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Media Representations of Obesity: First Amendment Friendly Approach to Addressing Hate Speech in the Media

Jacquelyn Simmons

Introduction

Mass media sets the agenda for public discourse by their selection of what is newsworthy, or worth reporting.¹ The discourse surrounding obesity, most often describes the condition as an epidemic, and most frequently uses war metaphors.² In fighting obesity, however, we most often fight ourselves and loved ones,³ alienating those who should be closest to us by constructing a veil of shame, condemnation, stigma, and stereotype.

Though media is most often conceptualized as a tool for transmitting information, it also has the power to identify, name and shape issues, informing public opinion on a given subject.⁴ This is particularly salient when mainstream media reports, or fails to report, events involving marginalized groups.⁵ The public representations of obesity do not merely inform us of “medical or biomedical ‘facts’, but also create meanings that influence cultural understandings of health, the body, and eating,” as well as understandings of the value of individuals.⁶

The number of articles reporting on the epidemic nature of obesity has dramatically increased in recent years demonstrating a reframing of the issue. Specifically, the perception of

¹ Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36:2 THE PUBLIC OPINION QUARTERLY 176, (Summer 1972)(showing a nearly perfect 1:1 correlation between what the major item emphasis portrayed by the media and what respondents independently judged to be important issues).

² Emma Rich & John Evans, “*Fat Ethics*” – *The Obesity Discourse and Body Politics*, 3 SOCIAL THEORY & HEALTH 341, 342 (2005), see also Lee F Monaghan, *Discussion Piece: A Critical Take on the Obesity Debate*, 3 SOCIAL THEORY & HEALTH 302, 306 (2005)(“in the war against fat, it often makes sense to become a smaller target”).

³ Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self-Interest*, 66 J. PERSONALITY & PSYCHOL. 882, 883 (1994) (“Fat people are denigrated by thin people, health care workers, employers, peers, potential romantic partners, their parents and even by themselves.”) (citations omitted).

⁴ Lorie M. Graham, *A Right to Media?*, 41 Colum. Human Rights L. Rev. 429, 429 (2010).

⁵ Id.

⁶ Rich, *supra* note 2 at 344.

fat has altered in the last one hundred years as societal perceptions of beauty have changed.⁷ The prejudice against fat birthed in a twentieth century ideal has created obesity as a physiological condition, where medical data remain unclear.⁸ Only in recent years has obesity become a quasi-medical “epidemic;” an epidemic that has largely been constructed through media discourse on weight.⁹ Such discourse relies on inferences drawn from an ethos that pre-dates obesity’s designation as a medical condition or American epidemic.¹⁰ It is a discourse largely developed and distributed by mass media¹¹ which, rather than focusing on actual health outcomes, centers around the generation and perpetuation of weight-based bias. Specifically, obesity has been defined as a “post-modern epidemic,’ one in which unevenly medicalized phenomena lacking a clear pathological basis get cast in the language and moral panic of more ‘traditional’ epidemics.”¹² Although we are continually warned of the “obesity crisis,” the relationships between obesity and health are far more complex and contradictory than the media discourse would lead us to believe.¹³

⁷ See Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 30-32 (1997) (“The slimming of American women . . . is a recent obsession following a ‘marked trend toward an increasingly thin ideal in women’s beauty.’ Only in the last seventy years or so has western culture equated slimness with beauty. ‘Between 1400 and 1700, . . . fat was considered fashionable and erotic.’”); Natalie Boero, *All the News that’s Fat to Print: The American “Obesity Epidemic” and the Media*, 30 QUAL. SCIOL. 41, 41 (2007).

⁸ KAREN E. FIELDS & BARBARA J. FIELDS, *RACECRAFT: THE SOUL OF INEQUALITY IN AMERICAN LIFE*, Verso Books (2013) (arguing that the assumption that racial prejudice is built upon differentiation in skin tone is false. Rather, the concept of race is a societal construct fabricated in order to justify the prejudice against, and subjugation of, minority groups.) Similarly, the concept of obesity arose 30 years after the initiation of prejudice based upon fat which coincided with a preference for natural thinness when the corset was abandoned.

⁹ Natalie Boero, *All the News that’s Fat to Print: The American “Obesity Epidemic” and the Media*, 30 QUAL. SCIOL. 41, 42 (2007) (Analyzing over 750 articles printed in the New York Times, the nation’s paper of record, between 1990 and 2001. The analysis showed that almost half were printed after 1998, and the number grossly outweighed the number addressing smoking (544), AIDS (672) and pollution (531) in the same time period. The articles did “far more than reflect the existence of a biomedical epidemic.”).

¹⁰ *Id.* at 42.

¹¹ *Id.*

¹² *Id.*

¹³ Rich, *supra* note 2 at 343; Monaghan, *supra* note 2 at 306 (“clinical guidelines for obesity are derived not from a rigorous evidence base but from unfounded assumptions about weight, morbidity, and metabolic fitness. And they overlook extensive research linking physiological responses to stress/discrimination with central adiposity, hyperphagia and hypertension. And yet governments and health organizations talk about “tackling weight problems”, while more expansive and intimately connected problems associated with social injustice [i.e. low socioeconomic status, lack of education, lack of access to healthcare] get hidden and suffocated by fat.”).

Though there is no dispute that there has been an increase in average weights and in potential health problems associated with unhealthy lifestyles, the conflation of excess fat and being overweight exaggerates the seriousness of the “epidemic” and creates a moral panic where none is necessary.¹⁴ Reporting in such a manner serves to perpetuate weight stigma, and descriptions used in the media are intended to appall and disgust,¹⁵ further perpetuating bias. Indeed it has been observed that prejudice on the basis of weight is the last socially acceptable form of discrimination.

The myths about overweight individuals abound, feeding into prejudice and intolerance. The overweight are perceived to be lazy, unattractive, unintelligent, and lacking energy and motivation.¹⁶ These myths are played out and perpetuated in popular television shows, movies, commercials, and advertisements. While there is a societal interest in promoting public health, fat hatred and fat shaming are not a necessary element in promoting healthy lifestyles. In fact, they are detrimental.¹⁷ Moreover, pervasive portrayals of stereotypes contributes to the individual’s experience of discrimination and prejudice, and via stereotype threat, limits performance of the stereotyped individual in response to the societal pressure.¹⁸ Such representations in the media, which fabricate and perpetuate defamatory stereotypes promotes hatred and condemnation of obese individuals and creates a climate of fear: fear of ridicule,

¹⁴ Rich, *supra* note 2 at 343.

¹⁵ Specifically words used to describe overweight actors, such as “female hippo,” “tractor-sized,” “humongous,”

¹⁶ Donald L. Bierman Jr., *Employment Discrimination Against Overweight Individuals: Should Obesity be a Protected Classification*, 30 SANTA CLARA L. REV. 951, 959 (1990) (noting The overweight are perceived to be lazy, slow, mentally disabled, and lacking energy). *See also* Korn, *supra* note 7 at 26 (“Society describes men and women who are obese as ‘lazy, sexless, ugly, self-indulgent, and sloppy.’ Others view the obese as “less intelligent, less creative, laier, dirtier and uglier than their thinner counterparts.”).

¹⁷ *See* Lucy Aphramor, *Is a Weight-Centered Health Framework Salutogenic? Some Thoughts on Unhinging Certain Dietary Ideologies*, 3 SOCIAL THEORY & HEALTH 315, 319 (2005) (listing consequences of dieting behaviors to include weight gain, compromised immunity, adverse skeletal integrity, decreased dietary quality, chronic dieting, poor body image, reinforcing a sense of failure, low mood, increased risk of laxative abuse/binge eating/purging/smoking, decreased exercise, and increased cardiovascular risk).

