

# The Right to Be Fat

Yofi Tirosh\*

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\* Assistant Professor, Tel Aviv University Faculty of Law. I am grateful to Susanne Baer, Yael Braudo, Michael Birmhack, Moshe Cohen-Eliya, Hanoch Dagan, Ronit Donyetz Kedar, Yair Eldan, Talia Fisher, Aeyal Gross, Tal Kohavi, Zohar Kohavi, Kevin Kolben, Shai Lavi, Menny Mautner, Sagit Mor, Tzili Paz-Wolk, Ariel Porat, Tali Scheafer, Hila Shamir, Sara Rushing, Rachel Wizner, Stephen Wizner, and Kenji Yoshino for illuminating conversations and helpful comments on earlier drafts. Hagai Kalai, Roni Liberson, Gal Sagi, and Tami Yakira provided outstanding research assistance. Finally, the suggestions of the editorial board of the *Yale Journal of Health Policy, Law, and Ethics* and its two anonymous peer reviewers have improved this Article significantly.

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## INTRODUCTION

Why say “Inside every fat person there is a thin person waiting to get out.”  
For me, it’s more like “Inside every fat person there is an even fatter person  
waiting get out.”<sup>1</sup>

In its now famous paragraph from *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>2</sup> the Supreme Court tried to delineate the scope of liberty that the Constitution guarantees:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State . . . .<sup>3</sup>

As one would expect from a text that takes on the considerable task of outlining the scope of liberty, the Court’s words are emotive. They seem to convey a sense of the core dimensions of being and the amalgam of perspectives, choices, and practices that make individuals who they are. These are components so personal and vulnerable that the government should refrain from interfering with them. The Court’s conceptual framework concerning abortion here is useful when we try to determine the scope of constitutionally protected liberty, because it invokes an intuition about the most basic and private aspects of our lives—those aspects that are most one’s own and should not require any explanation or be subjected to any State intervention. What else in life, like the decision about whether to have an abortion, lies at the heart of liberty in that it defines one’s concept of existence, of meaning, and of the mystery of human lives? What other views, choices, and ways of living should not be “formed under compulsion of the state?” While some rights, such as free speech or religious freedom, clearly fall within this protected realm, there are territories of human existence that also lie at the heart of our liberty and define how we live, but are yet to be recognized as such by constitutional theory.

In this Article, I visit one such uncharted territory and argue that American law should recognize a new realm of liberty: the realm of body size. Recognizing

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1. Thanks to Kenji Yoshino for sharing this quote (from a friend).

2. 505 U.S. 833 (1992).

3. *Id.* at 851 (citation omitted).

the right to be any body size as part of the general principle of liberty (and, more specifically, as part of autonomy and dignity) would entail that we cautiously scrutinize governmental policies aiming to create incentives for losing weight or deterrence against gaining weight, as well as some acts by private actors, and balance them vis-à-vis their potential infringement of the right. My principal contention is that the law has been blind to body size and shape, eating habits, and movement and exercise practices, due to a dualistic understanding of the relationship between mind and body.<sup>4</sup> However, decisions pertaining to these domains of experience lie at the core of human existence, no less so than questions such as whether to become a parent, which church to join, or what views to hold and express. Due to economic, technological, and cultural changes, body size and the practices associated with it (such as dieting, exercising, and surgery) have become more meaningful in the lives of American legal subjects than ever before. Body size plays a role in shaping individual and social identity,<sup>5</sup> but also it has become a central arena for policymakers, who routinely recruit the law in creating regulative instruments to encourage the slimming down of the U.S. population.

From the perspective of constitutional theory, legal instruments that encourage weight control are today construed as benign. To date, no legal scholar has argued that either legally mandated measures, such as regularly weighing school pupils to document their weight and recommend dietary and exercise measures, or the absence of body weight as a suspect category in antidiscrimination law constitutes an illegitimate violation of liberty.<sup>6</sup> Typically, legal measures of this nature are not discussed in the context of liberty, as they seem harmless and even welcomed in “the war against obesity.”

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4. Dualistic approaches view the body and the mind as distinct substances. For an elaboration see *infra* Section III.A.

5. There are important gendered aspects to the social meaning of body size. Since women’s physical appearance is more critically scrutinized in western culture, women are more susceptible to social sanctions for body sizes that deviate from conventions of the ideal body. This Article consciously employs a nongendered, general approach in conceptualizing the right to any body size, as it should be a right enjoyed both by men and women. However, there is undoubtedly room for further research on the different impact of weight-centered legal policies on men and women. Some classic accounts of the importance of body image and size, eating practices, and identity for women include SUSAN BORDO, *UNBEARABLE WEIGHT* (1993); KIM CHERNIN, *THE HUNGRY SELF: WOMEN, EATING, AND IDENTITY* (1994); and SUSIE ORBACH, *FAT IS A FEMINIST ISSUE* (2010). See also MICHAEL GARD & JAN WRIGHT, *THE OBESITY EPIDEMIC: SCIENCE, MORALITY, AND IDEOLOGY* 153-67 (2005); Yofi Tirosh, *Weighty Speech: Addressing Body Size in the Classroom*, 28 *REV. EDUC. PEDAGOGY & CULTURAL STUD.* 267 (2006). For empirical evidence demonstrating that women’s wages are more adversely impacted due to their “overweight” than men’s wages, see the sources cited in Jennifer Bennett Shinall, *Legal Largesse or Big Fat Failure: Do Weight-Discrimination Laws Improve Employment Outcomes for the Obese?* 31 *n.94* (Jan. 14, 2011) (unpublished manuscript), available at [ssrn.com/sol3/papers.cfm?abstract\\_id=1985371](http://ssrn.com/sol3/papers.cfm?abstract_id=1985371).

6. On “fat people’s liminal position outside civil rights protections,” see Anna Kirkland, *Think of the Hippopotamus: Rights Consciousness in the Fat Acceptance*, 42 *LAW & SOC’Y REV.* 397, 425 (2008).

Indeed, as I will show below, it is unsurprising that we have not yet recognized weight-related laws and policies as raising questions pertaining to liberty, since our jurisprudence has developed within the Western tradition of negating the body as secondary and inferior to the mind. This tradition has rendered it difficult for the law to identify the body as a domain of rights. However, it is time to take the body, and particularly body size, seriously as a subject of rights and as a domain that should be free from governmental (and in certain cases also societal) interference.

Thus far, weight has been discussed in legal scholarship mainly through the framework of discrimination.<sup>7</sup> In the past decade, the debate about whether weight should be a protected category of antidiscrimination law has become increasingly vibrant. Scholarly legal commentators who argue that weight should be a protected category, either in itself or as part of disability discrimination, have based their argument on two main strategies: questioning the rooted belief that weight is a voluntary and mutable characteristic<sup>8</sup> and critically examining the

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7. See ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 6 (2008) (mapping the possibilities of protecting weight discrimination under prevailing antidiscrimination law by “[e]xamining antidiscrimination law from both the center and the edges”); DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 102 (2010) (arguing that weight-based discrimination is the most common form of appearance discrimination and that the law should take part in preventing it); SONDRÁ SOLOVAY, *TIPPING THE SCALES OF JUSTICE: FIGHTING WEIGHT-BASED DISCRIMINATION* 233-38 (2000) (using the lens of discrimination to analyze legally various manifestations of fat oppression); Jane Byeff Korn, *Fat*, 77 B.U. L. REV. 25, 50-68 (1997) [hereinafter Korn, *Fat*] (arguing that obesity should be recognized as a disability under the Americans With Disabilities Act’s antidiscrimination protections); Jane Korn, *Too Fat*, 17 VA. J. SOC. POL’Y & LAW 209, 242-44 (2011) [hereinafter Korn, *Too Fat*] (suggesting that the 2009 amendment to the ADA, the ADAAAA, may not provide sufficient protection for weight discrimination); Karen M. Kramer & Arlene B. Mayerson, *Obesity Discrimination in the Workplace: Protection Through a Perceived Disability Claim Under the Rehabilitation Act and the Americans with Disabilities Act*, 31 CAL. W. L. REV. 41, 52-64 (1994); Elizabeth E. Theran, “Free To Be Arbitrary and . . . Capricious”: *Weight-Based Discrimination and the Logic of American Antidiscrimination Law*, 11 CORNELL J.L. & PUB. POL’Y 113, 148-53 (2001); Donald L. Bierman, Jr., Comment, *Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?*, 30 SANTA CLARA L. REV. 951, 958-59, 971-75 (1990); Brenda K. DeVries, Note, *Health Should Not Be a Determinative Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 IND. HEALTH L. REV. 137 (2009) (arguing that obesity should not disqualify potential adopting parents from eligibility to adopt); Elizabeth Kristen, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 71-100 (2002); Karol V. Mason, Note, *Employment Discrimination Against the Overweight*, 15 U. MICH. J.L. REFORM 337, 355-61 (1982); Bruce I. Shapiro, Comment, *The Heavy Burden of Establishing Weight as a Handicap Under Anti-Discrimination Statutes*, 18 W. ST. U. L. REV. 565, 575-77 (1991); William C. Taussig, Comment, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act*, 35 B.C. L. REV. 927, 956-63 (1994).

8. See RHODE, *supra* note 7, at 104-05 (discussing the low success rates of diets); *id.* at 39-41 (presenting the health risks associated with dieting); SOLOVAY, *supra* note 7, at 190-209 (discussing the immutability of weight and the dangers of dieting); Korn, *Fat*, *supra* note 7, at 44-48 (citing

seemingly well-known linkage between fat and health risks.<sup>9</sup> These lines of arguments are good strategies in the antidiscrimination context. Since suspect classifications in antidiscrimination law are usually of immutable traits, demonstrating that weight is not as changeable as is frequently assumed supports the claim that it should be a forbidden ground for discrimination. Similarly, if a large body is not as unhealthy as is commonly thought, then the number of cases in which body weight constitutes a relevant difference is significantly reduced. While discussing body size in the context of antidiscrimination law is important, this Article maintains that the antidiscrimination framework is insufficient. Body size raises challenges beyond the question of preventing discriminatory treatment because it is intrinsically worthy of protection in and of itself and not merely as a suspect classification. The size of one's body is an intimate feature of human experience. It touches the core of one's person, much like speech or religious faith. It thus merits more than what the antidiscrimination framework provides, which is the duty to be tolerant to certain differences. The law must develop a vocabulary that will enable respecting the sphere of body size and will restrict direct and indirect regulation to the necessary minimum. Thus, this Article takes an innovative approach: rather than relying on empirical data about the causes and effects of fat, it addresses the question of individual weight from a rights perspective and asks whether weight can and should be understood as a matter of liberty, alongside other deontologically based<sup>10</sup> fundamental rights. This inquiry

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sources that challenge the socially pervasive belief that weight is a matter of willpower and self control). *But see* Kramer & Mayerson, *supra* note 7, at 65-67 (reviewing scientific evidence that obesity is not a voluntary condition); Bierman, *supra* note 7, at 957 (citing medical and psychological causes for obesity, which are beyond the individual's control); DeVries, *supra* note 7, at 150-53 (reviewing the nature-nurture debate on obesity factors); Kristen, *supra* note 7, at 69 (surveying medical data indicating that "it is not clear that fat people can do anything about their size"); Mason, *supra* note 7, at 346 ("In most cases, [weight] losses are only short term, despite the claims of weight-loss clinics, diet books, and drug producers."); Taussig, *supra* note 7, at 930-32 (reviewing medical research on the genetic causes of obesity); Lucy Wang, Note, *Weight Discrimination: One Size Fits All Remedy?*, 117 YALE L.J. 1900, 1906-08 (2008) (discussing the role of genetics in obesity); Tali Schaefer, *Off Their Fat Backs!* 25-28 (May 25, 2010) (unpublished manuscript) (on file with author) (noting that "genetics are the most important cause of obesity, likely accounting for as much as forty to seventy percent of the variation in weight" and reviewing the research supporting this conclusion).

9. *See* RHODE, *supra* note 7, at 41 ("[F]rom a health perspective, the current obsession with weight is misdirected."); Kramer & Mayerson, *supra* note 7, at 70 ("[M]odern research shows that [it] is actually the effect of the diet cycle on the body, not extra pounds, that leads to health problems."); Theran, *supra* note 7, at 148-53 (referring to the complex and mixed medical evidence about the physiological causes and effects of fat); Bierman, *supra* note 7, at 958 ("[A]mbiguities remain whether a causal relationship exists between the obesity and the medical condition."); DeVries, *supra* note 7, at 154-55 ("[I]t is important to recognize that not all overweight people are unhealthy."); Kristen, *supra* note 7, at 67-69 ("Despite popular conceptions that being fat is dangerously unhealthy, the picture painted by the medical literature is not so clear."); Schaefer, *supra* note 8, at 33-50 (arguing that many of the assumptions about the benefit of weight loss and about the psychological and physiological harm of fat are flawed).

10. By saying that the philosophical basis of the right to be fat will be deontological, I mean

will lead to the conclusion that we should answer this question with an unequivocal “yes.”

The debate about the meaning of empirical data on obesity serves primarily utilitarian, instrumentalist arguments. Therefore, suspending the effects of these debates is important for addressing the question of liberty as “purely” as possible in developing a deontological basis for the right to be fat. Hence, I will assume, for the sake of argument and despite compelling data to the contrary, that weight is indeed a characteristic within the control of the person—a matter of willpower, discipline, and chosen lifestyle. I will further assume that being fat<sup>11</sup> is damaging to one’s health, although there is also a growing vein of critique of this view. In other words, I will assume that being fat is, from a health perspective, not an optimal lifestyle choice. And yet, mutability and health risks notwithstanding, I will argue for the freedom to occupy a body of any size by re-conceptualizing it within the domain of personhood—a domain in which a jurisprudence based on basic liberties in the classic liberal tradition would dictate that government and fellow citizens should not intervene.

The gist of my argument is that the dominant response to growing obesity rates has been to seek a solution to the obesity epidemic in getting people to lose weight or refrain from gaining it. But a complementary response must be to re-examine our biases concerning weight and our difficulty in recognizing the importance of corporeal existence. The necessary change is located as much on a social, political, legal, and ethical level as it is on a physiological level.

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that the justification of the right should be rooted in the right’s intrinsic value and should not depend on establishing that protecting this right will promote some independent account of welfare. Sometimes, choices or rules that will bring about good results are still morally wrong and should be rejected. For deontologists, as opposed to consequentialists, “what makes a choice right is its conformity with a moral norm,” and the right has a priority over the good. Larry Alexander & Michael Moore, *Deontological Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 11, 2007), <http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological/>. Making a deontological argument to justify the right to be fat means that we should examine whether it is justifiable to limit people’s freedom to be fat notwithstanding the positive outcomes that might result from such a policy (although *infra* Section II.C argues that making a utilitarian argument to justify pro-thinness policies is not as easy a task as it may seem).

11. Throughout this Article I prefer the term “fat” to “overweight,” “obese,” or “morbidly obese.” The terms I reject rest on the medical understanding of fatness, an understanding that, for reasons I will explain in this Article, I believe should be treated with caution. Indeed, “fat” is currently a derogative term in our culture, and I imagine that for many readers using this word in a law review article sounds inappropriately blunt. As prominent “fat advocate” Marilyn Wann puts it, fat is the new F-word. Marilyn Wann, *Fat Studies: An Invitation to Revolution, Forward to THE FAT STUDIES READER*, at ix, xii (Esther Rothblum & Sondra Solovay eds., 2009). Yet “fat” is the term used by identity politics groups who seek to empower and reaffirm big-bodied people and inject the term with positive meaning. See, e.g., NAAFA—NATIONAL ASSOCIATION TO ADVANCE FAT ACCEPTANCE, <http://www.naafaonline.com/dev2> (last visited Aug. 1, 2011). The growing academic field of fat studies chose to use “fat” and not “obese,” “big,” or “heavy” as its main signifier, in order to convey its critical standpoint regarding the pejoration of this term. See, e.g., Wann, *supra*, at xii; FAT!SO?, <http://www.fatso.com/> (last visited Aug. 1, 2011).

To many, being fat might seem unhealthy, aesthetically unappealing, costly to the individual and to society, and even immoral. Yet the law should not serve as an instrument for limiting fat people's access to basic liberties and to equal opportunities as it currently does—by creating incentives for weight loss and allowing private actors to express preferences not to employ fat persons, or by refusing to sell them health insurance or an airline ticket. In serving as an instrument to limit fat persons' access to rights and opportunities, American law reaches the most intimate areas of personal experience in ways that contradict the basic tenants of its commitment to liberty. Why, what, and with whom we eat, and how we exercise are such personal aspects of our existence that we should not be required to give account of them—neither to the government nor to fellow citizens.

Part I of this Article provides an inventory of the ways in which the law intervenes in the body size of its subjects. This review will demonstrate that fatness has become, in our culture and our law, a marker of a coherent set of personality traits. This Part also explains what I mean when I say that today there is no legal recognition of the right to be fat and how the legal discourse on weight is governed by the medical understanding of obesity. Part II reviews current research that challenges the predominant scientific and popular convictions that weight is within an individual's control and that being fat is counterproductive to one's health. This Part also temporarily abandons the a priori justification of the right to be fat and maps the utilitarian justifications for this right.

Part III provides the theoretical background to the argument that weight should be included in the scope of liberty by discussing the philosophical tradition of mind-body dualism, its contemporary deconstructions, and one of its alternatives, namely, the philosophical tradition of phenomenology. Rather than seeing fatness as an identity that is grounded in an imagined future and a lamented past with no possibility for a fat present, phenomenological accounts allow positive conceptions of the fat body as, among other things, a body that can be a subject of rights.

Part IV outlines the contours of the right to be fat and applies it to concrete legal issues. For example, it considers what legitimate policies the government can still promote in light of the right to be fat, whether it should be permissible for airlines to charge fat people for two seats, and whether weight should be a protected category under employment discrimination law. This Part also addresses the implication of my arguments for the legal regulation of dangerous behaviors and expensive tastes such as smoking or skydiving.

## I. FAT MANIFESTATIONS IN LAW

[T]he body is uniquely “personal and political.”<sup>12</sup>

Discussions of the “obesity epidemic”<sup>13</sup> have become ubiquitous. The media covers this issue extensively. The public is constantly warned by medical and nutritional experts, economists, and educators that we are becoming heavier, that overweight kills, and that something must be done immediately.<sup>14</sup> We are told that growing obesity rates threaten to cast an unbearable burden on medical costs, to reduce the productivity of sedentary workers who suffer from lack of willpower and self-control, and even to diminish the ethics of the social body, which has lost its disciplined character by surrendering to gluttony and laziness.<sup>15</sup>

The anti-fat craze does not remain on the policy level, but infiltrates both culture and law. Culturally, fat people are represented in the media as laughable and miserable figures.<sup>16</sup> They are socially marked as deviant and they experience prejudice and harassment. The preconceptions they encounter might be internalized, shaping their self-esteem such that it often reaches the core of their identity.<sup>17</sup> As for the law, I present examples below illustrating how body size

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12. Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENVER U. L. REV. 1, 4 (2009) (citation omitted).

13. For an account of the development of the notion of an “obesity epidemic” in America, see J. ERIC OLIVER, *FAT POLITICS: THE REAL STORY BEHIND AMERICA’S OBESITY EPIDEMIC* 36-59 (2006).

14. A recent prominent example is First Lady Michelle Obama’s initiatives to fight childhood obesity, which include starting a vegetable garden at the White House, setting up exercise programs for children, and lecturing restaurants on how to reduce fat content in their servings. Notwithstanding this campaign, Ms. Obama herself stated that she never talks about her daughters’ weight in their presence, for fear of causing problems with their diet. See Mail Foreign Service, *Now First Lady Lectures Restaurants on Food Choice as She Steps Up Campaign Against Childhood Obesity*, MAILONLINE, Sept. 15, 2010, <http://www.dailymail.co.uk/news/article-1311902/Michelle-Obama-lectures-US-restaurants-steps-childhood-obesity-campaign.html>.

15. Sander Gilman discusses the link between citizens’ weight and the health of the nation in the past century: “Dieting . . . [has become] a way to halt the obesity epidemic, to intervene so as to improve the private life of the individual and thus the health of the nation. . . . There were claims that morbid obesity impacted on the health of the mother and child, and thus weakened the state.” SANDER L. GILMAN, *FAT: A CULTURAL HISTORY OF OBESITY* 4 (2008); see also SOLOVAY, *supra* note 7, at 78-85 (discussing the prevalence of verbal abuse towards fat people in personal, public, and professional settings).

