This reality, in and of itself, makes clear that policy responses urging ever “more” information will never be sufficient—the problem of information overload or overwhelmment is not a speculative problem that can be bracketed-out for the sake of analysis. It is an undeniable and fundamental fact of human existence that legal analysis must engage at the heart of every inquiry.¹⁶⁷ Even with respect to informa-

Electronic Gambling Machines to Contain Pathological Gambling, 100 NW. U. L. REV. 1325, 1358 (2006) (noting Sunstein and Thaler’s use of waiting, grace, and cooling-off periods to maximize consumer choice—by minimizing consumers’ ability to opt-out—in situations “where impulse may be overriding reason”). Sunstein and Thaler’s term “libertarian paternalism” has been used in 93 different published law reviews and law journal articles since the publication of their article, *Libertarian Paternalism Is Not an Oxymoron*, *supra* note 120, in 2003. Westlaw search in “Journals and Law Reviews” (JLR) database as of Feb. 26, 2008.

¹⁶³ 93 GEO. L. J. 1335 (2005).

¹⁶⁴ See *supra* text accompanying notes 55-75.

¹⁶⁵ Bloche, *supra* note 163, at 1338-39.

¹⁶⁶ See *infra* text accompanying note 319 (making use of Unger in advancing the reform of corporate law as an approach to grappling with the obesity epidemic).

¹⁶⁷ See Yosifon, *supra* note 30, at 591-601 (arguing that the reality of cognitive limitation, and the problem of overwhelmment—must be developed more deeply in our assessment of the commercial speech doctrine).

tion purveyance, the problem runs deeper than just figuring out “how much” or “what kind” of disclosure will make people “fully” informed. As seen in my critique of Sunstein and Thaler,¹⁶⁸ the problem is that whatever form disclosures or warnings take, they will necessarily shape choice in a particular fashion, rather than enabling the actor to make an authentic preference-based decision.

More importantly, policy debate that is confined to the propriety of “informational” response is limited to addressing just a small portion of the kinds of unappreciated situational influence on human behavior and decision-making that the behavioral critique reveals. Market actors endeavor to “regulate” or influence consumer behavior with persuasive informational appeals as well as other non-informational methods of influence, such as by expanding their physical presence in the lived environment, manipulating ingredients, menu items, and portions in ways difficult for us to appreciate let alone avoid.¹⁶⁹ Legal analysis must have a way of conceiving of and responding to such conduct, as the simple fictions of consumer preference and informed decision-making are inadequate to grappling with the reality of human decision-making and behavior.

Where programmatic imagination can only be exercised within the domain of “information,” proposed solutions to the obesity epidemic can become rather strange and undignified. For example, Bloche, an influential health law scholar striving to be responsive to the behaviorist literature but bound to information strategies, argues that obesity awareness campaigns should not simply be fact driven, but rather, should take a more persuasive orientation:

[T]o the extent that erotic awareness encourages attitudes and behaviors that keep calorie intake and use in balance, it is a potential tool in the campaign against obesity. Advertising and other promotional ventures that connect with our sensual awareness should (while respecting the constraints of decency) be part of the effort to recast overeating and sedentary living as unsexy and uncool.¹⁷⁰

In the same vein, Bloche continues:

Health authorities should not present themselves as “food police” or puritan scolds, though information about health dangers ought to be part of their message. Anti-obesity campaigns that portray overeating as uncool, athleticism as chic, and slender (but not too skinny) as sexy are more likely to inspire people. On the other hand, promotional efforts should not shy

¹⁶⁸ See *supra* text accompanying notes 122-61.

¹⁶⁹ See *supra* text accompanying note 15 (describing broad efforts at situational influence undertaken by the food industry).

¹⁷⁰ Bloche, *supra* note 163, at 1350.

from judicious use of shame: portraying obesity as a burden to others (medically and financially) and a sign of self-indulgence can lend force to calls for self-restraint.¹⁷¹

Beneath a behavioralist veneer, Bloche's basic assessment is in the end little different than Epstein's conventional law and economics diagnosis and prescription. The key problem in the obesity epidemic turns out to be individual consumer's externalizing the cost of their overweight to everyone else, and the solution is to get them to internalize costs. Epstein wants to do so through insurance reform,¹⁷² Bloche wants to do so through shaming. Neither is responsive at all to the problem of situational manipulation, and neither provides a theoretical justification for regulating the conduct of market actors, rather than simply focusing on the conduct of consumers.

And the use of behavioralism that is sanctioned to alter consumer behavior seems particularly perverse. The kind of shaming that Bloche advocates literally adds insult to injury. The overweight and obese suffer widespread disparagement and discrimination, in their social lives, in their employment, and in public accommodation.¹⁷³ The overweight and obese also suffer depression and other psychological disorders in higher rates than the rest of the population. These realities, coupled with widespread concerns about body image disorders and incidence of eating disorders and depression related to body image problems, might counsel against the kind of "information" campaign Bloche imagines. Bloche responds to this kind of criticism by arguing that thin, healthy bodies are "already embedded" as a cultural ideal in our society and that obesity is a far more serious public health problem than is anorexia-nervosa.¹⁷⁴ But if this image is already embedded in our culture as some kind of an ideal, which surely it is,¹⁷⁵ then that would seem to count as evidence that an information oriented campaign of the type Bloche imagines would be ineffective as a response to the obesity epidemic, rather than an argument about why it is not objectionable.¹⁷⁶ This kind of policy, focused on scolding or disciplining the individ-

¹⁷¹ *Id.* at 1354.

¹⁷² Epstein, *supra* note 56, at 1369 & n.29.

¹⁷³ See Donald L. Bierman, Jr., *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951, 951 (1990); Elizabeth E. Theran, "Free to Be Arbitrary and . . . Capricious": *Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J. L. & PUB. POL'Y 113, 136 (2001).

¹⁷⁴ See Bloche, *supra* note 163, at 1350 (comparing rates of obesity and anorexia nervosa and arguing that because ideals of slimness are already embedded in our culture a campaign emphasizing them is unlikely to increase rates of anorexia).

¹⁷⁵ See *Broken Scales*, *supra* note 6, at 1713-15 (discussing the cultural idealization of thin bodies and its relationship to the contemporary obesity epidemic).

¹⁷⁶ Cf. Michael McCarthy, *The Economics of Obesity*, 365 LANCET 2169, 2169 (2004) ("Doctors tell patients to lose weight. Public-health campaigners urge the public to eat right and exercise more. Television programs, newspapers, and magazines serve up a steady diet of slimming tips, and diet books abound. And, yet, more and more people grow fat.").

ual human mind, without attention to disciplining the situation, is the yield of an analytic inquiry that simultaneously strives to attend to the basic insights of behavioralism while remaining committed to a dispositionist conception of human conduct.

B. *The Asymmetric Paternalism Gambit*

In a remarkable demonstration of the seemingly oft-recurring phenomena of significant new ideas emerging at the same time amid distinct thinkers working within a common intellectual climate, a second set of prominent scholars has simultaneously developed an idea that is very similar to the “libertarian paternalist” concept of Sunstein and Thaler. This second set of authors—Colin Camerer, Samuel Issacharoff, George Lowenstein, Ted O’Donoghue, and Matthew Rabin—call their project “asymmetric paternalism.”¹⁷⁷ I refer to this set of authors as the “Issacharoff group,” because Issacharoff has been an influential voice on the subject of behavioral law and economics within legal scholarship.¹⁷⁸ To the extent that asymmetric paternalism parallels libertarian paternalism, it falters for the same reasons. However, there are important differences in the “asymmetric” approach, which once scrutinized, reveal further the limitations of behavioral law and economics as a useful analytic approach to obesity epidemic analysis.

The Issacharoff group’s basic idea is that paternalistic policies are justifiable and should be pursued where they provide substantial benefits to people who are “irrational,” while imposing little cost or restriction on people who are “rational.”¹⁷⁹ This kind of paternalism, the authors urge, is unobjectionable because “[s]uch regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.”¹⁸⁰ In a sense, one could read this “asymmetric” formulation as a potential remedy to the analytic problem I identified in Sunstein and Thaler’s idea of “libertarian paternalism.”¹⁸¹ That is, if humans really could be divided into categories of “rational” and “irrational” then not only asymmetric paternalism, but also the “opt-out” imperative of “libertarian paternalism” would make sense (at least as applied to the “rational” types) and would seem to describe at least a plausible approach to policymaking. But these categories of human beings

¹⁷⁷ See Samuel Issacharoff et. al., *Regulation for Conservatives: Behavioral Economics and the Case for Asymmetric Paternalism*, 151 U. PA. L. REV. 1211, 1212 (2003).

¹⁷⁸ See Samuel Issacharoff, *The Difficult Path From Observation to Prescription*, 77 N.Y.U. L. REV. 36 (2002) (urging a slow progress down that path, as far as the use of behavioralism as a guide); Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729 (1998) (doubting it).

¹⁷⁹ Issacharoff et al., *supra* note 177, at 1211-12.

¹⁸⁰ *Id.* at 1212.

¹⁸¹ See *supra* text accompanying notes 120-32.

are not suggested by the behavioral critique that spurred the paternalism inquiry to begin with, and thus “asymmetric paternalism,” in the end, provides a poor framework for the legal theoretic understanding of that evidence.¹⁸²

Issacharoff and his co-authors do not make much of an elaborate effort to demonstrate that the categories upon which their analysis rests are viable; indeed, their own exegesis suggests just the opposite. They begin their project in typical behavioral legal economist fashion by stating that social science has falsified the “rational actor” at the heart of conventional law and economics in ways that economically oriented scholars must heed.¹⁸³ Not atypically, they point to cognitive biases that they claim give rise to the notion of “bounded rationality”¹⁸⁴ and to visceral factors, such as addiction, that give rise to the challenge of “bounded willpower.”¹⁸⁵ After briefly canvassing such findings, the authors then correctly state that social psychologists have, well beyond their illustrative examples, “catalog[ed] a list of common decision-making errors that even highly competent, well-functioning people make in predictable situations.”¹⁸⁶ Nevertheless, they then assert that “those mistakes are far from universal, and we worry that paternalistic policies may impose undue burdens on those people who are behaving rationally in a particular situation.”¹⁸⁷ There is no reference to any comprehensive treatment of the lessons of social psychology that would provide support for this position—that the world can usefully be divided into rational and irrational types—because none is available.¹⁸⁸ Nevertheless, the authors conclude that the real challenge the behavioral critique poses to conventional economic analysis of law is to “figure out what sorts of ‘idiotic’ behaviors are likely to arise routinely and how to prevent them, while imposing minimal restrictions on those who behave rationally.”¹⁸⁹ When state the central proposition of asymmetric paternalism they do it as a *hypothetical*, not as a statement about reality: “To fix ideas, *suppose* (1) we

¹⁸² See also Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (employing the same rational and irrational categorization scheme).