¹⁸ MICHAEL INZLICHT & TONI SCHMADER, *STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION* (Oxford University Press 2011).

discrimination, shame and isolation. This intimidation and subjugation is at the core of hate speech.¹⁹

Though the preservation of freedom of expression is one of the most highly cherished of American constitutional guarantees, it is not absolute.²⁰ All speech is not created equal.²¹ The Supreme Court has found that the government has a countervailing social interest that justifies some limitations on speech,²² including libel and defamation.²³ Though hate speech, *per se* is not regulatable, it threatens the public peace via the shaming and silencing of its targets, and thereby falls outside First Amendment protection.²⁴

The first section of this paper will focus on what constitutes hate speech, and determines that using the definition promulgated by leading thinker Jeremy Waldron,²⁵ the media representations of obese individuals comprise group libel which may be regulated under current First Amendment jurisprudence. The second section demonstrates the danger posed by the libelous representations of obese individuals seen most emphatically through stereotype threat and sanctioned discrimination. The third section examines the societal costs of obesity and determines that those do not warrant the treatment that obese individuals are exposed to in society and the media. The fourth section reviews various methods of remediation that aim to reduce incidents of obesity and yet are ineffective because of the perpetuation and internalization of stigma associate with weight-based bias. This section will also suggest methods to reduce the

¹⁹ Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in Democracy*, 44 WAKE FOREST L. REV.497, 499 (2009) (Hate speakers seek to intimidate targeted groups from participating in the deliberative process).

²⁰ U.S. Const. art I. "Congress shall make no law . . . abridging the freedom of speech, or of the press." See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, xi (Free Press 1995) (observing that this protection most symbolizes American dedication to liberty under the law).

²¹ See Sunstein, *supra* note 20 at 8 (noting that in our current jurisprudence the differentiation between high and low value speech, though not clearly delineated, indicates that there is a basic assumption that there are some forms of speech more deserving of protection than others).

²² *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²³ Tsesis, *supra* note 18 at 498.

²⁴ *Id.* at 502

²⁵ JEREMY WALDRON, *THE HARM IN HATE SPEECH* (Harvard Press 2012).

harm inflicted by the thin-centric media through government prescription and proscription of certain speech. Ultimately, this paper argues that in order to further the interests of free speech in a democratic society, the deleterious representations of obese individuals in the media must be limited in order to lend a voice to the significant minority currently being silenced by weight bias.

I. Media Representations of the Obese as Hate Speech

The overweight are generally portrayed as lazy, oafish, grotesque, and less intelligent.²⁶ While it is not determined whether the media representations create the stereotypes or simply play into and repeat them, it is undisputed that this widely held perception is also widely displayed on the screen. Rebel Wilson, an up and coming actress who happens to be overweight, has made showings in several recent comedies. In *Pitch Perfect* she plays “Fat Amy,” who, in order to remove the sting of the “skinny twig” girls talking about her behind her back, preemptively identifies herself as fat.²⁷ In the film *Bridesmaids* she plays the roommate of the main character, who has no job, gets a tattoo of a parasitic worm across her body that becomes infected, and has a questionably close relationship with her brother.²⁸ Melissa McCarthy also appears in *Bridesmaids*, where she is portrayed as crude, vulgar, uncultured (flopping over the sofa at a bridal boutique, uncontrollably overeating every chance she gets, her proposition of a male passenger on a plane mockable and awkward).²⁹ It is not until the end of the movie that we are briefly informed that she is presumably incredibly intelligent with an important government

²⁶ Lindsay Abrams, *A Case for Shaming Obese People – Tastefully*, THE ATLANTIC (Jan 23, 2013 12:47 PM ET). <http://www.theatlantic.com/health/archive/2013/01/a-case-for-shaming-obese-people-tastefully/267446/> (“The obese are said to be lazy, self-indulgent, lacking in discipline, awkward, unattractive, weak-willed and sloppy, insecure and shapeless.”).

²⁷ *PITCH Perfect* (Universal Pictures 2012).

²⁸ *BRIDESMAIDS* (Universal Pictures 2011).

²⁹ *Id.*

position. More recent portrayals in *The Heat*³⁰ and *Identity Thief*³¹ promise more of the same physical comedy, reliant upon quick and easy gag bits based on weight.

The censure is not limited to female portrayals. Overweight actors have always been the objects of ridicule.³² Some use their obesity to make comic movies, throwing their weight around like a giant sight gag.³³ Others, like Marlon Brando, let their weight get out of control but were able to maintain success built upon a previous perception of being a “sex symbol.”³⁴ Similar to the overweight ladies, overweight men by and large are portrayed as dimwitted, oafish and slovenly. Kevin James in *Paul Blart: Mall Cop*³⁵ is shown to be underachieving, clumsy, gluttonous, and inactive (relying on a Segue motor scooter to navigate a shopping mall),³⁶ who blunders his way into success and pseudo heroism. Such portrayal is despite the fact that he has demonstrated a charm and class when “made over” in a previous role in the film *Hitch*.³⁷ The constant derision of overweight characters provide easy fodder for entertainment writers and creates a social construct in which society finds it acceptable to make similar jokes in public. Moreover, the overweight individuals internalize this exchange, and expect to bear the brunt of such “comedic” diatribes.³⁸

In line with James’ kinder treatment in *Hitch*, media representations in which overweight individuals are featured prominently tend to be “makeover” shows. For example, programs such as *The Biggest Loser* or *Extreme Makeover* or MTV’s *Made*, require overweight people to be

³⁰ THE HEAT (Twentieth Century Fox Film Co. 2013).

³¹ IDENTITY THIEF (Universal Pictures 2013).

³² Shawn Lealos, 10 Overweight Actors, MADE MANUAL: INSTRUCTIONS FOR LIFE (Sep. 30, 2010), <http://www.mademan.com/mm/10-overweight-actors.html>.

³³ Id.

³⁴ Id.

³⁵ PAUL BLART: MALL COP

³⁶ Id.

³⁷ HITCH (Columbia Pictures Corp. 2005).

³⁸ George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26:2 J. COMMUNICATION 172, 182 (Spring 1976) (“As any mythical world, television presents a selective and functional system of messages . . . Being buffeted by events and victimized by people denotes social impotence; ability to wrest events about, to act freely, boldly and effectively is a mark of dramatic importance and social power.”).

maniacally driven or surgically altered to remove excess pounds. The message in those shows is clear: overweight people are only worth notice when they go to extremes to lose weight.

Moreover, in a supreme act of victim blaming, these shows promote the misconception that obesity is a consequence of individual failure, rather than a mixture of individual, environmental, social and genetic influences.³⁹

In addition to the way overweight individuals are *portrayed* in the media, of similar importance is the way that they are *precluded* from the media. The absence of representation, or underrepresentation, of some group of people in the media constitutes "symbolic annihilation."⁴⁰ This symbolic annihilation conveys to the missing group that they are not worthy of notice in the real world. Symbolic annihilation can be divided into three aspects: omission, trivialization and condemnation.⁴¹ This multifaceted approach to coverage not only disparages the communities of identity, make members invisible through the explicit lack of representation in all forms of media. One does not see overweight or obese characters in the same proportion as seen in society. Up to 60% of the adult population is considered to be overweight, however only 25% of men and less than 10% of women on screen are at or above normal weight.⁴² Moreover, one does not see overweight persons in the professions, or in positions of power or industry.⁴³ Nor are obese individuals portrayed as romantic interests, and if they are it is generally only for other overweight individuals which indicates that no one of "normal" size would wish to be romantically involved with someone who is overweight or obese.⁴⁴ This adds to the shame and denigration of a substantial portion of the population. Media and social bias becomes economic

³⁹ Id.