16. See, e.g., Bradley S. Greenberg et al., *Portrayals of Overweight and Obese Individuals on Commercial Television*, 93 AM. J. PUB. HEALTH 1342, 1346-47 (2003) (sampling episodes from top prime-time fiction television and finding that fat individuals are under-represented by more than half their percentage in the general population and that they are less likely to have positive personality attributes); Susan M. Himes & J. Kevin Thompson, *Fat Stigmatization in Television Shows and Movies: A Content Analysis*, 15 OBESITY 712, 715-16 (2007) (noting that fat stigmatization is often presented in the form of commentary and humor through entertainment media).

17. This is especially so in the case of women and girls. See generally JOAN JACOBS BRUMBERG, *THE BODY PROJECT: AN INTIMATE HISTORY OF AMERICAN GIRLS* (1997) (arguing that

has become a relevant category in various areas. Weight plays a role in determining access to employment opportunities, health services, and education, and may impact the possibility of serving on juries. Weight also jeopardizes the ability of fat people to sustain a sense of self-worth and entitlement to participate in the full scope of civic and personal life.

### *A. Legal Manifestations of Body Size: An Overview*

One way of characterizing the relationship between weight and the law is by distinguishing between *direct state interventions* that burden the right to be fat, and *failures of the State to intervene* in actions of private individuals or institutions that burden the right to be fat. In the first category of positive, active State intervention, I include features of the “war against obesity” that facilitate various regimes meant to regulate weight and create legal instruments that provide means for fighting the “obesity epidemic.” In the second category, the law is silent about weight even when it has become an insidious classification that might merit legal attention.

Usually in the first category, the legal intervention arises after other professional fields define a problem related to body weight and recruit the law to enforce policy. For example, the medical profession points to a fat-related risk. This risk is then echoed by public health officials, educators, or insurance companies. Finally, after these sectors have developed schemes of action to respond to the problem they named, we often find legal instruments are recruited to execute policies by creating legal authorizations and institutional, bureaucratized regulatory schemes.

Examples of State intervention include the following:

- 1) Laws mandating that schools weigh students on a regular basis and send report cards to their parents, along with dietary and exercise recommendations.<sup>18</sup>
- 2) Designing, via case law, parental neglect standards that are related to children’s weight. Courts may mandate that welfare authorities remove extremely fat children from the custody of their parents. The child’s weight is considered a

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for American girls, shaping the body is a central site for shaping one’s selfhood).

18. For a recent weighing policy in an Arizona school district see *Flagstaff Schools Send Home Warnings About Overweight Students*, THE DAILY COURIER, Nov. 14, 2010, <http://www.dcourier.com/main.asp?SectionID=1&SubsectionID=1&ArticleID=87494>. For a report on the pros and cons of such a program in the U.K. see Frances Elliot, *Parents of Fat Children To Be Given a Warning*, TIMESONLINE, Oct. 22, 2007, <http://www.thetimes.co.uk/tto/health/article1880936.ece>. For a critique of such programs, see Daniel Engber, *Leave the Fat Kids Alone*, SLATE, Mar., 10, 2011, <http://hive.slate.com/hive/time-to-trim/article/leave-the-fat-kids-alone> (“Tell a little kid he’s fat (or *obese*, or at *elevated risk of obesity*, or whatever clinical spin you put on it) and you might help him to eat his fruits and veggies—but watch what happens to his bendy little brain. Get in there early enough, and even the best intentions can metastasize into a deep-seated anxiety. What happens in the mind of an adolescent could be inscribed there for years to come.”).

primary indication of parental neglect and abuse, often overriding contrary evidence of improvement in a child's health and lifestyle, such as lower blood sugar and blood pressure.<sup>19</sup>

3) Denial of entitlements such as the right to graduate from college even if one has successfully completed one's academic requirements. In late 2009, the media reported a practice by Lincoln University in Pennsylvania, a state-related university, which denied fat students the right to graduate after completing their academic requirements unless they completed a fitness class (commonly referred to as "the fat course") that met three times a week.<sup>20</sup> After the media exposure, the school retreated, noting that this policy violated its commitment to equal treatment. The class would now only be offered as an elective to relevant students.<sup>21</sup>

4) Initiatives that are aimed at a specific segment of the population, identified as one with high rates of obesity, to make it costly for them to buy junk food or maintain other practices that are assumed to be in correlation with fatness. New York City's Mayor Michael Bloomberg, for example, has been promoting a ban on using food stamps to buy sugared soft drinks.<sup>22</sup> As I explain

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19. See Schaefer, *supra* note 8, at 36 ("The legal system sees weight and nothing else. So much so, that courts *ignore the actual health improvement* that some of the children experience when their diet and exercise habits change and *see* the parents as failing where they succeed in ensuring a healthier—but not thinner—lifestyle for their children.") (second emphasis added); see also SOLOVAY, *supra* note 7, at 64-77 (discussing removal of children from their parents' custody due to children's weight); Theran, *supra* note 7, at 170-71 (reviewing weight-based discrimination in family law and child custody). Obesity is also becoming a factor in custody cases. See Shauneen M. Garrahan & Andrew W. Eichner, *Tipping the Scale: A Place for Childhood Obesity in the Evolving Legal Framework of Child Abuse and Neglect*, 12 YALE J. HEALTH POL'Y L. & ETHICS 336 (2012); Ashby Jones & Shirley S. Wang, *Obesity Fuels Custody Fights*, WALL ST. J., Oct. 29, 2011, <http://online.wsj.com/article/SB10001424052970204294504576613100908629810.html>.

20. Kate Harding, *You Must Be This Thin To Graduate*, SALON.COM, Dec. 1, 2009, [http://www.salon.com/life/broadsheet/feature/2009/12/01/lincoln\\_university](http://www.salon.com/life/broadsheet/feature/2009/12/01/lincoln_university). Whether a university is public or private will change the above classification of such a policy as a State act or a private act. For further discussion of the divide between the government duty to respect the right to be fat and the duty of private actors, see *infra* note 216.

21. AP, *Pa. School Drops Required Fitness Class for Obese*, FOX NEWS, Dec. 6, 2009, <http://www.foxnews.com/story/0,2933,579577,00.html>. For a critique of the college practice, see Susan Albers, *Weighing College Students: Helpful or Harmful?*, PSYCHOL. TODAY, Nov. 21, 2009, <http://www.psychologytoday.com/blog/comfort-cravings/200911/weighing-college-students-helpful-or-harmful> (claiming the Lincoln University initiative did more harm than good, since it created weight discrimination by suggesting that students with BMI over thirty are unhealthy in comparison to thinner ones, an assumption that is incorrect). For data on the bias of instructors against fat students, and on its negative effects on students' achievements, see Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941, 949-50 (2009).

22. See Anemona Hartocollis, *New York Asks To Bar Use of Food Stamps To Buy Sodas*, N.Y. TIMES, Oct. 6, 2010, <http://www.nytimes.com/2010/10/07/nyregion/07stamps.html>. One reader response to this article reads: "There is something very warped about the richest person in NYC trying to prevent the poorest from drinking soda pop. The one who could, if he so desired, drink the most expensive champagne instead of water, fixated on making sure the little people can't get their hands on an Orange Crush." Dave, Comment to *New York Asks To Bar Use of Food Stamps To Buy*

below,<sup>23</sup> in light of the right to be fat we should question the legitimacy of such initiatives, which directly target fat people. The picture is different, however, with regard to initiatives aimed at the entire population, such as First Lady Michelle Obama's bill setting more restrictions on what school cafeterias can serve and offering them additional funding for serving healthier food.<sup>24</sup> This bill, and other general measures, such as food labeling regulations requiring that fast food restaurants specify the nutritional value of their products,<sup>25</sup> are not problematic because they do not suggest that the problem is one of individual failure of fat persons. Rather, these measures offer structural solutions to promote the health of the entire population.

In the second category, the law's failure to intervene when necessary, we find instances in which fat persons' access to opportunities, goods, and services provided by private actors are strongly and adversely determined by their weight; yet the law is silent about such weight-based distinctions. Here are some illustrations:

1) Body weight is absent from the list of suspect classes in antidiscrimination provisions, such as the Equal Protection Clause and Titles IX and VII of the Civil Rights Act. I will focus on employment discrimination because it is the field with the most empirical data and scholarly legal discussion. Despite significant evidence of a connection between fatness and employment discrimination, weight-based employment discrimination continues to be permitted.<sup>26</sup> There are a few recent exceptions of state and local employment discrimination rules that enumerate weight or appearance as forbidden grounds

*Sodas* (Oct. 7, 2010, 7:49 AM), <http://community.nytimes.com/comments/www.nytimes.com/2010/10/07/nyregion/07stamps.html>. A similar 2004 scheme by Minnesota was rejected by the Department of Agriculture, which must authorize such limitations on food stamps, with the reasoning that such a scheme "was based on questionable merits and would 'perpetuate the myth' that food-stamp users made poor shopping decisions." Hartocollis, *supra*.

23. See *infra* Subsection IV.C.1.

24. See Mary Clare Jalonick, *Obama Signs Historic School Lunch Nutrition Bill*, SALON.COM, Dec. 13, 2010, [http://www.salon.com/food/feature/2010/12/13/us\\_obama\\_child\\_nutrition](http://www.salon.com/food/feature/2010/12/13/us_obama_child_nutrition). I agree with Professor Paul Campos' critique of this initiative as one that focuses on "getting rid of fat kids." Paul Campos, *Childhood Shm obesity*, NEW REPUBLIC, Feb. 11, 2010, <http://www.tnr.com/article/politics/childhood-shm obesity>. Campos maintains that goals such as improving the nutritional value of school meals, helping children become more active by making urban areas amenable to physical activity, or improving labels on food products are laudable goals, but they should not be achieved by focusing on the slimming down of children, as this goal is neither achievable nor relevant for improving children's health and is bound to increase the social stigma against fat children. See *id.*

25. See Sewell Chan, *Court Upholds the City's Rule Requiring Some Restaurants To Post Calorie Counts*, N.Y. TIMES, Feb. 18, 2009, <http://www.nytimes.com/2009/02/18/nyregion/18calorie.html> (reporting on the rejected appeal by the New York State Restaurant Association against a 2007 New York City initiative requiring most major fast-food and chain restaurants to display calorie information on their menus).

26. On the empirical evidence of weight-based employment discrimination see *infra* Subsection IV.C.3.a.

for discrimination.<sup>27</sup> But in most U.S. jurisdictions, the law does not forbid rejecting a job candidate because of his weight. Exceptions also include circumstances wherein the candidate has a disability discrimination claim, but this would not be a claim of weight-based discrimination per se.<sup>28</sup> Whether it is a good idea to introduce weight as a suspect class in employment discrimination law is a question I will discuss later in this Article.<sup>29</sup> For this early stage of the exploration, I simply wish to note that weight is significant in access to jobs, promotions, salaries and other employment-related resources, and that the law does not recognize this form of discrimination as worthy of remedy.

2) Current law also does not forbid various forms of price distinction, such as double-charging fat air travelers<sup>30</sup> and setting a higher health insurance premium for heavier persons, which would be considered price discrimination if we were to conclude that these are unjust pricing practices.<sup>31</sup> There are other forms of price differentiation that might amount to discrimination. Anecdotal examples that have made it to the mass media include charging more for a manicure performed on a fat woman, explaining that she might cause damage to the salon chair,<sup>32</sup> or charging a bereaved family extra burial services by claiming that it would require extra effort to carry the corpse of a heavy person.<sup>33</sup> Indeed, a recent study found that fat women pay consistently more for services and

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27. The State of Michigan prohibits employers from discriminating on the basis of “religion, race, color, national origin, age sex, height, weight, or marital status.” MICH. COMP. LAWS ANN. § 37.2202(1)(a) (2012). Washington, D.C. prohibits any kind of discrimination based on “race, color, religion, national origin, sex, age, marital status, personal appearance . . . of any individual.” D.C. CODE ANN. § 2-1401.01 (2012). Interestingly, these advanced laws have produced very little litigation, for reasons I will discuss below. *See infra* Subsection III.C.2.

28. For scholarly accounts of weight-related disability claims *see infra* note 244.

29. *See infra* Subsection IV.C.3.

30. *See* Brian Bolton, *The Battle for the Armrest Reaches New Heights: The Air Carriers Access Act and the Issues Surrounding the Airlines’ Policy of Requiring Obese Passengers To Purchase Additional Tickets*, 69 J. AIR. L. & COM. 803, 813-16, 828-31 (2004) (examining whether it is appropriate to interpret the Air Carriers Access Act as covering obese passengers); Scott Mayerowitz, *How Fat Is Too Fat To Fly?*, ABC NEWS, Dec. 2, 2009, <http://abcnews.go.com/Travel/BusinessTraveler/obese-passengers-fat-fat-fly-us-airline/story?id=9227535> (reporting American Airlines’ policy for “larger passengers”); Rob Goldstone, *The Tricks and Trials of Traveling While Fat*, N.Y. TIMES, Oct. 20, 2010, <http://travel.nytimes.com/2010/10/24/travel/24journeys.html> (reporting a “plus size” passenger’s unpleasant traveling experience).

31. *See* Theran, *supra* note 7, at 162-65 (reviewing evidence for discrimination in provision of goods and services).

32. *See* Emily Friedman, *Salon Charges Customer Extra Five Dollars Because She’s Fat*, ABC NEWS, Aug. 23, 2010, <http://abcnews.go.com/US/michelle-fonville-charged-extra-georgia-salon-shes-fat/story?id=11461062>. For other problems of accommodation of goods and services encountered by fat clients *see* Korn, *Too Fat*, *supra* note 7, at 20 n.121, which cites cases dealing with incidents such as ejecting an obese woman from a bus, or not allowing an obese woman to bring her own chair to theater.

33. This incident was reported in the Israeli media. Amir Shuan & Shachar Genosar, *Herein Lies the Money*, YEDIOT ACHARONOT, July 3, 2009, at 20.

goods.<sup>34</sup>

3) Fashion brands such as Old Navy or H&M practice what might be dubbed “service differentiation,”<sup>35</sup> by selling their large size items only online, to avoid the damage to the fashionable image of the brand in the eyes of “regular” size customers. Being able to buy a product only via the Internet is not a trivial technicality, but may be considered both a symbolic and a literal exclusion of fat consumers from the marketplace.<sup>36</sup>

4) Fatness sneaks into litigation as well, often indirectly. For example, one case revealed a prenuptial agreement in which one of the conditions of marriage was that the wife “would not get fat.”<sup>37</sup> Since prenuptial agreements are at the private end of the public/private axis of contracts, I am not going to make a claim that the law should limit contractual freedom if it interferes with the liberty-based right to be fat. I am providing this example as an anecdotal illustration of how cultural values about weight surface in legal documents. The spouse’s weight emerges from this agreement as such a fundamental change in the spouse that it might be a cause of breaking the marriage bond.

Jury selection cases provide another example, whereby the “overweight” of a potential juror is cited as a legitimate reason for a peremptory challenge. In one case, the prosecutor explained why he struck two jurors:

[I]n his experience, this type of person had been picked on and made fun of by others . . . [and] they might feel sorry for the defendants because defendants also have the characteristic of having been picked on by the police or being deprived of the

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34. See generally Avi Dor et al., *A Heavy Burden: The Individual Costs of Being Overweight and Obese in the United States*, GEO. WASH. U. SCH. PUB. HEALTH & HEALTH SERVS. 9 (Sept. 21, 2010), [http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp\\_publications/pub\\_uploads/dhpPublication\\_35308C47-5056-9D20-3DB157B39AC53093.pdf](http://www.gwumc.edu/sphhs/departments/healthpolicy/dhp_publications/pub_uploads/dhpPublication_35308C47-5056-9D20-3DB157B39AC53093.pdf). Sometimes price or service discrimination is justified on efficiency considerations, at least short-term ones. See, e.g., Ian Ayres et al., *To Insure Prejudice: Racial Disparities in Taxicab Tipping*, 114 YALE L.J. 1613, 1653-56 (showing that taxi drivers might be justified in preferring white costumers because they leave better tips, but arguing, in a vein similar to mine, that this is a circular, somewhat tragic, effect of the market, that structural policy changes might appease).

35. Kay Jones, *Old Navy Removes Plus Size Clothes from Stores*, ASSOCIATED CONTENT (May 6, 2007), [http://www.associatedcontent.com/article/235870/old\\_navy\\_removes\\_plus\\_size\\_line\\_from.html](http://www.associatedcontent.com/article/235870/old_navy_removes_plus_size_line_from.html); *Good News and Bad News About H&M’s Plus Size Collection*, JEZEBEL, Jan. 26, 2011, <http://jezebel.com/5743168/good-news--bad-news-about-spring-plus+size-fashion-from-hm>.

36. See Hila Keren, *Equality Within Contract Law: A Feminist Call*, 31 MISHPATIM 269 (2000) (connecting the dots between exclusion of certain groups from private spaces). In the era of late capitalism, commerce areas such as stores and malls are the current town square. They shape people’s understanding of their community and serve as arenas for political and cultural exchange. I am grateful to my student, Guy Sadaka, for drawing my attention to this last point.

37. *Dewberry v. George*, 62 P.3d 525, 526 (Wash. 2003). I learned about this case from a paper by Martha Ertman, *Food R Us: The Primal Deal, Families, and Family Laws* (June 12, 2011) (unpublished manuscript) (on file with author).

advantages that others have.<sup>38</sup>

The defendant challenged this reasoning, arguing that since they were both black, this was a racially discriminatory decision. However, two courts (a district court and a court of appeals) were satisfied with the prosecutor's explanation that "his ten years experience showed him that he did not relate well to overweight people, and he thought they tended to identify with defendants."<sup>39</sup> Besides, noted the Court of Appeals, this prosecutor struck down three more white jurors for the same reason. I am not interested in whether this was indeed a racially motivated jury selection decision, but instead am concerned about both the matter-of-factness with which certain personal characteristics are attributed to potential jurors based on their body size and the unbearable lightness of judicial affirmation of this "common wisdom" about fat people.

In another jury selection case, the prosecutor struck down "Juror 7920," the only black prospective juror on the panel.<sup>40</sup> In explaining why his decision was not racially motivated, the prosecutor declared:

Your honor, as far as people who are overweight, women who are overweight, I feel that people who do not take care of themselves cause[] me a concern as far as being able to sit on a jury, and evaluate the testimony and credibility of the witnesses. And I exercised my peremptory against Juror 8218 [who was not black] and the same reason for Juror 7920, as well. I think that people who do not take care of themselves to the point of obesity concern[] me, as far as being on a jury.<sup>41</sup>

In finding the reasoning of the prosecutor acceptable, the trial court noted that both jurors mentioned by the prosecutor were indeed "noticeably and markedly overweight."<sup>42</sup> The California Court of Appeal found this reasoning acceptable:

We need not evaluate the reasonableness of the prosecutor's view of obesity to conclude as we conclude, based on the record as a whole, that the record supports the prosecutor's explanation that he challenged juror number 7920 because she was overweight and not because she was African-American, that the

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38. *Davis v. Texas*, 1992 WL 86692, at \*3 (Tex. Ct. App. 1992).

39. *Id.*

40. Since the prosecutor is not a private actor but a public servant, I could have classified this example under the first group of instances, as an illustration of State action towards citizens based on their weight. I classify it in the second group of examples because I want to emphasize the failure of jury selection doctrine to recognize that weight should not be a legitimate basis for attributing personality traits.

41. *People v. Wynn*, 2004 WL 417221, at \*2 (Cal. Ct. App. 2004).

42. *Id.* at \*4.

explanation is not inherently implausible, and that the trial court did not err in denying Wynn's motion for a new jury venire.<sup>43</sup>

Given the current doctrine, it is unsurprising that the court focuses its concern on whether the challenge to the juror was racially motivated. Nonetheless, this decision illustrates how judicial reasoning can discursively normalize the negative characteristics associated with fatness even when it formally attempts to leave weight issues out of the law.

