

NORMATIVE JUSTIFICATIONS FOR FOOD EXCISE TAXES

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Abstract

Obesity rates have increased dramatically in America. Public health advocates consider it self-evident that the government, as a public health matter, should intervene to improve nutrition. Their focus is on reducing the disease and premature death that could be avoided through better nutrition. Public health advocates have made various proposals to improve nutrition, including proposals to impose excise taxes on sodas and junk foods. Opponents of food excise taxes have argued that nutrition is a matter of personal responsibility and should not be the subject of government intervention.

Various normative theories have different implications for the implementation of food excise taxes as a response to the obesity epidemic. Under the economic approach, excise taxes on a good are warranted if consumption of the good generates negative externalities or if consumers are making decisions about consumption of the good with incomplete information. Public health advocates assume that unhealthy behaviors that cause disease and premature death must generate large negative externalities. That assumption turned out to be incorrect in the case of smoking externalities. It remains to be seen whether future externalities research with respect to poor diet will yield similar results. A second type of market failure, incomplete information, might justify food excise taxes under an economic approach. Consumers do not have adequate nutritional information about many of the foods they eat, including restaurant meals and other foods that are not subject to the federal food labeling requirements.

Under the behavioral economic approach, excise taxes might be justified to correct for systematic information-processing and decision-making errors people make with respect to their diets. Americans' dietary preferences are time-inconsistent. Americans spend \$40 billion a year on weight loss products, but prefer supersize portions of sodas, snacks, and restaurant foods because supersizing looks like a good deal. Food excise taxes could serve as a form of self-control device to reduce distortions caused by affective decision-making, biases, and heuristics. Excise taxes also could create incentives for food manufacturers and restaurants to offer consumers healthier food choices.

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Under the critical realist perspective, the focus is on the commercial manipulation of the situation. Food manufacturers and restaurants use sophisticated techniques to manipulate consumers' biases and heuristics for profit, but encourage consumers to take personal responsibility for their weight gain. The critical realist approach may support excise taxes as a means of countering commercial manipulation of situational pressures that encourage poor nutrition.

Food excise taxes also might be justified under the soft paternalism approach to protect people from their own choices if dietary decision-making is flawed (for example, because of incomplete information). Hard paternalism is a far more controversial and problematic rationale for food excise taxes.

Food excise taxes may be justified as a correction for day-in-day-out systematic information processing and decision-making errors that consumers make with respect to diet. As policymakers consider implementing food excise taxes to respond to the obesity epidemic, they should be careful to design food excise taxes to fit the normative justification for them.

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INTRODUCTION.

Rates of obesity and overweight for American men and women of all ages have increased significantly in the last 30 years.² Rates of overweight for American children have tripled in that time period.³ Obesity and overweight are associated with a variety of major health problems, including type 2 diabetes, hypertension, and cardiovascular disease.⁴ Public health officials have predicted that obesity will soon overtake smoking as the leading cause of death in America.⁵

Public health advocates and nutritionists had advocated a variety of legal and regulatory measures to respond to the obesity “epidemic.”⁶ Some of the proposals are designed to increase physical activity and others are designed to improve nutrition.

² Fred Kuchler, Ababayeho Tegene, and J. Michael Harris, Economic Research Service, U.S. Dep’t of Agriculture, *Taxing Snack Foods: What to Expect for Diet and Tax Revenues*, CURRENT ISSUES IN ECONOMICS OF FOOD MARKETS, AGRICULTURE INFORMATION BULLETIN NO. 747-08, August 2004. In this Article, consistent with conventions generally used in the public health literature, obesity is defined as a body mass index (BMI) of 30 or greater. Body mass index is defined as weight in kilograms divided by height in meters squared. *Id.* [Broken Scales defines obesity as BMI at the 95th percentile or greater. Sources cited in Broken Scales, nn. 4-5. Also note criticisms of BMI as measure of obesity]

³ Adam Benforado, Jon Hanson, & David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, __ [p. 4 of galleys] (2004) (childhood obesity rate has tripled in the last 30 years, with 15 percent of children currently obese) [hereinafter *Broken Scales*]. Researchers sometimes classify children as “overweight,” instead of “obese,” even if they have a BMI or 30 or more. Kuchler, Tegene, and Harris, *supra* note __ at __. Being overweight as a child often continues into adulthood. *Id.*

⁴ *Broken Scales*, *supra* note __, at __ [p. 4-5 of galleys] and n. 6.

⁵ *Id.* at n. 4.

⁶ Cite Epstein regarding definition of “epidemic.” Richard Epstein, *Let the Shoemaker Stick to His Last: A Defense of the ‘Old’ PublicHealth*, 46 PERSPECTIVES IN BIOLOGY AND MEDICINE S138 (Summer 2003).

Proposals that are intended to increase physical activity include proposals to: (1) provide people with more recreational facilities to increase their levels of physical activity; (2) encourage people to walk and bike to work and school by creating walking and biking paths; (3) educate the public and health care providers about the health effects of physical activity; and (4) promote physical activity on school campuses through curricular and standardized testing reforms. Proposals that are intended to improve nutrition include proposals to: (1) restrict advertising of junk foods, especially to children; (2) improve federally mandated nutritional food labeling on prepared foods; (3) extend federally mandated nutritional food labeling to restaurant meals; (4) educate the public and health care providers about the health effects of good nutrition; (5) restrict and regulate the provision of unhealthy foods on public school campuses; (6) subsidize the cost of healthy foods; and (7) tax unhealthy foods.⁷

Public health advocates Michael Jacobson and Kelly Brownell and nutritionist Marion Nestle have argued for the adoption of excise taxes on soft drinks and junk foods.⁸ The ultimate goal of these proposals is to reduce consumption of unhealthy foods and induce consumers to substitute healthy foods for unhealthy foods in their diets.⁹ Excise tax advocates argue that obesity is, in large part, attributable to a “toxic” food

⁷ For examples of these proposals, see E.K. Battle & K.D. Brownell, *Confronting a Rising Tide of Eating Disorders and Obesity: Treatment Vs. Prevention and Policy*, 21 ADDICTIVE BEHAVIORS 755 (1996); Marion Nestle, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH (2002) [hereinafter Nestle, FOOD POLITICS].

⁸ See, e.g., Michael Jacobson & Kelly Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. OF PUBLIC HEALTH 854 (2000); Nestle, FOOD POLITICS, *supra* note __ at __. In this Article, the generic term “Food Excise Taxes” include possible taxes on sodas, snacks, fats, energy dense nutritionally poor foods or super-size portions.

⁹ Doctor Nestle argues that food excise taxes could be used to fund public health education measures. Nestle, FOOD POLITICS, *supra* note __ at __. Although this makes it seem as though the goal of the excise taxes is to raise revenue, that revenue would be dedicated to education that would alter dietary patterns. The ultimate goal of the excise tax proposal is therefore a public health goal.

environment. In their view, government intervention is warranted to create a healthier food environment that promotes good nutrition.

Advocates for the soft drink and food manufacturing industries have decried the excise tax proposals as “nonsense” and the worst sort of example of the Nanny state.¹⁰ They argue that diet is a matter of personal choice. They take the position that government intervention is not an appropriate response to the obesity epidemic. In their view, Americans should be free to choose what they eat, and obese Americans should take “personal responsibility” for their dietary choices.