⁴⁰ Id. ("Representation in the fictional world signifies social existence; absence means symbolic annihilation.").

⁴¹ See Gaye Tuchman, *Making News: A Study in the Construction of Reality*, Free Press (1978).

⁴² John Whyte, *Media Portrayal of People who are Obese*, 12:4 AMERICAN MEDICAL ASSOCIATION J. OF ETHICS VIRTUAL MENTOR 321, 321 (Apr. 2010).

⁴³ Id. at 322

⁴⁴ Id.

bias as candidates who are overweight are less apt to be hired or promoted.⁴⁵ At the same time, norms for what is “normal” weight continue to slide down the scale.⁴⁶ Hollywood is fraught with waifish women, as the desired female aesthetic has diminished in recent years.⁴⁷ Such representations not only disempower the obese, but disempowers women who are consistently barraged by demands to take up less space, and be less visible.

The climate of fat hatred in the media is only growing more prevalent. News outlets are now reporting a call for fat shaming, the overt and intentional use of ridicule and condemnation, as a mechanism to remediate the “obesity epidemic.”⁴⁸ The premise behind the campaign is that such an approach would be similar to the “shaming” techniques used to combat cigarette smoking and drunk driving.⁴⁹ However, there are substantial differences between smoking, drinking and obesity. One does not have to smoke, nor does one have to drink in order to survive. Even if the analogies defining obesity as due to an “addiction” were perfect, the principal difference is that one cannot simply stop eating. One must consume food in order to survive, and so the trigger for the addiction, if there is one, cannot be avoided. Moreover, the sufferers of the condition are forced to live in a culture permeated with food in the form of advertisements and inundated with readily accessible fast foods. More specifically, they are

⁴⁵ Steven L. Gortmaker et al., *Social and Economic Consequences of Overweight in Adolescence and Young Adulthood*, 329 NEW ENG. J. MED. 1008, 1011 (1993) (“Evidence from several studies indicates that obese persons, particularly women, are highly stigmatized in the United States. There is evidence of discrimination against obese persons, including ‘employer prejudice,’ and lower-than-expected levels of occupational attainment among overweight workers.”). *See also* Korn, *supra* note 7 at 25 (“Studies indicate that obese women earn less than their thinner counterparts, and . . . that women are not fat because they are poor, rather they may be poor because they are fat.”).

⁴⁶ *Who’s Fat? New Definition Adopted*, CNN INTERACTIVE (June 17, 1998 2:10 PM), <http://www.cnn.com/HEALTH/9806/17/weight.guidelines/> (noting that millions of people became obese overnight with the change in standards adopted by the National Institute of Health based on the Body Mass Index which ignores the frame of the individual, uses the same weights for men and women, and does not take into account muscle mass).

⁴⁷ Korn, *supra* note 7 at 25 (“Over the past few decades . . . women have faced increasing pressure to become slimmer, as evidenced by the changing ideal female image. Playboy centerfolds, for example, have become thinner . . . Meanwhile, Miss America pageant winners ‘grew [one] inch taller and [five pounds] thinner. . . .’”).

⁴⁸ JoNel Aleccia, *Fat-Shaming May Curb Obesity, Bioethicist Says*, TODAY HEALTH (Jan 24, 2013 5:05 AM), http://todayhealth.today.com/_news/2013/01/24/16664866-fat-shaming-may-curb-obesity-bioethicist-says?lite.

⁴⁹ *Id.*

enveloped in a society that equates food with reward and where social gatherings are constructed around the trigger. Moreover, the overweight are already demonstrably subject to such derision, though the societal approval remains somewhat tacit. Applying more shame to overweight individuals will only increase instances of weight gain, as shaming and indignity have been found to lead to *decrease* motivation to perform healthy behaviors.⁵⁰ Such fat shaming already exists in the negative portrayals of obese individuals, news media declaring war on such individuals, as well as the conspicuous absence of overweight individuals in media despite their significant presence in the American population. When taken together, such treatment creates the perception that overweight persons are less deserving of recognition and dignity.

Constitutional scholars are divided over permissible regulation of hate speech. Jonathan Rauch would argue that the representations of obese persons in the media do not constitute hate speech, but even if they did, they should not be regulated.⁵¹ According to Rauch, the impulses driving the push to limit harmful speech are guided by egalitarian and humanitarian principles.⁵² These principles seek to “help the oppressed and let in the excluded” and “stop verbal violence and the pain it causes” respectively.⁵³ To Rauch there is no greater threat to liberty than the humanitarian perspective, wherein individuals who have been offended have the right to redress and apology.⁵⁴ In fact, it is deadly to intellectual freedom and the pursuit of knowledge.⁵⁵ Thus, no matter what the harm caused by speech, even if violent, it should not be regulated. The humane norm that should be pursued is liberal science, according to Rauch, though it permits and even sometimes encourages offensive speech because it has been successful as a producer of

⁵⁰ See generally Jason D. Seacat & Kristin D. Mickelson, *Stereotype Threat and the Exercise/Dietary Health Intentions of Overweight Women*, 14:4 J. HEALTH PSYCHOL. 556 (May 2009).

⁵¹ JONATHAN RAUCH, *KINDLY INQUISITORS*, University of Chicago Press (1993).

⁵² *Id.* at 28.

⁵³ *Id.*

⁵⁴ *Id.* at 26.

⁵⁵ *Id.*

technology, peacemaker, and builder of social bridges.⁵⁶ Though Rauch's view does not ignore the harm perpetrated by such offensive and demeaning speech, it does subordinate this harm to the greater purpose of promoting liberty through increased discourse. Thus for Rauch, the cure for the offensive speech is simply counter speech. However, as this article will demonstrate, the perpetration of negative stereotypes creates a silencing effect, which reduces the incidence and efficacy of speech counter to the stereotype. While in the absence of such silencing Rauch's concept would preserve access to the market of ideas and promote great liberty in the realm of speech, it is insufficient to address the realities of the current animus filled climate.

Cass Sunstein, on the other hand, recognizes that the inherent harms of some speech remove them from First Amendment protection permitting regulation.⁵⁷ Further, he makes explicit notice of the harms fundamental to hate speech.⁵⁸ However, in the case of such invective, he exempts from protection only those expressions that amount to no more than "mere epithets."⁵⁹ In terms of regulation, however, he maintains an additional element, requiring that the speech not only be unprotected, but also that the government be able to invoke a neutral "harm based" justification for such subject matter restriction.⁶⁰ If read broadly, Sunstein's approach would allow remediation for victims of hate speech when taken in conjunction with the proven psychological, emotional, and economic harm experienced by those subjected to stereotype threat. However, as Sunstein limits his definition of epithet to an exceedingly narrow

⁵⁶ Id.

⁵⁷ Sunstein, *supra* note 20.

⁵⁸ Id. at 186 (noting that invective directed at minority groups creates fear of violence, exclusion and subordination not plausibly described as "mere offense." Moreover, such harms are arguably antithetical to political equality, a precondition for democracy and animating element of the First Amendment itself. Further, he recognizes that people confronted with hate speech may experience silencing, noting that they are reluctant to speak in the face of such attack, and are not heard even when they do).