### *B. Three Preliminary Remarks*

#### *1. Fatness Has Become Associated with a Distinct Set of Characteristics*

The prenuptial agreement case and the jury cases just discussed clearly demonstrate how fatness is emerging in culture and in the legal discourse as an identity with distinct personality attributes. The wife and the jurors' weight are understood as stable signifiers of a certain set of characteristics. From the viewpoint of the husband or the lawyer, the fat body marks not just a physical state, but also a persona.

The abundance of expert knowledge on fatness, and the multiple regulative schemes to monitor and correct it, render the fat body as a body that should be thoroughly monitored, deciphered, and treated. Fatness is becoming a status. It functions as an indicator of a set of traits that make up a certain character, or more accurately, for a general failure of character.<sup>44</sup> Fat, writes Sander Gilman, "has taken on a new and rather sinister quality over the past century."<sup>45</sup> The expansive waistline, Gilman continues, has new meanings now firmly attached to it.<sup>46</sup> It is an index for laziness, lack of self-control, illness, contamination, and even irrationality and feebleness of mind.<sup>47</sup>

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43. *Id.* For a discussion of other weight-related jury selection cases see SOLOVAY, *supra* note 7, at 90-98. For other concerns of fat bias in criminal procedure, see Valena Beety, *Criminal Justice and Corpulence: The Unsung Role of Fatism in the Courtroom* (Aug. 27, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1667136](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1667136) (discussing weight-based discrimination of, among others, jurors and defendants); Theran, *supra* note 7, at 168-70 (reviewing discrimination against the overweight in juries and in prisons).

44. I have often been asked why I do not write on ugliness in general, but instead focus on weight. The answer is that these are different cases. Ugliness indeed prompts discrimination and bias, see, e.g., NANCY ETCOFF, *SURVIVAL OF THE PRETTIEST: THE SCIENCE OF BEAUTY* (2000) (providing empirical evidence, grounded in evolutionary biology, of the preferred treatment society accords to beautiful people), but ugliness, unlike fat, is not subjected to the medical paradigm for explaining it, has not become associated with a set of characteristics, and is not assumed to be in the control of the individual (at least not to the extent that fat is).

45. GILMAN, *supra* note 15, at 3.

46. See *id.*; see also Beety, *supra* note 43, at 12 (noting that "lawyers and jurors . . . may infer or presume that the defendant's body provides insight into the crime and the defendant").

47. See, e.g., Le'a Kent, *Fighting Abjection: Representing Fat Women*, in *BODIES OUT OF BOUNDS: FATNESS AS TRANSGRESSION* 130, 134 (Jana Evans Braziel & Kathleen LeBesco eds.,

We may be witnessing what might be called “a Foucauldian turn” with regard to fat identity. In volume I of *The History of Sexuality*, Michel Foucault famously observes that at a certain point in the nineteenth century, homosexual practices ceased to be perceived merely as forbidden acts, but took on a personality. It became an organizing category marking a fundamental quality that lay at the core of those who practiced homosexual acts.<sup>48</sup>

As defined by ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life norm, and a morphology with an indiscreet anatomy and possibly a mysterious psychology. Nothing that went into his total composition was unaffected by his sexuality. . . . We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized. . . . [T]he homosexual was now a species.<sup>49</sup>

For Foucault, sexuality as a meaningful category in understanding the human subject emerged as a result of a new discourse about sexuality—discourse produced by disciplines such as medicine, law, education, and theology. It is the very thriving of the discourse on sexuality that constituted it and regulated it as a meaningful prism through which to “decipher” human subjects.

As with sexuality, fatness emerges as a trait that allegedly reveals much more about the individual than medical information such as body mass index or fats in blood. The new category of fatness pathologizes excessive weight and paves the way for many kinds of social control mechanisms aimed to supervise this perversion. As sociologists Abigail Saguy and Anna Ward note, “People who cannot buy health insurance, clothing in offline stores, or are forced to buy two airplane seats because of their body size unquestionably fall into a category that carries social costs. Such incidents provide frequent reminders that their body size makes them a second-class citizen.”<sup>50</sup> But these forms of direct and covert oppression also simultaneously enable the emergence of a counter-discourse that

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2001) (discussing media representations of the fat body as signifying “lack of self-control, leading to disease”); Korn, *Too Fat*, *supra* note 7, at 222 (“Those who are obese are perceived as dishonest, sloppy, ugly, socially unattractive, less productive, lazy, stupid, and worthless.” (citation omitted)); Samantha Murray, *(Un)Be)Coming Out? Rethinking Fat Politics*, 15 *SOCIAL SEMIOTICS* 153, 154 (2005) (“[J]ust some of the characteristics we have come to assume define fatness are laziness, gluttony, poor personal hygiene, and a lack of fortitude.”).

48. MICHEL FOUCAULT, I *THE HISTORY OF SEXUALITY* 43 (Robert Hurley trans., Vintage Books 1990) (1976).

49. *Id.*

50. Abigail Saguy & Anna Ward, *Coming Out as Fat: Rethinking Stigma*, 74 *SOC. PSYCHOL. Q.* 53, 71 (2011).

resists labeling large bodies as deviating and turns to paradigms such as pride and politics of identity. In this context, it is significant to note the rise of a counter, fat-affirming, discourse that rejects the dominant negation of fatness and aspires to create room for an alternative discourse of a positive, visible, and vocal fat presence.<sup>51</sup>

As we have seen in the above survey of fat manifestations in law, the law plays a significant role in creating and protecting fat as a meaningful identity category.<sup>52</sup> The Foucauldian framework acknowledges the interrelations between oppressive, normalizing power on the one hand, and resistance on the other hand, but expresses ambivalence towards this dynamic. This Article's argument, that body size should be conceptualized as part of liberty, is offered with similar ambivalence: wouldn't promoting recognition of body size as a new category only serve to further reify the importance of weight? Still, I believe that grounding the right to be fat within the conceptual framework of liberty, rather than within the framework of antidiscrimination, would mitigate many of the normalizing effects that are associated with the power of law. I elaborate on this point below.<sup>53</sup>

## 2. *The Medical Framework's Monopoly on Legal Discourse*

In the legal manifestations of fatness reviewed above, fatness is almost exclusively discussed through the medical lens: by referring to accurate scientific measurements, such as weight, height, and BMI, or by examining medical causes of weight that might excuse one from responsibility for being fat. This point is stressed here because later in this Article, alternatives to the medical approach will be presented and advocated.<sup>54</sup>

As early as 1977, a sex discrimination case challenged an airline for establishing maximum weight standards for its female flight attendants that were stricter than those for male flight attendants of the same height.<sup>55</sup> Flight attendants were subject to meticulous and elaborate supervision of their weight. At different stages, the airlines prescribed a desired rate of weight loss (between half a pound to two pounds per week) and issued various administrative rules, such as requirements that a flight attendant should not be weighed during her menstrual period.<sup>56</sup>

A federal district court accepted as legitimate the medicalized height-weight tables in use, indicating that "the weight control program was implemented with

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51. On the fat-affirming identity politics groups, see *infra* Subsection III.C.2.

52. The law does not, however, operate alone, but draws from, and feeds back into, other disciplines of knowledge that participate in the discursive constitution of the fat persona.

53. See *infra* Section IV.A.

54. See *infra* Section III.C.

55. *Jarrell v. Eastern Air Lines, Inc.*, 430 F. Supp. 884 (E.D. Va. 1977).

56. *Id.* at 888.

the approval of [the airline's] medical department."<sup>57</sup> The court found that "[t]he application of [the airline's] weight tables to the general population of the United States between the ages of 25 and 31 would find a greater percentage of women than percentage of men to be in noncompliance."<sup>58</sup> Despite these findings, the court rejected the sex discrimination claim and was satisfied by the medical testimony submitted at trial "that weight is a characteristic which, within reasonable limits, is controllable by an individual."<sup>59</sup> The court granted further credence to the medical discourse by noting that "[t]he standards adopted for both sexes are consistent with accepted medical notions of good health and may be complied with without imposing a health hazard. For those flight attendants who are medically unable to meet their chart weight, exemptions are available."<sup>60</sup> In another case, the court held that it passed muster to permit an employer's physician to determine whether an employee's weight was acceptable by consulting "a weight chart, which he had clipped out of a newspaper and which he believed conformed to an insurance company's actuarial tables."<sup>61</sup>

That this approach is not a relic of bygone judicial stances is evidenced by recent cases that still readily adopt the medical perspective on weight. In a 2007 case that turned on the question of the evidence required to establish a disability discrimination claim under the Americans with Disabilities Act (ADA) and an analogous state law, plaintiff's weight grew beyond the limit set for employees in his role on a team that was responsible for installation and maintenance of telephone services.<sup>62</sup> The employing company hired another company to supervise the employees' weight, and plaintiff was informed that he would have to lose weight in order to continue his employment. The plaintiff was introduced with a timetable under which he was required to lose fifty pounds over a period of twenty-five weeks<sup>63</sup> and was terminated when he failed to lose the required weight.<sup>64</sup> Analyzing the problematic doctrine of ADA interpretation illustrated in this case is beyond the scope of this Article. What I wish to emphasize here is the face-value priority given to the medical gaze on the plaintiff's body, treating the body mechanically, as a simple object, easily susceptible to weight reduction or increase according to dictated and preset goals, while ignoring the plaintiff's own account that previous repeated attempts to lose weight caused him various types of distressing symptoms such as insomnia, a sense of sting in his hands and feet,

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57. *Id.*

58. *Id.* at 889.

59. *Id.* at 890.

60. *Id.* at 893.

61. *Or. State Corr. Inst. v. Bureau of Labor & Indus.*, 780 P.2d 743, 744 (Or. App. 1989).

62. *Greenberg v. BellSouth Telecomm., Inc.*, 498 F.3d 1258 (11th Cir. 2007).

63. *Id.* at 1260.

64. *Id.* The company offered to help place the plaintiff in another job within the company before terminating him.

fainting spells, and more.<sup>65</sup>

### 3. “*But No One Violates the Right To Be Fat!*”

One might object to the aim of this project that it makes no sense to protect a right to be fat because no one is denying fat persons the possibility of being fat. Indeed, in the above review of the manifestations of fat in contemporary law, nowhere can we find a government official who chases fat people with teeth wires (one of the more hideous and inhumane diet techniques—wiring the jaws so that no solid food can go through the mouth),<sup>66</sup> or threatens to throw fat people into jail unless they lose weight. But current legal arrangements do sometimes punish fat children and infringe the autonomy of their parents by mandating that obese children are removed from their parents’ custody to placements in which they are closely supervised so that they will not gain weight.<sup>67</sup> Current law also permits fining fat people for their weight (by allowing private actors to charge more for goods and services sold to fat people),<sup>68</sup> and limiting their freedom of opportunity (by striking fat people out of jury panels and by allowing weight-based employment discrimination).

What the above review demonstrates is the existence of an amalgam of legal arrangements (or lack thereof) that creates a legal climate in which being fat means being a second-class citizen. Our law sends repeated messages that fat people’s bodies are inferior. These messages also implicate the personality to which this body supposedly attests. They jeopardize the fat person’s sense of self-trust in his or her body and the sense of self-efficacy as an agent. Such legal arrangements hamper fat people’s ability to participate fully and equally in various domains from the family to the market. The law has an expressive role that is no less significant than its legal directives.<sup>69</sup> Recognizing the expressive role of the law enables us to realize the importance of the message sent by contemporary law—a message that life as a fat person is less valuable in many respects and merits less effort to create conditions for full realization of its potential.

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65. *Id.*

66. *See, e.g.,* Pietro Castelnuovo-Tedesco et al., *Jaw-Wiring for Obesity*, 2 *GENERAL HOSPITAL PSYCHIATRY* 156 (1980) (reporting a clinical study that found that jaw wiring was an ineffective means for controlling weight).

67. *See* sources cited *supra* note 19.

68. *See supra* text accompanying note 30.

69. On the expressive role of law, see, for example, Alex Geisinger & Michael Ashley Stein, *A Theory of Expressive International Law*, 60 *VAND. L. REV.* 77, 81 (2007) (“By expressive law, we mean the impact that law and legal process have on individual behavior . . . by affecting the social, or normative, meaning of that behavior.” (footnotes omitted)).

## II. THE CONTENTIOUS SCIENCE ON FAT

As with the blacks and the poor, fat people are thought to violate some of the most fundamental tenets in American political culture: that all people are fundamentally responsible for their own welfare; that self-control and restraint are the hallmarks of virtue; and that all Americans are obliged to work at improving themselves.<sup>70</sup>

[L]ives are lived in the context of a range of competing priorities, such as cultural tradition, interpersonal relationships, physical pleasure and economic resources. While the case for making overweight and obesity our number one health concern may seem obvious to obesity scientists, perhaps outside in the wider world life is seen as more complex and more prone to compromise.<sup>71</sup>

In the discussion throughout this Article, I will assume, for the sake of argument, and despite evidence to the contrary, that weight is mutable. That is, I will assume that changes in lifestyle through diets and exercise, or more radical interventions such as surgery, can lead to a long-term weight loss. I will also assume that fatness is generally not conducive to good health, in that it is either a factor in, or a cause of, conditions such as diabetes, heart disease, cancer, and high blood pressure. Excess fat might decrease life expectancy and life quality.

Making these presuppositions renders the challenge of arguing for the right to be fat more difficult. If fatness can be changed and leads to a shorter and worse life, why should we worry about protecting a right to remain fat, instead of encouraging fat people with both sticks and carrots to lose weight and to lead a lifestyle that prevents weight gain?<sup>72</sup>

Before embarking on the main argument, however, it is worth sketching the findings and claims regarding why fat is *not* as mutable and unhealthy as the medical establishment, the diet industry, and popular culture prompt us to believe. The following discussion is not offered as an exhaustive review of the literature, but rather as an outline of its main trajectories.

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70. OLIVER, *supra* note 13, at 73.

71. GARD & WRIGHT, *supra* note 5, at 187-88.

72. The suspect categories enumerated in Title VII of The Civil Rights Act of 1964 are mostly immutable categories, such as race, sex, or nationality. This is also true for age. *See* The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1967). The changeable categories, such as religion, are ones that it would seem too invasive for liberty and autonomy to require that one changes in order to avoid discrimination. For a pioneering study showing that traits (including weight) considered controllable by the individual are perceived as less worthy of protection from discrimination, see Tami Kricheli-Katz, *Choice Based Discrimination: Labor Force Type Discrimination Against Gay Men, the Obese and Mothers* (unpublished manuscript) (on file with author).

### A. The Immutability of Bodily Weight

Constant advertisements for diets or fitness regimes, and the public health discourse about the need to slim down the population, emphasize personal accountability and self-control as the keys to “normal” weight. However, data increasingly indicate that hormonal factors, metabolism, and genetics<sup>73</sup> are all factors that predetermine one’s weight and impede attempts to lose it. Long-term, significant weight loss is still a challenging enigma to science and medicine. Rosenbaum and his colleagues, for example, found that after weight loss, brain regions associated with reward were more active than the parts associated with self-control, leading to fast regain of the lost pounds.<sup>74</sup> According to a 2001 survey of weight loss studies, five years after a weight loss subjects gained back almost eighty percent of their lost weight.<sup>75</sup> A 2007 extensive literature review found even more conclusive evidence that “dieters are not able to maintain their weight losses in the long term.”<sup>76</sup> Studies also find that the more weight is reduced, the smaller the chances of sustaining the new weight.<sup>77</sup> In other words, most weight losses (through diets, exercise, or surgery) end in regaining the pounds lost and adding to them more weight within five years.<sup>78</sup> Cynically

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73. See, e.g., OLIVER, *supra* note 13, at 100-21 (surveying the research on physiological reasons for obesity and on its immutability); Elizabeth K. Speliotes et al., *Association Analysis of 249,796 Individuals Reveal 18 New Loci Associated with Body Mass Index*, 42 NATURE GENETICS 937 (2010) (thirty-two distinct genetic variations have so far been identified as related to body mass index or to obesity); Joanne E. Cecil et al., *Variants of the Peroxisome Proliferator-Activated Receptor  $\gamma$ - and  $\beta$ -Adrenergic Receptor Genes Are Associated with Measures of Compensatory Eating Behaviors in Young Children*, 86 AM. J. CLIN. NUTR. 167, 171-72 (2007) (finding correlation between genetic makeup and eating behaviors of children); Anthony G. Comuzzie & David B. Allison, *The Search for Human Obesity Gene*, 280 SCIENCE 1374 (1998) (indicating that by some estimates, between forty and seventy percent of human obesity is heritable); A. Marti et al., *Genes, Lifestyles, and Obesity*, 28 INT’L J. OBESITY S29, S36 (2004) (finding that it is difficult to separate the roles of genetic makeup from that of environmental factors such as “cultural and social mediated food intake and reduced domestic and living work activities”). *But see* James O. Hill & Edward L. Melanson, *Overview of the Determinants of Overweight and Obesity: Current Evidence and Research Issues*, 31 MED. & SCI. IN SPORTS & EXERCISE s515, s520 (1999) (arguing that genes play little if any role in obesity, and that the major factor in the increased rates of obesity is the decrease in physical activity).

74. Michael Rosenbaum et al., *Leptin Reverses Weight Loss-Induced Changes in Regional Neural Activity Responses to Visual Food Stimuli*, 118 J. CLIN. INVEST. 2583, 2588 (2008).

75. James W. Anderson et al., *Long-Term Weight-Loss Maintenance: A Meta-Analysis of US Studies*, 74 AM. J. CLINICAL NUTRITION 579, 582 (2001).

76. Traci Mann et al., *Medicare’s Search for Effective Obesity Treatment: Diets Are Not the Answer*, 62 AM. PSYCHOLOGIST 220, 230 (2007).

77. Anderson et al., *supra* note 75, at 583. Although subjects who exercised regularly had a better chance of keeping their new weight, even their success was limited. *See id.* at 582.

78. Glenn Gaesser, *Is “Permanent Weight Loss” an Oxymoron? The Statistics on Weight Loss and the National Weight Control Registry*, in THE FAT STUDIES READER, *supra* note 11, at 37-40 (indicating that solid data about weight loss success is hard to find, and that the 90-95% figure of failure in long term weight loss “may not be far from the truth”). Gaesser also points to a direct correlation between weight loss attempts in U.S. population and weight gain of this population. *Id.*

phrased, the available data indicate that good strategy for *gaining* weight is embarking on a weight loss program.<sup>79</sup>

Mainstream science promoting the notion that weight is mutable employs, according to critics, problematic methodologies, such as keeping track of the weight of research subjects for too short a time (thus boosting the data on the success of weight loss and failing to isolate the benefits of weight loss from other factors such as “exercise, sodium/alcohol reduction, or even antihypertensive medication use”<sup>80</sup>). Critics also maintain that weight loss studies fail to address the health consequences of weight regain, which occurs in most dieters within five years of their weight loss.<sup>81</sup>

Another factor that weakens the individualistic personal-choice explanations for weight gain is the tight nexus between weight and socioeconomic factors. Income and home location determine one’s ability to access fresh produce and fiber-rich foods.<sup>82</sup> Race and ethnicity are also strong predictors of weight in the United States—partly because of their correlation with poverty<sup>83</sup> and the lived environment that encourages a sedentary lifestyle,<sup>84</sup> but also due to genetics.<sup>85</sup>

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79. See LINDA BACON, *HEALTH AT EVERY SIZE: THE SURPRISING TRUTH ABOUT YOUR WEIGHT* 47-50 (2008).

80. Mann, *supra* note 76, at 229.

81. *Id.* at 230.

82. See, e.g., Paul Ernsberger & Richard J Koletsky, *Biomedical Rationale for a Wellness Approach to Obesity: An Alternative to a Focus on Weight Loss*, 55 J. SOCIAL ISSUES 221, 244 (1999) (analyzing the evidence that fat people are significantly more likely to be poor and uneducated). For low-income families, it is often a rational choice to eat three meals a day in cheap fast food restaurants rather than buy basic ingredients and prepare them at home.