¹⁸³ See Issacharoff et al., *supra* note 177, at 1214-19.

¹⁸⁴ *Id.* at 1222-23.

¹⁸⁵ *A Behavioral Approach to Law and Economics*, *supra* note 63, at 1476-89.

¹⁸⁶ *Id.* at 1214.

¹⁸⁷ *Id.*

¹⁸⁸ The only reference given for this truly central feature of asymmetric paternalism argument is to Issacharoff's 1998 essay, *Can There Be a Behavioral Law and Economics?*, *supra* note 178, which is fairly summarized in a footnote as “noting that substantive deviations from the rational choice model found in the endowment effect, hindsight bias, and self-serving biases require more research before they can be incorporated into an accurate behavioral model.” Issacharoff et al., *Can There Be a Behavioral Law and Economics?*, *supra* note 178, at 1214 n.10. No doubt. But that is hardly evidence that there are two kinds of people in the world, rational and irrational, and that legal analysis should proceed from and adhere to those categories. *Id.* at 1214 n.11. See also *The Situational Character*, *supra* note 6, at 185-86 (critiquing that Issacharoff essay).

¹⁸⁹ Issacharoff et al., *supra* note 177, at 1218.

can divide consumers into two types: those who are boundedly rational (in the sense described above) and those who are fully rational; and that (2) a fraction, p , of consumers fall into the boundedly rational category.¹⁹⁰ The rest of the piece then takes this “suppos[ition],” deployed to “fix ideas,” as the given reality, and proceeds to explicate the implications for legal analysis accordingly. Conventional law and economics has been criticized by behavioral law and economics for taking an unsupportable supposition (the rational actor) as given for the sake of easing analysis, and yet here the Issacharoff group starts law and behavioralism down that same road.

Gregory Mitchell, with somewhat different intentions, deploys the same “rational” and “irrational” characterization scheme in his assessment of the behavioral critique.¹⁹¹ “[I]ndividuals differ reliably in their propensities to exhibit various irrational behaviors,”¹⁹² he argues. Mitchell, and presumably the Issacharoff group, rest their claim for this schema largely on the fact that while decision-making studies often reveal large percentages of subjects deviating from what a “rational” actor would do in the tested condition, such studies almost never find *all* subjects so deviating.¹⁹³ Such findings lead these scholars to conclude that while some people seem to be irrational, others are rational.¹⁹⁴ Mitchell himself goes further and argues that legal theorists are wrong to draw conclusions about widespread “irrationally” among decision-makers based on social psychology’s findings regarding cognitive biases.¹⁹⁵ Mitchell argues that just as surely as they have iden-

¹⁹⁰ *Id.* at 1219 (emphasis added).

¹⁹¹ Mitchell argues that the truth of the rationality-irrationality divide ultimately leads to the conclusion that, “[i]n short, libertarian paternalism is an oxymoron.” Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1248 (2005) [hereinafter *Libertarian Paternalism*]. While he objects to Sunstein and Thaler’s project, Mitchell notes that he finds “asymmetric paternalism” to be basically in accord with his own “‘do no harm’ approach.” *Id.* at 1248 n.10. See also Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002) (critiquing Hanson and Kysar’s *Taking Behavioralism Seriously* series). Cf. Jonathan Klick and Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1622-26 (2006) (arguing, *inter alia*, that cognitive biases should not be attended to by regulatory response because it will interfere with how humans learn to think in a discerning fashion). My arguments here, while of course inspired by Hanson and my work with Hanson, should not be taken as a general rebuttal of Mitchell’s critique of Hanson and Kysar; indeed, my arguments should not be taken necessarily to represent Hanson’s (or Kysar’s) views on any of these matters.

¹⁹² *Libertarian Paternalism*, *supra* note 191, at 1270-71.

¹⁹³ *Libertarian Paternalism*, *supra* note 191, at 1270-71 and nn.95-96 (referencing literature). See also *infra* text accompanying notes 219-26 (addressing Mitchell’s (and the Issacharoff group’s) arguments regarding “ideographic” differences in decision-making based on gender, race and age). Here I am concerned with arguments behind the “rational” “irrational” categorization scheme.

¹⁹⁴ Mitchell, *supra* note 191, at 1263.

¹⁹⁵ *Id.* at 1265-67.

tified biases, social psychologists have also well-documented methods of de-biasing decision-makers.¹⁹⁶

I believe that such an assessment again misses the most crucial point, for legal analysis, of the behavioral critique. The point is not merely to recognize that humans think “sub-optimally,” or predictably sub-optimally, or that some humans think sub-optimally some of the time, as behavioral legal economists take it to be. Instead, the critical lesson of the behavioral critique is that human decision-making can be *influenced* in consistent, predictable ways, through exercising influence over the situating of their choosing, to a far greater extent than our intuitions about the sources of our own and other people’s behavior would lead us to appreciate. To be sure, some particular version of a study (call it the “alpha” version) may show that a particular frame given to a decision achieves “only” 65% deviation from choices that would be expected if people were making “rational” decisions. But such findings do not prove that 35% of people are “rational” types. Indeed, some other framing (the “beta” version) might produce a 75% deviation, or some third (“gamma”) a 20% variation, for that matter. The point is that the frame matters, and more than we tend to believe.¹⁹⁷

¹⁹⁶ “Most importantly . . . methods exist for diminishing the effects of choice frames and, even without debiasing efforts, there are significant individual differences in framing effects.” *Libertarian Paternalism*, *supra* note 191, at 1247 n.8; *see also id.* at 1256-58 nn.40-46 (summarizing literature). With these premises in place Mitchell has the essence of his conservative critique of libertarian paternalism:

[I]t is only if there is no way for individuals to overcome these irrational influences that state control over citizen choice is inevitable. . . . [Sunstein and Thaler] need to add a premise stating that choice-framing effects are insuperable, but closer inspection of . . . [their] argument and a consideration of additional empirical evidence reveal that such a premise is not warranted.

Id. at 1251. I critique Mitchell’s argument along with the claims of asymmetric paternalism in the text, accompanying notes 191-214.

¹⁹⁷ Consider for example the demonstration of “unbounded situation” in the Milgram experiments that Hanson and I featured in earlier articles. *See, e.g., The Situation*, *supra* note 6, at 150-53; *see also* STANLEY MILGRAM, OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 13-26 (1974). In those famous studies, Milgram designed an experiment in which subjects were told to administer a “shock” to a second subject, and to increase the voltage of the shocks at intervals up to 450 volts (marked “Danger XXX”), whenever the second subject answered questions incorrectly on a memory test. MILGRAM, *supra*, at 20. The studies provide a vivid illustration of the unexpected power of situation to influence human behavior, as many more people engaged in the shocking conduct than either lay people or even professional psychologists predicted *ex ante*. *See The Situation*, *supra* note 6, at 152-53. For present purposes, consider that in the “alpha” version of the experiment—with the shocked individual audible but not visible, and the scientist standing over the switch-flipping subject’s shoulder—65% of respondents complied fully. *Id.* Does this mean that the other 35% were “rational,” in the sense that they manifested or maximized their own stable preferences uninfluenced by the framing in the situation? It does not, for in Milgram’s “beta” version, wherein the shocked subject could be neither heard nor seen, Milgram achieved 100% compliance. MILGRAM, *supra*, at 22. The proper way to construe the behavior of the 35% who did not shock in Milgram’s “alpha” scenario is not that they behaved rationally or dispositionally, but rather to appreciate they were influenced by other, competing situational influences in the circumstance, such as the screams of the subject, which were, after all, just another situational

Surely it cannot be the case that we must see 100% deviation from the rational actor model for every person in every decision context before the behavioral critique can be considered relevant as a general matter. After all, even if people made decisions randomly, sometimes the randomness would accord with what the rational actor model would predict—even a broken clock is right twice day—but that does not mean that the categories of “rational” and “irrational” are viable.¹⁹⁸

More importantly, while it may be true that our cognitive and motivational biases are capable of being ameliorated, legal theory cannot be sanguine about the prospect of such de-biasing taking place without addressing the problems of power economics and market manipulation. When social scientists examine and influence their subjects’ behavior, the scientists are typically doing so from a relatively benign perspective—they are endeavoring to develop a deeper understanding of human decision-making and behavior.¹⁹⁹ But in understanding the legal theoretic import of that social science, it is crucial to depart from this perspective and to bear centrally in mind the more precise incentives of market actors endeavoring to exercise situational influence over consumer choice. Market actors are not just observing and shaping influence, as the social scientist does. Rather, they are endeavoring to shape behavior *in a particular direction*—that is, towards greater consumption of the firms’ goods and services.²⁰⁰

The “asymmetric” premise is untenable because it conceives of our cognitive capacities and choice behaviors as if they were operating in a vacuum. It conceives of human cognitive biases and limitations as if they were locked within our minds innately affecting us to greater or lesser extents, from within. The analysis does not address the *endogeny* of biases and cognitive limitations, that is, the extent to which they are subject to exacerbation, manipulation, and exploitation in given circumstances, such as in particular consumer markets. The difference between the critical realist picture and the behavioral law and economics approach is not a dispute about what the science tells us—it is an analytic dispute about how the material is to be used in legal theory. Behavioral legal economists are quick to worry about the motivation and competence of government actors, but they

influence of Milgram’s, as the “shocked” subject was really an actor, a collaborator in the exercise of situational influence within the experiment. See *The Situation*, *supra* note 6, at 150-53; see also MILGRAM, *supra*, at 32-43 (describing different responses based on proximity to victim variables).