Food excise tax proposals have been controversial and generated heated debate. The public is divided on the issue, with opponents of the proposal deriding it in extreme terms. State legislators from New York to California have joined in the debate.¹¹

Certain normative theories are implicit in the current rhetoric surrounding the excise tax debate. For example, the “free market” “personal responsibility” approach to diet advocated by excise tax opponents may be consistent with the basic approach of the rational actor economic norm. The “toxic food environment” approach advocated by excise tax proponents takes into account situational factors that are relevant under a behavioral economic approach, a critical realist approach, or a paternalistic approach. Considering the implications of various normative theories for government intervention in diet can advance our thinking about food excise taxes. This Article will consider the implications of four normative approaches for the formulation of obesity-related food excise taxes: (1) rational actor economics; (2) behavioral economics; (3) critical realism;

¹⁰ *See, e.g.*, THE CENTER FOR CONSUMER FREEDOM, FUZZY LOGIC, http://www.consumerfreedom.com/news_detail.cfm?headline=625 (last visited April 4, 2005) (taxing junk food is “nonsense”). “Taxing “junk food” to raise its price so that “healthy foods” are more competitively priced is nonsense. If enough people choose to eat what nannies deem “healthy food,” ... producers will flood the market with products to meet the need and prices will adjust themselves accordingly.”

¹¹ [Describe bills]

and (4) paternalism.¹² Specifically, this Article will consider whether externalities and systematic information-processing and decision-making errors justify food excise taxes under the various normative approaches.

I. IMPLICATIONS OF RATIONAL ACTOR ECONOMICS.

Under this normative approach, the best outcome for society will be achieved if markets are left to operate freely.¹³ This normative approach is consistent with the “free market”¹⁴ and “personal freedom”¹⁵ arguments made by excise tax skeptics. Rational people may decide to give up being a healthy weight in exchange for eating the foods

¹² Professor Jeff Strnad has considered various normative justifications for food excise taxes. JEFF STRNAD, CONCEPTUALIZING THE “FAT TAX”: THE ROLE OF FOOD TAXES IN DEVELOPED ECONOMIES 34 (Stanford Law School, Law and Econ. Research Paper Series, Working Paper No. 286, 2004), *available at* <http://ssrn.com/abstract=561321> (on file with author). In this outstanding article, Professor Strnad addresses some of the normative justifications that are explored in this Article, such as externalities and internalities, but ultimately justifies food excise taxes as a component of our health insurance system. He concludes that food excise taxes are needed to address ex ante moral hazard problems and adverse selection problems. *Id.* at ___ [83 of pdf draft]. This Article does not address Prof. Strnad’s social insurance rationale. Instead, this Article focuses on externalities and specific information processing and decision-making errors that may justify food excise taxes.

¹³ STIGLITZ, ECONOMICS OF THE PUBLIC SECTOR 63 (under certain conditions, competitive markets lead to a Pareto-optimal allocation of resources).

¹⁴ THE CENTER FOR CONSUMER FREEDOM, FUZZY LOGIC, http://www.consumerfreedom.com/news_detail.cfm?headline=625 (last visited April 4, 2005) (“Taxing “junk food” to raise its price so that “healthy foods” are more competitively priced is nonsense. If enough people choose to eat what nannies deem “healthy food,” ... producers will flood the market with products to meet the need and prices will adjust themselves accordingly”). See also [cite to “wrecking ball” article, Boston Globe, June 2, 2003]

¹⁵ See, e.g., the “You are too stupid” ads run by the Center for Consumer Freedom, at <http://www.freedomads.org/live/entries.php?id=6>

“You are too stupid to make your own food choices. At least according to the food police and government buerocrats who have proposed food taxes on foods they don’t want you to eat.... We think they’re going too far. It’s your food. It’s your drink. It’s your freedom.”

they want or for being inactive.¹⁶ (Recent increases in obesity also are in part attributable to “technological change [that] has led to weight growth by making home-and market-production more sedentary and by lowering food prices through agricultural innovation.”¹⁷)

Despite the fact that this approach is a free market approach, government intervention is warranted under this approach if there are various types of distortions or imperfections in the market. Market imperfections can include: (1) inadequate competition;¹⁸ (2) public goods;¹⁹ (3) externalities;²⁰ (4) incomplete markets;²¹ (5) information failures;²² and (6) unemployment, inflation, recession or depression.²³ The two

¹⁶ Lakdawalla and Philipson study indicates that “at least some of the growth of obesity . . . may be a matter of rational, personal choice rather than the result of factors such as a “toxic” food environment.” [study discussed in Strnad at pp. 11-12.]

¹⁷ Lakdawalla and Philipson study [also quoted in Strnad.] [Discuss empirical research re: various causes of obesity. See Zywicki et al.]

¹⁸ Stiglitz, *supra* note __ , at 71 (for example, inadequate competition results if a market is dominated by a monopoly).

¹⁹ *Id.* at 74. A public good has two properties. First, it doesn’t cost anything for an additional individual to enjoy the benefits of the public good. Second, it’s difficult or impossible to exclude individuals from the enjoyment of the public good. A large scale example is national defense. A small scale example is a lighthouse. Markets will not supply a sufficient quantity of public goods, so the government may need to intervene to provide these goods (such as police and fire protection, military defense, and homeland security).

²⁰ *Id.* at 75.

²¹ *Id.* at 76. For certain items, for example insurance and loans, private markets may fail to provide adequate amounts of the item and government may need to intervene. Stiglitz warns that, for some goods, there may be good reasons for the seemingly inadequate amount of the good.

²² *Id.* at 78.

²³ *Id.* at 79. Stiglitz notes that the role of the government to correct high unemployment is controversial.

market imperfections that are relevant in our discussion are externalities and information failures.²⁴

Externalities exist where the actions of an individual or firm impose an uncompensated cost on others or confer an unrewarded benefit on others.²⁵ The externality is a “negative externality” if the actions of the individual or firm impose uncompensated costs on others.²⁶ The externality is a “positive externality” if the actions of the individual or firm confer an unrewarded benefit on others.²⁷ Markets will not result in an efficient allocation of resources where externalities exist. If individuals do not bear the cost of the negative externalities they generate, they will engage in too much of the activity that generates the externality. If individuals are not rewarded for the positive externalities they generate, they will engage in too little of the activity that generates the externality.²⁸

Governments sometimes intervene to regulate activities that generate negative externalities, such as polluting. Governments also sometimes impose financial penalties on activities that generate negative externalities and financially reward activities that generate positive externalities.²⁹

Markets also will not function properly if the economic actors are making choices with incomplete information.³⁰ Markets will supply inadequate amounts of certain types of information, absent government intervention. An example is weather information. In such a case, the government may intervene to provide additional information (e.g., weather

²⁴ [Stiglitz adds that, even where markets are efficient, government intervention may be warranted to encourage the consumption of merit goods like seat belts and elementary education. Consider the implications of this.]

²⁵ *Id.* at 75.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 76.

³⁰ *Id.* at 78-79. Stiglitz notes that “[i]nformation is, in many respects, a public good.” *Id.*

information provided by the U.S. Weather Bureau) or may require the economic actors to provide the information. An example of this type of regulation is the federal securities law requirement that public companies periodically file with the SEC reports such as annual reports.