83. See OLIVER, *supra* note 13, at 75 (surveying data that demonstrate that “America’s poor and minorities are much fatter, on average, than its middle class, whites” (citation omitted)); RHODE, *supra* note 7, at 42-43; Kylie Ball & David Crawford, *Socioeconomic Status and Weight Change in Adults: A Review*, 60 SOC. SCI. & MED. 1987, 2007 (2004) (finding an inverse correlation between occupation status and obesity among non-blacks in developed countries); Sirin Yaemsiri et al., *Food Concern and Its Associations with Obesity and Diabetes Among Lower-Income New Yorkers*, 15 PUB. HEALTH NUTRITION 39 (2011) (finding a correlation between being concerned about the availability of sufficient food to one’s family and obesity rates among whites and some sub-groups of blacks in New York). Women’s body size is particularly susceptible to poverty, probably due to gendered expectations that women prioritize the healthful nutrition of other family members. See, e.g., Molly A. Martin & Adam M. Lippert, *Feeding Her Children, But Risking Her Health: The Intersection of Gender, Household Food Insecurity, and Obesity*, 74 SOC. SCI. & MED. 1754 (forthcoming 2012), available at <http://dx.doi.org/10.1016/j.socscimed.2011.11.013>.

84. There is often a correlation between race, poverty, and environmental measures that encourage outdoor physical activity, such as the availability of streetlights and sidewalks, recreational facilities, and trust of neighbors. See, e.g., Charyl L. Addy et al., *Association of Perceived Social and Physical Environmental Support with Physical Activity and Walking Behavior*, 94 AM. J. PUB. HEALTH 440 (2004) (finding correlation between the perceived social and physical environment and tendency for walking and other physical activity).

85. See John P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 AM. J. PREVENTATIVE MED. 211 (2004) (finding a higher availability of fast food restaurants in predominantly black neighborhoods); Mason, *supra* note 7, at 344-45 (reviewing data on the

The immutability of weight is relevant to the debate about weight-based discrimination because it has implications for questions of distributive justice. It would seem unfair, for instance, to tell a young man applying for a job that, because he grew up in an inner-city neighborhood where the available food was processed, rich in simple carbohydrates, and poor in fiber—facts that prompted his high body weight—now he will not receive a fair, merit-based chance of employment because he is too fat. Such limitations on one’s opportunities due to one’s background would go against the principles of freedom of opportunity and of meritocracy.

As these data suggest, even those who view obesity as a problem that should be prevented (and I am not among them) should neglect the individualistic “willpower” understanding of obesity and realize that the appropriate way to comprehend “the obesity epidemic” is as a collective and structural phenomenon.<sup>86</sup> The structure of the food market is not a natural fact, but a result of large-scale governmental policies that would be changeable, given the right political conviction.<sup>87</sup> It would be both more effective and more just to redirect government subsidies from corn and meat to fruit, vegetables, and whole grains and legumes than to target obesity as the means to promote public health. Similarly, attention should be directed at discouraging consumption of processed food and fast food, which are often cheaper than raw ingredients. This has to do not only with price schemes, but also with other factors that determine how Americans prepare and consume their food. The structure of the labor market, which may require that both parents work full time in order to sustain a family, makes it hard for parents to shop for basic ingredients and cook at home, rather than shop for TV dinners or to dine in fast food venues.<sup>88</sup> The ever more

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unequal affliction of obesity among social groups).

86. See, e.g., Robert Paarlberg, *The Politics of Obesity*, in *FOOD POLITICS: WHAT EVERYONE NEEDS TO KNOW* 81-94 (2010) (anchoring the causes for obesity in structural reasons such as fast food and the food industry, and failure of governmental intervention); J. C. Peters et al., *From Instinct to Intellect: The Challenge of Maintaining Health Weight in the Modern World*, 3 *OBSIDITY* 69, 72 (2002) (stressing the recognition that “obesity is not a problem of defective physiological regulation, but is an environmental and societal problem and therefore must be approached through environmental and social solutions”).

87. For a detailed account of a different structure of food subsidies, and other original measures such as replacing soda vending machines with carrots and grapes machines, see Mark Bittman, *Bad Food? Tax It, and Subsidize Vegetables*, *N.Y. TIMES*, July 23, 2011, <http://www.nytimes.com/2011/07/24/opinion/sunday/24bittman.html?pagewanted=all>.

88. See Roberto De Vogli et al., “Globoesization”: *Ecological Evidence on the Relationship Between Fast Food Outlets and Obesity Among 26 Advanced Economies*, 21 *CRITICAL PUB. H.* 395 (2011) (finding correlation between the prevalence of fast food change and obesity rates). In an interview, this study’s leader stressed that “the public debate is too much focused on individual genetics and other individual factors, and overlooks the global forces in society that are shaping behaviors worldwide.” Jeannine Stein, *Wealthy Nations with a Lot of Fast Food: Destined To Be Obese?*, *L.A. TIMES BOOSTER SHOTS BLOG* (Dec. 22, 2011), <http://articles.latimes.com/2011/dec/22/news/La-heb-obesity-fast-food-20111222> (quoting study author Roberto De Vogli). Another study found that the prevalence of obesity was lower in areas with supermarkets and

demanding and stressful corporate culture dictates that employees eat lunch at their desk, and often they do not even move their bodies to go out and shop for it.

I discuss the accessibility of healthy food and of constructive eating habits because they likely play a role in obesity rates (alongside other factors such as genetic makeup). But I should clarify that, while I maintain that the law should protect the right to be of any body size, this Article is not meant as a vindication of the food industry, waiving it of its responsibility to the population's health. This Article does not object to governmental policies that would promote citizens' health. It does, however, strongly object to policies that target weight and aim to enhance weight loss with sticks or carrots. As my review of the ways in which fat manifests in law demonstrates,<sup>89</sup> the law mostly treats fatness as an *individual* fault that is in the control of each legal subject alone. All that is allegedly needed is a stronger willpower, and the extra pounds will fall off. This privatization of the issue is unconvincing and ineffective.

For the sake of analytical clarity, let me emphasize that, although I think that there is much that should be done to improve access to healthier eating and more active lifestyles, I do not believe this should undermine the right to be fat. Policymakers should focus on measures that would improve the quality of life rather than ones that would promote weight loss. I would argue for the right to be of any body size, including the right to be fat, even if we were to assume a utopian world in which everyone would have access to healthy food and active lifestyles, and even if there were no linkage between weight and poverty or weight and race.<sup>90</sup> The right to be fat would still be viable under such hypothetical conditions because, as I will show below, body size is a factor in human experience that has intimate and diverse meanings—meanings that are far wider than its narrow medical understanding conveys and that are derived from one's identity, community, culture, and psychology.

### *B. Weight and Health*

A growing body of research suggests that the correlation between fatness and illness is much more complex than is popularly assumed and that the prevailing argument that obesity leads to health risks stands on unstable ground.<sup>91</sup>

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higher in areas that had fast food restaurants and small grocery stores. See Kimberly B. Morland & Kelly R. Evenson, *Obesity Prevalence and the Local Food Environment*, 15 HEALTH & PLACE 491, 493 (2009).

89. See *supra* Section I.A.

90. Still, the grave contemporary state of eating habits and bodily practices and the increasing weight of the population are of course a significant catalyst in writing this Article. It is likely that had obesity not become a central issue of public policy, and had fatness not become associated with a distinct character, see *supra* Subsection I.B.1, there would not have been a need for an article about the right to be fat, for fat people would not have become a stigmatized social and legal category.

91. See, e.g., sources cited *supra* note 88.

A salient example is provided by Paul Campos' *The Diet Myth*,<sup>92</sup> which constructs a powerful critique of the economic interests of pharmaceutical companies, physicians, and insurance companies to convince policymakers and the public that weight is a central factor of disease.<sup>93</sup> Research demonstrates that the weight-height charts used by health insurers and employers are skewed and finds that some people who are considered overweight by such charts actually live longer than those at a "normal" weight.<sup>94</sup>

There are strong indications that data on the health risks involved in weight might be inflated and skewed.<sup>95</sup> Research indicates, for example, that fat but physically fit obese people are healthier than thin and sedentary persons.<sup>96</sup> In some disease, such as cancer and heart disease, higher BMI is actually associated with lower rates of disease.<sup>97</sup> Furthermore, evidence suggests that the pressure by the medical establishment to lose weight is itself a risk factor: frequent attempts to lose weight and yo-yo dieting cause damage to physical and mental health by increasing cardiovascular disease, mortality, and damaging self-confidence and

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92. PAUL CAMPOS, *THE DIET MYTH: WHY AMERICA'S OBSESSION WITH WEIGHT IS HAZARDOUS TO YOUR HEALTH* (2005) (arguing that financial and political interests distort public health policy regarding obesity); see also SOLOVAY, *supra* note 7, at 171-88 (discussing the interests of the diet industry in portraying obesity a pressing medical and moral issue).

93. Such interests contribute to scientific accounts that are biased and falsely amplify the problem, enhance the sense of public moral panic, and prompt the demonization of people who are considered overweight. When assessing the benefits of weight loss surgeries, for example, many researchers measure and document only the success, such as the decrease in blood pressure, but not the risks from anesthesia, infection, or other surgery side effects. Cf. Jeanine C. Cogan, *Re-evaluating the Weight-Centered Approach Toward Health: The Need for a Paradigm Shift*, in *INTERPRETING WEIGHT: THE SOCIAL MANAGEMENT OF FATNESS AND THINNESS* 229 (Jeffery Sobal & Donna Maurer eds., 1999) (reviewing evidence on the distortion of medical research data that is affected by what a thinness bias). Some studies also exclude participants with physical health problems, and thus are not able to examine whether weight loss actually improves health conditions. See Esther D. Rothblum, *Contradictions and Confounds in Coverage of Obesity: Psychology Journals, Textbooks, and the Media*, 55 J. SOC. ISSUES 355, 359 (1999) (noting the inherently problematic nature of weight-loss studies in psychology journals and how they are misinterpreted by the media).

94. See, e.g., CAMPOS, *supra* note 92, at 5-40; Katherine M. Flegal et al., *Aim for a Healthy Weight: What Is the Target?*, 131 J. NUTRITION 440S, 449S (2001) ("[W]eights outside the healthy weight range may be healthy and . . . weights inside the healthy weight range may not be healthy.").

95. See generally GARD & WRIGHT, *supra* note 5 (arguing that the current science on obesity is "confused and replete with flawed and misleading assumptions" and that the inflated rhetoric of risks associated with obesity is harmful); MICHAEL GARD, *THE END OF THE OBESITY EPIDEMIC* 12 (2011) (arguing that "there is now consistent evidence that obesity rates are leveling off" and providing a helpful review of the arguments against the seeming scientific consensus on the causes, scope, and solutions to obesity).

96. See, e.g., Xuemei Sui et al., *Cardiorespiratory Fitness and Adiposity as Mortality Predictors in Older Adults*, 298 JAMA 2507, 2515 (2007) (finding that in adults sixty years old and older, lack of fitness was a better predictor of mortality than BMI, waistline, and other measures of obesity).

97. See OLIVER, *supra* note 13, at 26.

emotional well-being.<sup>98</sup>

Another factor undermining the conviction that weight itself is risky to one's health is the bad healthcare provided to fat people. Physicians—operating from the paradigm that fat is unhealthy—tend to focus on what they see as the patient's imperative to lose weight while withholding treatment for other symptoms and ailments.<sup>99</sup> Many fat patients leave the doctor's office with no treatment for their ear infection or joint problem—but with the sole instruction to lose weight.<sup>100</sup> Many do not return to the clinic, deterred by the focus on their being a failure and the lack of responsiveness to their physical distress.<sup>101</sup> There are also accessibility and accommodation problems: treatment beds, for example, are often too narrow or not stable enough for very fat patients, which is another reason that fat persons do not seek appropriate medical care.<sup>102</sup> These obstacles to medical care frame the grim data about the bad health of fat persons in a different light. The unaccommodating and often hostile medical institution significantly contributes to their deteriorating health.<sup>103</sup>

There is also a problem of causality in linking weight to bad health. Science has thus far succeeded in finding a linkage between high weight and disease, but it

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98. See, e.g., Frances M. Berg, *Health Risks Associated with Weight Loss and Obesity Treatment Programs*, 55 J. SOC. ISSUES 277, 279, 282-84, 287-89 (1999) (examining the unhealthy influence of diet techniques such as pills and surgeries); Jerome P. Kassirer & Marcia Angell, *Losing Weight—An Ill-Fated New Year's Resolution*, 338 N. ENGL. J. MED. 52, 52 (1998) (noting that failed attempts to lose weight often create guilt and self-hatred, and that anti-obesity and weight-loss drugs are linked to medical problems, such as a loss of essential nutrients). Metabolic activity in bodies that lose and regain weight slows down, as the body reacts by slowing fat burn due to evolutionary survival programming. See, e.g., Gretchen Voss, *When You Lose Weight—And Gain It All Back*, MSNBC, June 6, 2010, <http://www.msnbc.msn.com/id/36716808/#.T52RO-1YtYs>. The sense of failure and self-unworthiness that accompanies weight regain impairs both physical and psychological quality of life. *Id.* at 189-90.

99. See Kelly D. Brownell & Rebecca M. Puhl, *Stigma and Discrimination in Weight Management and Obesity*, 7 PERMANENTE J. 21, 21-22 (2003) (reviewing studies that find pervasive implicit bias against the obese even among medical professionals who specialize in obesity treatment, and that such negative attitudes lead obese persons to avoid seeking medical care, including routine preventative checkups such as pelvic exams or breast exams); Puhl & Heuer, *supra* note 21 at 947 (“[R]ecent studies confirm that obese patients encounter prejudice, ambivalence, and oftentimes unsatisfactory treatment in health care.”).

100. Cf. Marlene B. Schwartz et al., *Weight Bias Among Health Professionals Specializing in Obesity*, 11 OBESITY RES. 1033, 1037-39 (2003); SOLOVAY, *supra* note 7, at 218-28 (discussing the inadequate medical treatment given to obese patients).

101. For personal accounts of never returning to doctors who focus on the patient's weight regardless of the patient's complaint see KATE HARDING & MARIANNE KIRBY, *LESSONS FROM THE FAT-O-SPHERE: QUIT DIETING AND DECLARE A TRUCE WITH YOUR BODY* 49-63 (2009).

102. Cogan and Ernsberger dub this a “weight-centered approach toward health.” Cogan & Ernsberger, *supra* note 98, at 188; see also Susan Trossman, *Obesity on the Rise Leads to Workplace Challenges, Patient Concerns*, REDORBIT (May 11, 2005), [http://www.redorbit.com/news/health/149270/obesity\\_on\\_the\\_rise\\_leads\\_to\\_workplace\\_challenges\\_patient\\_concerns/](http://www.redorbit.com/news/health/149270/obesity_on_the_rise_leads_to_workplace_challenges_patient_concerns/) (noting that in American hospitals rooms are too small for obese patients, beds are too narrow, chairs have arms, and even larger blood pressure cuffs tend not to fit).

103. See OLIVER, *supra* note 13, at 108 (discussing the health damages of diets).

has yet to establish the causal direction between the two. It is unclear, for example, whether high weight leads to high blood pressure or to diabetes, or whether high blood pressure and diabetes prompt weight increase.<sup>104</sup> In addition, the monetary burden that high rates of obesity cast on the public budget is often inflated and miscalculated, for example, by failing to include in the calculations the millions of dollars spent on useless and even harmful diet products.<sup>105</sup>

Data also indicate that perhaps the growing social problem is not the increasing rate of growth of the fat population, but instead is the increasing and ever more radical pursuit of thinness.<sup>106</sup> In our contemporary sociolegal atmosphere, not only is there no right to be fat, but there is also a duty to be thin. Having reviewed substantial data undermining the predominant belief that weight is both unhealthy and mutable, I will nonetheless presume, as a preliminary matter for the rest of my argument, that the majority is correct in its conviction that weight is changeable and hampers good health.

### C. Utilitarian Arguments

The main line of argument in this Article develops a deontological justification for a right to be fat. Yet the predominant debate about weight employs a utilitarian framework, emphasizing the allegedly high social cost of fatness and the urgency in lowering this cost. Although I have deep reservations about anchoring the right to be fat in utilitarian justifications, I provide the following discussion to demonstrate that this right could also be instrumentally justified. This Section challenges the prevailing view that policies that create incentives to lose weight or to avoid gaining it promote overall utility. I will briefly demonstrate that the current formulation of the utilitarian calculations misses important components due to anti-fat bias. Furthermore, recognizing the right to be fat might not be as expensive as we tend to assume, and, in fact, acknowledging it might even produce more efficient outcomes.

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104. See GARD & WRIGHT, *supra* note 5, at 102 (claiming that the available studies “provide little or no information about the impact of fatness and changing levels of fat on the health of individuals” and that there is no direct evidence tying excess fat tissue to diabetes or heart disease); OLIVER, *supra* note 13, at 118 (noting that the prevailing view that losing weight is the way to prevent diabetes, heart disease, and other conditions is based on data that prove association between certain conditions and obesity, but not the causal direction).

105. For more problems with the calculation of the benefits and costs of obesity see *infra* Section II.C.

106. One extensive study found that a high discrepancy between participants’ actual and ideal weight was a better predictor of poorer mental and physical health than actual BMI. See Peter Muennig et al., *I Think Therefore I Am: Perceived Ideal Weight as a Determinant of Health*, 98 AM. J. PUB. HEALTH 501, 504 (2008) (“[P]ercentage of desired weight loss was a much stronger predictor of unhealthy days than was BMI.”). Describing the study, the authors state, “The number of unhealthy days increased as participants became increasingly dissatisfied with their weight. . . . [P]sychological stress associated with a negative body image explains some of the morbidity commonly associated with being obese.” *Id.* at 503-04.

Cost-benefit analysis is central in prevailing discourse about obesity: The argument is that the increase in the population's weight causes an overall deterioration in the population's health, which in turn leads to ever-growing medical costs, decreases in workers' productivity, etc.<sup>107</sup> But such calculations of the effect of obesity on overall welfare usually neglect the significant benefits that fat people would draw from operating in conditions of autonomy and dignity in whatever body size.<sup>108</sup> If welfarist approaches are to produce a convincing argument that it is best to continue fighting obesity by targeting fat people and creating direct and indirect incentives for them to lose weight, or refrain from gaining it, then their calculus must take more costs into account.<sup>109</sup>

*The utility calculus must include the public money invested in convincing fat people that their body needs to change.* In addition to the burden these costs present to the public budget, we must be aware that funds that are currently invested in obesity-focused policies divert resources from alternative measures that could benefit the health of the entire population, weight notwithstanding (e.g., investing in subsidizing healthful food, decreasing pollution, designing neighborhoods that facilitate walking rather than driving).

*The health risks associated with frequent attempts to lose weight should be taken into account.* To the extent that they are effective in convincing the public it should try to lose weight, public campaigns and other policies designed to create incentives for weight loss damage public health. As demonstrated earlier, long-term weight loss is virtually impossible for most, and repetitive attempts to lose weight may be harmful for both physical and mental health. In calculating the utility of weight-loss promoting policies, therefore, we should take into account the damage to health by yo-yo dieting or crash diets, the complication risks of weight-loss surgery, and the stress and decrease in self-esteem caused by failing to lose weight and being labeled as unhealthy, not pretty, and of a weak personality. As we know, stress is a significant health risk factor, so the mental effects of dieting feed back to the physical ones. In other words, any argument from utility that supports casting heavier burdens on fat people as a way to

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107. See, e.g., Tomas Philipson & Richard Posner, *Is the Obesity Epidemic a Public Health Problem? A Review of Zoltan J. Acs and Alan Lyles's Obesity, Business and Public Policy*, 46 J. ECON. LITERATURE 974, 974 (2008). The authors offer utilitarian arguments such as: "The problem is not that disadvantaged persons cannot read labels and are unaware that obesity is bad for their health, but that uneducated persons have less of an incentive to invest in their health because their longevity and their utility from living are below average," thus stressing that the life of the obese is a life of lesser worth. *Id.* at 979.

108. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (discussing the distinction between the intrinsic value of rights and utilitarian justifications for rights).

109. Because the utility arguments are inherently based on empirical data about obesity rates, health costs, etc., in this Part, I abandon the assumptions employed throughout the main part of this Article (i.e., that weight is mutable and that it is unhealthy), and return to a fact-based analysis, which takes into account the prevalence of failure in losing weight and the indications that weight is not as unhealthy as is commonly assumed.

compensate for the externalities their weight casts on society (e.g., by charging a higher health insurance premium, or by allowing weight-based employment discrimination) must also take into account the thus-far glaringly low success rates of such policies and assess them vis-à-vis the cost of stigma, guilt, low self-esteem, and disempowerment that would be associated with such burdens.