¹⁹⁸ Cf. Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1, 4 (1962). Becker critiques the notion that downward-sloping demand curves constitute evidence that people think rationally; Becker pointed out that with limited resources consumption drops with prices even if people make decisions randomly, not rationally. *Id.* at 6-7.

¹⁹⁹ *The Situation*, *supra* note 6, at 188 (noting that social scientists “should be committed to examining the implications of what we know to be true, no matter how much we want to deny it, and rejecting what we know to be false no matter how much we want to embrace it”).

²⁰⁰ *The Situation*, *supra* note 6, at 226-27.

are remiss in their inattention to the motivation and the enormous competence of profit-seeking firms in competitive markets.²⁰¹

The absence of attention to the possibility of manipulation leads these scholars to embrace an easy agnosticism on the critical question of whether consumer “cognitive error” likely results in too much or too little consumption: “[I]t is not necessarily the case that firms will be hurt; if consumer errors are in the direction of buying too little, asymmetric paternalism may bring the beneficial side effect of increasing firms’ profits.”²⁰² Under this conception, consumer “mistakes” are exogenous to the market and firms passively either benefit from the “mistakes” or are harmed by them, or may be harmed by social planning that helps keep consumers from making these mistakes.²⁰³ The critical realist perspective suggests a more precise orientation of the problem, at least as an analytic presumption in certain circumstances.²⁰⁴

This problem is illustrated in Issacharoff and his co-authors’ discussion of the application of their project to consumer behavior in markets for extended warranties on electronic devices. The question emerges in this context because “[t]he fact that [extended warranties] are enormously profitable to retailers implies they are costly to buyers.”²⁰⁵ According to Issacharoff, the asymmetric paternalist is now perplexed:

Should we treat those who would be prone to purchase them as though they are modern equivalents of minors or idiots? It depends on whether overpaying for a warranty is a mistake or a preference (a “bug” or a “feature” in the human mind). Perhaps people who buy warranties do not realize how slight the chance is that the product will break within the warranty period, or the fact that the small loss they have to pay for repairs out-of-pocket can be easily absorbed into the hedonic ups and downs of everyday life. On the other hand, it is also possible that consumers who purchase warranties are perfectly cognizant of the relevant probabilities and derive real benefits (e.g. “peace of mind”) that warrant the expenditure. In the face of such uncertainty, the right policy is one that encourages disclosure rather than, say, ban warranties If informed consumers continue to purchase the warranties, then it is quite possible that they have good reason to do so, however unfathomable that decision may seem to an economist.²⁰⁶

There is no consideration of the fact that consumer purchases of warranties might not stem from a “bug”²⁰⁷ in the mind *or* a stable “feature”²⁰⁸ of that mind, but rather from the situational influences in the store—the salesperson, and the myriad of situational pressures on the other hedonic ups-and-downs of life. The problem with the “bug” conception of the behavioral

²⁰¹ *Id.* at 227.

²⁰² Issacharoff et al., *supra* note 177, at 1221.

²⁰³ *Id.* at 1219.

²⁰⁴ *See supra*, text accompanying notes 24-29 (discussing power economics).

²⁰⁵ Issacharoff et al., *supra* note 177, at 1253-54.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

critique is that it makes it appear as if merely providing “more” information about the likelihood of the product breaking will exterminate the “bug” and allow for the stable dispositional “features” of the mind to manifest the authentic preference. But the essence of the behavioral critique is that the framing of the disclosure will inevitably influence expressed preferences. If the disclosure is framed in X manner we will likely see N fewer extended warranty purchases; if it is framed in Y manner we are likely to see N*2 fewer extended warranty purchases. As with opt-outs, this problem is inescapable; there is no disclosure design that will reveal the warranty purchases once and for all to be preferences rather than bugs. However, consumer decisions in this arena do not have to remain “unfathomable”²⁰⁹ to economists or legal analysis. They can be understood, or a prudent approach to their understanding can be established, if one begins with the problems of unbounded situation, power economics, and market manipulation, rather than seeing the problem as a difficulty in discerning the rational actors from the idiots.

Still, there remains the question of how to properly assess the fact that situations in a given circumstance do not influence all people the same way, as is evidenced both by the inconstant responses of subjects in many formal studies, and of course is very obvious in any kind of study or observation of human behavior. Issacharoff and his colleagues,²¹⁰ Mitchell²¹¹, Sunstein and Thaler,²¹² and also Eptsein and Posner²¹³ believe that such differences are to be accounted for by differences in individual disposition, and therefore such differences are to have important, indeed, decisive, normative implications. However, if we continue to restrain the dispositionist impulse and hold, for the sake of analysis, to an “unbounded situation” approach, we can easily see a deeper situational influence, and not a deeper dispositional inclination in varied behavior.

This can perhaps be done most easily if we again extend our behavioral perspective beyond the choice biases that have so strongly grabbed the attention of behavioral legal economists. In the context of the obesity epidemic, for example, it is crucial to appreciate some counter-intuitive realities not just about human cognition, but about the human eating system as well. Consider an intriguing and illustrative piece of evidence regarding the situational nature of “rational” or “irrational” eating behavior. Some studies of highly social, hierarchically ordered groups of non-human species have found that *non-dominant* members of such groups tend to gain more weight in times of abundant food availability than do their more dominant counter-

²⁰⁹ *Id.*

²¹⁰ See *supra* text accompanying notes 177-91.

²¹¹ See *supra* text accompanying notes 91-116.

²¹² See *supra* Part III.

²¹³ See *supra* Part II.

parts.²¹⁴ This might at first seem backwards, but researchers argue it is explained by the fact that the dominant individuals, by virtue of their status, always have first dibs on food, and so are less likely to go hungry during periods of scarcity; they thus need not anticipate scarcity to ensure their survival.²¹⁵ Similarly, it is well known that the poor in America suffer from obesity in greater numbers than do higher status groups.²¹⁶ Studies of humans have repeatedly associated eating behavior with threats of economic, social, and personal insecurity.²¹⁷ Understanding that there may be an important relationship between the human impulse to overeat and vulnerability to the threat of scarcity, helps to explain what would otherwise be a counter-intuitive finding: some studies have shown that women eligible for and participating in food-stamp programs are less likely to suffer obesity than are those who are poor enough to qualify but are not participating in the program.²¹⁸ The poor, whose ranks suffer obesity more than the wealthy, are not less rational than other groups, nor is their food consumption behavior the expression of authentic privately ordered preference. Nor are the different—and healthier—eating patterns of higher status individuals proof of their greater rationality. These findings suggests that it is the *situation* of vulnerability, the threat of insecurity, which may induce within humans the orientation to eat a lot when food is available, and further, that the repose of high status may induce less impulse to eat than is felt by the vulnerable.²¹⁹

²¹⁴ See, e.g., Jan B. Ekman & Kristjan Lillendahl, *Using Priority to Food Access: Fattening Strategies in Dominance Structured Willow Tit (*Parus montanus*) Flocks*, 4 BEHAVIORAL ECOLOGY 232, 237 (1993); C. W. Clark & Jan Ekman, *Dominant and Subordinate Fattening Strategies: A Dynamic Game*, 72 OIKOS 205, 212 (1995). Both articles cited in Trenton G. Smith, *Reconciling Psychology with Economics: Obesity, Behavioral Biology, and Rational Overeating* 21, (Wash. State Univ. Sch. of Econ. Scis. Working Paper No. 2006-4, 2006).

²¹⁵ Ekman & Lillendahl, *supra* note 214, at 232 (“Priority to food access did not correlate to either acquisition rate or net turnover of body reserves, but subordinates with low food availability had larger body reserves than dominants.”); Smith, *supra* note 217, at 17 (associating food insecurity with obesity).

²¹⁶ See *Broken Scales*, *supra* note 6, at 1725-26, 1804-05 (noting greater problem of obesity among poor, blacks, and Hispanics).

²¹⁷ See Elizabeth J. Adams, Laurence Grummer-Strawn, & Gilberto Chavez, *Food Insecurity is Associated with Increased Risk of Obesity in California Women*, 133 J. NUTRITION 1070, 1073 (2003) (noting a correlation between obesity and socioeconomic status); *But see* Lucia Kasier et al., *Choice of Instrument Influences Relations Between Food Insecurity and Obesity in Latino Women*, 80 J. CLINICAL NUTRITION 1372, 1377 (2004) (noting conflicting findings regarding the strength of the association between food scarcity and obesity).

²¹⁸ See Michele Ver Ploeg, Lisa Mancino, & Biing-Hwan Lin, *Food Stamps and Obesity: Ironic Twist or Complex Puzzle?*, 4 AMBER WAVES 1, 35 (2006), www.ers.usda.gov/amberwaves (“Among women, food stamp participants are not getting relatively heavier over time. Rather, BMI has grown more among eligible nonparticipants—and even among women with higher incomes—than for food stamp recipients.”).

²¹⁹ Studies have demonstrated that poor neighborhoods have fewer supermarkets than do wealthier neighborhoods while also having a high percentage of fast food restaurants. Ronald Cotterill & Andrew Franklin, *The Urban Grocery Store Gap* 14 (Univ. of Connecticut, Food Mktg. Policy Issue Paper No. 8, 1995), available at <http://www.fmpc.uconn.edu/publications/ip/ip8.pdf>; Amanda Shaffer, *The Persis-*

On this reading, it is not different kinds of people who are rational or irrational; it is differently situated people who behave as if they are more or less rational, depending on the situation. Thus, even if we do choose to call one of these patterns of behavior “rational” and the other “irrational,” very different normative implications follow if we see such categories as stemming from situational rather than dispositional sources. From the situationist perspective, limitations on “choice” opportunities for the rational, out of concern for the irrational, begins to look more like ameliorative justice rather than it does the restriction of individual freedom.