⁵⁹ Id. at 187. However, *Webster's Dictionary* defines an epithet as "a characterizing word or phrase accompanying or occurring in place of the name of a person or thing" or "a disparaging or abusive word or phrase," thus any descriptive term could plausibly form the basis of an epithet.

⁶⁰ Id. at 193, "A subject matter restriction on unprotected speech should probably be upheld if the legislature can plausibly argue that it is counteracting harms rather than ideas."

category of unprotected fighting words,⁶¹ he denies redress to anyone not immediately driven to enraged violence at the imposition of such speech. Thus for Sunstein, as the humiliating and shaming treatment of obese individuals in the mass media does not invite or induce violent reaction, there is no constitutional means for regulation of such expression.

Jeremy Waldron provides a mechanism through which the individual and social harms occasioned by the vilification of minority groups may be remedied. Relying on the case of *Beauharnais v. People of the State of Illinois*,⁶² Waldron argues that libelous publications targeting groups remain prohibited. Causing offense is not the same as launching a libelous attack on a group's dignity⁶³ to Waldron, and the execution of such an attack lies outside the reach of law.⁶⁴

There exists, in some realms, a “right to media” which comprises core rights including freedom of expression and the right to receive information.⁶⁵ This right to media supports other core rights, such as the rights to non-discrimination, self-determination, and respect for integrity.⁶⁶ False representations create and perpetuate unfounded stereotypes and serve to subordinate a portion of the population, thus violating the aforementioned bundle of rights. As publications that denigrate, demean, and deny dignity to a minority group, current

⁶¹ Id. at 192.

⁶² 72 S.Ct. 725 (1952). (stating “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. ‘Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.’”).

⁶³ Jeremy Waldron, *supra* note 25 at 85 (Positing that dignity is a matter of status that is normative, it is something about a person that commands respect from others and from the state. Dignity requires the element of assurance, an assurance to all citizens that they can count on being justly treated).

⁶⁴ Id. at 45 (“It is not the immediate flare-up of insult and offense that “hate speech” connotes . . . it is the fact that something expressed becomes established as a visible or tangible feature of the environment – part of what people can see and touch in real space . . . that is what attracts the attention of the criminal law.”).

⁶⁵ Lorie M. Graham, *supra* note 4 at 430-431.

⁶⁶ Id.

representations of overweight individuals in the media constitute hate speech as a form of group libel. The direct harm affected is visible in the presence of constant ridicule, permissible discrimination in the workplace, lack of access to opportunity, and diminished personhood for overweight individuals, and calls for elimination of such denigrating discourse from a well-ordered society.

II. The Stereotype Threat for Obese Individuals

Mass media representations create and perpetuate stereotypes, which in turn cause stereotype threat. Stereotype threat is a situational dynamic wherein individuals are aware that their behaviors could be judged based on negative stereotypes.⁶⁷ When negative stereotypes are widely known, anything a person says or does that is consistent with the stereotype lends credence to the stereotype as a self-characterization.⁶⁸ This threat of confirming negative stereotypes introduces extra-task concerns, which distract from performance and can ultimately result in stereotype confirmation.⁶⁹ Thus, where individuals are consistently stereotyped as lazy, indolent, slovenly, less intelligent, or otherwise inferior, the anxiety and associated stress become so intrusive, that the individual ultimately displays such traits reinforcing an otherwise artificial construct.

Stereotype threat spillover, which is defined as a “situational predicament whereby coping with negative stereotypes leaves one in a depleted volitional state and, thus, less able or willing to engage in a variety of tasks requiring effortful self-control,”⁷⁰ has particularly salient implications for obese individuals. In other words, the shaming approach of the media, creating

⁶⁷ Michael Inzlicht, et. al., *Lingering Effects: Stereotype Threat Hurts More than You Think*, 5:1 Social Issues and Pol’y Rev. 227, 227-228 (2011).

⁶⁸ Id. at 228.

⁶⁹ Id. (“Stereotype and social identity threat, once appraised ... result in a number of physiological, emotional, cognitive, and behavioral reactions that are distinguished along the lines of *involuntary* stress reactions and *voluntary* coping responses.”)

⁷⁰ Id.

and perpetuating false negative stereotypes regarding obesity, decreases the likelihood of overweight individuals participating in healthful behaviors that require activity or restriction. Specifically, it has been shown that when 100 women were primed to think about weight-based stereotypes, it led to diminished exercise and dietary health intentions.⁷¹ Thus when women are surrounded by images, commercials, television shows, and movies that reinforce the stereotypes of the overweight as lazy, undesirable, and gluttonous, they are less able to then engage in behaviors that would remove from them the stigma. Moreover, such a depleted volitional state and reduced ability to exercise self-control would make it nearly impossible for the individual to be successful in healthful intentions, even if they motivated themselves to engage in them, because they do not have the necessary internal resources to see them to fruition. Thus the explanation for the failure of 95% of dietary efforts may lie in the proliferation of the negative weight based stereotypes and the associated stereotype threat spillover.

Stereotype and social identity threat have lingering effects that continue to influence people after they leave threatening environments, such that it has residual effects on behavior even in areas unrelated to the impugning stereotype.⁷² It creates a dual-task paradigm wherein the affected individual experiences emotions and cognitions competing with limited executive resources.⁷³ Thereby, the individual suffers processing inefficiencies caused by the depleted executive resources, increasing the likelihood of diminished performance in a myriad of tasks.⁷⁴ When the stereotype and associated stereotype threat are removed or redressed, the individual can then perform equivalently or better than their non-stereotyped peers.⁷⁵

⁷¹ Jason D. Seacat & Kristin D. Mickelson, *Stereotype Threat and the Exercise/ Dietary Health Intentions of Overweight Women*, 14:4 J. HEALTH PSYCHOL. 555 (May 2009).

⁷² Inzlicht, *supra* note 66 at 232.

⁷³ *Id.* at 231.

⁷⁴ *Id.*

⁷⁵ Tom Schmader, et. al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115:2 PSYCHOL. REV. 336 (2018).

The harm inherent in the media representations through the perpetuation of stereotypes and the corresponding defamation also contributes to incidents of active discrimination of obese individuals. The stereotyping of fat, and this correlated harm, is so ubiquitous that it is assumed.⁷⁶ In every day life, overweight individuals are subjected to verbal ridicule and outright disdain. Specifically, in an otherwise politically correct society, wherein it is acknowledged that it is generally unacceptable to insult on the basis of race, gender, sexual orientation, or national origin, it is yet entirely permissible and reasonable to be “blindingly rude” to the overweight.⁷⁷

In the face of such open hostility, the number of celebrities who have donned “fat suits” in order to shed light on the poor treatment of overweight individuals has sky rocketed in recent years. Notably, the incredibly thin Gwyneth Paltrow reported being ignored, and treated as invisible when wearing the fat suit for *Shallow Hal*.⁷⁸ Tyra Banks, the American super model, faced laughter, stares, and nasty comments, to which she did not respond.⁷⁹ One more self-aware woman noted that when confronted with open and audible insults, calling her “disgusting,” she was “tempted to tell them that they, too, were no oil paintings. But curiously, encased as [she] was in blubber, [she] lacked the confidence to stand up to them.”⁸⁰

This experience, along with the absent responses of otherwise ogled celebrities, demonstrates the silencing effect that such a hostile environment engenders. Those exposed to the judgment and prejudice based on the media driven stereotypes emphasizing the thin aesthetic

⁷⁶ See Rich, *supra* note 2 at 344. See also Rich, *supra* note 2 at 347 (“culturally universal demands, that everyone should participate in the culture of thinness . . . may have damaging implications for people’s self-esteem, embodied identities, and understanding of health and self.”); Aphramor, *supra* note 17 at 333 (“societal weight stigmatization adversely affecting the fat person’s health and well-being – in and beyond the healthcare setting. . .”).