*The monetary costs of largely futile weight-loss attempts should not be ignored.* In addition to the health risks created by repeated efforts to lose weight, a cost-benefit analysis of the best policy regarding weight should incorporate the costs of the billions of dollars spent on diet products, diet food, diet groups, etc.<sup>110</sup>

*An assessment of the cost of fatness must additionally consider the reverse behavioral effects of fat bias.* The public campaigns discussed here may not even be efficient in changing behavior. Telling people that they should lose weight does not prompt them to a constructive behavior associated with weight loss, probably because such messages create psychological burden such as low self-esteem and a sense of inadequacy. Recent studies demonstrate that the more fat people internalize the stigma associated with their weight, and the more they are subject to teasing about their weight, the more likely they are to binge-eat, and the less likely they are to exercise.<sup>111</sup>

Finally, law professor Gowri Ramachandran anchors body-related rights not in dignity, autonomy, and other deontological grounds, but rather in the potential of subversive bodily practices “to engage in making culture,” to resist conventional bodily norms, to engage in culture wars, and to “[move] culture in radical ways”<sup>112</sup> (a function she dubs “cultural velocity”). Following this work, utilitarian accounts of the desirability of regulating obesity should add to their calculus the damage in halting Ramachandran’s cultural velocity by superimposing a narrow notion of the normal body size. Weight-control policies suppress the potential for subversive and destabilizing bodily practices of fat people (such as fully participating in activities like dancing or swimming which

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110. A common figure in the literature is that the diet industry is a forty billion dollar per year industry in the United States. See, e.g., Eric A. Finkelstein et al., *Economic Causes and Consequences of Obesity*, 26 ANN. REV. PUB. HEALTH 239, 252 (2005).

111. Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1024 (2010) (finding that stigmatizing fat individuals threatens health and interferes with effective prevention efforts); Puhl & Heuer, *supra* note 21, at 956 (“[T]he existing evidence is sufficient to challenge common perceptions that stigma may motivate healthy eating behaviors, and instead suggests that bias may increase maladaptive eating behaviors, exercise avoidance, and in some cases reduce motivation to lose weight.”); see also RHODE, *supra* note 4, at 42 (surveying data that demonstrates that bias against fat people is counterproductive); Douglas Degher & Gerald Hughes, *The Adoption and Management of “Fat” Identity*, in INTERPRETING WEIGHT: THE SOCIAL MANAGEMENT OF FATNESS AND THINNESS, *supra* note 93, at 11, 20-21.

112. See Ramachandran, *supra* note 12, at 30-31.

many fat individuals prefer to avoid)<sup>113</sup> and neglect law's potential in "[carving] out [a] space for individuals, subcultures, families, and other groups to form different, challenging identities, and even reform them, yet still have a job, shelter, and other needs met that would permit participation in the broader culture."<sup>114</sup>

The items on the list above are consistently omitted by the prevailing welfarist policy discourse that advocates the pressing need to slim down the population. It is only after incorporating these items into the utility calculus that welfarist calls to take measures in "the war against obesity" can be made convincingly. Including the above-mentioned components might lead to the conclusion that the right to be fat is defensible in instrumentalist, utilitarian terms as well.

### III. THE PHILOSOPHICAL GROUNDING OF THE ARGUMENT FROM LIBERTY

Human beings are creatures of the flesh. What we can experience and how we make sense of what we experience depend on the kinds of bodies we have and on the ways we interact with the various environments we inhabit. It is through our embodied interactions that we inhabit a world, and it is through our bodies that we are able to understand and act within this world with varying degrees of success.<sup>115</sup>

Liberty is a basic tenet of modern liberal legal regimes. But liberty is an open-ended and abstract concept, and the content that has been associated with it throughout its existence in political and legal thought has been ever changing depending on place, time, and context. I would like to argue here that the modern legal understanding of liberty, as well as the related rights of autonomy and dignity, have been based on a disembodied, mind-focused understanding of human experience. This "trouble with the body" is to a great extent responsible for our failure to recognize legal regulation of weight as infringing on liberty. Our concept of liberty should be broadened to include an appreciation of body size (along with certain other bodily traits and experiences), as an important locus of freedom, autonomy, and dignity. This Part will lay down the philosophical foundations for my argument that, even if weight is mutable and

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113. See, e.g., Degher & Hughes, *supra* note 111, at 19-20.

114. See Ramachandran, *supra* note 12, at 31, 39 ("Due to the embodied nature of subjectivity, control of a person's body may in fact become control of that person's very subjectivity, directing the identity, thoughts, and beliefs of the person being controlled."). Like Ramachandran, I stress that my argument for the right to be fat is not universal: It is contingent on the unique ways in which fat is understood in twenty-first century U.S. society, culture, and law. In a society in which fatness has *not* become associated with a set of distinct characteristics, see *supra* Subsection I.B.1, there would probably be no room for this right, and it would be rendered meaningless.

115. Mark L. Johnson, *Embodied Reason*, in PERSPECTIVES ON EMBODIMENT: THE INTERSECTIONS OF NATURE AND CULTURE 81, 81 (Gail Weiss & Honi Fern Haber eds., 1999) [hereinafter PERSPECTIVES ON EMBODIMENT].

harmful to one's health, body size should be guarded from governmental regulation and also be partly protected in the private sphere, because, like speech or the right to have an abortion, body size is an intimate and fundamental area of personhood. This conclusion dictates that body size must be handled with the same respect and care apportioned for speech, even speech with which we vehemently disagree, or for abortion, even an abortion decision that we believe to be ill-informed and mistaken.

### A. A Brief Overview of Mind-Body Dualism

Rene Descartes, arguably the founder of modern philosophy, maintained that, in order to find certain truth, one must disregard information attained through the senses, which sometimes mislead, and instead rely instead on the mind. Descartes wrote, "I shall consider myself as not having hands or eyes, or flesh, or blood or senses, but as falsely believing that I have all these things."<sup>116</sup> Descartes reached the well-known maxim *cogito ergo sum* (I think, therefore I am)<sup>117</sup> and launched a bold intellectual experiment negating the importance of the body. In Descartes' view, the body, unlike the soul, is a machine, "devoid of subjectivity and intention."<sup>118</sup> Descartes played a crucial role in our tradition, both in conceptually separating the soul from the body and in privileging the mind over the body by identifying it as the residence of our souls, and consequently, our true selves.<sup>119</sup> This perspective has invited a view of the body as something that could be reshaped in a limitless fashion by science, medicine, and by the choice of the soul that occupies it.

The idea that it is possible, and even desirable, to conceptually separate oneself from all bodily and sensory experience, has managed to keep a tight grip on the West's imagination—so much so that it is possible to posit that in the centuries since Descartes' dualistic framework, our ability to relate to our body as a meaningful site of our being has been numbed. The right to be fat is a good example. We can easily recognize the harm in limiting speech or intervening in

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116. DESCARTES, *Meditations on First Philosophy*, in DESCARTES SELECTED PHILOSOPHICAL WRITINGS 73, 77 (John Cottingham et al. trans., 1998).

117. *Id.* at 80.

118. Drew Leder, *A Tale of Two Bodies: The Cartesian Corpse and the Lived Body*, in THE BODY IN MEDICAL THOUGHT AND PRACTICE 17, 20 (Drew Leder ed., 1992).

119. This shift could be traced back to other origins, such as to the Judeo-Christian tradition, which separates body and soul, or to Plato, who was infatuated with knowledge that is based on neither the senses nor concrete material existence. In Plato's view, because the soul is eternal, it has privileged access to the truth compared to the finite body. Since the center of my project is not intellectual history, I focus on Descartes' ideas and their aftermath because they occupy the scholarly critique of the denial of the body in modern sensibility. I could have delved, however, into sources of the mind-body separation, from Plato, through Christianity, to Kant. For a discussion of the history and philosophical origins of mind-body dualism, see Howard Robinson, *Dualism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, pt. 1 (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/archives/fall2003/entries/dualism/>.

one's religious faith, but most people simply do not appreciate what is so shocking or wrong about sending a message to a growing segment of the population that their bodies are deformed, inferior, and in urgent need of change. We treat the body instrumentally, essentially as a vessel for our mind, emotions, and other faculties that are considered abstract. But changing one's body size is not nearly a technical thing or something that is external to the self (as Descartes would have it). Losing weight affects the intimate corporeal experience. It affects one's pace of walking and of breathing, the texture of one's skin, and the extent to which the body's contours are rounded or straight angled. As the famous Gershwin song goes, it affects "the way you wear your hat/ the way you drink your tea."<sup>120</sup> It affects the most basic gestures, the most fundamental aspects of what it means to be a person. And yet, largely due to Cartesian tradition, mind-body dualism had a decisive influence on modern legal thought, and this influence has had a significant role in contemporary law's obliviousness toward the body in general, and body-size in particular, as important sites of rights. Thinking purely, without dependence on the body, is perceived as a superior activity. The body remains in this tradition opaque, misleading, and insignificant.<sup>121</sup> Our law, therefore, sees body size through a mechanistic lens, as if asking legal subjects to lose weight is no more cumbersome than requiring them to get their car fixed by a mechanic.

American constitutional law has recognized rights related to bodily practices, such as the right to abortion, contraceptive rights, the fundamental right to intimate consensual sexual conduct, or the right to refuse medical treatment. These rights are distinct from the problem of bodily weight, however, in at least two ways that contributed to their recognition as worthy of legal protection. First, they are concerned with something the body does, or something that is done to the body directly. The right to any body size lacks a concrete moment in which one can take, or refrain from taking, specific actions. One's body size is determined by myriad daily practices. This Article's argument is crucially related to this fact: Regulating body size essentially involves regulating one's everyday practices and habits, in a way that is disturbing when examined from the prism of liberty interests. Second, the courts grounded the bodily rights mentioned above in easily recognizable underlying interests that were not essentially about the body. Abortion rights, for example, have been theorized as part of the right to privacy. Sex rights have been explained as pertaining to the right to personal autonomy. In the present case, by contrast, it is difficult to generalize and

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120. Fred Astaire, *They Can't Take That Away from Me*, on SHALL WE DANCE? (RKO Radio Pictures 1937).

121. See, e.g., BORDO, *supra* note 5, at 1-3 (2004) (analyzing the poem "The Heavy Bear," by twentieth century American poet Delmore Schwartz, in which the body is represented as with me but not "me," lacking intelligence or intentionality, clumsy, gross, disgusting and capable of aggression, an obstacle to self expression, and a "prison of the soul and confounder of its projects").

represent through conceptual language the experience of “being of a certain body size”<sup>122</sup> and, therefore, it is more difficult to recognize the precise interests that are derived from one’s body size. As a result, this Article suggests anchoring the right to be fat in the right to liberty, rather than in more specific rights such as privacy or free speech.

### 1. *The Contemporary Critique of Mind-Body Dualism*

The last four decades have seen a flourishing of scholarship that positions the body as a central and essential site of human existence. Such critical strands emerged from a sense of unease regarding the omission of the body in understanding culture, psychology, history, and politics.<sup>123</sup> Scholars have begun to point out that the erasure of the body not only is unconvincing, but that it also fails to address the role that judgments about bodies play in sustaining the exclusion of marginalized groups such as people of color, women, Jews, the LGBT community, or people with disabilities.<sup>124</sup> Stigma and prejudice toward such groups have been in large part directed at their bodily features in two significant ways.

First, the “essence” of members of marginalized groups has been characterized as more bodily and thus less capable of rational thinking, abstract scientific inquiry, or artistic, ethical, and spiritual achievements.<sup>125</sup> Women, for example, who are distinct from men in their body and its natural procreative functions, have been associated with an emotional and irrational nature, and thus viewed as secondary, and even dangerous, to the development of human civilization.<sup>126</sup> Similarly, in American culture, past portrayals of black people as

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122. On the ways in which the body is resistant to representation through language, see Yofi Tirosh, *Adjudicating Appearance: From Identity to Personhood*, 19 *YALE J.L. & FEMINISM* 49, 104-08 (2007). For a discussion of conceptual language and its limitations in general, see JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 22-45 (1990).

123. See, for example, Seyla Benhabib’s critique of social contract theories, which argues that Thomas Hobbes’ account that a “vision of men as mushrooms is an ultimate picture of autonomy” erases the role of maternal pregnancy and care from our understanding of the human condition. SEYLA BENHABIB, *SITUATING THE SELF: GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS* 156-58 (1992) (citing THOMAS HOBBS, *PHILOSOPHICAL RUDIMENTS CONCERNING GOVERNMENT AND SOCIETY* 109 (W. Molesworth ed., *Wissenschaftliche Buchgesellschaft* 1966) (1651)).

124. See, e.g., IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 11 (1990) (“In the last twenty years feminists, Black liberation activists, American Indians, disabled people, and other groups oppressed by being marked as fearful bodies have asserted such images of positive difference.”)

125. See DREW LEDER, *THE ABSENT BODY* 4 (1990) (discussing the far reaching social effects of the mind-body dualism, as used to sustain projects of oppression of “women, animals, nature, and other ‘Others’”).

126. See Sherry B. Ortner, *Is Female to Male As Nature Is to Culture?*, in *WOMAN, CULTURE AND SOCIETY* 67 (1974) (arguing that the identification of women with nature leads to their devaluation across all cultures).

sub-human were rooted in a perception that they had amplified sexual potency and animal-like body features. These characterizations were thought to capture fundamental bodily differences between black people and “normal” (white) humans.<sup>127</sup>

Second, not only were marginalized groups considered more bodily, but their bodies were viewed as deviant, disgusting, and dangerous. Contemporary research has documented how moral imperatives, gender conventions, and class and race distinctions are “engraved” and “inscribed” on the body.<sup>128</sup> The emerging account of the human body suggests that these distinctions are far from a natural, biological fact. Rather, it is constructed by socio-cultural requirements, norms, and habits.<sup>129</sup> Judith Butler famously observed, for example, that one’s sex, gender, or sexual orientation involve constant acts of reiteration, citation, and “performative repetition” of norms associated with one’s gender.<sup>130</sup> Kendall Thomas made a similar point about race, maintaining that “‘race’ is a verb, that we are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”<sup>131</sup>

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127. See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 876-79 (2006); N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321-22 (2004); D. Marvin Jones, “We’re All Stuck Here for a While”: *Law and the Social Construction of the Black Male*, 24 J. CONTEMP. L. 35, 71-77 (1998).

128. See, e.g., PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* (Richard Nice trans., Harvard University Press 1984) (1979) (connecting class differences to bodily practices such as how people eat, what they wear, and how they move about); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (discussing the evolution of punishment and how different disciplinary practices mark the convict’s body with his crime); IRIS MARION YOUNG, *ON FEMALE BODY EXPERIENCE: “THROWING LIKE A GIRL” AND OTHER ESSAYS* (2005) (exploring women’s embodied experiences as a way to understand the social meaning of gender).

129. See, e.g., Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory*, 4 PRAXIS INT’L 402, 413 (1985) (“Identity does not refer to my potential for choice alone, but to the actuality of my choices, namely, to how I as a finite, concrete, embodied individual shape and fashion the circumstances of my birth and family, linguistic, cultural, and gender identity into a coherent narrative that stands as my life’s story.”); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 206-07 (1988) (arguing that the body is integrally related to the self, therefore prostitution and surrogacy are unlike regular labor, where the employer is interested not in the employee’s body but in her work).

130. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY*, at xiv-xv (2d prtg. 1999) (1990). *But cf.* Seyla Benhabib, *Feminism and Postmodernism: An Uneasy Alliance*, in *FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE* 17, 21-30 (Seyla Benhabib et al. eds., 1995) (doubting Butler’s notion that there is no self behind the mask of its representation, for it debunks women’s fragile autonomy as well as any possibility for new ethics, politics, or aesthetics); Kelly Oliver, *What Is Transformative About the Performative? From Repetition to Working-Through*, in *CONTINENTAL FEMINISM READER* 168, 168-90 (Ann J. Cahill & Jennifer Hansen eds., 2003) (arguing that Butler’s proposal “that a theory of performative agency better serves political theory than a theory of sovereign agency” is insufficient and needs supplementing through critical self-analysis and interpretation).

131. Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*,

Shifting the research focus to embodied experience, then, was an intellectual move with potentially important implications for promoting equality and universal humanness.<sup>132</sup> This new attention to the body has been dubbed “the body turn,” “the embodiment turn,” or “the corporeal turn.”<sup>133</sup> Scholarly attention to the body has not stopped at research related to stigmatized groups. Today it engages studies of “unmarked” hegemonic groups as well, a shift illustrated by the development of fields such as masculinity studies and whiteness studies.<sup>134</sup> Another vein of recent scholarship is located outside of the identity paradigm (blackness-whiteness, masculinity-femininity, etc.) but rather explores embodied meanings in themes and fields that vary from modern dance<sup>135</sup> to geography.<sup>136</sup> Such accounts relate to the body not merely as a physical fact or as inanimate matter in which the mind is clothed, but as an important site of meaning-making, crucial for understanding human experience. They recognize the body as a site through which the self is constituted and maintained, and through which the powers of culture, language and society are manifested and negotiated.

## 2. *The Body Turn in Law*

The intellectual developments emanating from the critique of mind-body

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79 VA. L. REV. 1805, 1806-07 (1993).

132. See, e.g., MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 71-123 (2004).

133. See, e.g., Martine Abramovici, *The Sensual Embodiment of Italian Women*, in TOURISM & GENDER: EMBODIMENT, SENSUALITY AND EXPERIENCE 107, 110 (Annette Pritchard et al. eds., 2007) (discussing the “embodiment and corporeal turn in tourism studies” as an intellectual shift that enables understanding touristic experience as sensory, and as one that goes beyond “the passivity of the ‘tourist gaze’”); Barbara Kirshenblatt-Gimblett, *The Corporeal Turn*, 95 JEWISH QUARTERLY REV. 447, 447-53 (2005) (discussing the corporeal turn in Judaic studies); Shoji Nagataki & Satoru Hirose, *Phenomenology and the Third Generation of Cognitive Science: Towards a Cognitive Phenomenology of the Body*, 30 HUMAN STUD. 219, 224 (2007) (referring to “the embodiment turn” in the history of philosophy as a counter to Richard Rorty’s “linguistic turn”).

134. See, e.g., CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997) (featuring articles such as “Growing Up (What) in America?” and “The End of the Great White Male”); RICHARD DYER, WHITE (1997) (a cultural analysis of the representation of whiteness in white Western literature, cinema, art, and popular culture); THE MASCULINITY STUDIES READER (Rachel Adams & David Savran eds., 2002) (exploring themes such as the macho, sex differences, and honor and shame); MASCULINITY STUDIES AND FEMINIST THEORY: NEW DIRECTIONS (Judith Kegan Gardiner ed., 2002) (mapping both the productive and the tensed intersections between masculinity studies and feminist theory).

135. See, e.g., TAL KOHAVI, BETWEEN DANCE AND ANTHROPOLOGY (forthcoming 2012) (on file with author) (arguing that the body in itself is a site of meaning production and outlining ways to access these meanings).

136. See, e.g., Robyn Longhurst, *VIEWPOINT: The Body and Geography*, 2 GENDER, PLACE AND CULTURE 97, 99 (1995) (observing that the body is portrayed in geography as the passive and weak partner of the dominant and potent mind).

dualism have not skipped over legal studies.<sup>137</sup> Legal theory dealing with underrepresented, stigmatized, or underprivileged groups (feminist jurisprudence, Critical Race Theory, Queer Legal Theory, and Disability Legal Studies) explicitly sought to deconstruct the mind-body dualism and to understand the ways in which bodily differences constitute identities and play a central role in the legal subject's life. Moreover, physical appearance itself has been the subject of a wide range of scholarship in the areas of discrimination<sup>138</sup> and of basic liberties.<sup>139</sup> A consistent vein in the legal scholarship on appearance is a refusal to accept the hierarchical distinction, prevalent in Western philosophy, between "inner" identity and "outer" appearance (or, more generally, between status and conduct).