There are also important racial dimensions to the situation of obesity that may lead us to question the wisdom of deploying a rational/irrational categorization scheme in analysis of the problem. Some studies have found that particular racial groups have a greater genetic susceptibility to obesity than do others.²²⁰ If this is true, then stopping at reforms that are sufficient for some races but insufficient for others would be profoundly unfair—indeed, it would be racist. Here, the influence of our dispositionism threatens to be particularly pernicious. For example, perhaps a policy reform no more dramatic than “more information” would curb the obesity epidemic among racial groups with less vulnerability to obesity. In our dispositionism we are likely to see that group’s collective “choice” to maintain a healthy bodyweight as principally reflecting disposition (discipline, good personal choices, rationality), and will find it easy to disparage on dispositional grounds (laziness, bad personal choices, irrationality) the continued obesity of other races. By attending to our differing genetic situations and not only our dispositional “choices,” we may be able to see behavioral differences stemming from situation, rather than from the content of one’s character. Respectfully inverting King’s formulation in this context provides an angle through which the threat of racial injustice in a rational/irrational categorization scheme can be deciphered.²²¹

tence of L.A.’s Grocery Gap: The Need For a New Food Policy and Approach to Market Development 20 (2002), available at <http://departments.oxy.edu/uepi/cfj/publications/Supermarket%20Report%20November%202002.pdf>. See also *infra*, text accompanying notes 297-302 (discussing zoning and other regulatory reforms as a policy response to the obesity epidemic).

²²⁰ Haas, *supra* note 74, at 2107-08 (finding higher obesity rates among adolescent “Asian/Pacific Islanders” and “Latinos” to be greater than among “Black” and “White” adolescents; black and white adolescents were found to be overweight a similar rates); Timothy Richards et al., *Native American Obesity: An Economic Model of the “Thrifty Gene” Theory*, 88 AMER. J. OF AGRIC. ECON. 1 (2006) (noting that alarmingly high levels of obesity among Native Americans has been attributed to, *inter alia*, a “genetic predisposition” to obesity); Trenton G. Smith, *supra* note 214, at 17-19 (collecting sources).

²²¹ See Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 217, 219 (James Melvin Washington ed., 1986). It may be that there are genetic differences in individual susceptibility to obesity irrespective of race, an appreciation of which may also yield a more sensitive analysis of the propriety of different kinds of regulatory response to the problem. Where such differences fall along racial lines, however, given our legal history, a particularly urgent social justice problem is presented.

In addition to class and race, there are of course important cultural dimensions to the unbounded situation of the obesity epidemic. Different cultures and sub-cultures embrace different kinds of body-types as ideal or desirable.²²² Any analysis of the obesity “epidemic” must be sensitive to and respectful of such distinctions. Yet a respectful posture need not lead to the Posner-ian conclusion that there is no obesity crisis.²²³ Indeed, critical assessment of such cultural trends may yield surprising and troubling insights. A “cultural” preference for large-body types may be deeply evolutionary and biologic in the same troubling fashion as is seen with respect to class and racial concerns. Some studies, for example, have found that “in cultures with scarce resources, heavier women are preferred; while in cultures with abundant resources, thinner women are preferred.”²²⁴ One study found that men dissatisfied with their own financial situation or who were hungry at the time they were surveyed preferred heavier women than did men who were at ease with their financial situation or satiated at the time of the survey.²²⁵ Thus, revealed preferences again may suggest more about situation than it does about individual or group disposition. In an unbounded situation approach we must appreciate the formation and operation of those aspects of ourselves even of which we are consciously aware, yet mistakenly perceive as disposition.

Appreciating situational differences in decision-making and behavior in this fashion should make it clear that the basic normative thrust of asymmetric paternalism, which enjoins the analyst to aid the “irrational” only where doing so would impose little cost on the “rational,” is not legitimate. Having already benefited from being situated “rational,” it is not clear why the rational should further benefit from social policies primarily

²²² See Rachel E.K. Freedman et al., *Ethnic Differences in Preferences for Female Weight and Waist-to-hip Ratio*, 5 EATING BEHAV. 191, 191 (2004) (examining “ethnic differences . . . in male preferences for ideal body size and shape in women” and finding that “African-American men were more likely to choose heavier figures as ideal than White American men did”). One study of racial differences in perception about obesity found that within the population studied (university students) found that “all heavy white females perceived that they were heavy, compared to only 40% of heavy black females. 78% of heavy white males considered themselves heavy versus only 36% of heavy black males.” Sharon M. Desmond et al., *Black and White Adolescents’ Perceptions of Their Weight*, J. SCHOOL HEALTH 59(8):353-358 (1989), cited in *Perceptions about Obesity: Racial Differences*, Nutrition Research Newsletter, (Jan. 1990), available at http://findarticles.com/p/articles/mi_m0887/is_n1_v9/ai_83_54049.

²²³ See *supra* text accompanying notes 77-87 (discussing Posner’s economic analysis of the obesity epidemic).

²²⁴ Smith, *supra* note 214, at 24 (citing A. Furnham & P. Baguma, *Cross-Cultural Differences in the Evaluation of Male and Female Body Shapes*, 15 INT’L J. EATING DISORDERS 81, 81-89 (1994)).

²²⁵ Leif D. Nelson & Evan L. Morrison, *The Symptoms of Resource Scarcity: Judgments of Food and Finances Influence Preferences for Potential Partners*, 16 PSYCHOL. SCI. 167, 172 (2005).

concerned with their interests, at the expense of those unfortunate enough to be situated as “irrational.”²²⁶

Asymmetric paternalists have not applied their theory to the obesity epidemic in particular in any extended treatment, but as with Sunstein and Thaler, what they have said bearing on the matter expresses well the limitations of their project as an approach to obesity epidemic analysis. In a revealing passage, Issacharoff and his co-authors embrace social policies that have emerged in health and food regulation as a guiding beacon for the project they are attempting to establish:

Health and food regulations are heavily informed by scientific understanding (albeit an understanding sometimes captured by special interests) and by a widespread belief among professionals that average folks require information, prodding, and often regulation to improve their health and diet. Thus are born paternalistic policies such as food content labels, warnings on cigarette packs, active anti-tobacco advertising, and FDA grading. We envision a vaguely similar system which, substituting the phrase ‘economic judgment’ for the phrase ‘health and diet’ in the preceding analogy, leads to a similar mix of information, persuasion, and regulation.²²⁷

If these are asymmetric paternalist policies, and if these are the model to which asymmetric paternalism aspires, then the approach is clearly not up to the task of generating reliable social policy. After all, this obesity epidemic has emerged on the watch of such policies. “Asymmetric paternalism” offers little more potency in terms of policy innovation than does conventional law and economics or libertarian paternalism. Indeed, it seems unlikely that it could authorize anything more than the inadequate “more information” gambit, as at least one of the Issacharoff group authors has elsewhere suggested.²²⁸ Issacharoff has now been repeating for nearly a decade his claim that “behavioral economics is in an early stage of development, and therefore its findings should elicit more caution than those from more ‘mature’ fields (which are by no means themselves invulnerable

²²⁶ Gregory Mitchell takes issue with the distributional consequences of libertarian and asymmetric paternalism from the conservative perspective that such approaches redistribute *too much* from the rational to the irrational. See *Libertarian Paternalism*, *supra* note 191, at 1269-76. My argument in the text is meant in part as a rebuttal to Mitchell’s claim.

²²⁷ Issacharoff et al., *supra* note 177, at 1222-23 (footnote omitted).

²²⁸ Co-author Colin Camerer states:

I am not eager to see much broad paternalism without doing more research . . . In our *Penn Law Review* paper . . . [we] argued for a middle ground you might call ‘conservative paternalism’ (we called it ‘asymmetric paternalism’ in our paper). Conservative paternalism is a set of policies which may help a few people who make judgment mistakes a lot, and impose very little harm on people who behave rationally. Examples include informed consent, disclosing information which profit-motivated firms may not disclose voluntarily (such as nutritional content of food or drug efficacy), mandatory waiting periods (which exist for marriage and divorce), and ‘cooling-off’ laws which allow consumers to break contracts for purchase of certain consumer goods.

Colin Camerer, Research: Policy Applications, http://www.hss.caltech.edu/~camerer/web_material/pa.html (last visited Jan. 27, 2008).

to revision).²²⁹ By more mature fields, of course, he means conventional, unreconstructed law and economics. But the power of the behavioral critique has made a highly deferential posture towards that framework impossible to sustain.²³⁰

IV. THE USES AND LIMITATIONS OF CULTURAL COGNITION THEORY

It seems fair to say that a number of people who would be opposed to a robust regulatory response to the threat of obesity would probably be, generally speaking, the same people you might find supporting a very robust regulatory response to, say, the threat of terrorism. It also seems fair to say that a number of people who would be in favor of a robust regulatory response to the obesity epidemic would probably be the same people you would expect to find arguing against a robust response to the threat of terrorism. Obesity will no doubt kill and disable many times more Americans over the next several decades than will terrorists, the latter would argue. Yet the former will say that the threat of terrorism is much greater, as not only uncertain numbers of lives, but also our very way of life is at stake. Both of these sets of arguments rely, at some level, on factual premises about just how “risky” each one of these independent threats is to our society. How do people come to different conclusions regarding the facts supporting their beliefs about these threats?

Section V briefly reviews and tries to add to the landscape of possible policy responses to the obesity epidemic. Before reaching that Section, it will serve well to consider the question of present public opinion on the obesity problem. Whatever else may be said to emerge from survey data on the subject, it seems clear that the American people are not uniformly opposed or in favor of robust obesity regulation. One detailed survey of public opinion on the obesity problem found, for example, that 57% of respondents agreed or strongly agreed that “junk food and fast food” ads on television should be regulated by the federal government “the way they do for cigarettes and alcohol,” while 36% percent disagreed or strongly disagreed with such a proposal.²³¹ 47% of respondents agreed or strongly agreed that junk food should be banned from schools, while 43% disagreed or strongly disagreed with such a policy.²³² 48% of respondents agreed or strongly agreed, and 42% disagreed or strongly disagreed, that “[o]verweight people

²²⁹ Issacharoff et al., *supra* note 177, at 1214. *See also* similar warnings from Issacharoff in his articles cited *supra* note 178.