Where there are market imperfections, taxation can be used to as a market-corrective measure. For example, a market corrective tax could be imposed on a good to compensate for the fact that consumers have incomplete information about the risks of the good. Market corrective taxes are known as “Pigouvian taxes.”³¹

If the government plans to adopt a market corrective measure to reduce the effect of a market distortion, we must consider whether the market corrective measure actually is an improvement overall, consistent with the Theory of Second Best.³² If we lived in a first best world, with no market distortions at all, then introduced a single distortion, eliminating that distortion would be an improvement. But we do not live in a first best world. We live in a second best world in which there are multiple market distortions, so eliminating a single existing distortion may make things better – or may make things worse.

The classic example is the example of the polluting monopolist. The monopoly creates a distortion by reducing production. The pollution creates a distortion by generating externalities. If the government, through regulation, eliminated the monopoly, society may or may not be better off. The former monopolist would produce more goods, but would also generate more pollution. The elimination of the monopoly may or may be

³¹ The tax is referred to as a Pigouvian tax because Pigou articulated this market corrective rationale for taxation. A.C. PIGOU, A STUDY IN PUBLIC FINANCE (year?). Professor Strnad notes that a Pigouvian tax “mandates imposing a levy on each unit of externality-generating consumption equal to the marginal external costs generated by that unit of consumption.” Strnad, *supra* note __, at __ [36 of pdf doc]. The relationship between diet and disease likely is non-linear, which means that it may be difficult to set the Pigouvian tax at the correct level. *Id.* at [36 pdf, 25 pdf, 62 pdf].

³² R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956-57).

an improvement, but we should not simply assume that the elimination of a single distortion would be an improvement.

The rational actor economic approach can be applied to the problem of obesity. The starting point is that the government should not intervene in private markets so it should not regulate food choices. This is the normative position that is implicit in arguments made by many opponents of food excise taxes. Of course, this assumes that there are no market imperfections would warrant government intervention.

Public health advocates have taken the position that government intervention in diet is warranted because poor diet is associated with chronic diseases that are expensive to treat. If people externalize the costs of their poor diets, government regulation may be justified.

An externalities justification for food excise taxes is similar to the externalities justification that public health advocates offered to support tobacco taxes. In the early 1990s, anti-tobacco groups argued that federal, state, and local governments should impose substantial tobacco taxes on smokers because of the externalities generated by smoking.³³ Said another way, when public health advocates wanted to reduce smoking rates in the U.S., they appealed to market-based externalities arguments instead of appealing to paternalistic arguments about saving smokers from themselves. These arguments often stressed the medical costs of treated smoking related illness. Public health advocates cited various studies that indicated that the annual health care and lost productivity costs of smoking were more than \$2 per pack.³⁴

For example, in 1993, the Coalition on Smoking OR Health asserted that annual federal, state, and local tobacco tax revenue totaled around \$11 billion,¹ but that the annual health care and lost productivity costs of smoking were \$65 billion, or \$2.17 per

³³ In the early 1990s, advocates of tobacco tax increases argued that smokers impose costs on others in excess of the existing tobacco taxes. *See, e.g.*, COALITION ON SMOKING OR HEALTH, SAVING LIVES AND RAISING REVENUE: THE CASE FOR MAJOR INCREASES IN STATE AND FEDERAL TOBACCO TAXES 11 (March, 1993).

³⁴ *Id.* [This dollar estimate is not in 2005 dollars.]

pack.³⁵ This \$2.17 per pack cost estimate was based on a 1985 study prepared by the Congressional Office of Technology Assessment.³⁶ The Coalition also cited a 1992 study by Hodgson, in which the author concluded that the excess lifetime health care costs for smokers exceeded \$500 billion.³⁷ The OTA and Hodgson studies considered direct medical costs of smoking and the OTA study considered the indirect costs of loss of production from illness or death. The Coalition noted that these studies did not take into account the intangible costs attributable to the pain and suffering and loss of life caused by smoking, which the Coalition argued should also be taken into account in setting the tobacco tax rate.

Economists countered that the cost estimates in these studies overestimated the true external per pack costs of smoking for various reasons.³⁸ First, most of the studies attempted to calculate the total excess health costs attributable to smoking, which include both the external and internal costs of smoking.³⁹ If the justification for increasing the tax was an externalities justification, the tax rate would be based on the external costs of smoking, not the combined internal and external costs of smoking.

Second, the studies on which public health advocates relied may have overestimated the excess medical costs of smoking because they did not attempt to determine which excess medical costs of smokers were attributable to smoking and which were not. Attributing smokers' entire excess medical costs to smoking overestimates the medical costs of smoking if some of those excess costs are attributable to other behavior, such as heavy drinking, or other attributes, such as education level. In addition, many of the studies considered only the current excess medical costs of smoking. If smokers did not smoke, they would not incur the

³⁵ [add cite. This dollar estimate is not in 2005 dollars.]

³⁶ [add cite]

³⁷ [add cite]

³⁸ See e.g., Gravelle and Zimmerman CRS Rep., p. 53

³⁹ OTA, Rice et al.

expenses of smoking related illness but later would incur the expenses of other illnesses associated with living longer (e.g., Alzheimer's).

Third, the studies on which public health advocates relied ignored the fact that smokers subsidize the pensions and nursing home care of nonsmokers. This occurs because smokers pay into public and private social insurance programs during their working lives, but tend to die at about the time they would begin receiving benefits from those social insurance programs.

Fourth, some of the studies failed to take into account the timing differences between (1) the taxes paid currently by smokers, (2) the excess medical costs incurred by smokers, and (3) the pension and nursing home subsidies to nonsmokers. A young smoker paying tobacco taxes today will not contract most smoking related diseases for many years and will subsidize the pensions and nursing home care of nonsmokers far in the future when the smoker dies prematurely. If the externalities justification compares the taxes paid with the future costs and savings attributable to smoking, the future costs and savings should be discounted to present value so that taxes, costs and savings can be compared in equivalent dollars.

Many of these methodological problems were addressed in a 1991 study by Willard Manning and others ("the Manning Study").⁴⁰ Economists consider the external cost estimate in the Manning Study to be far more accurate than the estimates in the earlier studies.⁴¹ In the Manning Study, the authors concluded that the best estimate of the external costs of smoking was \$.15 per pack (in 1986 dollars).⁴² That per pack

⁴⁰ WILLARD G. MANNING, EMMETT B. KEELER, JOSEPH P. NEWHOUSE, ELIZABETH M. SLOSS, & JEFFREY WASSERMAN, THE COSTS OF POOR HEALTH HABITS (1991) [hereinafter MANNING STUDY].

⁴¹ See, e.g., Gravelle and Zimmerman.