While studies have demonstrated convincingly that bodily practices, including grooming and dress, do not merely represent the "real" person behind them, but are part of bidirectional dynamics in which how one looks and is socially perceived shapes who one is, the theoretical shift in legal thought towards the body has yet to include body size in its account of the interplay between body and law. In what ways does the thin or fat body constitute us as persons and as legal subjects? What are the personal, psychological, social, and cultural meanings of fatness, and to what extent should our legal arrangements regarding body size be shaped by such meanings? Descartes' devaluation of the body renders it unsurprising that we lack the vocabulary and the conceptual toolbox to talk and think about the body as a subject of the law. This Article establishes the theoretical foundations to begin filling this gap.

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137. See generally ALAN HYDE, *BODIES OF LAW* (1997) (analyzing manifestations of the body in different legal contexts and depicting the conceptual challenges that the body presents for legal analysis).

138. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279-99 (2000) (pointing to the extra "identity work" that outsiders such as women and minorities seem pressured to do in the workplace because of negative views on their identity); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1230-44 (2004) (arguing that voluntary behavior, such as hairstyle, of minority employees should be of concern to judges in discrimination cases); Patrick S. Shin, *Vive La Difference? A Critical Analysis of the Justification of Sex-Dependent Workplace Restrictions on Dress and Grooming*, 14 DUKE J. GENDER L. & POL'Y 491, 493-95 (2007) (questioning the exclusion by employment antidiscrimination law of sex-specific workplace dress and appearance codes).

139. KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 74-176 (2007) (arguing that the burden on minorities to assimilate through their behavior and appearance contradicts basic liberties); Gowry Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos and Piercing*, 66 MD. L. REV. 11, 30-60 (2006) (proposing a legal right to dress as a liberty-based right); Tirosh, *supra* note 124, at 99-104, 113-19 (arguing that the identity paradigm for protecting appearance claims is insufficient, and proposing personhood as the alternative organizing concept).

### B. Fatness as a Future-Grounded Identity

In the previous Section, I argued that the body turn in law has yet to include body size as part of its comprehension of the interrelation between body and law. In the following Sections, I will explore what it would mean for legal discourse to decipher the meaning of body size. While the present Section focuses on the negative meaning of fat and asks why, in light of this negative meaning, a defense of a right to be fat is warranted, Section C lays the foundations for positive accounts of fatness.

Most people perceiving themselves as fat experience the center of gravity of their identity in their imagined, post-transformation future.<sup>140</sup> Often, they experience the present as a limbo between a thinner past in which things were right and a future that will restore this longed-for past. Or, if they were fat for as long as they can remember, the leap is from a past that should be carefully analyzed to trace the reasons that brought about their fatness, to a future of miraculous metamorphosis into thinness. Weight loss is conceived as an act of restoring or finally finding the true self, whose emergence will bring with it confidence and happiness that are deficient for many fat people.<sup>141</sup>

The discourse around fat people is, then, past-centered and future-centered, while neglecting the present. It leaps from the paradise lost onto the idealized post-diet transformation. A full experience of oneself and one's body in the present, with its various characteristics, both desired and unwelcome, is denied and unattended to. Diets are often a way to suspend dealing with current issues and challenges in a fat person's life, such as a career or relationship. As clinical psychologist Deb Burgard told *The New York Times*, for many dieters "the pursuit of thinness as a dream is a place holder. . . . It gets in the way of asking, 'What is it I am dreaming of?'" Burgard further said that a dieter may think: "'If I could just lose weight, all that will take care of itself,' so they don't invest in getting what they want, [but instead] they invest in weight loss."<sup>142</sup> Cultural studies scholar, Samantha Murray, describes the experience of her fat body as one in which "there is a sense of suspension, of deferral, of hiatus. One is waiting to become 'thin', to become 'sexual', waiting to *become*."<sup>143</sup>

People undergoing weight-loss surgery often relate to the surgery day as a "re-birth date," as an opportunity to be reborn, or as a "take two" of their life. This narrative of dramatic transformation and of an opportunity for a fresh start is

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140. See, e.g., Kent, *supra* note 48, at 131 (discussing fat women's experience of their bodies "as the 'before' picture"); Samantha Murray, *supra* note 48, at 154-55 (noting that "the fat body is discursively constructed as a failed body project").

141. See Karen Throsby, *Happy Re-Birthday: Weight Loss Surgery and the 'New Me'*, 14 BODY & SOCIETY 117, 122 (2008).

142. Mandy Katz, *Tossing Out the Diet and Embracing the Fat*, N.Y. TIMES, Jul. 15, 2009, <http://www.nytimes.com/2009/07/16/health/nutrition/16skin.html>.

143. Murray, *supra* note 47, at 155.

also manifested in the ritualistic practice of “before and after” photographs, illustrating the dramatic change, sometimes to the point at which it is hard to recognize that the two photos are of the same person.<sup>144</sup> The structure of weight-loss narratives, then, portrays bodily fat as an obstacle to a full and authentic expression of one’s true self, which is always thin, currently trapped within the layers of fat that require removal.<sup>145</sup>

This present-denying temporal characteristic of fat identity poses difficulty for the argument that fatness should be conceptualized as a right. If all that fat people want is to become thin, and both fat and thin people believe that everyone should be thin, then who needs a right to be fat?<sup>146</sup> My answer to this question is twofold. First, recognizing the right to be fat entails recognizing the right to be of any body size. That is, the right to be fat does not negate or contradict people’s will *not* to be fat, just like the right to religious freedom entails both the right to be free *from* religion and the freedom to practice any religion or none at all. Second, in recognizing the right to be fat, it is important to be aware of the dynamic interplay between law and life. Legal change often precipitates social change. Therefore, protecting the right to be fat is justifiable even when fatness is mostly experienced through its negation and temporariness. In Section III.C below, I will describe the thriving of alternative voices in current public discourse, involving grassroots activists, medical, legal, and policy professionals, as well as scholars, who posit an alternative, affirmative approach to fatness. They claim that it is both unproductive and unjust to frame the lives of so many people as lives that would only gain value when the longed-for, permanent weight loss finally happens.

These increasingly loud voices serve as a reminder that the commonsense understanding of “good” or “bad” identities and bodies is constantly evolving. As recently as four decades ago, many gay individuals would have preferred to be able to “correct” their sexual orientation and transform “back” to straightness. Here, “back” signifies that heterosexuality was considered the default sexual orientation, just like “normal” BMI is considered default body size today.<sup>147</sup> The notion that, for example, gay identity would be claimed and affirmed through

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144. Throsby, *supra* note 141, at 118. Moreover, “the pre-transformation body [is conceived] as discordant with the true self.” *Id.* at 119.

145. The quest of the dieting person is to find “the thin person hiding inside you.” *Id.* at 119; see also Donald Moss, *Obesity, Objectification, and Identity: The Encounter with the Body as an Object in Obesity*, in *THE BODY IN MEDICAL THOUGHT AND PRACTICE*, *supra* note 118, at 179, 190 (finding obese women often feel that “this body that you see is never me, I am always the beautiful personality that resides invisibly within”).

146. Cf. Kevin Kolben, *The Right Not To Be Fat* (unpublished manuscript) (on file with author) (claiming that current food policy in the United States ignores the will of most Americans to be thin).

147. Homosexuality was removed from the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders only in 1973. See RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* 40 (1987).

concepts such as pride seemed then not only unrealistic, but also unnecessary and even unwelcomed. Straight was normal and good; gay was a psychiatric pathology and a threat to the health of the individual, the family, and society as a whole.

We might be witnessing the emergence of a similar development regarding fat identity. It is plausible that fifty years from now, people might look back at our time and sigh uncomfortably about how crassly wrong we were in our expectation that fat people must correct themselves (or at least signal that they know that they are abnormal and need to change).<sup>148</sup> In advocating for the right to be fat, then, my legal argument echoes and picks up on the radical new interpretations of fatness by certain strands in science and culture. The bidirectional movement between law and life suggests that recognizing the right to be of any body size might have expressive and constitutive effects of enabling more people to unapologetically define themselves as its bearers.

Indeed, the case of the fat body provides a powerful demonstration that bodies “can be shown to have been lived differently historically . . . or to be lived differently culturally.”<sup>149</sup> Fat bodies were considered healthy and beautiful in the Middle Ages, for example, as they signified wealth (manifested by abundant access to food)<sup>150</sup> and freedom from the need for physical labor. There are also contemporary examples of cultures and sub-cultures that challenge the prevailing aversion toward fat bodies. Some rappers aim to achieve a “phat” sound through effects such as delay, echo, and double voice, but the positive characteristics of largeness do not end with sound: they also manifest in attitude toward body size. As Joan Gross documents, black male rappers view heavy physical weight as symbolizing wealth, authority, and virility.<sup>151</sup> As another example, although male gay culture generally demonstrates harsh attitudes toward fat, and privileges bodies that are considered fit, there is also a cultural vein of admiring “bears”: big, hairy men, who are considered sexy and desirable.<sup>152</sup> As much as the current prevailing negative meanings of fatness seem to most of us so natural and self-

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148. Signaling that one needs to lose weight has been theorized as an act of coming out of the fat closet. See discussion *infra* Subsection III.C.2.

149. David Couzens Hoy, *Critical Resistance: Foucault and Bourdieu*, in PERSPECTIVES ON EMBODIMENT, *supra* note 115, at 3, 8.

150. See Richard Klein, *Fat Beauty*, in BODIES OUT OF BOUNDS: FATNESS AS TRANSGRESSION, *supra* note 44, at 19, 24.

151. See Joan Gross, *Phat*, in FAT: AN ANTHROPOLOGY OF AN OBSESSION 63 (Don Kulick & Anne Meneley eds., 2005).

152. See Les Wright, *Introduction: Theoretical Bears*, in THE BEAR BOOK: READINGS IN THE HISTORY AND EVOLUTION OF A GAY MALE SUBCULTURE 1-20 (Les Wright ed., 1997). Wright's examination of how women in Niger aspire for as much body fat as possible provides an opportunity for re-examining Western axioms about weight. These women try to gain a lot of weight to make themselves attractive before they marry; these women also seek to achieve stretch marks on their stomachs, arms, and thighs. See Rebecca Popenoe, *Ideal*, in FAT: AN ANTHROPOLOGY OF AN OBSESSION, *supra* note 151, at 9.

evident that it is impossible to contest, I believe that such resistance is not only theoretically possible, but also empirically around the corner.<sup>153</sup> On the possibility of resisting seemingly natural and universal truths about the body, one author writes that by exposing contrasting meanings given to the body across time and space, “[w]e will not be able to go back to the past or to step out of our culture entirely, but we may be able to find the resources in ourselves to save ourselves from the destructive tendencies that the contrast reveals.”<sup>154</sup>

### C. Phenomenological Accounts of Fatness

If, as I proposed in the last Section, the fat body is experienced through its present negation, and is mainly located in a longed-for past and an imagined future, then what would an alternative to this conceptual schema look like? How would it be possible to think about the fat body in the present? The philosophical stream of phenomenology provides appealing alternatives to the prevailing medicalized understanding of the fat body, which sustains the dualistic conception of the body as an object<sup>155</sup> and of the fat body as essentially negative and under a pressing imperative to change. Developed by such continental philosophers as Husserl, Heidegger, and Merleau-Ponty, phenomenology evolved, to a great extent, due to a sense of unease with the dualistic view of mind and body.<sup>156</sup> It objected to a view that treats the body as an object for scientific accounts of human experience, which often “have objectified human behavior, separated the senses from one another, and have failed to grasp the subject as a holistic manner.”<sup>157</sup> Phenomenological analysis of the body emphasizes understanding the body not as an object, but as a “lived body,” as a meaningful site of experience, and as a body of one’s own.<sup>158</sup>

As Merleau-Ponty poignantly writes, “we are *condemned to meaning*.”<sup>159</sup>

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153. See Klein’s interesting thesis, speculating that it is either the global food crisis or simply the pendulum movement of fashion that will bring fat back to fashion. Klein, *supra* note 150, at 20-21.

154. Hoy, *supra* note 151, at 8. There are two more answers to the question I posited in this Section (namely, who needs the right to be fat when fatness is a negated identity). First, even if one thinks that fat people should aspire to lose weight, this does not mean that until they do, they should be denied equal access to opportunities, to conditions that enable self-respect and dignity, and to other social goods. And second (as I argued *supra* in Section II.C), even from a utilitarian perspective that rejects the deontological basis for the right to be fat, there are some strong indications to suggest that enabling fat people to lead a life in which they accept their body size would be instrumental for enhancing the health of the overall population.

155. Mind-body dualism is discussed *supra* in Section III.A.

156. *See id.*

157. DERMUT MORAN, INTRODUCTION TO PHENOMENOLOGY 420 (2000); *see also id.* at 422 (discussing Merleau-Ponty’s aspiration “to rethink our traditional dualism of soul and body, mind and body, consciousness and body”).

158. *See* THE ABSENT BODY, *supra* note 125, at 5 (discussing the problematic distinction between the physical body and the living body).

159. MAURICE MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION, at xxii (Colin Smith trans.,

Phenomenology rejects as unsatisfactory the traditional view of the body as a thing, a derivative phenomenon that should be mainly scientifically examined. As Dermut Moran noted, “The lived body is the body as immediately experienced, that is, as an organ for action in the world, and as a vital relation to the world. . . . [T]he body is that through which [a person] moves through the field of daily life.”<sup>160</sup> It is clear why, from this understanding, the body does not have merely a passive role in its bearer’s life, but rather an active role of constituting one’s sense of self and of shaping one’s relationship to objects and to other humans.<sup>161</sup>

The phenomenological critique points to the limiting reductionism that typifies current scientific accounts of human life. In order to count as a valid scientific statement, data must be quantifiable, generalizable, and measurable, as well as produced and presented from an external point of view. In contrast, the phenomenological approach “holds that the body of a living being has an essential structure of its own which cannot be captured by the language and concepts used to explain inanimate nature.”<sup>162</sup> Living things cannot be explained and observed only in terms of material parts and processes. Living organisms, even when viewed through their biology, should be understood as more than “highly complex physical mechanisms constituted only by their distinct material parts.”<sup>163</sup> This entails employing a perspective “from within,” seeking the voice of the embodied subject and his or her embodied experience.

Being attuned to the lived body involves not only noticing how we carry ourselves in the world, but also how the world comes to be for us. In other words, the body has a role in constituting the way we perceive and experience our environment. The body has a significant part in creating our environment and in the formation of meaning, relationship, and sense of self.

Importantly, phenomenology does not deny the material aspects of the body or the ways in which it is an object or a thing. It is, however, a view that maintains that not only is the body matter, but that the body also has subjective aspects and that it is an intentional entity. Different body sizes would, therefore, produce different experiences of ourselves and of the world around us. As Mark Johnson stresses, “If our bodies were different, and if we therefore had different bodily experiences and different kinds of interactions with our multiple and multidimensional environments, then we would have a different sense of self and

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Routledge 2002) (1945).

160. Moss, *supra* note 145, at 181. Moss notes that Husserl describes the body as that by which humans hold sway in the world. *Id.*

161. See MORAN, *supra* note 157, at 426 (explaining Merleau-Ponty’s understanding of bodily inhabitation of space).

162. Leder, *supra* note 118, at 25.

163. Chris Oleson, *Remembering the Phenomenon of Life*, THE WESTCHESTER INSTITUTE, [http://www.westchesterinstitute.net/index.php?option=com\\_content&view=article&id=372](http://www.westchesterinstitute.net/index.php?option=com_content&view=article&id=372) (last visited Apr. 9, 2012) (reviewing HANS JONAS, *THE PHENOMENON OF LIFE: TOWARDS A PHILOSOPHICAL BIOLOGY* (2001)).

different ways of understanding and reasoning.”<sup>164</sup>

Beyond the quantitative means for understanding personal physique, health and disease should also be understood via “qualitative differences in the individual’s relations to the physical environment, in personal temporality and spatiality, in relationships to the family and social world, and in the struggle for identity.”<sup>165</sup> According to this approach, weight gain and weight loss would be understood as “never merely a phenomenon of the *physical* body. . . . They are always also an event of the *human* body”<sup>166</sup> and as such are both an expression of one’s relations to the world and play a role in transforming these relations.

In the medical context, philosopher of medicine Drew Leder proposes replacing the mechanical approach to illness with a phenomenological approach, which considers the “lived body” as a central factor in understanding the patient’s condition. Thus, from a phenomenological perspective, one’s bodily weight would not only (and not mainly) be seen as a biological fact, measured and explained by factors such as BMI, body fat percentage, or blood lipids. Understanding the fat body would entail looking beyond such medical measures.<sup>167</sup> As Donald Moss explains, “The physician and the clinic produce a context of vocabulary, concepts, images, and interventions which permeate the everyday life of the obese individual.”<sup>168</sup> The fat body would need to be understood in legal theory through social practices associated with it, and through the individual’s personal experience of his or her body.<sup>169</sup>

From a phenomenological perspective, then, foundational notions such as liberty, autonomy, freedom, experience, and agency would be impossible to explore without tracing their bodily dimensions and manifestations.<sup>170</sup> From this

164. Johnson, *supra* note 115, at 99.

165. Moss, *supra* note 145, at 179.

166. *Id.* at 181 (emphasis added) (quoting and translating MEDARD BOSS, GRUNDRISS DER MEDIZIN UND DER PSYCHOLOGIE (Switzerland, Verlag Hans Huber 1975)).

167. Leder, *supra* note 118, at 25.

168. Moss, *supra* note 147, at 182; *see also id.* at 188-89 (describing the “identity-depleting battle” in an environment where “from infancy she is immersed within a total cultural milieu, permeated by the concepts and language of a medicine which serves to define her body and its size, in its many meanings, from her earliest self-awareness as a young woman with a body”).

169. Critics point to several shortcomings of phenomenology as a comprehensive theory for understanding the human condition in general, and embodied experience in particular. An extended discussion of these critiques is unnecessary for the present context, both because of the very specific application of phenomenology that this Article employs—phenomenology as an account that can fill the gap of thinking about the fat body in the present—and because many of the criticisms against phenomenology are, in my view, pointed at its earlier versions, while contemporary phenomenological accounts correct for many of the shortcomings that critics noted. Thus, for example, one criticism was that phenomenological accounts of the body tend to be a-historical and lack social contexts about power relations. Today, however, it seems nearly impossible to produce phenomenological work without incorporating critical lenses such as Bourdieu’s habitus and Foucault’s bio power and disciplinary knowledge.

170. Legal scholars have also attempted to develop phenomenological accounts from other perspectives, such as that of judges. *See, e.g.*, WILLIAM E. CONKLIN, THE PHENOMENOLOGY OF

theoretical standpoint, by which “the mind is incarnated in the body,”<sup>171</sup> it would simply be impossible to produce value judgments about the fat body as disconnected from the experience of its bearer or treat the fat body as an object that the mind can discipline or tame.

The phenomenological approach to the body demonstrates that legal regulation of body size reaches far beyond the technical aspects of weight, such as calories consumed and energy burned. Rather, legal policies pertaining to body weight entail changing behaviors, emotional patterns, and personal characteristics. Such regulation amounts to heavy-handed intrusion into intimate areas of personal existence, which are often hard to put into words because, as Merleau-Ponty sees it, they “arise out of a more primordial, less articulated form of experience.”<sup>172</sup> In a legal system that respects personal autonomy in other contexts, such as religious belief or freedom of conscience, such mechanistic interruptions to the person should be considered illegitimate.

The meanings of being of a large body extend far beyond the medical meaning of fatness. A phenomenological approach would go beyond the “inadequacy of contemporary empiricist and scientific accounts of human experience,” which “failed to grasp the subject in a holistic manner,”<sup>173</sup> and would stress that “[w]hat we need to look for are not causes but *reasons* motivating the behaviour of the patient.”<sup>174</sup> For example, being heavy can enhance one’s sense of groundedness and stability in an ever-more unstable and dynamic world. Or consider the argument that the fat body has positive sexy and sexual qualities, as articulated by Hanne Blank: “[F]at bodies are really sexy and sensual. There are a lot of textures and there’s a lot of skin and surface area, and a lot of sensory nerves. Everything that you’ve got on a thin body you’ve just got more of on a fat body.”<sup>175</sup>

As another example, survivors of sexual abuse sometimes don extra pounds, deliberately or unwittingly, in an attempt to avoid objectifying and sexualizing gazes.<sup>176</sup> Legal arrangements with regard to body size must recognize that the

MODERN LEGAL DISCOURSE: THE JURIDICAL PRODUCTION AND THE DISCLOSURE OF SUFFERING 135-68 (1998) (analyzing *Brown v. Board of Education* from the perspective of Justice Holmes’ lived world).