²³⁰ *See The Situational Character*, *supra* note 6, at 164 n.776 (noting that this call to yield cautiously to the more mature sciences rings hollow when it is appreciated that psychology and the social decision sciences have been around a lot longer than law and economics or, arguably, economics itself).

²³¹ J. Eric Oliver & Taeku Lee, *Public Opinion and the Politics of Obesity in America*, 30 J. HEALTH POL. POL'Y & L. 923, 934-35, 950 (2005) (reviewing their own 2001 study).

²³² *Id.* at 935, 950.

should be subject to the same legal protections and benefits offered to people with other physical disabilities.”²³³ Thus, there is divergent opinion on the obesity issue, just as is seen on so many other important social policy questions—terrorism, global warming, guns, abortion, gun control, the war on drugs, to name just a few. Nevertheless, I believe that the consensus necessary to agree on and implement obesity reforms can be accomplished. In examining such a possibility, I will review, and have occasion to critique, another exciting idea to emerge recently from the law and behavioralism movement: cultural cognition theory.²³⁴

Cultural cognition theory begins at that familiar starting place of the behavioral critique—the understanding that our minds are limited, such that we can only take in and make sense of a small amount of information in the world around us. To deal with our cognitive scarcity we have developed a myriad of cognitive mechanisms, including the use of heuristics, which we use to assess the world around us. Cultural cognition theorists argue that one of the basic heuristics that we rely on is our set of cultural values:

[E]ssentially, cultural commitments are prior to factual beliefs on highly charged political issues . . . [C]ulture is prior to fact in the cognitive sense that what citizens believe about the empirical consequences of those policies derives from their cultural worldviews. Based on a variety of overlapping psychological mechanisms, individuals accept or reject empirical claims about the consequences of controversial policies based on their vision of a good society.²³⁵

These “vision[s] of a good society” might be described and categorized in a number of different ways, but cultural cognition theorists argue that a useful framework with robust empirical support can be built on world view classifications “along two cross-cutting dimensions: ‘group,’ which characterizes how ‘individualist’ or ‘communitarian’ a person’s cultural orientation is; and ‘grid,’ which characterizes how ‘hierarchical’ or ‘egali-

²³³ *Id.*

²³⁴ See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 151-57 (2006) [hereinafter *Cultural Cognition*] (providing an overview of cultural cognition theory); The Cultural Cognition Project at Yale Law School, <http://research.yale.edu/culturalcognition/> (providing additional resources on cultural cognition). Kahan and Braman have explored their idea fruitfully in the gun control debate. Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, The Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 571 (2006) [hereinafter *Overcoming*] (arguing that citizens accept or reject empirical data in the gun control debate based on their cultural vision).

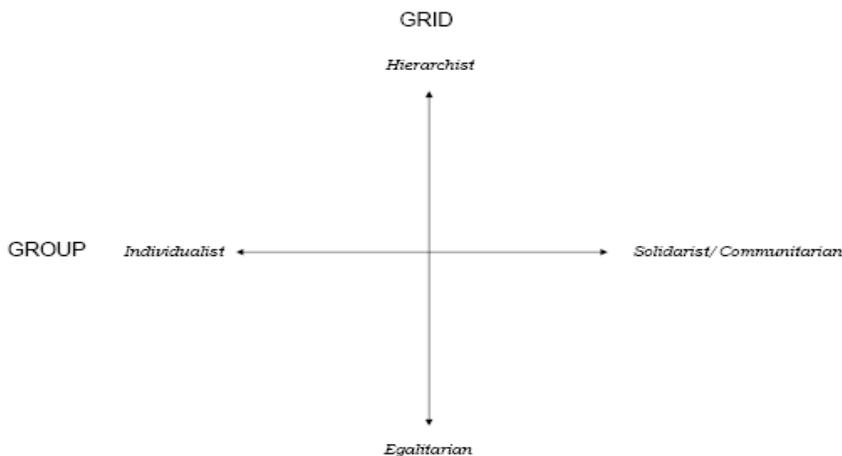
²³⁵ *Cultural Cognition*, *supra* note 234, at 150.

tarian' it is."²³⁶ People's views about different kinds of risks can be mapped along these classification schemes. For example, "individualists" tend to "reject claims of environmental risk" yet think there is a substantial risk that "excessive gun control will render individuals unable to defend themselves."²³⁷ The operation of the "individualist" world-view heuristic produces these correlations. On the other hand, "communitarians," by operation of their world-view heuristics, *do* think that environmental risk is a significant problem, yet are not moved to concern about the risk of being left defenseless against other individuals bearing arms against them.²³⁸ Kahan argues these associations are:

the statistical smoking gun of cultural cognition. There is no reason to believe that hierarchs and individualists have better or worse access to information about societal harms than egalitarians or communitarians, or that any one of them is more or less reliant on heuristics in interpreting such information. The only cogent explanation for the clustering of beliefs among persons who share such orientations is that culture is indeed entering into the social and psychological processes that determine their perceptions of risk.²³⁹

Cultural cognition theorists point to a number of psychological mechanisms driving our worldview heuristics.²⁴⁰ Crucial among these is our tendency to trust and rely on the views of the people who share our world view.²⁴¹ Most of us form our views on controversial subjects without formal

²³⁶ The framework can be graphically rendered like this:



Id. at 153 (citing MARY DOUGLAS, NATURAL SYMBOLS 54-68 (1970)).

²³⁷ Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 123 (2007).

²³⁸ See *id.* (contrasting communitarians with egalitarians, who "worry . . . that excessive gun control will render individuals unable to defend themselves.").

²³⁹ *Id.* at 124.

²⁴⁰ *Cultural Cognition*, *supra* note 234, at 155-56.

²⁴¹ *Id.* at 157.

study of the often cacophonous scientific analysis of the questions.²⁴² In the absence of exhaustive study, when “members of society disagree about the harmfulness of a particular form of conduct, we instinctively *trust* those who share our values—and whose judgments are likely to be biased in particular direction by emotion, dissonance avoidance, and related mechanisms.”²⁴³

Kahan and his co-author rightly contend that this exegesis presents “not just a puzzle to be explained but a problem to be solved.”²⁴⁴ In light of the problem of cultural cognition, Kahan argues, policymakers and advocates should embrace an “expressive overdeterminism” in their assessment of pressing social problems.²⁴⁵ That is, discourse on public policy should strive on any given issue to be responsive to the particular cognitive frameworks of numerous different world-views.²⁴⁶ Such an approach promises to ameliorate otherwise intractable social discord, in a manner that is broadly satisfying.²⁴⁷ For Kahan, a quintessential example of successful expressive over-determinism is France’s abortion law.²⁴⁸ After decades of acrimony between groups and individuals with different world-views and concomitantly differing positions on the question of whether abortion should be legal or not, France finally adopted a law which holds that abortion is permissible only after a woman has obtained certification that the abortion was necessitated by an “emergency.”²⁴⁹ The medical certification of “emergency” is not reviewable as a legal matter.²⁵⁰ Nevertheless, according to Kahan, such a framework was satisfying to individualists who favored access to abortion, while simultaneously expressively validating, and thus satisfying, communitarians concerns for the sanctity of life.²⁵¹ It is important to appreciate that under cultural cognition theory this is a *sincere* conciliation that leaves everyone better off.²⁵² The secret to the sincerity is that people are in reality much more concerned about the maintenance and validation of their world-views than they are concerned about specific social policy disputes.²⁵³ Where world-views are not threatened, fewer intractable, socially debilitating and anxiety-producing policy disputes emerge in public discourse.²⁵⁴

²⁴² See *id.* at 149.

²⁴³ Kahan, *supra* note 237, at 117.

²⁴⁴ *Cultural Cognition*, *supra* note 234, at 164.

²⁴⁵ Kahan, *supra* note 237, at 145.

²⁴⁶ *Id.*

²⁴⁷ See *id.* at 151-53.

²⁴⁸ Kahan, *supra* note 237, at 146.

²⁴⁹ See *id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² See *id.* at 152.

²⁵³ See *id.*

²⁵⁴ Kahan, *supra* note 237, at 152.

Exploring the potential application of expressive overdeterminism to a social policy problem in the United States, Kahan and his co-authors turn their attention to gun control debates.²⁵⁵ In our society some people are in favor of gun control and others are against it—both rely at some level on a factual predicate regarding whether guns make us safer or not.²⁵⁶ There are in fact, Kahan and his co-authors argue, divergent social scientific findings respecting whether gun control laws result in less or more gun violence.²⁵⁷ Again, it is highly unlikely that most Americans who support or oppose such laws have reviewed and critically assessed such studies.²⁵⁸ Instead, by operation of “cultural cognition,” communitarians tend to believe such laws effectively stem violence, while individualists tend to believe such laws lead to vulnerability and ultimately more violence.²⁵⁹ Facing this predicament, Kahan and his co-authors suggest an expressively overdetermined gun-registration “bounty” system, wherein gun owners would be paid a certain amount of money to register their guns with law enforcement.²⁶⁰ Such a policy “would affirm the cultural identities of both gun-control supporters and gun-control opponents simultaneously because both could see it as an effective and fair solution to a collective action problem—even without agreeing what that problem is.”²⁶¹ The bounty system is responsive to the egalitarian’s concerns about the risk of violence from unregulated guns, while also expressing to individualists that their decision to own a gun is a good one, evidenced by the bounty they receive in the form of a cash payment.²⁶² Such expressive over-determinism ameliorates the need to determine who is “right” or “wrong” in the gun control debate; indeed, that question has been quieted as a salient matter of social discord.²⁶³

In his most recent extension of cultural cognition theory, Kahan argues that “expressive overdetermination” should replace “public reason” as the principled mode of policy discourse in liberal societies.²⁶⁴ “Public reasoning” refers to a prominent norm of liberal discourse, promoted by political theorists such as John Rawls, which holds that arguments favoring a particular social policy should be advanced with reference to “the ‘overlapping

²⁵⁵ See Donald Braman, Dan M. Kahan, & James Grimmelman, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 19 SOC. JUST. RES. 283, 288 (2005) (“The adoption of expressively over-determined policies by identity vouchers can be expected to change the common perception that the outcome of the gun-control debate is a measure of the social status of competing social groups.”); see also *Cultural Cognition*, *supra* note 234, at 158-59 (discussing the gun control debate).