⁴² MANNING STUDY, supra note __ at 127.

estimated external cost was *less* than the average combined federal and state excise taxes on tobacco in effect at the time of the study.⁴³

Some aspects of the Manning study were controversial. For example, the study classified as internal costs the costs of smokers' family members having asthma attacks.⁴⁴ Another controversial aspect of this line of research was the conclusion that, although society incurs expenses for smoking related illness (some of which is borne by nonsmokers), smokers tend to die earlier than nonsmokers, which reduces Social Security, Medicare, and pension payments to smokers.⁴⁵ In other words, smokers cost society money because of their smoking related illnesses, but also save society money because smokers die early, at the time they otherwise would be retiring. Later studies have refined some of the methodology used in the Manning Study.⁴⁶

As applied to obesity caused by poor diet, the determination of externalities is complicated. We have estimates of the direct and indirect costs of obesity. They are quite substantial and growing significantly. In 1998, Wolf & Colditz estimated that combined direct and indirect costs of obesity of \$117 billion in 2000.⁴⁷ In 2003, another study estimated direct costs of \$61 billion and indirect costs of \$56 billion.⁴⁸

Not all of these costs are external costs, however. If public health advocates want to justify food excise taxes with an externalities argument, they will need to determine the amount of external costs associated with poor diet, as opposed to the total social costs of poor diet. More precisely, they would have to establish the external costs generated by the specific food or foods to be taxed. If the tax is to apply to a narrow class of food or drinks, such as sodas, it will be difficult to establish the external costs of consumption of

⁴³ [add cite]

⁴⁴ [Get Cite. Add that Gravelle & Zimmerman defended the approach used in the Manning study.]

⁴⁵ [add cite]

⁴⁶ [add discussion of subsequent study by Viscusi]

⁴⁷ [add cite: W & C is cited in Broken Scales at 1651 n.9]

⁴⁸ [add discussion of Rand study by Sturm.]

that product. In part, this is due to uncertainty about the relationship between consumption of specific foods or drinks and health.⁴⁹ In this sense, the externalities argument is harder to make with respect to a narrow class of foods than it is with respect to tobacco. In the smoking area, Viscusi used an externalities analysis to argue that existing tobacco taxes were too high.⁵⁰ If future externalities research in the area of nutrition tracks the externalities research in the smoking area, we may find that the externalities associated with poor diet are small.⁵¹

The externalities generated by a poor diet conceivably could be larger than smoking externalities because the time lag between poor diet and the disease it causes is shorter than the time lag between smoking and the disease it causes. Overweight children develop type 2 diabetes during childhood at disproportionate rates, which means that some of the significant costs of diet-related disease would be discounted less than the costs of smoking-related disease.

If we determine that specific foods and drinks generate externalities of an estimated amount, we could impose a market corrective Pigouvian tax in that amount to reduce the market distorting effect of the externality. In that case, we would have to consider whether the market corrective taxation is actually an improvement, in light of remaining distortions, consistent with Second Best Theory. For example, if we heavily taxed all soft-drinks, consumers might substitute Frappuccinos for a diet-soda –which may make the obesity problem worse. Even if we distinguish between non-diet and diet soda and tax only non-diet sodas, a Chai Latte may still have more calories than the non-diet soda.

⁴⁹ Strnad, *supra* note __, at [12 pdf]. [add discussion of controversy about health effects of soda consumption, with studies reaching opposite conclusions.]

⁵⁰ See W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking*, in TAX POLICY AND THE ECONOMY 51 (James Poterba, ed. 1995).

⁵¹ *Id.* at __ [83 pdf]

An externalities argument for food excise taxes assumes that we understand the dietary causes of obesity and can attribute a certain portion of external costs to certain groups of foods. An externalities argument could support the imposition of food excise taxes only if empirical evidence about the externalities is consistent with the structure and amount of the taxes.

Incomplete information is a second type of market imperfection that might justify food excise taxes. If consumers do not know the nutritional value of the food they eat, they may eat foods that would not have eaten with full information. In other words, the lack of nutritional information causes them to make poor dietary choices.

Here, again, there is a parallel between tobacco taxes and food taxes. Advocates of higher tobacco taxes argued that people would not smoke if they knew and understood the health risks of smoking.⁵² They proposed excise tax increases to act as a proxy for the missing information about the health risks of smoking. However, economist Kip Viscusi, in his book *Smoking: Making the Risky Decision*, argued that both smokers and non-smokers *overestimate* the health risks of smoking.⁵³ This study did not end the debate however, as researchers considered why smokers who know the risks of smoking continue to smoke. Some commentators have argued that the Viscusi study is flawed because he failed to take into account certain information-processing and decision-making flaws. (These flaws are discussed in more detail later.)

Excise tax opponents argue that people know that energy dense foods make them gain weight.⁵⁴ On the other hand, excise tax opponents also argue that there are no bad foods, only bad diets.⁵⁵ In addition, there are conflicting views about the methods of weight control that are most effective.⁵⁶ Even slight estimation errors can result in

⁵² [add cite]

⁵³ W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992) [get pin cite]

⁵⁴ [cite to articles about the McDonalds lawsuit]

⁵⁵ [add cite]

significant weight gain over time,⁵⁷ so it seems that people do not have enough information about nutrition to manage their weight effectively.

Many food items are subject to the federal nutritional labeling law,⁵⁸ which requires food manufacturers to print the Nutrition Facts Panel⁵⁹ on food packaging. On the other hand, nutritional information is incomplete because the NLEA does not require labeling on: (1) fresh fruits and vegetables; (2) uncooked meat (even when it is high in fat and calories) and fish; (3) deli and take-out foods; and (4) restaurant meals.⁶⁰ A person who is trying to control her weight can use a calorie counting guide to determine rough calorie counts for raw foods purchased in a grocery store, but has no way of accurately estimated the calorie counts of deli foods, take-out foods, and restaurant meals. These latter foods often contain hidden calories that make calorie estimation particularly problematic.⁶¹ Excise taxes on unhealthy foods (as well as subsidies for healthy foods) could be justified as a proxy for more complete nutritional information.

Even if the government required food manufacturers and restaurants to provide more nutritional information, there would still be a question about how consumers process and use that information. It is clear that many, but not all consumers actually read nutritional labels and make choices based on the labels. It is less clear whether consumers understand what they are reading. For example, consumers may be confused by the relationship between the portion size and the nutritional values indicated in the

⁵⁶ Strnad, *supra* note ___, at ___. For example, the dietary recommendations vary enormously between (1) the Atkins diet, (2) the Zone diet; (3) the Sugar-busters diet; (4) Dean Ornish's diet. The only area of agreement among them is that Americans should eat less refined grain and sugar.

⁵⁷ Add a cross-ref to long-term effect of a 30-calorie a day error.

⁵⁸ add cite for NLEA.

⁵⁹ Explain the NFP.

⁶⁰ Add data re: meals consumed outside the home, with recent trends.

⁶¹ [Cite to the Shape magazine article by a professional chef.]

label.⁶² It is also not clear whether consumers who do understand the labels use the nutritional labels to lose weight. The labeling may have a lulling effect. Just as drivers who wear seatbelts sometimes drive faster since they are better protected from injury, consumers may save calories on some food items by reading labels, but may compensate by consuming more calories on other foods.

Also, consumers may buy foods based on affective or visceral responses, instead of analytic deliberative processes. (This issue will be discussed in more detail later.) Consumers also may have too little time to read every label on every item they purchase in the grocery store – even if every item is labeled. In addition, consumers face the weight control “Tower of Babel” problem because they receive complex and sometimes conflicting information about the connection between the foods they eat and both obesity and disease. Witness the ebbs and flows of the Adkins diet. Sorting out all of this seemingly conflicting information may be so costly and confusing to consumers that labeling may not help people control their weight effectively.

II. IMPLICATIONS OF BEHAVIORAL ECONOMICS.

Behavioral economics assumes that people are generally rational, but are subject to certain systematic flaws in information processing and decision-making.⁶³ This section will consider the effects of affective decision-making and various specific biases and heuristics.