171. MORAN, *supra* note 157, at 425.

172. *Id.* at 418. For a beautiful treatment of the moral recognition worthy of “unalterable” individual qualities such as the way one laughs or moves about, see Martha C. Nussbaum, *Love and the Individual: Romantic Rightness and Platonic Aspiration*, in *LOVE’S KNOWLEDGE* 314 (1990).

173. MORAN, *supra* note 157, at 420 (citations omitted).

174. *Id.*

175. Tracy Clark-Flory, *The Joy of Fat Sex*, SALON.COM, Sept. 24, 2011, [http://www.salon.com/2011/09/24/fat\\_sex/](http://www.salon.com/2011/09/24/fat_sex/) (an interview with the author of HANNE BLANK, *BIG BIG LOVE* (2011)).

176. See, e.g., T. B. Gustafson & D. B. Sarwer, *Childhood Sexual Abuse and Obesity*, 5 *OBESITY REVIEWS* 129, 132-33 (2004) (reviewing the available studies on the link between obesity and childhood sexual abuse); Jennie G. Noll et al., *Obesity Risk for Female Victims of Childhood*

contours of a body are the outcome of intimate, not always explicable, pasts and practices. Prompting people to change their body size is prompting them to change the way it feels when they breathe, walk, and encounter others—it is changing fundamental axes of who they are and how they experience themselves and the world.

From a phenomenological perspective, such examples are important because they provide an alternative story about the meaning that weight can have for certain people; a meaning that is different from the narrow medical one that usually monopolizes the legal discourse. Such accounts of the meaning of the fat body bolster the position that a law's requirement that individuals lose weight or refrain from gaining it as a precondition for equal opportunity or access to rights and liberties is far from a mere technical requirement. This mandate requires more than changing caloric consumption or increasing physical activity; it has to do with deeply personal aspects of one's being.

This perspective is all but completely absent from the existing discourse on the appropriate legal approaches to fat prevention. The law relies almost exclusively on the medical paradigm in comprehending the fat body.<sup>177</sup> A legal system that fails both to appreciate the uniqueness of literally every body and to allow its subjects the freedom to live their lives with their own, special, intimate bodily texture (which is both a product of who they are and makes them who they are) is a legal system that cannot claim to be based on the liberal premise of respect for basic liberty, autonomy, and dignity.

## 2. *The Rich Meanings of Food and Eating*

Eating habits—alongside other factors like physical activity, genetic

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*Sexual Abuse: A Prospective Study*, 120 PEDIATRICS e61, e65-66 (2007) (finding that young adults females who were subject to sexual abuse in childhood were more than twice as likely to be obese compared to a demographically similar control group of nonabused women). The more severe the sexual offense (e.g., offenses that include penetration), the more prevalent the obesity rates. See Gustafson & Sarwer, *supra*, at 131 (indicating that sexual abuse that involved any type of penetration was associated with an increased risk of obesity); see also D. F. Williamson et al., *Body Weight and Obesity in Adults and Self Reported Abuse in Childhood*, 26 INT'L J. OBESITY 1075, 1079 (2002) (finding that obesity rates among adults increased the more severe and frequent the abuse as children). Findings from these studies, however, should be read with caution, however. Many obese people are not survivors of abuse, and fat is not protective of abuse, although it does make reporting abuse much harder. Still, to appreciate the diverse meaning of weight for different people, it is noteworthy that according to one study, among groups of obese people, survivors of sexual abuse were the only ones to express positive stances towards their weight and expressed less body dissatisfaction among obese adults. See Gustafson & Sarwer, *supra*, at 132-32. When asked to indicate their ideal weight, the only ones whose ideal weight fell within the medical definitions of obesity (rather than "normal" weight) were sexual abuse survivors. Among weight reduction groups, victims of childhood sexual abuse lost significantly less weight and had higher likelihood of regaining their weight within eighteen months. *Id.* at 133.

177. See *infra* Subsection I.B.2.

makeup, and medical condition—determine body size. But eating is not like fueling a car or charging a battery. Yet this is how they are most often discussed by the prevailing medical discourse, which has been dominating the legal discourse on weight. What we eat, how we shop for our food and prepare it, and when, where, and with whom we eat are matters that have strong social, financial, political, and emotional aspects.<sup>178</sup> As many scholars have argued, food has symbolic value, functioning in our lives as a system rich with meaning.<sup>179</sup> For most Americans it would be unacceptable to measure the value of the turkey eaten at the Thanksgiving dinner merely through the lens of its caloric and nutritional values; turkey has a meaning special to national identity, family tradition, childhood memories, and household rituals of preparation. (Mother's secret stuffing recipe will never be the same if replaced by a low-calorie substitute.) Similarly, for immigrant and indigenous communities, certain foods and particular ways of consuming them connote the cherished past and are significant in sustaining their affinity with their native or old homeland's culture.

Food writer Michael Pollan coined the term “nutritionism”<sup>180</sup> to describe the growing tendency in America to view food and eating from the scientific lens alone, in which food is assessed through its nutrients, such as fat percentage, carbohydrates and protein content, and calories. Nutritionism is also how food is treated in the legal discourse: Eat *X* calories to correct your body, and do not bother us with the cultural and personal meaning of your ways of eating. To employ a famous literary example, it is not the nutritional content of the madeleine cookie that raised in Marcel Proust a powerful childhood memory.<sup>181</sup> Using the exact same amount of sugar, butter, or daily percentage value of protein and carbohydrates needed for a madeleine to bake another cookie—different in shape (a shape that, according to Proust, “look[s] as though [it] had been molded in the fluted scallop of a pilgrim's shell,”<sup>182</sup>) or different in density than the madeleine, would not have produced the same strong memory in the adult Proust. The craving for a particular cookie as a vehicle for a faint childhood memory cannot be summarized by the pseudomedical phrase (so commonly

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178. See MICHAEL S. CAROLAN, *EMBODIED FOOD POLITICS* 130-33 (2011) (discussing a phenomenological account of the embodied experience of food and eating, and on the changing relations to food when one grows it in programs such as Community Supported Agriculture). See generally SIDNEY W. MINTZ, *TASTING FOOD, TASTING FREEDOM: EXCURSIONS INTO EATING, CULTURE, AND THE PAST* 69 (1996).

179. See, e.g., Mary Douglass, *Deciphering a Meal*, 101 *DAEDALUS* 61-68 (1972); see also Claude Lévi-Strauss, *The Culinary Triangle*, 22 *NEW SOC'Y* 937-40 (1966).

180. MICHAEL POLLAN, *IN DEFENSE OF FOOD: AN EATER'S MANIFESTO* 28-29 (2008) (lamenting the prevalence of the ideology for which “[f]oods are the sum of their nutrient parts” rather than an approach to food that is not reliant on expert knowledge but on tradition, culture, taste, pleasure, and identity).

181. MARCEL PROUST, *REMEMBRANCE OF THINGS PAST PART ONE: SWANN'S WAY* 58 (Charles Kenneth Scott Moncrieff trans., 1922).

182. *Id.*

heard these days) “my blood sugar dropped, I need something sweet.” The drop in blood sugar certainly might play a part in our craving for certain foods, but it fails to reflect the whole story. Often, the food we eat is an extension of ourselves and our tradition, culture, community, memory, esthetic upbringing, and more.

I could go on with numerous examples of the rich meanings of particular foods and specific ways of eating, but I presume the point is clear: our body size, which, to a significant extent, is a product of the food we eat and of how we eat (alongside other factors such as genetic makeup or physical activity), reflects an array of often personal motivations that are sometimes hard to put to words. These reasons for what we eat and how we eat are richer than a summary of caloric consumption and energy burn measures can explain. Such reasons have to do with who we are as humans, not merely as living organisms; they are related to axes of our identity that involve race, religion, socioeconomic class, gender, and more. Our body size reflects a subtle everyday internal dialogue (often in the form of negotiation) about how we live in the world. Hence, when law or society sends a message to people that they should lose weight, this imperative is far from being a technical demand about reducing caloric consumption and increasing physical activity. It is a requirement that penetrates areas of personhood that we feel certain, in other contexts, both law and fellow humans should stay out of. Thus, body size, like speech, thought, religion, and other areas of liberty, should be protected from interventions by both the law and other social actors.

### *3. Affirmative Accounts of the Fat Body*

Since the 1960s there have been alternative voices, mainly from grassroot activists, that have been trying to formulate and advocate for an understanding of fat identity that is grounded in the present and rejects the focus on the fantasized post-diet future.<sup>183</sup> In the past decade, these voices have been growing in prominence and visibility. Fat activism seems to draw more constituencies with the thriving of fat affirmative blogs,<sup>184</sup> books, and conferences. In addition, more scientists, dieticians, and physicians are ready to question the almost axiomatic medical conviction that obesity is a pressing problem. These developments have drawn the attention of humanities and social science scholars, marking the emergence of a new field of study: Fat Studies.<sup>185</sup> These new discourses do not

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183. See generally Jeffery Sobal, *The Size Acceptance Movement and the Social Construction of Body Weight*, in *WEIGHTY ISSUES: FATNESS AND THINNESS AS SOCIAL PROBLEMS* 231 (Jeffery Sobal & Donna Maurer eds., 1999).

184. See, e.g., BIG FAT BLOG, <http://bigfatblog.com/> (last visited Apr. 4, 2012); Marianne Kirby, THE ROTUND, <http://www.therotund.com/> (last visited Apr. 4, 2012); Joy Nash, FAT RANT BLOG, <http://fatrantblog.wordpress.com/> (last visited Apr. 4, 2012).

185. The publication of *The Fat Studies Reader*, *supra* note 9, and the forthcoming new journal, *Fat Studies*, to be published by Routledge/Taylor & Francis Group, are some indications of

stop at rejecting the dominant understanding of the fat body as a signifier of failure or disease, but instead take an extra step by developing positive accounts that affirm the fat body as a legitimate one—a body that is an object of desire, that can be healthy and productive, and that may rid itself of the ubiquitous and pressing requirements to change by slimming down.

One such affirmation that has received scholarly attention is the act of “coming out of the fat closet.”<sup>186</sup> At first, the notion of a fat closet may sound absurd, for body size is plainly visible.<sup>187</sup> But, as Eve Kosofsky Sedgwick observed, the idea of a fat closet makes sense because in contemporary culture, occupying a fat body is difficult, because it is a discursive taboo.<sup>188</sup> Until a fat person comes out of the closet as fat (that is, until he signifies that he is fully aware of his body size and claims a stable position within this body size), it is an untouchable topic of conversation. Before the topic is opened to conversation, there is little room for ambivalent or unstable meanings of the fat body. It is deciphered by the social environment along the prevailing codes of unhealthiness, lack of willpower, laziness, etc. As Saguy and Ward put it, “While coming out as fat . . . does not involve revealing a secret about one’s body size, it does reveal the surprising—and potentially subversive—attitude that being fat is acceptable.”<sup>189</sup> De-closeting oneself also means changing the temporal mode of the fat body. As Saguy and Ward note, “[C]oming out as fat involves a person who is easily recognized as fat affirming to herself and others her fatness as a nonnegotiable aspect of self, rather than as a temporary state to be remedied through weight loss.”<sup>190</sup>

Such a spirit of living fully with one’s fat body provides the basis for a recent public health approach called Health at Every Size (HAES).<sup>191</sup> The approach stems from research findings that active and well-nourished fat people can be healthier than sedentary and poorly nourished thin people and from the recognition that weight loss diets are generally unsuccessful and detrimental to

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this new field. This development reaches law as well. At the May 2011 Law and Society Association’s Annual Meeting in San Francisco, there was a round table entitled “Legal Fat Studies: Directions, Promises, Challenges.”

186. For a study of “the migration of the coming out narrative from queer to fat politics,” see Saguy & Ward, *supra* note 50, at 61. See also Tirosh, *supra* note 5, at 274-75 (2006) (presenting Eve Kosofsky Sedgwick’s idea of a fat closet and applying it to a pedagogical challenge of teaching about weight).

187. Indeed, writes Samantha Murray, “[u]nlike the gay body, the fat body is always already out.” Murray, *supra* note 47, at 157.

188. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 45 (1990).

189. Saguy & Ward, *supra* note 50, at 66.

190. *Id.* at 65.

191. See generally BACON, *supra* note 79; Deb Burgard, *What Is “Health at Every Size”?*, in *THE FAT STUDIES READER*, *supra* note 11, at 41 (explaining the principles of this public health approach); ASDAH (ASSOCIATION FOR SIZE DIVERSITY AND HEALTH), <http://sizediversityandhealth.org> (last visited Apr. 29, 2012) (containing information and resources on HAES).

health.<sup>192</sup> HEAS advocates recommend that fat people be physically active and eat healthful food, while abandoning their attempts to lose weight.<sup>193</sup> When Kate Harding and Marianne Kirby, veteran bloggers on fat acceptance, recommend adopting HAES,<sup>194</sup> they accompany their recommendation with several steps that stress living in the present, rather than in an imagined thin future. They recommend, for example, to avoid keeping clothes that do not fit as a motivator for losing weight<sup>195</sup> and to refrain from putting things off until one is thin.<sup>196</sup>

The idea is, then, that in the interests of physical and mental health for all, our culture and law should open up the possibility for fat people to occupy the present, to be here now. Rather than suspending their potential for a full and prosperous life, fat people should claim the possibility to live fully in whatever size—to be physically active, outgoing, and outreaching and to be in touch with their present body, its needs, desires, and beauty. Such affirmative notions of the fat body pave the road for a new way to talk about the fat body in law and for theorizing the right to be fat.

#### IV. THE RIGHT TO BE FAT

[W]e should see [rights] as part of ongoing practices of social self-interpretation and negotiation.<sup>197</sup>

##### *A. The Basic Contours of the Right To Be Fat*

Thus far I have argued that human experience of body size is imbued with meanings beyond what the medical, instrumentalist, and scientific paradigms can capture. These meanings stem from domains as intimate and intricate as

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192. For evidence on these facts, see *supra* Section II.B.

193. Linda Bacon et al., *Size Acceptance and Intuitive Eating Improve Health for Obese, Female Chronic Dieters*, 105 J. AM. DIETETIC ASS'N 929, 935-36 (2005) (comparing women who underwent a diet program with women who were trained in the HAES program, and finding that the latter showed better results in health measures, physical activity, and self-esteem); Katz, *supra* note 142 (quoting Steven Blair, Professor of exercise science, epidemiology and biostatistics at the University of South Carolina, indicating that his research shows that “obese individuals who are fit have a death rate one half that of normal-weight people who are not fit”); Marcia Wood, *Health at Every Size: New Hope for Obese Americans*, 54 AGRIC. RES. 10, 11 (2006) (monitoring two groups of obese women—one following traditional diet and exercise advice, and the other following the HAES approach, and finding that two years later, the group of dieters regained their weight, and the HAES group maintained a stable weight for the entire time, and that the latter group lowered their cholesterol levels and systolic blood pressure for the entire duration of the study, as opposed to the dieted group, who did not lower their cholesterol at all, and reduced and then regained their blood pressure).

194. HARDING & KIRBY, *supra* note 101, at 13-18.

195. *Id.* at 158-61.

196. *Id.* at 213-21.

197. Leif Wenar, *Rights*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (FALL 2011 EDITION), <http://plato.stanford.edu/archives/fall2011/entries/rights> (last updated Jul. 2, 2011).

emotions, culture, identity, and personhood. Such an understanding of body size in the life of legal subjects must lead, in my view, to the realization that contemporary law should add to the list of legally recognized fundamental rights the right to be of any body size, including the right to be fat. This right derives from the right to liberty and is a concrete instance of the rights to autonomy and human dignity.<sup>198</sup>

The right to be fat is the right to be free of governmental (and sometimes societal) intervention regarding one's weight, either by direct treatment or indirect impact.<sup>199</sup> It also means being equally entitled to social goods<sup>200</sup> regardless of one's physical weight.<sup>201</sup> The legal framework of antidiscrimination, which, thus far, has prevailed in the scholarly treatments of the fat body in law, is important but insufficient, in my view, for fully reflecting the role of body size in human experience. Antidiscrimination law can indeed prevent disparate treatment of fat people on the basis of their weight, but it does not provide ways to understand fatness affirmatively.<sup>202</sup> The framework of antidiscrimination can protect a certain group from differential treatment while still sustaining the view that the protected group is inferior, worthy of pity, and better if changed. As the phenomenological accounts of fatness (discussed in

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198. Whether the right to be fat should be conceptualized as located in the penumbra of other constitutional rights, such as the right to free speech or as part of due process, is certainly a point worth developing, but since this Article employs "thick brush strokes" to set the theoretical premise for establishing the right, it seems premature to enter such detailed doctrinal analysis at this stage.

199. In Hohfeldian terms, this is a privilege-right, as it creates a duty of non-interference by the government and by fellow citizens. However, as I show in the present discussion, the right to be fat has other aspects of Hohfeld's typology. For example, it creates claims against those who interfere with one's right to any body size. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 34-38 (1913).

200. John Rawls' enumeration of primary goods provides a helpful list for appreciating what I mean by social goods. See JOHN RAWLS, *A THEORY OF JUSTICE* 62 (1971).

201. There is myriad literature critiquing the usefulness of rights as indeterminate, individualistic in nature, rendering the legal discourse as monopolist and imperialist by numbing other, non-legal venues for social change. I am aware of this literature, and still believe in the power of using the language of rights, particularly with regards to thus-far neglected groups and causes. For a classical formulation of the critique of rights, see, for example, Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 396-406 (1988); and Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 719 (2011) ("[W]e need a critical way for thinking about rights that not only survives across generations but also adapts to the changing contours of rights."). *But cf.* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 301-15 (1987) (arguing that rights are still a useful concept for those who have been denied access to them, such as people of color); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 297, 299 (1992) (arguing that using rights to promote change should not be construed as expressing naïve faith in the power of legal change to produce a structural revolution).

202. See generally Susanne Baer, *Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009) (developing a holistic account of liberty, equality, and dignity as mutually complementing fundamental rights).

Section III.C) demonstrate, one's body size is intrinsically worthy of protection, not just in comparison to how other bodies are treated, but due to its fundamental role in developing and sustaining a sense of identity and personhood. According to my suggested framework, it is the liberty to be fat that paves the way to protecting people against weight-based discrimination. As explained in Subsection IV.C.3 below, the antidiscrimination framework has additional disadvantages, such as a plaintiff's need to prove that his or her body is included in the protected group, and the reification of the medical categorization of body size that emanates from the antidiscrimination discourse.

Injecting notions of both liberty and equality into the justifications for the right to be fat would mean, for example, that individuals will be entitled to medical treatment that is not only unbiased against fat people, but also abandons the prevailing imperative to change the fat body and annihilate it to the extent possible. Such a principle shift necessitates, therefore, going beyond the paradigm of fairness and impartiality that underlines antidiscrimination law and a thick account of the nature and significance of the experience of body size. Such an account would appreciate the extent to which body size is an intimate sphere of existence and the extent to which bodies that are considered too large can have positive and enriching roles in the lives of their bearers. Conceptualizing body size as an aspect of liberty would similarly entail a more careful and critical assessment of parental capability in custody cases of fat children.

The central rationale behind the right to be fat is that sending a direct or an indirect message to a fat person that he or she needs to lose weight in order to gain access to various social goods, such as equal opportunity, dignity, and autonomy, is no less intrusive than telling a legal subject how to think, what to believe, or what to say. Limiting the extent of the body is, from the perspective of non-dualistic notions of personhood, as severe as limiting the scope of speech.

Regulating speech and regulating body size are indeed two radically different ways of infringing upon human freedom, but there are some aspects in which they are very similar. Liberal legal systems recognize that speech is one of those mysterious and idiosyncratic activities that sometimes emerge spontaneously, without a systematic premeditation.<sup>203</sup> Thus one need not justify the usefulness or truthfulness of one's speech before one utters it. Additionally, because of the law's recognition of the fragile interplay between speech and thought, speech is left alone so as not to limit thought. Legal subjects are, therefore, allowed to produce the most bizarre, nonsensical, and even, to some extent, harmful speech.<sup>204</sup> In the end, according to contemporary American

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203. See, e.g., Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482-86 (2011) (anchoring the right to free speech in the interest of maintaining participatory democracy).