²⁵⁶ See *Cultural Cognition*, *supra* note 234, at 158.

²⁵⁷ *Id.* at 158 nn.38-39.

²⁵⁸ See *id.* at 149.

²⁵⁹ See *id.* at 158.

²⁶⁰ *Id.* at 170.

²⁶¹ *Cultural Cognition*, *supra* note 234, at 170.

²⁶² *Id.*

²⁶³ See *id.*

²⁶⁴ Kahan, *supra* note 237, at 151-53.

consensus' comprising values common to all (reasonable) comprehensive views and distinctive of none of them."²⁶⁵ Under the norm of public reasoning, policies should not be advanced with reference to a specific world view or a comprehensive vision of the good or the good life, as this will threaten to alienate and even to subjugate one's adversaries, just as the exercise of such an approach by our adversaries might threaten to alienate or subjugate us.²⁶⁶ But Kahan argues that, from a cultural cognition perspective, public reasoning is both impossible and undesirable.²⁶⁷ We are always inevitably influenced by our own world-view, both in our assessment of current conditions and in our pursuit of reform. Similarly, our adversaries, guided by their world-views, are unmoved by what they (it turns out rightly) suspect is superficial public reasoning on our part, serving as pretext for the advancement of a more sectarian purpose.²⁶⁸ The liberal discursive ideal of "public reason" is a failure and our discourse is, and must necessarily be, illiberal because of our cognitive limitations.²⁶⁹ Expressive-overdeterminism "stands public reason on its head"²⁷⁰ and enjoins us to "infuse[]"²⁷¹ our discourse with expression in such a manner that "every cultural group can find affirmation of its word-views within it."²⁷² This can be instrumentally effective, as evidenced in the abortion and gun control examples.²⁷³ But it is also ethically and normatively estimable, Kahan argues, as the discursant is obliged to explicitly acknowledge the manner in which the policy she advocates advances her own cultural values, and she is further made explicitly conscious of its effect on other people's cultural values.²⁷⁴

Cultural cognition theory can no doubt plausibly explain the lack of consensus in our society on the question of the obesity epidemic.²⁷⁵ A recent study by Abigail Saguy and Kevin Riley analyzing "framing contests" over obesity on the part of anti-obesity researchers and advocates on the one hand, and "fat acceptance" researchers and advocates on the other, reveals

²⁶⁵ *Id.* at 143 (internally quoting JOHN RAWLS, *POLITICAL LIBERALISM* 175, 217-18 (1993)).

²⁶⁶ *See id.* at 143-44.

²⁶⁷ *See id.* at 144.

²⁶⁸ *Id.* at 144-45.

²⁶⁹ Kahan, *supra* note 237, at 144.

²⁷⁰ *Id.* at 145.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *See Cultural Cognition, supra* note 234, at 168-69, 170.

²⁷⁴ Kahan, *supra* note 237, at 145. One might be tempted to think that this is just what politicians already try to do—it is Clinton-ian triangulation. Kahan argues that politicians are indeed the ones who really have need of expressive over-determinism, but their commitment to the norm of public reasoning keeps them from succeeding. *Id.* at 150. To the extent that they succeed politically, it is typically because the politician managed to appeal to the particular world-view of their supporters, rather than by finding consensus. *See id.* at 149-50.

²⁷⁵ *See supra* text accompanying note 231.

conceptual and discursive patterns that can plausibly be construed under the cultural cognition framework.²⁷⁶

Saguy and Riley acknowledge that “[t]he view that obesity is a serious health problem dominates studies of obesity.”²⁷⁷ Predictably endeavoring to conform to the norm of public reason, anti-obesity academics and activists have framed their efforts in terms of shared, overlapping values of preventing harm²⁷⁸ and curbing enormous health care costs.²⁷⁹ However, in accord with the chronic “illiberalism” diagnosis of cultural cognition theory, Saguy and Riley argue that the writings and statements of these scholars and activists reveal that “debates over the nature of the condition have largely hinged upon underlying moral assumptions about fat individuals and their behaviors.”²⁸⁰ Saguy and Riley find that “a risky behavior frame” dominates anti-obesity discourse, a frame that “emphasizes the extent to which body weight is under personal control and implies that those who are fat have unhealthy lifestyles while the thin make good food and exercise choices.”²⁸¹ Even as these authorities exhibit “a general recognition that body weight is not completely under personal control, a risky behavior framing dominates antiobesity literature and [in] . . . interviews with antiobesity researchers, especially in discussion of remedies for obesity.”²⁸² Further, among “pro-fat” researchers and advocates who deny that obesity is a significant social problem and promote cultural acceptance and legal rights for “fat”²⁸³ people, Saguy and Riley similarly find an explicit, but superficial, adherence to the norms of public reason.²⁸⁴ Much like their anti-obesity adversaries, “pro-fat” scholars and activists point to scientific studies that dispute the extent to which obesity is associated with adverse health.²⁸⁵ They further argue that it is discrimination against the obese generally, and in the provision of health care in particular, and not obesity itself, that accounts for distinctions

²⁷⁶ See Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests Over Obesity*, 30 J. HEALTH POL. POL'Y & LAW 869, 869-70 (2005).

²⁷⁷ *Id.* at 875.

²⁷⁸ *Id.*

²⁷⁹ See, e.g., Ronen Avraham & K. A. D. Camara, *The Tragedy of the Human Commons*, 29 CARDOZO L. REV. 479, 481 (2007).

²⁸⁰ *Id.* at 871.

²⁸¹ *Id.* at 883.

²⁸² *Id.* at 884.

²⁸³ A number of people who write on the obesity epidemic freely use the word “fat,” sometimes noting that it has been embraced by “fat activists.” See generally Theran, *supra* note 173 (using the word “fat” to discuss the problems of obesity). As it seems to me that many people do find that word coarse or insulting, I prefer usually to use the terms overweight or obese.

²⁸⁴ Saguy & Riley, *supra* note 276, at 908, 915.

²⁸⁵ See, e.g., Saguy & Riley, *supra* note 276, at 874 (discussing activists and researchers who disagree about whether obesity has adverse health effects); Theran, *supra* note 173 at 151 (“there is increasing evidence that an individual’s fitness level—i.e., in terms of cardiovascular health, strength, and endurance—is not much related to his/her weight, and that many of the health risks often touted as associated with obesity may in fact stem from inactivity, regardless of weight.”).

found in the health status of the overweight and obese.²⁸⁶ Saguy and Riley argue that upon closer examination the discursive patterns of these advocates reflect anxieties about identity and status preservation—concern about being stigmatized and made into “a bogeyman”²⁸⁷—rather than reflecting the norms of public reasoning.²⁸⁸ We need not artificially force this evidence into cultural cognition theory’s categorization scheme in order to appreciate Saguy and Riley’s suggestion that there is a cultural values heuristic operating behind people’s views on the obesity epidemic. Both groups think they are basing their own claims on reason, while thinking that the other group is blinded to the truth of the matter by their worldview. In fact, both groups are right about the other, but neither is right about itself.

Expressive overdeterminism might help produce some kind of consensus on how to respond properly to the obesity epidemic. One could imagine an overdeterministic idiom of obesity epidemic analysis. On behalf of individualists, obesity analysts advocating a robust regulatory response to situational influences on the problem might emphasize that what is at stake in this quandary is the dignity and individual freedom of people in our society. To the communitarian, the harms suffered by the overweight and obese might be emphasized. Nevertheless, the problem with Kahan’s approach is the agnosticism it exhibits with respect to the world-views he identifies. Just as Kahan claims that his critique of public reason is not political but cognitive, my critique of expressive-overdeterminism is cognitive, not political. I urge a counter-intuitive scrutiny of the dispositionist discourses that are running amok through our world-view heuristics. Kahan would have us patronize them. As I have argued in the previous Sections, such patronization leaves the analyst chronically inattentive to the problem of market manipulation, which remains unseen, un-theorized, and unregulated.²⁸⁹ Indeed, it plays no part in the basic framework of cultural cognition theory. Instead of an ecumenical expressive overdeterminism, what we need are discursive “rules” or suggestions that give attention to the biases of our world-views, decisional rules, presumptions, and orientations—discourse that might in cumulative fashion expel the heuristics our behavioralism has aided us to discredit.

Indeed, if Kahan’s argument is that social discord is a result of expressive *under*-determinism, then another way of putting his point might be that where we do see relative consensus, there might already be overdeterminism at work in the discourse. While people express different opinions about obesity when asked, the obesity epidemic is hardly a hot-button social is-

²⁸⁶ Saguy & Riley *supra*, note 276, at 883.

²⁸⁷ *Id.* at 893 (quoting their own interview with Mariln Wann, a prominent figure in the fat acceptance movement).

²⁸⁸ See also *Broken Scales*, *supra* note 6, at 1726-27 (providing a parallel exegesis with respect to system justification theory and the conception of obesity entertained among people who are obese).

²⁸⁹ See *supra* Part II.A.

sue. The absence of deep antagonism may be reflective of a present consensus on the issue, and this may suggest that discourse on obesity is already expressively overdetermined. The root of that overdeterminism is dispositionism. It speaks to, influences, and quiets concern about the obesity epidemic across particularized world-views. If this is true, then what we need is a discursive idiom that will disrupt this consensus. One way of doing so is to repudiate dispositionism and develop a discourse on unbounded situation.