⁷⁷ *My Big Week as a Size 26*, MAIL ONLINE (Jul. 8, 2004 11:34 AM), <http://www.dailymail.co.uk/femail/article-309523/My-big-week-size-26.html>.

⁷⁸ *Paltrow Humiliated by Fat Suit*, ABC NEWS (Aug. 21,), <http://abcnews.go.com/Entertainment/story?id=102849&page=1#.UWMLt3B7Gi8>. Specifically, no one would make eye contact, and felt humiliated because people were “dismissive.”

⁷⁹ *Tyra Banks Experiences Obesity Through a Fat Suit*, ABC NEWS GOOD MORNING AMERICA (Nov. 4, 2005), <http://abcnews.go.com/GMA/BeautySecrets/story?id=1280787#.UWMDdnB7Gi8>.

⁸⁰ *My Big Week as a Size 26*, *supra* note 76. (Author also notes that while in the suit, she became invisible to men, who were no longer accommodating or sociably polite. To women she became an object of “horrified fascination”).

are precluded from voicing opposition and thereby providing counter speech to contend with the media's presentation. This silencing effect violates the victims' freedom to engage in discourse, and to participate in the marketplace of ideas. The marketplace is thus obstructed, and ceases to perform its function. In order to preserve this portion of the population's right to self expression, some action must be taken to reduce and remediate the construction of negative stereotypes through specious media representations.

Most salient in these "experiments" is the fact that wearing the suit changes no other quality about the individual. They maintain the same personality, the same intelligence, the same health profile. The only aspect that has altered is their aesthetic appeal, which makes them the target of socially sanctioned contempt and dehumanization. This dehumanization has far reaching implications. Recent research on mirror neurons, specialized brain cells that permit us to detect and engage with the mental states of other individuals, and allow us to understand empathically what other people are saying and doing,⁸¹ indicate that their functionality is influenced by the perceived likeability of the observed individual.⁸² Specifically, where the observed individual is perceived as dislikable by the observer, the mirror neurons fail to fire, indicating that the consciousness and appreciation of the observed individual is limited in the observer.⁸³ The observer is literally unable to engage in what the other person is communicating.⁸⁴ Thus the proliferation of disgust and disdain for the overweight not only deprives them of the opportunity to speak by robbing them of their voice in the marketplace, it also precludes the listener's ability to attend to their communication, thereby contravening the

⁸¹ V. Gallese, *The "Shared Manifold" Hypothesis. From Mirror Neurons to Empathy*, 8 J. CONSCIOUSNESS STUDIES 33 (2001).

⁸² Mona Sobhan, et. al., *Interpersonal Liking Modulates Motor-Related Neural Regions*, PLOS ONE (Oct. 5, 2012), <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0046809>.

⁸³ Id.

⁸⁴ Id.

First Amendment rights of each.⁸⁵ Therefore the climate of hatred generated by media perpetuated stereotyping and scorn creates a two-fold silencing effect which dispossess the overweight of their right to self expression as well as the listener's right to hear guaranteed by the First Amendment. Thus in the present case, *lack* of government regulation results in infringement upon the freedom of speech for the entire population.

This silencing effect on the overweight, moreover, makes it impossible for the overweight to effectively combat the prevalence of employment discrimination. Employment discrimination based on weight is a recognized reality, and is now equal in occurrence to racial discrimination,⁸⁶ yet it remains unregulated by law. Unlike discrimination based on race, gender, religion, or disability,⁸⁷ overweight individuals subjected to discrimination have no available legal remedy, as there is no statutory provision precluding discrimination based on weight.

Certainly, employers have a right to control productivity by discriminating against those individuals or job applicants with high potential for absenteeism and low productivity.⁸⁸ However, lawful discrimination can only occur where policy, procedure, or practice is applied uniformly and reasonably.⁸⁹ In the case of obesity, the three prongs are not applied uniformly or reasonably, as men are not discriminated against in the same measure as women. Moreover, the

⁸⁵ FREDERICK DOUGLASS, GREAT SPEECHES BY FREDERICK DOUGLASS, 48-50 Dover Publications (John Daley ed. 2013) (Noting that free speech was regarded as one of the most sacred rights by the Framers. Moreover, government regulation of speech is a double wrong in that it not only deprives the speaker of the right to express his views, but also the listener's right to hear to view expressed).

⁸⁶ See generally Rebecca Puhl, et. al., *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, INTERNATIONAL J. OF OBESITY 1 (2008).

⁸⁷ Title VII of the Civil Rights Act of 1964 provides "it shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C.A. § 2000e-2 (West 2013). The Americans with Disabilities Act provides similar protection based on medical disability that does not interfere with essential job functions. 42 U.S.C.A. § 12112 (West 2009).

⁸⁸ Donald L. Bierman Jr., *Employment Discrimination against Overweight Individuals: should Obesity be a Protected Classification*, 30 SANTA CLARA L. REV. 951, 963 (1990).

⁸⁹ Id.

quality of being obese has no established relation to productivity or absenteeism, other than a perceived increased risk for certain conditions. In truth, the primary concern of employers is potential increase in insurance costs, however even this is not an eventuality as obesity in and of itself is not causally related to increase in disease.

One proposed remediation for employment discrimination is to include obesity as an enumerated disability under the American's with Disabilities Act and the Rehabilitation Act.⁹⁰ However, classifying obesity as a disability where it does not negatively impact performance and does not have attenuated negative health consequences is to further conflate the obesity and affliction perpetuating the fabricated stereotypes that vilify overweight individuals. This would not solve the problem, but instead would exacerbate it, adding to the stereotype threat when overweight persons internalize the notion that they suffer a "disability."

III. The Illusion Obesity's Economic and Societal Toll

The costs of obesity can be broken down into three levels: direct costs, societal costs, and personal costs. The direct costs, costs to the community related to the diversion of resources to the diagnosis and treatment of diseases directly related to obesity or obesity itself, have generally been estimated to lie between 1-5% of total healthcare costs for various countries.⁹¹ These include costs to health service, including visits to general practitioners, consultations with specialists, hospital admissions and medication.⁹² However, given that more than 30% of the population is obese, and at least 60% are considered overweight, a 1-5% expenditure on the

⁹⁰ See generally *Id.*; Jay R. Byers, *Comment: Cook v. Rhode Island: It's not Over Until the Morbidly Obese Woman Works*, 20 IOWA J. CORP. L. 389 (1995).

⁹¹ J.C. Seidell, *Societal and Personal Costs of Obesity*, 106 EXP. CLIN. ENDOCRINOL DIABETES 7 (1998).

⁹² *Id.*

“condition” and its “related diseases” demonstrates that the claims that obesity and overweight contribute substantially to healthcare related costs⁹³ are grossly over exaggerated.