A. *Affective versus deliberative decision-making.*

There are two types of decision making processes. One processing mode is deliberative, analytic and rational and the other is intuitive, automatic, non-verbal, and *affective*, meaning it is based on feelings.⁶⁴ Psychologist Paul Slovic defines “affect” as

⁶² [see slide with nutrition facts cartoon]

⁶³ [add cite]

⁶⁴ Paul Slovic, *Cigarette Smokers: Rational Actors or Rational Fools?*, in *SMOKING: RISK, PERCEPTION, & POLICY* 97, 99 (Paul Slovic, ed., 2001) (“[P]eople apprehend reality in two fundamentally different ways, one variously labeled intuitive, automatic, natural,

“the specific quality of ‘goodness’ or ‘badness’ (a) experienced as a feeling state (with or without conscious awareness) and (b) demarcating a positive or negative quality of a stimulus. Affective responses occur rapidly and automatically.”⁶⁵ Affective reactions to stimuli color subsequent information processing and decision-making.⁶⁶

Hanson and Kysar note that “affective responses to products often determine our purchasing decisions.”⁶⁷ Manufacturers are aware of this, and employ affective advertising that does not tell us anything specific about the product, but sends the message that we will be happy, wealthy, popular, and beautiful if we buy their product.⁶⁸ In addition, the mere fact of a consumer being exposed to a product repeatedly can create a positive attitude about the product.⁶⁹

Affective responses also have an impact on risk perception. Judgments about risk and benefit are negatively correlated.⁷⁰ Slovic notes: “people base their judgments about an activity... not only on what they *think* about it but also on what they *feel* about it. If they like an activity, they are moved to judge the risks as low and the benefits as high.”⁷¹

One implication of the research on dual processing is that analytically-based warnings about consumption of a good that triggers a strong positive affective response may be ineffective. For example, if cigarette advertising portrays smokers as hip,

non-verbal, narrative, and experiential, and the other analytical, deliberative, verbal, and rational.” *Id.*, quoting Epstein (1994) [fill in cite]).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jon D. Hanson & Douglas A. Kysar, *The Joint Failure of Economic Theory and Legal Regulation*, in *SMOKING: RISK, PERCEPTION, & POLICY* 229, *supra* note ___, at 246.

⁶⁸ *Id.* at 247.

⁶⁹ Slovic, *supra* note ___, at 102.

⁷⁰ *Id.* at 105.

⁷¹ *Id.* at ___.

glamorous, and beautiful, a verbal warning on the product about the risks of smoking may not effectively deter consumption. Recently, some governments have experimented with graphic picture warnings that illustrate the health risks of smoking.⁷² These types of warnings can help to neutralize the strong positive affective response to the good that is attributable to affective advertising of the good.

George Loewenstein’s research on visceral factors parallels the research on affective decision-making. Loewenstein posits that visceral factors related to drive states (such as hunger) can crowd out more deliberative decision-making (including consideration of the consequences of the impulsive action).⁷³ Visceral factors make us focus on goals that, from a biological perspective, have a “high priority” such as eating when we are hungry.⁷⁴ When visceral factors are weak or moderate, will power can trump the visceral factors; on the other hand, where visceral factors are strong, they trump volition, despite the fact that the consumer often is aware that she is not acting in her long-term best interests.⁷⁵ The result is that people then behave in ways that are not in their long-term best interests. Loewenstein argues that addiction is just an extreme type of visceral factor.

There is a controversy about whether foods can be addictive (in the sense of leading to physiological withdrawal symptoms).⁷⁶ The focus on defining “addiction” may obscure the fact that “craving” may be just as important as addiction. Studies of

⁷² [add cite]

⁷³ [see slide with ice cream cone cartoon]

⁷⁴ George Loewenstein, *A Visceral Account of Addiction*, in *SMOKING: RISK, PERCEPTION, & POLICY*, *supra* note __, at 191.

⁷⁵ *Id.* at 192.

⁷⁶ Strnad, *supra* note __, at __ [40 of pdf]. Strnad notes that there are various approaches to defining addiction. For example, one approach defines addiction by reference to: (1) tolerance; (2) withdrawal; and (3) reinforcement. *Id.* [Discuss brain research conducted by U of Florida and Princeton researchers who spoke on food addiction at PHAI obesity conference. Also look at sources cited in Broken Scales at 34 of galley re sugar research.]

drug addiction have shown that environmental factors can trigger cravings that are more difficult to overcome than the physical discomfort of withdrawal.⁷⁷ Even if foods are not physically “addictive,” they definitely trigger cravings that are difficult to resist. If a food causes cravings, visceral processing results in “active but biased decision-making.” Although consumers recognize that they should abstain from consuming the good, “their ability to abstain is powerfully constrained by the force of intermittent craving.”⁷⁸ Visceral factors also “shorten the individual’s time horizon,”⁷⁹ leading the consumer to make very “short-sighted trade-offs.”⁸⁰

Loewenstein argues that people consistently underestimate the power of visceral factors on their future decision-making. They demonstrate what he calls “cold-to-hot empathy gaps.” When individuals are “cold,” meaning that they are not experiencing a visceral factor, they tend to “mispredict [their] behavior when ‘hot’,” meaning when they are subject to visceral factors.⁸¹ People overestimate their ability to resist visceral factors in the future. At best, many people know only that they will need some type of self-binding or self-control device to avoid yielding to the craving.

Economists Gary Becker and Kevin Murphy have posited a “rational addiction” model to show that consumption of addictive goods is not due to myopia.⁸² Although it had generally been assumed that addicts do not think about the future implications of ingesting the addictive good, Becker and Murphy argued that consumption of addictive goods is rational because “the addict understands that consumption in different time

⁷⁷ [Add cite from Slovic Smoking book.]

⁷⁸ Loewenstein, *supra* note __, at 190 (“cravings limit the scope of volitional control of behavior.” *Id.* at 189).

⁷⁹ *Id.* at 199.

⁸⁰ *Id.*

⁸¹ *Id.* at 193.

⁸² Gary S. Becker & Kevin Murphy, *A Theory of Rational Addiction*, 96 J. POLIT. ECON. 675 (1988).

periods are complements.”⁸³ Their conclusion is supported by subsequent empirical research that demonstrates that smokers reduce consumption of cigarettes if they anticipate a future increase in the price of cigarettes.⁸⁴

On the other hand, there is evidence that smokers have time-inconsistent preferences. Although smokers express the desire to quit smoking in the future and the expectation that they will quit smoking within five years, only a small percentage of those smokers actually quit smoking.⁸⁵ Gruber concludes that this gap between desired levels of future smoking and actual levels of future smoking is attributable to time-inconsistent preferences.⁸⁶ Professor Strnad observes that the need for self-control devices to quit smoking also is evidence of time-inconsistent preferences.⁸⁷ He notes that “adding time-inconsistent preferences to the rational addiction model does not change the prediction, observed in empirical studies, that anticipated future [price increases] should lower present consumption.”⁸⁸

Consumers display time-inconsistent preferences with respect to diet. They snack and eat supersize portions of food,⁸⁹ but express the desire and plan to lose weight.

⁸³ Strnad, *supra* note __ at __ [37 pdf].

⁸⁴ *Id.* [citing Gruber at 203].

⁸⁵ *Id.* [citing Gruber at 204].