Further, it is crucial for the cultural cognition theorist to appreciate again that our cognitive predicament is not happening internally, within “bounds.”²⁹⁰ Worldviews and worldview heuristics are sought after and contested, on a playing field that is not level. As I have emphasized, market actors have an abiding interest, indeed, an existential interest, in the maintenance of dispositionism.²⁹¹ In explaining the persistence of differing assessments of public policy problems, Kahan credits a kind of ironic by-product of an important norm within formal scientific discourse: “[T]he academy tolerates and even encourages competitive dissent. As a result, cultural advocates will always be able to find support from seemingly qualified experts for their perception that what’s ignoble is also dangerous, and what’s noble benign.”²⁹² But this is too naïve and too sanguine a view of the production of science surrounding controversial social issues. As Hanson and Kysar showed that with respect to the smoking “controversy,” the tobacco industry was able to “capture” scientific discourse on the subject by pumping millions of dollars into research to create the appearance of varied scientific opinions on an issue which in science, was unadulterated by such influence—settled.²⁹³ Such studies provided the ambiguity that smokers, already motivated to doubt the science indicating that their addiction was deadly, needed to continue viewing their own smoking as unproblematic.²⁹⁴ The cacophonous discourse on smoking was thus neither a product of the internal norms of science nor those of public reasoning generally—it was the result of manipulation, a manipulation to which we, by operation of world-view heuristics and other psychological processes, were vulnerable.²⁹⁵

In previous work, I have endeavored to demonstrate that the same “deep capture” process is evident within broad social discourses surround-

²⁹⁰ See *supra* text accompanying notes 108-11 (critiquing the idea of “bounded” rationality).

²⁹¹ See *infra* text accompanying notes 306-21 (emphasizing the crucial part that dispositionism plays in corporate law).

²⁹² Kahan, *supra* note 237, at 124-25.

²⁹³ See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1467-1553 (1999) (describing industry efforts to manipulate consumer-risk perception regarding smoking, with specific reference to manipulation of science).

²⁹⁴ *Id.* at 1506.

²⁹⁵ *Id.*

ing the obesity epidemic.²⁹⁶ I do not advocate an expressively overdeterministic idiom, but instead, at least with respect to obesity analysis, an idiom that is determined to discern and restrain the power of world-views that in our social discourse are already cognitively advantaged and disproportionately patronized.

V. AMELIORATING THE OBESITY EPIDEMIC: A CORPORATE LAW APPROACH

Lawrence Gostin has usefully categorized eight types of interventions presently available to stem the tide of overweight and obesity: disclosure, tort liability, regulation of food marketing to children and adolescents, taxation, school and workplace policies, zoning regulation, health monitoring and surveillance, and food prohibitions.²⁹⁷ Efforts in these areas are underway in many places, most at the state and municipal level.²⁹⁸ The cumulative effect of such policy innovations will no doubt contribute substantially to curbing the obesity epidemic. The foregoing analysis has meant to explore why such reactions are necessary and justifiable. Such efforts, as I suggested earlier, have to date largely been directed at children.²⁹⁹ I intend the foregoing exegesis to provide an understanding of the importance of, and the justification for, extending such efforts to adults. Further, I have emphasized the importance of not mistaking regulatory responses that are appropriate for the affluent, or for people of specific genetic backgrounds, as policies that will be responsive to the needs of everyone.³⁰⁰

But there are also reasons to doubt that such regulatory approaches are likely to be successful. First, the problem of dispositionism will make it difficult to engender broad public support for strong versions of most of the approaches Gostin catalogues. Second, irrespective of public opinion, there is the problem of regulatory capture. The narrow interests of food companies, coupled with their size and their concentrated wealth, give them tremendous advantages over dispersed consumers in the competition for regulatory favor.³⁰¹ These two problems converge in the problem of deep cap-

²⁹⁶ See *Broken Scales*, *supra* note 6, at 1757-69; Yosifon, *supra* note 30, at 519-25.

²⁹⁷ Lawrence O. Gostin, *Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity*, 297 J. AMER. MED. ASSOC. 87 (2007) (reviewing the basic arguments in favor or against each of these approaches).

²⁹⁸ See generally *id.* (describing local government and states' efforts to utilize various legal tools to curb behavior leading to obesity).

²⁹⁹ See *supra* text accompanying note 15.

³⁰⁰ See *supra* text accompanying notes 217-22.

³⁰¹ See generally MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* (2002) (analyzing corporate influence on state and federal regulation of food industry); see also MICHELE SIMON, *APPETITE FOR PROFIT: HOW THE FOOD INDUSTRY UNDERMINES OUR HEALTH AND HOW TO FIGHT BACK* (2006) (analyzing food industry influence on food policy).

ture—the corporate promotion and entrenchment of a particular, dispositionist conception of consumer behavior, to both regulators and consumers themselves.³⁰² In light of this entanglement, I will conclude here with a brief examination of one additional idea that might be added to the taxonomy of available policy responses to the obesity epidemic. I propose a corporate law solution.

As I previously stated, the obesity problem is polygenetic.³⁰³ I did not intend anything in this Article to suggest that the problems of power economics and market manipulation are the sole or even the principle causes of the obesity epidemic. Nevertheless, I have argued that there can be little doubt that these dynamics are at least part of the problem, and that they should be remedied. I have argued that the kind of market manipulation evident in the obesity context results from the ravenous pursuit of profit by powerful corporations operating in competitive markets. Behind both the power and the pursuit is corporate law.

Our corporate law bestows tremendous advantages on corporations that allow them to efficiently gather large amounts of capital. These concessions include limited liability, indefinite life, and favorable taxation, to name just a few.³⁰⁴ Such aggregation enables economies of scale and other efficiencies that make corporations very powerful. The *purpose* that our corporate law intends to be served by such power, however, is the public interest.³⁰⁵ According to leading corporate law scholars Henry Hansman and Reinier Kraakman, “all thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other member of society.”³⁰⁶ After all, while shareholders certainly have some property interest in the stock they invest in, they surely do not have the right to the benefits bestowed on the corporate form in law.³⁰⁷

³⁰² See *supra* notes 49-55 (discussing “deep capture”).

³⁰³ See *supra* Part I.A.

³⁰⁴ Chen & Hanson, *supra* note 67, at 54, 144, & n.505.

³⁰⁵ *Id.* at 66.

³⁰⁶ Henry Hansmann & Reinier Kraakman, *The End of History For Corporate Law*, 89 GEO. L.J. 439, 441 (2001).

³⁰⁷ I am deliberately flouting the “nexus-of-contract” theory of the firm in favor of the “entity” theory, but only as a matter of exegesis. See Ronald J. Gilson & Charles K. Whitehead, *Deconstructing Equity: Public Ownership, Agency Costs, and Complete Capital Markets*, 108 COLUM. L. REV. 231, 241 (2008) (defining the “nexus of contract” theory as a conception of “the corporation as an equilibrium among actors, including shareholders, creditors, and managers, who bargain within a complex set of relationships with the corporate entity at the center”). The real point is that both theories must rest ultimately on a “public interest” justification. I read Hansmann and Kraakman to sanction this conflation in *The End of History for Corporate Law*:

In a hoary debate that cuts across jurisdictional boundaries, proponents of the view that corporations exist by virtue of a state “concession” or privilege have also been associated with the view that corporations ought to be governed in the interests of society-or all corporate

In what may at first blush appear to be a paradox (or worse), while the purpose of our corporate law is the public interest, the central *rule* of our corporate law is that firms should primarily pursue profits on behalf of shareholders.³⁰⁸ Indeed, while they insist that all “thoughtful”³⁰⁹ people know that corporations are public institutions, Hansmann and Kraakman also write that “[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.”³¹⁰ Corporate theory unravels the seeming paradox by explaining that the shareholder primacy norm *does* serve the public interest, and that it does so better than would any alternative norm for corporate conduct.³¹¹ Shareholder primacy, like other concessions, creates a strong incentive for capital investment. Such accumulation serves worker interests by creating opportunities for employment; more profits mean more opportunities for further investment and employment.³¹² Consumers, my focus here, similarly benefit from the efficiencies from capital aggregation that shareholder primacy provides.³¹³ Economies of scale and the diligent pursuit of profit give firms the power and the discipline to provide products and services for consumers at competitive prices.³¹⁴ Escalating profits thus signal heightened states of consumer preference satisfaction.³¹⁵ Consumers are able to monitor their stake in the social enterprise of the firm through their decisions to consume corporate goods and services or not.³¹⁶ Consumer interests are also backed

constituencies—rather than in the private interest of shareholders alone. Conversely, proponents of the view that the corporation is at bottom a contract among investors have tended to advance the primacy of shareholder interests in corporate governance. In our view the traditional debate between concession and contract theorists is simply confused. On the one hand, corporations—whether “concessions” or contracts—should be regulated when it is in the public interest to do so. On the other hand, the standard model is, in effect, an assertion that social welfare is best served by encouraging corporate managers to pursue shareholder interests.

Hansmann & Kraakman, *supra* note 306, at 441 n.5 (internal citations omitted). In other words, “[a]ll thoughtful people” must see that contract theories rest on a particular kind of regulatory apparatus (one which, for example, enforces agreements) and thus must ultimately seek justification in consequentialist claims, no less than do entity theories, which emphasize the more specific benefits that corporations receive in law. *See also* KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 45-47 (2007); Chen & Hanson, *supra* note 67, at 87-88 (dissecting the false categories of “markets,” on the one hand, and “regulations,” on the other).

³⁰⁸ *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders.”) *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998).

³⁰⁹ Hansmann & Kraakman, *supra* note 306, at 441.

³¹⁰ *Id.* at 439.

³¹¹ *Id.* at 444 & n.7.

³¹² Chen & Hanson, *supra* note 67, at 47.

³¹³ *Id.* at 22.

³¹⁴ *Id.*

³¹⁵ *See generally Broken Scales*, *supra* note 6, at 1689.