Societal or indirect costs are those costs related to the loss of productivity caused by absenteeism, disability, pensions, and premature death. Personal costs include the costs borne by obese individuals due to discrimination, including decreased earning due to stigma and prejudice. Moreover, health insurance companies regularly charge higher premiums with increasing degrees of overweight,⁹⁴ which defers the costs on the community, as the healthcare expenditures are funded from the overweight’s own pockets. The data on societal and personal costs are insufficient to allow specific calculation of expenses, but even on cursory overview, it is apparent that the indirect costs of obesity are overstated, and the person who bears the overwhelming weight is the overweight themselves through the increased insurance costs and decreased economic and social opportunity.

The correlation between obesity and health is tenuous at best. There are very few certainties surrounding the science of weight gain,⁹⁵ and the emphasis on thinness as a universal good⁹⁶ masks the fact that the relationship between obesity and ill health is not definitive.⁹⁷ Moreover, the “obesity myth”⁹⁸ in the United States re-admits and legitimates white, middle class prejudices towards poor and racialized minorities.⁹⁹ By ascribing moral designations to

⁹³ Id.

⁹⁴ Id.

⁹⁵ Rich, *supra* note 2 at 342.

⁹⁶ This emphasis is presumably due to the fact that the discourse on obesity rests on the assertion that there is a correlation between being overweight and ill health and that losing weight will cure the associated diseases. However, the correlation between being overweight and ill health is tenuous at best, and considered by some to be mythological. See Esther D. Rothblum, *Women and Weight: Fad and Fiction*, 124 J. PSYCHOL. INTERDISC. & APPLIED 5, 17-21 (1990) (arguing that the notion that obesity is related to poor physical health is a myth and that our culture’s obsession with body weight is what is really harmful).

⁹⁷ Rich, *supra* note 2 at 346. See also Monaghan, *supra* note 2 at 307. (“active obese individuals actually have lower morbidity and mortality than normal weight individuals who are sedentary.”)

⁹⁸ Aphramor, *supra* note 17 at 329 (noting that the implicit assumption that all fat people are unhealthy and/or experience eating dilemmas requiring treatment too often goes unchallenged).

⁹⁹ Monaghan, *supra* note 2 at 306.

behavior surrounding food and exercise, obesity discourse is instrumental in manufacturing a “public health scare.”¹⁰⁰ Size is not associated with excess mortality and being overweight does not preclude health or well-being.¹⁰¹ Moreover, in the interests of national health, and in conserving resources spent on addressing health concerns, people should not be discouraged from taking steps to improve health if they notice little to no change on the scales.¹⁰²

The issue is further complicated by the fact that there is no effective, scientifically ratified, long-term, safe dietary strategy for reducing weight.¹⁰³ The medical community has become so blinded by fat bias that instead of empirically studying the determinants of health, they are in constant search of results that reinforce previously held assumptions.¹⁰⁴ This approach results in skewed data founded on faulty hypotheses rather than hard science.¹⁰⁵ The associated cultural pressure to obtain the “right” body size or shape is not simply about being healthy, but is propelled by moral characterizations of the obese or overweight as lazy, self-indulgent or greedy.¹⁰⁶ Moreover, weight loss practices have been associated with increase in mortality and

¹⁰⁰ Rich, *supra* note 2 at 352. See also John Evans, Emma Rich & Brian Davies, *The Emperor’s New Clothes: Fat, Think, and Overweight. The Social Fabrication of Risk and Ill Health*, 23 J. TEACHING IN PHYSICAL EDUC. 372, 376 (2004) (“the terms *obesity* and *overweight* have become ‘the biomedical gloss for the moral failings of gluttony and sloth. Important themes in American society, we are told, are individual control and fear of non-control – obesity is a visual representation of non-control.’”).

¹⁰¹ In fact, obese people today have better cardiovascular disease risk profiles than did their leaner counterparts a generation ago. Rich, *supra* note 2 at 353. See also Monaghan, *supra* note 2 at 306 (noting that there are documented health benefits associated with “excess” weight, calling for a challenge to the social construction of obesity as a disease).

¹⁰² Monaghan, *supra* note 2 at 312.

¹⁰³ Aphramor, *supra* note 17 at 320.

¹⁰⁴ Rich, *supra* note 2 at 349 (“Such is the focus on weight that even when trials reveal evidence to suggest weight is not the issue, often the conclusion ... is to call for better trials, better behavior change skills, rather than actually re-write the question.”).

¹⁰⁵ The *Oxford English Dictionary* defines the scientific method as: “a method or procedure that has characterized natural science since the 17th century, consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypotheses.” The modification of the *hypothesis* is implicit. Changing the experiment to produce desired results is contrary to the foundational principles of scientific inquiry, which is intended to be as objective as possible and seeks to reduce biased interpretation of results. Thus the current approach to obesity research results in a complete bastardization of the scientific method of inquiry, and engenders results that are neither repeatable, nor thereby reliable. The people are consequently deprived of accurate information about the condition of two-thirds of the population.

¹⁰⁶ Rich, *supra* note 2 at 352.

morbidity, to the extent that the “cure” for obesity may be worse than the “condition.”¹⁰⁷ This focus on fatness as a social ill draws upon size discrimination, which, especially when combined with the toll that weight loss imposes, could be characterized as a form of civilized oppression.¹⁰⁸ Because of such focus, feeling fat carries personal evidence of stigma, including feelings of guilt and shame, the corollary of which is that control, virtue and goodness are found in slenderness and the processes of becoming thin.¹⁰⁹ Thus value and virtue as a person is determined by how demonstrably one is in control – as is written in one’s form. This is the true societal cost of the manufactured obesity epidemic.

IV. The Fight on the Fat: Current Methods of Remediation Perpetuate Fat Bias

A. Proposed Bans of Sugary Beverages

In an effort to combat obesity, New York’s Mayor Bloomberg initiated a statutory ban on the sale of high sugar beverages in quantities above 16 ounces at restaurants, theaters and food carts.¹¹⁰ The New York Supreme Court struck down the measure as arbitrary and capricious for encapsulating too many loopholes and exemptions,¹¹¹ however this is not the only issue with the ban. While targeting the behavior, and limiting access to high calorie foods, would decrease risks of diabetes, the purpose of the ban is to decrease incidents of overweight. By regulating consumption of a product we do not directly confront First Amendment values, although there may be other constitutional concerns.

However, in framing the problem in terms of weight, rather than immediate impact on brain function and insulin production that massive amounts of sugar induce, the ban does nothing

¹⁰⁷ Monaghan, *supra* note 2 at 310. *See also* Aphramor, *supra* note 17 at 319.

¹⁰⁸ Rich, *supra* note 2 at 353.

¹⁰⁹ *Id.* at 352.

¹¹⁰ Michael M. Grynbaum, *Judge Blocks New York City’s Limits on Big Sugary Drinks*, NEW YORK TIMES (Mar. 12, 2013), http://www.nytimes.com/2013/03/12/nyregion/judge-invalidates-bloombergs-soda-ban.html?pagewanted=all&_r=0.

¹¹¹ *Id.*

to address the treatment of overweight individuals. Instead it seeks a new way of making them conform to a perception of “normal” that does not exist, adding to the shame, guilt, and prejudice, especially if the diminished access fails to engender results. The ban in and of itself is not objectionable in terms of the obesity discourse as it limits access for all individuals regardless of weight. However, it further perpetuates the stereotypes that obese individuals lack control, are gluttonous, and are unable to self-moderate. This is directly in line with the moral vocabulary associated with weight: sloth, sins, good/bad, naughty, lapse, self-control, willpower, reward – and invokes a restitution narrative carrying both religious and infantilizing connotations.¹¹² In order to truly address the public health concern the issue has to be redefined in terms that recognize and respect the autonomy of the overweight.