⁸⁶ [also discuss projection bias and hyperbolic discounting? People assume that their future preferences will be the same as their current preferences. In decision-making, people apply a high discount rate to early years and a lower discount rate to later years. In the context of obesity, this means that overweight people incorrectly assume that it will be easier to lose weight in the future.

⁸⁷ *Id.* at __ [38 pdf] (self-control devices “allow the current self to impose costs on future selves who smoke beyond the point that the current self judges as optimal”).

⁸⁸ *Id.* at __ [39 pdf]

⁸⁹ [add cite and explain what happened when Ruby Tuesdays restaurant chain reduced portion size to improve the diets of their customers. Sales dropped by 5 percent, so the chain announced that it would reverse the reduction in portion sizes.]

Americans spend \$40 billion a year on weight loss products.⁹⁰ This enormous cost for dietary self-control devices illustrates the gap between desired weight and actual weight.

Gruber and Koszegi use the term “internalities” to describe the costs incurred by “different ‘selves’” at different points in time, and argue that internalities of smoking can justify higher tobacco excise taxes than under an externalities approach.⁹¹ Food excise taxes similarly could be based on the internal costs of poor diet.

B. Availability.

People tend to disregard small daily risks⁹² and ignore statistical data if it is contrary to what they experience in daily life.⁹³ In their day-to-day life, people do not see direct evidence of the injury that results over the long term from poor diet.⁹⁴ Consider a dietary example of this from the website of the Center for Consumer Freedom in a report complaining about proposals to regulate the consumption of soft drinks. “A study by Georgetown University researchers found that overweight children consumed, on average, about a shot-glass more soda per day than children of normal weight. That amounts to 30 calories -- the same number that's in a carrot.”⁹⁵ They offer this statistic to demonstrate the dietary irrelevance of soft drinks. Although “30 calories” may sound like nothing, the consumption of an extra 30 calories a day results in a weight gain of approximately 40 to 60 pounds over a 20-year period!⁹⁶ In fact, researchers recently

⁹⁰ [add cite and data re: prevalence of diets.]

⁹¹ *Id.* at ___ [39 pdf]

⁹² [discuss examples in Smoking.]

⁹³ Hanson & Kysar, *supra* note ___, at 233.

⁹⁴ *Id.* at 245.

⁹⁵ The Center for Consumer Freedom, *Pediatricians Against Fizzy Drinks*, (Jan. 7, 2004), at http://www.consumerfreedom.com/news_detail.cfm/headline/2299.

⁹⁶ One pound of weight gain results from ingesting approximately 3,500 of excess calories, although there are slight variations from person to person. James O. Hill, Holly

estimated that the median annual weight gain for Americans, of 1.8 to 2 pounds per year, likely is attributable to ingesting an extra 15 to 30 calories a day on average.⁹⁷ A recurring pattern of ingesting a seemingly trivial number of extra calories produces weight gain that many people would find surprisingly large.

C. *Framing and portion control.*

The context within which choices are presented affects the choices people make.⁹⁸ If people are offered larger portions, they will eat significantly more and not realize what they are doing.⁹⁹ Marion Nestle and Lisa Young have documented dramatic increases in food and drink portion sizes in the U.S.¹⁰⁰ Supersizing at what appears to be a bargain price makes economic sense from a retailer's or restaurant's perspective. Overhead is constant no matter how large the portion is. Food costs are only about 20 percent of the sale price of fast foods.¹⁰¹ If a fast food restaurant sells a bag of fries for \$1.25 and it costs the restaurant only 10 cents to produce a "large" portion that is 50 percent larger, the restaurant can make an extra 15 cents on each large bag of fries.¹⁰² The reason we do not feel too gluttonous for eating the 520 calorie "large" fries (instead of the 200 calorie "regular" size fries) is because there is an even larger (620 calorie) "supersize" portion.

R. Wyatt, George W. Reed, and John C. Peters, *Obesity and the Environment: Where do We Go From Here?* 299 SCIENCE ___, at 853-55 (Feb. 7, 2003).

⁹⁷ *Id.*

⁹⁸ *Broken Scales*, *supra* note ___, at ___. [search for small & medium radio ex. in article]

⁹⁹ *Id.* at 1696. [cite to specific examples on pg. 32 of article?] *See also*, Barbara Rolls, Erin L. Morris, & Liane S. Roe, *Portion Size of Food Affects Energy Intake in Normal-weight and Overweight Men and Women*, *Am J. Clinical Nutrition*, Dec. 2002. [also cite the Wansink popcorn study?]

¹⁰⁰ Lisa R. Young & Marion Nestle, *Portion Sizes in Dietary Assessment: Issues and Policy Implications*, 53 *NUTRITION REV.* 149 (1995).

¹⁰¹ *Broken Scales*, *supra* note ___ at ___ [33 of galleys].

¹⁰² *Id.*

Portion size has also increased in restaurants other than fast food restaurants. In many cases, the customer does not have the option to reduce the portion size. People have a tendency to eat their entire meal, no matter how large it is. In addition, increased portion size in restaurants may change people's perceptions of what is a normal portion size at home. Increased restaurant portion size leads to increased portion size at home.

III. IMPLICATIONS OF CRITICAL REALISM.

The recent critical realist scholarship of Jon Hanson and others stresses the situational nature and manipulability of decision-making. This normative approach shares with Behavioral Economics a concern about systematic flaws in information processing and decision-making. This approach diverges from behavioral economics, however, because the behavioral economics approach views internal information-processing and decision-making flaws in isolation. It assumes that biases and heuristics are static and can be assimilated into standard economic models. The critical realist approach focuses on both: (1) the internal information-processing and decision-making flaws; and (2) the constantly changing external market manipulation of those biases and heuristics.

Hanson, Yosifon, and Benforado recently applied a critical realist perspective to the problem of obesity.¹⁰³ The authors note many of the biases and heuristics that distort information processing and decision-making in the area of diet. They focus, in part, on the systematic processing errors that result from our unconscious efforts to reduce cognitive dissonance due to: (1) self-affirming bias; (2) group affirming bias; and (3) system-affirming bias. As individuals, we are motivated to see ourselves as "good" (the self-affirming bias). As members of a group, we are motivated to see the group of which we are a member as "good" (the group-affirming bias). As a member of a system or society, we are motivated to see the system or society of which we are a part as "good" (the system-affirming bias). As a result of these biases, individuals have a tendency to see themselves as rational and autonomous, not controlled by situation, so they attribute

¹⁰³ *Broken Scales*, *supra* note __.

situationally induced behavior to character or disposition. This is what underlies the dispositional “personal responsibility” norm.

Consumers tend to think that they are in control of their diet and weight, and assume that obesity is attributable to disposition (i.e. a lack of will-power) not to situation (including manipulation of consumer’s dietary choices through aggressive marketing). In the group context, members of groups have a tendency to divide the world into “us” and “them” and to see “us” more favorably than “them.” The authors argue that the lobbyists and other advocates who represent food manufacturers and retailers exploit this tendency by casting obese people, the trial lawyers who represent them, and the public health advocates who support dietary government intervention as “Out” groups worthy of the disdain of the “In” group. It is no coincidence that the Center for Consumer Freedom and other food and beverage industry lobbyists have given public health advocates names that link them with the political enemies of the U.S. (both real and fictional) such as Food Taliban, Grease Gestapo, Food Fascists, and Big Brother.