³¹⁶ *Id.* at 1690.

by other regulatory institutions, including consumer protection statutes.³¹⁷ While the consumer can monitor the firm at the cash register, after shareholders have invested their capital, there is little opportunity for them to watch over or control what is done with it. The open-ended nature of capital investment, coupled with the absence of shareholders from corporate control, requires that firm directors be bound to shareholder interests by the golden yoke of fiduciary obligation.³¹⁸

Roberto Unger has urged legal scholars to shun what he calls “the fetishization of institutions,” a problem he describes as:

the belief that abstract institutional conceptions, like political democracy, the market economy, and a free civil society, have a single natural and necessary institutional expression. Institutional fetishism is a pervasive type of superstition in contemporary culture. It penetrates each of the disciplines mentioned earlier [including legal analysis], and it informs the language and debates of ordinary politics. The old-fashioned idea of enlightenment would today best be applied to efforts to dispel the institutional fetishism vitiating orthodox doctrines in each of the social disciplines. Dispelling it would be the full-time job of a generation of social critics and social scientists.³¹⁹

The view that we are at the “end of history” for the basic design of corporate law reflects the fetishization of institutions that Unger laments. The behavioral critique can help us to break the spell of this fetishism, and it can inform our imagination of alternative institutional arrangements. There may indeed be many areas of the economy and our social life in which shareholder primacy operates quite effectively, but even the broad viability of the norm does not mean that it is appropriate in all areas. It may be socially useful in particular in the area of food to depart from the shareholder primacy norm. With a realistic picture of consumer behavior in food markets in place, we might easily see that in this context consumers are in

³¹⁷ Indeed, the availability of other regulatory agencies is, within the shareholder primacy regime, a crucial backstop for protecting the interests of any stakeholders that cannot, given firms’ advantages, cannot effectively use contract to protect themselves. A point which Hansmann and Kraakman underscore:

Of course, asserting the primacy of shareholder interests in corporate law does not imply that the interests of corporate stakeholders must or should go unprotected. It merely indicates that the most efficacious legal mechanisms for protecting the interests of nonshareholder constituencies—or at least all constituencies other than creditors—lie outside of corporate law. For workers, this includes the law of labor contracting, pension law, health and safety law, and antidiscrimination law. For consumers, it includes product safety regulation, warranty law, tort law governing product liability, antitrust law, and mandatory disclosure of product contents and characteristics. For the public at large, it includes environmental law and the law of nuisance and mass torts.

Hansmann & Kraakman, *supra* note 306, at 442.

³¹⁸ See Hansmann & Kraakman, *supra* note 306, at 441-42 (adumbrating the basic elements of this script); see also GREENFIELD, *supra* note 306, at 234-236 (critiquing the script); Chen & Hanson, *supra* note 67 (critiquing the script).

³¹⁹ ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 7 (1996), available at <http://www.law.harvard.edu/faculty/unger/english/whatsa.php>.

as much need of a place in the boardroom, representing their interests, as are shareholders. The consumer relationship to food need not solely be mediated by contract, tort, and administrative agencies—it can happen also in corporate law.

It is clear that the competitive ferocity enflamed by the shareholder primacy norm has contributed substantially to the obesity epidemic.³²⁰ This influence could be contained if firms in this market were made fiduciaries of consumers as well as of shareholders. This corporate purpose could be served in part by a consumer advocate representative on boards of directors. Consumers at large could elect such an advocate, exercising voting shares, though having no residual claims on profits. Such advocates would serve as agents of the public in the internal decision-making processes of the firms. Beyond specific consumer representatives on the board, the fiduciary obligation of the entire board of directors might be expanded to require care not just of shareholder interest, but also consumer interest.³²¹

Traditional corporate law scholars argue that acrimony and board paralysis would ensue if “stakeholders” other than shareholders were given a place in the boardroom.³²² As Ron Chen and Jon Hanson point out, this claim seems to be at odds with the fundamental justification of the profit norm, from the perspective of consumers’ interests, which is that firms are good at knowing what consumers want and are motivated to give it to them, that is, that consumer and corporate interests are already aligned.³²³ The problem of acrimony is only introduced when different stakeholders indeed have at least potentially adverse interests. Yet corporate law need not necessarily fear acrimony. As Kent Greenfield argues in connection with his support for worker representation on boards:

Making the board less insulated and less homogenous will make decisions more difficult simply because more views will have to be taken into account, and the board will be forced to compromise on a decision that is acceptable to a majority or plurality of stakeholders The real question is whether additional diversity results in decisions that are worth the extra effort, and here there is reason to be hopeful. Numerous studies have shown . . . that ‘defective decision making’ is ‘strongly correlated’ with structural flaws such as ‘insulation and homogeneity.’³²⁴

³²⁰ See *supra* note 155 and accompanying text; see also *Broken Scales*, *supra* note 6, at 1688.

³²¹ This is a combination of co-determination and multiple-constituent approaches to corporate law reform. I am informed here by Kent Greenfield’s exegesis and proposal regarding worker representation on corporate boards. *Supra* note 307, at 146-52.

³²² See Hansmann and Kraakman, *supra* note 307, at 445 (“The growing view today is that meaningful direct worker voting participation in corporate affairs tends to produce inefficient decisions, paralysis, or weak boards, and that these costs are likely to exceed any potential benefits that worker participation might bring.”). Curiously, Hansmann and Kraakman’s otherwise meticulously referenced article provides no citation for this proposition. *Id.*

³²³ Chen & Hanson, *supra* note 67, at 47.

³²⁴ GREENFIELD, *supra* note 307, at 151.

Even with respect to corporate boards, there is evidence that the most contentious boards are the most successful.³²⁵ Indeed, many of our institutions and methods of social and personal decision-making embrace the creative value of discursive antagonism, or at least of giving different views opportunity for expression.³²⁶ There is no reason that corporate decision-making necessarily needs to be an exception. Again, the claim is not that consumers should always be fiduciaries of all firms they do business with, but rather to suggest that they might be for some types of firms. While food is in some ways like any other consumer good, it also unique in its fundamentality—it is an essential and basic ingredient of human life. And, as I have argued, its deeply evolutionary nature, perhaps maladaptive to present circumstances, is one that is both opaque to our conscious understanding and unusually susceptible to situational manipulation.

If a fiduciary concern for consumers were insufficient, more aggressive approaches are available within corporate law. One possibility would be to remove the shield of limited liability from firms operating in certain areas of the food market. The benefit of limited liability is the tremendous incentive it provides to capital investment. The justification for it rests primarily on the idea that limited liability is merely a contract term to which anyone who deals with a corporation agrees. That sunny tale, of course, is not so warm to the uncompensated tort victim who did not negotiate her terms with the firm. Corporate law has no effective answer to this problem other than to point to alternative remedies for tort victims, such as common law tort claims, first party insurance, and social safety nets.³²⁷ One reason to remove limited liability for some kinds of food firms would be to ensure that victims identified by tort law in the area of overweight and obesity can be made whole. Indeed, removing limited liability may even follow necessarily if we were to adopt the previous suggestion of recognizing fiduciary obligations to consumers. But another reason to remove limited liability might be for the express purpose of stunting the growth of markets that such limited liability creates and exploits. Limited liability makes it possible for people to invest money and walk away clear of any consequences of their capital. In areas of social life where ill consequences predictably result from easy capital aggregation, the engines of limited liability may be doing more harm than good.

The corporate law reforms suggested here might substantially help the obesity problem in this country. Such reforms are not an alternative to present policy responses, but rather should be advanced alongside them. As

³²⁵ *Id.* (citing CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 28 (2003) (quoting Jeffrey A. Sonnenfeld, *What Makes Great Boards Great*, 80 HARV. BUS. REV. 106, 111 (2002))).

³²⁶ For example, deliberative democratic processes, the adversarial system, etc.

³²⁷ *See generally* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability*, 100 YALE L.J. 1879 (1991) (arguing that a general rule of unlimited pro rata shareholder liability for torts provides greater efficiencies than does the contemporary unlimited liability regime).

Greenfield wrote advocating worker representation on Boards as an approach to the problem of stagnant worker wages, “[o]ne need not conduct a comprehensive comparison of corporate law tools with various other regulatory initiatives to decide that changes in corporate law offer great possibilities [T]he durability of the problem[] indicates that new initiatives from corporate law should be seriously considered.”³²⁸ Indeed, making food firms fiduciaries of consumers might make it much easier to pursue reform through other regulatory institutions, such as those listed by Gostin, as those institutions may now be freed by multi-fiduciarism from their capture by shareholder primacy.

It should be clear that there is nothing in this institutional experimentation that unduly limits individual choice. This is not about banning any product or discourse. Gregory Mitchell argues that the reformative impulse of the behavioral critique is, from the libertarian perspective, unfairly redistributive:

If the cafeteria director helps diners with low self-control gain some greater control over their impulses and eat less, then she may need to raise prices, meaning that diners with high self-control may now bear some of the cost of the libertarian paternalist policy. In general, in any domain where resources are limited and the increased costs of a libertarian paternalist policy cannot be externalized the cost of increasing benefits to irrational persons is likely to be borne by rational persons.³²⁹

But neither shareholders nor other consumers are entitled to the spoils of power economics. It is only by manipulating “low self-control” consumers that prices are kept low for high self-control types. Where that manipulation is made possible by the benefits bestowed in corporate law, those with high self-control have not lost anything to which they are entitled when prices rise due to changes in those benefits.

CONCLUSION

The proposals advanced here are relatively modest. I embrace the posture of humility that Issacharoff has promoted in all of his writing about the implications of “behavioralism.”³³⁰ The critical suspicion and a scrutiny that has motivated the foregoing theoretical inquiry into obesity epidemic analysis must also be brought to bear on the policy prescriptions such inquiry suggests. Reformative incrementalism is attendant to the general humility that our social science informs us we would be wise to hold with respect to

³²⁸ GREENFIELD, *supra* note 307, at 183.

³²⁹ *Libertarian Paternalism*, *supra* note 191, at 1274 (footnote omitted).

³³⁰ See *supra* text accompanying notes 178-219. Similar warnings appear in Issacharoff’s other articles. See generally Issacharoff, *The Difficult Path From Observation to Prescription*, *supra* note 178; Issacharoff, *Can There Be a Behavioral Law and Economics?*, *supra* note 178.

any of our theories about ourselves and the world, given our cognitive limitations and motivational biases. Moreover, just as our social science reveals that we should be cautious when guided by our intuitions, the history of social science and the sciences generally is replete with corrections, reversals, and repudiations of beliefs once held to be true. Incrementalism and skepticism are thus the proper pace and posture. The prudence of such humility, however, should not be taken to cast doubt on the urgency of the need for reform, nor the strength of the justification for it.