B. Let’s Move! Campaign

Michelle Obama as first lady has instituted a campaign along the lines of Nancy Reagan’s “Just Say No” approach to the 1980’s war on drugs. Relying on a direct causal relationship between childhood obesity and development of diabetes or “chronic obesity-related health problems like heart disease, high blood pressure, cancer and asthma.”¹¹³ The Let’s Move campaign is couched in terms of combating childhood obesity through the instruction of city leadership, schools, parents and kids in healthy eating and increased activity.¹¹⁴ While the programmatic goals of empowerment, education, and increased access to resources are admirable, the contextualization pitting the world against childhood obesity plays into the stereotypes. These stereotypes and the combative nature of the campaign put obese individuals, including the targeted children, on the defensive. This defensive posture engages stereotype

¹¹² Aphramor, *supra* note 17 at 333.

¹¹³ *Health Problems and Childhood Obesity*, LET’S MOVE!, <http://www.letsmove.gov/health-problems-and-childhood-obesity>.

¹¹⁴ *Id.*

threat responses, including the reduced volition experienced in the stereotype spillover. In framing the campaign in the negative and playing off of the pernicious perceptions of obese individuals the campaign decreases its likelihood of success by initiating stereotype threat.

Eating proper nutrition and engaging in proper activity corresponds to heart health and other physical indicators that are not driven specifically by weight.¹¹⁵ It would be better to focus on comprehensive health of the nation's children, including ensuring access to consistent nutrition for the nation's poor, rather than specifically upon childhood obesity. There would be no negative consequences of reframing the campaign as one to promote lifelong health behaviors, rather than a crusade to combat an arbitrary and highly contested definition.

Moreover, contrary to the campaign's assertion, high blood pressure and other poor health indicators are not *caused* by obesity, but instead are simply *correlated*, or found together frequently. This is because the numerous factors that contribute to conditions like high blood pressure and pre-diabetes, such as smoking, lack of physical activity, unhealthy diet, and excess alcohol,¹¹⁶ *also* contribute to development of obesity. Moreover, the issue is more complex than simply promoting one social good over a social ill, in this case thinness over fatness.

Childhood obesity is influenced by socioeconomic status,¹¹⁷ race and ethnicity,¹¹⁸ and parental education level.¹¹⁹ For example, deemphasizing "thinness" and improving parenting

¹¹⁵ Ursula E. Bauer & Sarah M. Lee, *School Guidelines to Promote Healthy Eating and Physical Activity*, CENTER FOR DISEASE CONTROL AND PREVENTION (Sept. 16, 2011), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr6005a1.htm> ("Healthy eating and regular physical activity play a substantial role in preventing chronic diseases, including heart disease, cancer, and stroke, the three leading causes of death for adults.").

¹¹⁶ Tom Kelly, *One Third of Young People Suffer from High Blood Pressure Thanks to Drinking and Lack of Exercise*, MAIL ONLINE (Jul. 30, 2010 4:28 AM), <http://www.dailymail.co.uk/health/article-1298853/One-young-people-suffer-high-blood-pressure.html>.

¹¹⁷ Cynthia L. Ogden, et. al., *Obesity and Socioeconomic Status in Children and Adolescents: United States, 2005-2008*, CDC NHS DATA BRIEF NO. 51 (Dec. 2010), <http://www.cdc.gov/nchs/data/databriefs/db51.htm>. (Low income children and adolescents are more likely to be obese than their higher income counterparts.

¹¹⁸ *Id.* (The socioeconomic and parental education relationships are not consistent across race and ethnicity groups).

¹¹⁹ *Id.* (Children and adolescents living in households where the head of household has a college degree are less likely to be obese compared to those living in households where the household head has less education).

skills have been proven to have an effect on “normalizing” children’s weight gain – sometimes more so than direct dietary intervention.¹²⁰ Promoting weight loss suggests that thinness is the desired goal irrespective of health, and inherent in that message is the underlying assumption that fatness is undesirable thus perpetuating size discrimination.¹²¹ Thus what is required is a reframing of the issue. Specifically, if health is the target, removing “fat” as a frame of reference and attending only to healthful behaviors regardless of weight consequences would go far further in promoting national longevity than the “war on obesity.”¹²² If we must have a “war,” it would be more effective to have a “war” on hypertension, a “war” on diabetes, a “war” on the actual conditions threatening life, rather than the largely aesthetic distinction that has limited implications for health.

C. Fat Acceptance Campaigns

There have been some campaigns to increase fat acceptance, including both advertising and social movements. Dove instituted its “Campaign for Real Beauty” in 2004, in an effort to show “real” women of many sizes. Though the campaign was one of the first of its kind, and well received by many women as highly relatable, the campaign did meet with some criticism. Specifically, the campaign was designed to sell a new line of “firming creams,” indicating that any size is okay, so long as it isn’t fat.¹²³ Objectively, moreover, none of the women were above

¹²⁰ Aphramor, *supra* note 17 at 317.

¹²¹ Rich, *supra* note 2 at 354.

¹²² Aphramor, *supra* note 17 at 321 (“with lifestyle changes and independent of weight loss: ‘reductions in BP [blood pressure] occur’; ‘exercise training improves glucose tolerance and insulin sensitivity [markers for diabetes development]’; ‘in medical terms, great health gains can be achieved if a patient’s smoking, dietary, and exercise habits are improved to reduce risk factors’ . . . So too, ‘exercise protects against non-insulin dependent diabetes and cardiovascular disease irrespective of BMI.’”).

¹²³ Jennifer L. Pozner, *Dove’s “Real Beauty” Backlash*, WOMEN IN MEDIA AND THE NEWS (last accessed Apr. 6, 2013), <http://www.wimnonline.org/articles/dovebacklash.html>.

roughly size 12.¹²⁴ As 14 is the national average size for women, this indicates that roughly half the female population is 14 or above, and therefore remains unrepresented in the Real Beauty campaign. While the Dove campaign remains a revolutionary and “humanitarian” endeavor to promote the appreciation of women of more diverse appearance than traditional ads,¹²⁵ however it remains insufficient to combat the tidal wave of aspirational advertisement calling women to be thinner at any cost.

The National Association to Advance Fat Acceptance (NAAFA) uses advocacy, public education and support to “create healthy at every size initiatives with healthcare providers and including weight in Civil Rights protections for employment.”¹²⁶ Similarly, the Obesity Action Coalition was formed in response to legislative recognition that patients affected by obesity were unrepresented in policy discussions.¹²⁷ In a slightly different trend, the Yale Rudd Center, though seeking to reduce weight stigma, also seeks to improve the world’s diet and prevent obesity.¹²⁸

If the true cure for toxic speech is an abundance of palliative speech then, as a remedial measure, such groups hold there should be requirements prescribing the influx of more balanced representation of obese individuals.¹²⁹ News representations should rely on sound science and recognize conflicts of interest.¹³⁰ Stereotypes and the use of obese persons merely for the

¹²⁴ Seth Stevenson, *When Tush Comes to Dove: Real Women, Real Curves, Really Smart Ad Campaign*, SLATE (Aug. 1, 2005 10:15 AM), http://www.slate.com/articles/business/ad_report_card/2005/08/when_tush_comes_to_dove.html.