In the systemwide context, members of a society have a tendency to dispositionalize victims by concluding that they have gotten what they deserve. In the authors’ words, “[a] threat to our sense that the world is just is met with a justice-creating dispositional attribution reassuring us that people get what they deserve.”¹⁰⁴ Other research indicates that the system-affirming bias can trump the self-affirming and group-affirming biases and “as a consequence, disadvantaged groups will often be the most adamant defenders of the status quo.”¹⁰⁵ This tendency to dispositionalize:

“translates to a presumption against regulatory intervention even against visible harms, for the actors involved are presumed to be choosing the inevitable risks that gave rise to those harms. Since the commercial interest merely responds to individual manifestations of choice, responsibility for bad outcomes (the giant gut and the cellulite thighs) can be squarely placed on the consumer. Regulatory intervention is warranted only in circumstances in which markets demonstrably fail to respond to consumer dispositions – for instance, when consumers clearly

¹⁰⁴ [B, H & Y at 18 of Emory draft] [this quote changed in the newer version of the article published in the Emory L.J. so revise the quote.]

¹⁰⁵ *Broken Scales*, *supra* note ___, at 1667.

lack information or when a transaction creates significant externalities. But, even in the presence of such market imperfections, calls for regulation may be rebutted on the grounds that imperfect markets are preferable to imperfect regulations.”¹⁰⁶

Smokers began to win tobacco lawsuits only when plaintiff’s lawyers established that tobacco companies had hidden information about the addictive nature of smoking.¹⁰⁷ In other words, they began to win when the proof of situational manipulation of tobacco consumption was so strong that it refuted the presumptive dispositional “personal responsibility” account of tobacco consumption.¹⁰⁸

Fast food companies and food manufacturers are in business to make money.¹⁰⁹ Consistent with their profit maximizing goals, they manipulate situational pressures very effectively to encourage consumers to buy their goods. They also encourage dispositionism through their rhetoric: Have it your way; We do it all for you; Put a smile on.¹¹⁰ In fact, they manipulate the situation in such a way that consumers are not even aware they are being manipulated.

When offered the option of a super-size portion for a modest price increase, we buy it and eat more than we would have if we had purchased a smaller portion – without even realizing what has happened. The authors note:

“The ‘personal responsibility’ norm is so powerful that in spite of the mighty efforts by fast food corporations to infiltrate children’s situations and the widespread acknowledgement that children are especially impressionable and [gullible], obesity in children still manages to get pinned almost entirely on

¹⁰⁶ *Id.* at 1689-90.

¹⁰⁷ *Id.* at __ [54 of galleys] (noting that plaintiff’s lawyers eventually showed the tobacco industry “in its dressing gown, a gaunt and vampiric apparition — a history of misinformation and manipulation thrust out into the light”).

¹⁰⁸ [add cite]

¹⁰⁹ The dominant view of corporate law in the U.S. is that corporations exist primarily to maximize shareholder wealth. [add cite.]

¹¹⁰ [see slide with cat & mouse cartoon]

parents.... The choice to buy or not buy a Happy Meal is framed as the only real choice a parent is faced with.”¹¹¹

The result of this situational pressure is a distortion of dietary choices.

Excise tax skeptics argue that there are no good or bad foods, only good or bad diets.¹¹² Even the most caloric food items can be part of a balanced diet. The problem is that the diets of most Americans are not balanced. In a 1997 study, researchers found that only 2 percent of children aged 2 to 19 satisfied “all five federal recommendations for a healthy diet.”¹¹³ Excise taxes could be used to help level the playing field by counteracting the market manipulation of consumers’ dietary choices. For example, an excise tax on super-size portions would counteract the consumer perception that the super-size portion is a good deal. The authors observe: “While the law sometimes recognizes a concept of ‘imperfect information,’ there is no similar concept [of] ‘imperfect autonomy.’ We see “free choice” or “no choice” and nothing in between. And yet “imperfect autonomy” is our predicament.”¹¹⁴

IV. IMPLICATIONS OF PATERNALISM.

Under this normative approach, government intervention is warranted to protect consumers from harming others and perhaps from harming themselves. In its strongest form, it would protect consumers from harming themselves, even if the consumers being protected do not want to be protected. This approach is consistent with the idea that we should reduce human suffering where we can. On the other hand, we value liberty so we must ask whether there is a justification for limiting liberty.

Justifying government intervention on the basis of paternalism is common in the public health literature. This approach is consistent with the idea that our government

¹¹¹ *Broken Scales*, *supra* note ___, at 1705–06. [Cite to alleged “inconsistency” of Margo Wooten described on website of Center for Consumer Freedom.]

¹¹² [add cite]

¹¹³ [add cite]

¹¹⁴ *Broken Scales*, *supra* note ___, at 1798.

should adopt measures to reduce rates of disease and death that are preventable. For example, Professor Larry Gostin has argued: “When illness or disease are preventable, or when pain and disability can be alleviated, the government's failure to act is conspicuous. Persons whose morbidity and suffering could have been prevented or lessened through reasonable government interventions may understandably claim that they count less, that their dignity is undermined by governmental inaction.”¹¹⁵

There are varying degrees of paternalism. First, consistent with The Harm Principle, government may intervene to prevent harm to third parties. Second, the government may intervene to protect people from harms caused by their own choices where the decision-making process is flawed (e.g. where their consent is not voluntary or they lack information.) This form of paternalism is sometimes referred to as soft paternalism. More controversially, the government even may intervene to protect people from harm caused by their well-informed and voluntary choices. This form of paternalism is sometimes referred to as hard paternalism.

Excise tax skeptics take a strongly anti-paternalistic stance, arguing that food excise taxes are an unwarranted infringement of people’s right to choose for themselves what they will eat.¹¹⁶ When excise tax critics criticize excise taxes as a “Big Brother” or “Nanny state” approach to obesity, they are taking this rhetorical stance. The idea is that people should be free to choose whether to live in ways that are healthy or unhealthy.

Excise tax opponents seem to assume that excise taxes constitute hard paternalism, the most difficult type of paternalism to justify. Given the likelihood of dietary information processing and decision-making errors, food excise taxes could be characterized as soft paternalism if the regulatory policy “fits” the soft paternalism justification for the policy.

¹¹⁵ Lawrence O. Gostin, *Securing Health Or Just Health Care? The Effect Of The Health Care System On The Health Of America*, 39 ST. LOUIS L.J. 7, 13 (1994). [Add quote from Shelling re: statistics about suffering and disease vs information about a particular individual’s suffering and disease.]

¹¹⁶ [add cite]

In addition, an excise tax on particular foods does not “force” people to not eat the taxed food. In fact, very small food excise taxes, such as a 1 percent tax on sodas, may have little or no effect on consumption levels.¹¹⁷ Food industry spokespersons have acknowledged that fact.¹¹⁸ Even if the tax were high enough to create an economic incentive to avoid consuming the good, the role of the tax would be to shape consumer preferences to more healthy consumption patterns, not to prohibit consumption of the good. The tax also would encourage manufacturers to develop healthy untaxed substitutes for the unhealthy taxed goods.

Excise tax skeptics would likely respond that the government should take people’s preferences as it finds them. It should not attempt to alter people’s preferences. On the other hand, consumers’ current “selves” and the future “selves” may have very different preferences, and consumers may want the government to favor the preferences of the future selves. For example, smokers regret smoking and wish they could quit, so a majority of smokers actually have favored the imposition of tobacco taxes. They do not mind that the government is mandating a tax structure that gives them an added incentive to quit. Americans spend \$40 billion a year on weight loss products. If the food excise tax were structured in way that did not penalize any particular weight loss approach, we may be able to reach consensus on the imposition of the tax.

V. OTHER NORMATIVE ISSUES TO BE ADDRESSED

Food excise taxes raise other normative issues that must be addressed.

A. *Regressivity.*

Food excise taxes would be regressive, meaning that the tax would constitute a higher percentage of a poor person’s income than a wealthy person’s income. In this country, we typically prefer, as a policy matter, to distribute the burdens of paying for government programs based on ability to pay, not consumption. In other words, we

¹¹⁷ Fred Kuchler, Ababayeho Tegene, and J. Michael Harris, *supra* note __, at __.

¹¹⁸ [add cite]

generally favor income taxes, with a progressive rate structure, over regressive consumption taxes.

The public health advocates who argue for the adoption of food excise taxes have suggested that the tax be at a trivial rate (e.g., 1 percent of the cost of the soda or snack food) to eliminate concerns about regressivity.¹¹⁹ Although imposition of excise taxes creates deadweight losses, the size of the deadweight loss is lower if the tax is imposed at a lower rate instead of a higher rate.

The initially trivial size of the tax does not completely eliminate the regressivity issue if we think it likely that the size of the tax would increase down the line. In that case, we could adopt a regressivity offset through the tax system to allow lower income taxpayers to recoup some (but not all) of the food excise taxes they pay.

Food excise taxes may ultimately be less regressive than they might seem at first. If the goal of the tax is to reduce consumption of the unhealthy taxed goods, we expect consumers to avoid the tax by substituting healthier untaxed products for the unhealthy taxed goods – which reduces the regressive effects of the tax.¹²⁰ In other words, the potential inequity of the excise tax would be replaced with a potential inefficiency.¹²¹

B. Administrative costs.

Food excise taxes also raise efficiency issues related to administering the tax and defining the operative terms in the tax. Excise tax advocates argue that the tax is fair because it would be used to fund public health measures to increase awareness about diet and activity. As a tax policy matter, we also generally favor broad based income taxes over “user fees” and “dedicated taxes.” Part of the reason is that each specific user tax and dedicated tax must be separately administered. Depending on how the excise tax proposal is structured, however, it may be possible to piggyback the collection of the

¹¹⁹ [add cite]

¹²⁰ Note that obesity rates are highest in lowest socio-economic groups.

¹²¹ [add cite to Bittker]

food excise taxes on top of the collection of existing state sales tax. Numerous states already have a sales tax structure that exempts food generally but imposes a sales tax on certain foods, such as soda and snack foods.¹²²

Also, if the excise tax rates on food vary significantly from state to state, the taxes may also create bootlegging issues. Our experiences with tobacco excise taxes indicate that consumers may evade food excise taxes, for example by crossing borders between high-tax and low-tax states or by making non-taxed purchases using the internet.¹²³

C. Definitional issues.

Last but not least, adopting excise taxes on certain foods would require that we define the taxed goods precisely. For example, if we decide to tax candy, but exclude sweets with flour in them from the definition of candy, M & M's will be taxed, but Kit Kat bars will not be taxed. Although these definitional issues may be difficult to resolve, our experience with state sales taxes on certain classes of foods indicates that they can be resolved.

As states consider the definition of the taxed good in their state, they should also consider how manufacturers might respond to “game” the definition. For example, if a state taxed energy dense, nutritionally poor (EDNP) foods, manufacturers might fortify foods to take them out the class of EDNP foods.¹²⁴ Or manufacturers might add water to EDNP foods to take them out of the class of EDNP foods.¹²⁵ There is evidence that consumption of high-calorie liquids does not cause the same satiety as consumption of the same number of calories of solid food,¹²⁶ so states might want to treat liquids and

¹²² [add cite]

¹²³ Cite to Goolsbee.

¹²⁴ [add cite to Strnad.]

¹²⁵ *Id.*

¹²⁶ [add cite]

solids differently. Also, we might want to exempt particular EDNP foods, such as bread and cheese.¹²⁷

An EDNP tax also raises distributional considerations. Low income groups disproportionately consume EDNP foods,¹²⁸ so they would be particularly impacted by such a tax, unless manufacturers supplied them with nutrient rich alternatives in the same price range and consumers changed their eating habits.

Another approach that would have an impact on diet, but not penalize particular foods, would be to impose a super-size portion tax on beverages, snacks, and meals. This approach would put pressure on the determination of portion size. This approach could pressure consumers and/or manufacturers to reduce portion sizes. Super-size portion taxes would not be administrable for food prepared at home, or the raw ingredients of foods prepared at home, but could be applied to beverages, snacks and prepared meals. The super-size portion tax could be more narrowly applied to take-out and restaurant meals. The biggest normative problem with a super-size portion tax is that the caloric requirement for individuals is heterogeneous. A super-size portion tax would overtax meals that are served to very active people like laborers and athletes and might undertax meals that are served to children. It might be possible to combine the super-size portion and EDNP approaches as applied to restaurant meals.

VI. CONCLUSION.

Obesity rates have increased dramatically in America. Public health advocates consider it self-evident that the government, as a public health matter, should intervene to improve nutrition. Their focus is on reducing the disease and premature death that could be avoided through better nutrition. It does not usually occur to them to consider the normative justification for such intervention.

Various normative theories have different implications for the implementation of food excise taxes as a response to the obesity epidemic. Under the economic approach to

¹²⁷ [add cite to Strnad.]

¹²⁸ [cite to Drewnowski]

excise taxes, taxes are warranted only if consumption of the good generates negative externalities. It is not clear whether consumption of a poor diet or certain classes of foods or drinks generates negative externalities, but future empirical research can resolve that question, as the Manning Study and later studies did with respect to smoking externalities. In the alternative, another market failure, incomplete information, might justify food excise taxes.

Under the behavioral economic approach, excise taxes might be justified to correct for systematic information and decision-making errors people make with respect to their diets. Americans' dietary preferences are time-inconsistent. Americans spend \$40 billion a year on weight loss products, but prefer supersize portions of restaurant food because supersizing looks like a good deal. Food excise taxes could serve as a form of self-control device to reduce distortions caused by affective decision-making. Excise taxes also could create incentives for food manufacturers and restaurants to offer consumers healthier choices.

Under the critical realist perspective, the focus is on the commercial manipulation of the situation. Food manufacturers and restaurants use sophisticated techniques to manipulate consumers' biases and heuristics for profit, but encourage consumers to take personal responsibility for their weight gain. The critical realist approach may support excise taxes as a means of countering commercial manipulation of situational pressures that encourage poor nutrition.

Food excise taxes also can be justified under the soft paternalism approach to protect people from their own choices if dietary decision-making is flawed (for example, is made with incomplete information). Hard paternalism is a far more controversial and problematic rationale for food excise taxes.

Food excise taxes can best be justified as a correction for day-in-day-out systematic information processing and decision-making errors that consumers make with respect to diet. As policymakers consider implementing food excise taxes, they should be careful to design the taxes to fit the normative justification for them.