¹²⁵ *Id.*

¹²⁶ *About Us*, NATIONAL ASSOCIATION TO ADVANCE FAT ACCEPTANCE (last accessed Apr. 2, 2013), <http://www.naafaonline.com/dev2/>.

¹²⁷ *About Us*, Obesity Action COALITION (last accessed Apr. 8, 2013), <http://www.obesityaction.org/about-us>.

¹²⁸ *Who We Are*, YALE RUDD CENTER FOR FOOD POLICY AND OBESITY (last accessed Apr. 8, 2013), http://www.yaleruddcenter.org/who_we_are.aspx.

¹²⁹ *About Us*, NATIONAL ASSOCIATION TO ADVANCE FAT ACCEPTANCE (last accessed Apr. 2, 2013), <http://www.naafaonline.com/dev2/>.

¹³⁰ *Guidelines for the Portrayal of Obese Persons in the Media*, YALE RUDD CENTER FOR FOOD POLICY AND OBESITY (last accessed Apr. 8, 2013), http://www.yaleruddcenter.org/resources/upload/docs/what/bias/media/MediaGuidelines_PortrayalObese.pdf.

purposes of humor should be avoided.¹³¹ Obese persons in cinema and television should be represented in equal proportion to their presence in society.¹³² Moreover, they should be represented in leading roles, with complex and substantial character development and as romantic interests, not simply as fodder for comedic mockery or as grotesque caricatures.¹³³

V. A Framework for Obesity-Based Hate Speech Regulation

The government's ability to compel speech is as similarly limited as it's ability to proscribe it.¹³⁴ Jeremy Waldron defines hate speech as group libel, fallacious publications that shame, demean, denigrate and silence. Current representations of obese individuals in the media constitute group libel, a harm of which warrants regulation under the precedent set forth in Beauharnais. However, a simpler methodology may be suggested, which would reconcile Sunstein's prescription for counter speech, and Waldron's proscription of hate speech, and would require the government to regulate only itself. In regulating only the State and its actions First Amendment confrontation would be avoided, and individual liberties of non-state actors would not be implicated.

Specifically, the government should begin by reframing its own discourse on obesity by calling off the war on fat. Instead focusing on initiatives that will further healthful behaviors. Moreover, State actors should be precluded from perpetuating the stereotypes of obesity. For example, the Centers for Disease Control and Prevention (CDC) should refrain from trying to "prevent obesity", and focus solely on nutrition and physical activity.¹³⁵ The inclusion of obesity is driven primarily due to its ease of comprehension by a populace acculturated to fear fat. Fat

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all").

¹³⁵ *Overweight and Obesity*, CENTER FOR DISEASE CONTROL AND PREVENTION (last accessed Apr. 8, 2013), <http://www.cdc.gov/obesity/>. Guided by the Division of Nutrition, Physical Activity, and Obesity.

people serve as socially sanctioned scapegoats¹³⁶ thanks to culturally entrenched somatophobia,¹³⁷ which is perpetuated by the government utilizing obesity as a catchall for a number of complex and diverse physiological processes and conditions. The CDC note that Body Mass Index, or definitional obesity, is only one of many indicators of potential health risks.¹³⁸ Just as important are the individual's waist circumference, implicating fat distribution, as well as other risk factors pertaining to lifestyle related diseases, such as hypertension or physical inactivity.¹³⁹ Though government agencies thereby recognize the complexity of obesity causality and its implications for health, they continue to promote weight loss as a panacea for premature morbidity, despite the fact that very few effective strategies exist to help the already obese lose weight.¹⁴⁰ In light of such conflicting evidence based on questionable scientific methodology, it is irresponsible for the government to maintain a position that creates a moral epidemic where a medical epidemic does not exist. Public policy favors the interest of the libeled over that of anyone wishing to intentionally or negligently spread fallacy,¹⁴¹ including the government itself. Thus in order to promote the free speech ideals of equality and self-determination, the State must cease from perpetuating the morality-based characterization of weight by redefining the epidemic and the government's remedial efforts in terms of consistently quantifiable conditions.

Moreover such reframing should extend to media entities that receive government funding. Specifically, the United States Government heavily subsidizes mass media, and

¹³⁶ Aphramor, *supra* note 17 at 334.

¹³⁷ Id

¹³⁸ *Defining Overweight and Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION (April 27, 2012), <http://www.cdc.gov/obesity/adult/defining.html>.

¹³⁹ Id.

¹⁴⁰ Robert H. Eckel and Ronald M. Krauss, *American Heart Association Call to Action: Obesity as a Major Risk Factor for Coronary Heart Disease*, 97 CIRCULATION: J. AMERICAN HEART ASSOCIATION 2099, 2100 (1998), <http://circ.ahajournals.org/content/97/21/2099>.

¹⁴¹ Tsesis, *supra* note 18 at 498 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974)).

specifically news outlets.¹⁴² If news media were required to follow the prescriptions of the Yale Rudd Center, including making reports on obesity founded in legitimate science, noting the source of funding for the study and any conflicts of interest, there would not only be an influx of positive and even-handed speech to counter the stereotypes spouted elsewhere, but a corresponding decrease in stereotype perpetuation by the news media themselves. The purveyors who receive government funding or benefit could choose to alter their representations of obesity, or not to receive the government support. By regulating its own discourse, and the related impact on stigma, bias and stereotype threat, the government would effectively serve its social interest in order and morality, without impinging on personal liberties.

Conclusion

Given the harms inherent in group libel, including cognitive, emotional, social and economic consequences borne by the individual within the group, there is a societal interest in limiting or addressing such expression. Because such speech is false, portraying inaccurate or overly generalized characterizations of groups, it is of low social value. Moreover, because it both creates and perpetuates stereotypes it contributes to stereotype threat and discrimination thereby perpetrating a particularized trauma on the subjects of the expression. This combination of low value and high social harm argues strongly for the regulation of such media representations.

Though Congress may “make no law . . . abridging the freedom of speech,” in sustaining laws that protect and promote invective filled expression, the U.S. government in fact officially condones and encourages the curtailing of speech for effected groups. Whether legislating

¹⁴² Laura McGann, *Separation of News and State? How Government Subsidies Bouyed Media*, NEIMAN JOURNALISM LAB (Jan. 28, 2010, 12:01 A.M.), <http://www.niemanlab.org/2010/01/separation-of-news-and-state-how-government-subsidies-bouyed-media/>. (Indicating that postal subsidies and statutorily required public notices account for a significant portion of news purveyor’s revenues).

regulation or the lack thereof, in either instance the freedom of one party to engage in expression is impinged upon. In one instance the government is actively legislating what one can and cannot say. In the other, it is implicitly sanctioning the removal of one's right to speak because of their presence in a particular group. This implicit legislation through lack of regulation poses a more significant threat to the nation's welfare because it is invisible and insidious. Thus, in order to ensure the national wellbeing is preserved, and each voice is given equal opportunity to be heard, there should be a reframing of the obesity issue. Specifically, the government should be required to eliminate derogating descriptions, combative terminology, and discriminatory practices from its healthcare initiatives. Moreover, commercial media outlets subsidized by government funding should be required to adhere to the same regulations.

Though there is undeniably an argument regarding a slippery slope of permissible government regulation sliding into tyrannical deprivation of liberty, an absolutist approach overestimates both the implications of government regulation and the caliber of public opinion. However, by limiting government regulation to recipients of government funding and government discourse, the state will be regulating only itself, and First Amendment values remain unthreatened. The harm in hate speech experienced by overweight individuals will thereby be ameliorated, and the marketplace of ideas corrected.