204. The right to free speech, like any right, is not unlimited. To invoke the familiar example, shouting "fire!" in a crowded theater would amount to an abuse of the right to free speech, and

constitutional law, individual freedom to think and speak is, in most instances, more important than the potential costs and damages of speech.

Similarly, as I have shown, bodily weight is related to our most intimate, vulnerable, and inexplicable inner worlds. Even in cases when the weight-related elements of our inner worlds *can* be explained, we should not be required to account for them.<sup>205</sup> Bodily weight has to do with the emotional value of food, with communal and cultural aspects of eating, with one's gender,<sup>206</sup> race, and class,<sup>207</sup> with his or her self positioning on the spectrum of conventional beauty and body size norms. Limiting body weight is analogous to limiting speech in that both can be potentially intrusive. They invite society and government to enter areas in the life of persons that no liberal political philosophy views as legitimately accessible to others. Current legal arrangements deny a job applicant the job because he or she is too fat, or remove children from their parents' custody due to the children's or the parents' body sizes. For fat persons (and their guardians) these are requirements that they change not only their BMI, but also their psychological makeup, their idiosyncratic, fragmented, and intimate internal dialogues, and their basic understanding of themselves, of others, and of the human condition. Weight-related requirements, whether direct or indirect, are requirements that one modifies core aspects of one's existence. Thus weight should not be assessed merely through its alleged social cost, but respected as a domain of self that is as intimate to individual privacy and autonomy as faith, conscience, thought, or speech. Weight should be deontologically released from the socio-legal gaze. Even readers who are convinced that being fat without making efforts to lose weight is a bad lifestyle choice should endorse the right to be fat. They should view it as the right to make one's own mistakes in one's own way. This is how we think of ill-informed speech. As mistaken as it may be, it

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would not be respected as part of this right. Indeed, the body also challenges the doctrine of free speech. As Amy Adler shows, the strong judicial fears and sexual panic that females dancers can evoke led the Supreme Court to produce a skewed doctrine of free speech. Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005).

205. I developed a similar argument in a different context, in which I defended the need to rid legal subjects of the need to explain their hairstyle or grooming practices: Tirosh, *supra* note 122, at 83-89, 104-08.

206. There is abundant evidence that for women, weight is often a more critical site of their experience of self, and that women are socially sanctioned for much milder overweight than men. See, e.g., RHODE, *supra* note 5, at 30-31 (women are more penalized for perceived overweight); NAOMI WOLF, *THE BEAUTY MYTH* 179-217 (Anchor Books 1992) (1991) (discussing the worrying prevalence of anorexia nervosa among women and tying it to the increase in harsh and debilitating cultural expectations of women at the historical moment when women entered the public and thus far male dominated spheres); Korn, *Fat*, *supra* note 7, at 29-32 (discussing the unrealistic and unhealthy weight expectations American women face and some of the explanations for this phenomenon). My approach in this Article, however, is not gender-specific, for I believe that despite the significant gender disparities in the behavior of weight vis-à-vis liberty and equality infringements, the right to be fat would benefit both sexes.

207. On the correlation between body size and race and class, see *supra* Section II.A.

should still be protected, because the damage of limiting it and interfering with it would outweigh the benefits of such constraints.

Frances Kamm writes of the right to free speech, stating “The right to speak freely may simply be the only appropriate way to treat people with minds of their own and the capacity to use means to express it. . . . Not recognizing a person’s option of speaking is to fail to respect him.”<sup>208</sup> This justification easily could be paraphrased to fit the right to be fat: The right to be fat may simply be the only appropriate way to treat people with bodies of their own and the capacity to use means to embody, or occupy it. Not recognizing a person’s option to live in whatever body size is to fail to respect him. This, then, is the rationale for the recognition of the right to be fat.

This right has both “negative” and “positive” aspects.<sup>209</sup> It is derived from rights traditionally classified as negative, such as the right to autonomy, to dignity, and to liberty, because it essentially requires that the government or other societal actors refrain from intruding upon the lives of people when the basis for such intrusion is body size. A person’s body size, be it petite or voluptuous, should be irrelevant to the relationship between the citizen and the State.

Thus, legal subjects should be free of the requirement to lose weight in order to gain access to basic goods and opportunities, such as an equal opportunity to serve on juries,<sup>210</sup> equal taxes (so that it would be illegitimate to tax only poor people—who are generally fatter than more privileged groups—for unhealthful foods),<sup>211</sup> or merit-based accreditation in public education (recall the example of the mandatory “fat class” in Lincoln college).<sup>212</sup>

Acknowledging the right to be fat does not mean ignoring the complex

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208. F.M. KAMM, *INTRICATE ETHICS: RIGHTS, RESPONSIBILITIES, AND PERMISSIBLE HARM* 247 (2007).

209. In their important book, Holmes and Sunstein convincingly show that the classification of rights as either negative or positive, as much as it resonates with intuition, is still false, because negative rights also have costs and require State action to sustain them (e.g., by financing the justice, enforcement, and correction systems, or by giving tax exemptions to organizations that work to protect rights such as the American Civil Liberties Union). STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 37-48 (1999). While I accept this argument, I still employ the negative/positive classification for the sake of ease of communication about the different aspects of the right.

210. *See supra* Section I.A.

211. *See id.* As I clarify in *infra* Subsection IV.C.1, I am not categorically opposed to taxing junk food. However, we should be mindful about the regressive effects of such a tax, as it would unequally limit the consumption patterns of poor people. When taking into account that there is significant correlation between poverty and rates of fatness, the reservations against junk food tax become even stronger, because this might be a policy against poor people disguised as neutral. Additionally, I believe it is insufficient and unjust to tax junk food without simultaneously increasing the affordability of healthful foods.

212. *See supra* Section I.A. Again, although I classify this aspect of the right as negative, we should be mindful that these aspects of the right have costs. For example, these rights have costs in holding effective legal proceedings that would provide remedies for infringements of this right. *See* Holmes & Sunstein, *supra* note 209, at 35-48.

health toll that fatness might charge.<sup>213</sup> Rather, it means recognizing that some practices merit a respectful distance despite the risks that they pose to one's longevity, or quality of life. Indeed, going back to the canonical articulation of liberalism, John Stuart Mill's *On Liberty* reminds us that this is what true respect for personal freedom entails. Mill gives the example of a man about to cross an unsafe bridge. It is permissible to stop him from crossing if there is no time to inform him of the danger, and this would not count as an infringement of his liberty, "for liberty consists in doing what one desires, and he does not desire to fall into the river."<sup>214</sup> Mill continues:

[W]hen there is not a certainty, but only a danger of mischief, no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty), he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.<sup>215</sup>

Protecting the liberty to be any body size should not be restricted to the scope of the relationship between citizens and the government. It also reaches the relationships among citizens, and contractual relationships in particular.<sup>216</sup> The right to be fat would cast a burden on private actors not to discriminate based on

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213. Although these concerns may be much more limited than the prevailing account on weight and health indicates, and many of them have been used to justify stigmatization and discrimination. For a discussion of the contested relationship between health and weight see *supra* Section II.B.

214. JOHN STUART MILL, *On Liberty*, in THE BASIC WRITINGS OF JOHN STUART MILL 95, 100 (2002).

215. *Id.* Mill indeed permits warning against the danger. While some may argue that because obesity is not illegal, all that current law does is warn people against the dangers of obesity, I contend that many of the practices currently in place do much more than inform. They are sufficiently coercive that they are more like stopping a man than warning him.

216. Addressing the extent to which constitutional protections apply "horizontally" (between private actors) rather than "vertically" (between the government and its citizens) is beyond the scope of this Article. At this primary stage of conceptualizing the right to body size, I merely wish to indicate that the right might have implication for private actors, within the constraints of constitutional law. Indeed, the justification of the State action doctrine has been characterized as "one of the most important and hotly debated in comparative constitutional law." Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003). Gardbaum argues that the threshold search for State action in order to trigger a constitutional claim is misguided and unwarranted, because all law is subject to the Constitution. *Id.* at 414. For a critique of the way that State action doctrine preserves the status quo by portraying it as neutral, see CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 159-61 (1993). For a review of the ways in which the Supreme Court already recognized private actors' duty to refrain from violating constitutional rights, see Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. L. REV. 455, 486-505 (2011). For an argument that the government has a duty to protect citizens from fellow citizens' attempt to infringe on their right to religious freedom, see HOLMES & SUNSTEIN, *supra* note 209, at 184.

body size (for example, in charging more for goods and services,<sup>217</sup> or in using weight as a factor in granting employment opportunities<sup>218</sup>).

The right to be fat also has what is traditionally thought of as “positive” aspects. Guaranteeing the right to be fat entails that life activities and opportunities would be open to fat persons just as they are open to any other person. Physical spaces such as doctors’ beds or theater and airplane seats would need to be accommodating to various body sizes.<sup>219</sup> Fat people are often publicly shamed by when the passengers next to them on the airplane demand to be seated elsewhere, or when fat individuals are subjected to the “armrest test” to determine whether they can remain on the flight. Furthermore, fat airline passengers often leave a plane bruised from the seat’s armrests after sitting on two seats with an armrest in their back. Other times they are dehydrated from avoiding beverages prior to and during traveling, because they cannot use the airplane restrooms.<sup>220</sup>

Like any other right, the right to be fat is not absolute and might be withheld when it conflicts with other rights or interests.<sup>221</sup> Recognizing body size as a

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217. I elaborate on this point *infra* Subsection IV.C.2.

218. For a discussion on weight-based employment discrimination, see *infra* Subsection IV.B.3.

219. The idea of setting a duty on private entities to provide physical accommodation has already been introduced to U.S. law in Title III of the Americans with Disabilities Act. I elaborate on airplane seats *infra* Subsection IV.C.2.

220. Many of these forms of accommodation are similar in character and scope to the accommodations of disabled people, and my approach draws significantly on disability legal studies (DLS). For a pioneering account on DLS see Sagit Mor, *Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy*, 18 YALE J.L. & HUMAN. 63, 67-79 (2006).

221. The same is true for the right to be extremely thin. This Article was written with the case of “overweight” in mind, but the case of anorexia nervosa also raises, of course, questions regarding the legitimate scope for legal intervention in body size, because like the fat body, the anorexic body is considered on the extreme end of the spectrum of normative body size. As with fatness, there are competing cultural and biological, explanatory frameworks for the phenomenon. See ARTHUR KLEINMAN, *RETHINKING PSYCHIATRY: FROM CULTURAL CATEGORY TO PERSONAL EXPERIENCE* 34-76 (1988) (mapping the culture/biology debate with regards to schizophrenia, depression, and anxiety disorders in the context of both the mental and physical symptoms they produce and may be caused by). But fatness and anorexia are also different in significant ways. The threats to life and health (reproductive function, bone mass, blood makeup, immune system and more) posed by anorexia nervosa are much less contestable and much more immediate than the threats to life and health posed by heavy weight. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 584 (4th ed. 2000) [hereinafter *DSM-IV-TR*] (discussing the menstrual abnormalities of anorectic patients); see also *id.* at 587-88 (indicating that the long-term mortality rate due to anorexia of individuals admitted to university hospitals is over ten percent); *id.* at 585 (noting that disorders associated with anorexia include depressive symptoms and obsessive compulsive features). Even those considered “morbidly obese” usually live for many more years and in much more productive and regular working and personal lives than anorexic patients in advanced stages of the illness. This difference suggests that it might be more legitimate to intervene in the short-term autonomy of the anorexic patient than in that of fat individuals. Another difference concerns age. Anorexia mostly bursts among teenagers, at an age at which

basic right would entail weighing it against other rights and interests, such as freedom of contract, the property rights of employers or insurers, or the utility and competitiveness of air carriers. This should be done with care similar to that taken when balancing traditionally recognized rights, such as freedom of speech or religious freedom, against competing state interests. I provide illustrations of such balancing in Section IV.C below.

### *B. A Note About the Bearers of the Right*

In presenting this Article's argument, I am sometimes asked, "But what about those really huge people? You can't seriously include *them* in your defense of the right to be fat!" Many interlocutors, who are sympathetic to the idea that "moderately fat" people should have a weight range in which the law shall not interfere still feel that people who are clinically defined as "morbidly obese" present a fundamentally different challenge to law and policy.

My argument does not and cannot contain an internal distinction between different scales of fatness. The right to be fat extends even to cases wherein most people would agree that one's current weight is unhealthy. I do not see the difference between saying that it might be okay to be fat as long as you are not *really* fat or *too* fat and saying that it is okay to have freedom of speech as long as one does not say *extremely* silly things or make *absolutely* outrageous arguments.<sup>222</sup> Just as the real commitment to freedom of speech is tested at the extremes, so it is with the right to be of any body size. Principled recognition of body size autonomy means extending it to any body size.

In addition, I believe that the heaviest end of the weight spectrum is not where the real body-size drama takes place. The endless self-critique and societal judgment, the internal dialogues on dieting, calorie counting, and waist size also happen in the lives of people of more moderate sizes. For many average-weight women, for example, weighing as little as five pounds more than their desired weight makes all the difference in the world in their feelings about themselves.

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patients are neither legally autonomous nor psychologically ripe to fully appreciate the implications of their condition. With fatness, people usually become fatter as they grow older. See LeAdelle Phelps et al., *Figure Preference, Body Dissatisfaction, and Body Distortion in Adolescence*, 8 J. ADOLESCENT RES. 297, 306-07 (1993) (finding that the highest rates of body distortion among girls are in their mid-teenage years); DSM-IV-TR, *supra*, at 587 ("Anorexia Nervosa typically begins in mid- to late adolescence (age 14-18 years).") Even when fat people were already fat in childhood, their childhood fat normally does not kill them (at least not nearly as much as anorexia kills young women), and so they live to be adults who can appreciate the implications of their body size more than teenagers can. I thank Tal Kohavi for pointing out this difference.

222. See, e.g., *United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."); *Collin v. Smith*, 578 F.2d 1197, 1203 (7th Cir. 1978) ("The asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression."); *Collin*, at 1210 ("[I]f [First Amendment] rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.").

These five pounds may determine whether they permit themselves to go on a job interview, on a blind date, or to the beach. Moreover, such a gap between present and desired weight defines whether they perceive themselves to be good, both as women and as persons. The borders of fat identity are very fluid. For most purposes they are not defined by medical indicators such as the lines drawn between obese and morbidly obese BMI, but by a personal sense and social perception of appropriateness of one's body size or the deviation therefrom. Potential jurors or employment candidates are disqualified because they are perceived as fat, regardless of their actual medical measurements such as BMI or body fat percentage. For the airline hostesses who, as described in *Gerdom v. Continental Airlines*,<sup>223</sup> "were weighed once a month in full uniform including shoes" and required to lose two pounds a week if "excess" weight was found,<sup>224</sup> fat was a significant factor in their lives even when they would have been considered thin by prevailing social standards.

In other words, the main locus of the right to be fat is not the "morbidly obese." This Article is as much about those defined as slightly overweight as it is about those at the extreme end of the weight spectrum.

### *C. Normative Implications: Some Hard Questions*

What does a right to be fat look like? What is the meaning of this suggested new legal notion? In this Section, I outline normative implications of this right.

#### *1. May the Government Still Introduce Weight-Related Policies?*

Releasing bodily weight from law and society's regulative grip does not mean that the government may not introduce policies that educate and encourage all people to live a healthier life, richer in physical activity, and with nourishing, rather than inferior and nutritionally impoverished, foods. But in light of the right to be fat, such policies should be introduced without using weight as a proxy for singling out their audience.<sup>225</sup> Defining fat people as the target of such programs would be counterproductive for fat people themselves, as the programs' humiliating and stigmatizing effects would likely hamper the chances of fat persons developing a healthy connection with their body.<sup>226</sup> Rather, such

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223. *Gerdom v. Continental Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982).

224. *Id.* at 603.

225. For a helpful review of possible legal instruments for encouraging healthful habits for all, see generally Jennifer L. Pomeranz et al., *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185 (2009), which suggests measures such as compelling the food industry to expose the nutritional facts of its products, introducing government speech to do the same, using tort litigation as a regulatory mechanism, and more. See also Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1411-29 (2007).

226. On stigma being counterproductive to weight loss, see *supra* note 111.

programs would probably lead to even greater alienation from the body and its needs. Additionally, people who are not fat would also significantly benefit from general health and education programs, because they have no less need for accessible healthful food and environments that encourage physical activity. Many people who are not considered fat by prevalent BMI guidelines or height/weight tables still consider themselves fat or are constantly worried that they might become fat and turn to extreme and unhealthy measures to control their weight.<sup>227</sup> Therefore, they would also benefit from eliminating fat-phobic messages. An extensive study of almost a quarter million participants found that a wide gap between one's weight and one's desired weight is a better predictor of poor health than actual weight or BMI.<sup>228</sup> These findings demonstrate the extent to which the public atmosphere that constantly stamps fat or seemingly fat bodies as inferior might pose a health risk no less serious than the purported health risks from fat itself.

The government can, for example, legitimately design a program to encourage all citizens to walk at least ten thousand steps a day (preferably while also creating conditions for such walks, through walking-friendly urban and suburban planning) or to buy fresh produce at the farmers' market supplied by sustainable farming, rather than the processed food industry. It is crucial, however, that these programs target everyone, not only fat people.<sup>229</sup> It could even legitimately design a lifestyle program targeting the diabetic or high blood pressure patients, as long as it does not use weight as a proxy for tracing the recipients of such programs, for there are many fat people who do not suffer from diabetes or high blood pressure and many thin people who do. In contrast, a city-wide campaign that recruits the whole city to a goal of losing weight together to reach a total of such and such tons within a year would be problematic, because it focuses on weight and not on health. As a result, it would probably place social pressure on those who visibly "spoil" the city's chances to reach its goal.<sup>230</sup>

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227. The stigma associated with fatness renders those who do not presently feel fat "to live in fear of getting fat." Marilyn Wann, *supra* note 11, at xi, xv (2009). A study on American teenagers found that if they considered themselves not the right weight (too thin or too fat—regardless of their actual BMI), they were significantly more likely to attempt suicide. Danice K. Eaton et al., *Associations of Body Mass Index and Perceived Weight with Suicide Ideation and Suicide Attempts Among US High School Students*, 159 ARCH. PEDIATR. & ADOLESC. MED. 513, 517 (2005). Another study found that teenagers who use conventional dieting practices, as well as teenagers who turn to unhealthy weight control behaviors, are *more* likely to gain weight compared to non-dieting teenagers within ten years. See Dianne Neumark-Szainer et al., *Dieting and Unhealthy Weight Control Behaviors During Adolescence: Associations with 10-Year Change in Body Mass Index*, 50 J. ADOLESC. HEALTH 80, 84-85 (2012).

228. See Muennig et al., *supra* note 106, at 504-05.

229. On the problematic ethical and factual aspects of the individualistic approach to obesity, see OLIVER, *supra* note 13, at 72-76.

230. Returning to the analogy to free speech, a governmental policy that targets certain body sizes would be subject to constitutional scrutiny similar to the scrutiny of governmental measures limiting free speech. In *Reynolds v. U.S.*, 98 U.S. 145, 162-65 (1878), the Court explained that the

## 2. *Airplane Tickets and Health Insurance Premiums*

Should air carriers be allowed to require a double ticket from very fat people who cannot fit into one airplane seat, or at least cannot fit while leaving enough free space for the passengers sitting next to them? And should health insurance providers be permitted to refuse insuring very fat people, refuse to cover gastric bypass surgery, or charge more from those whom they categorize as overweight? How would the right to be fat help determine these questions?

First, it is problematic to determine the prices of goods and services for individuals, based on statistical data about their group. The practice of health insurance companies to categorize insurance applicants based on their weight burdens the applicants' right to be of any body size. Including fat people in a group where certain ailments may be more prevalent is problematic because individual applicants do not necessarily exhibit these ailments.

Second, although airlines justify charging fat people a higher price by citing the additional costs that such passengers incur on the carrier, there are groups that the airlines do not single out for charging higher price, even when they result in higher costs for the airline when compared to other passengers. Religious customers provide such an example. On flights departing from or arriving in Israel, it is common for observant Jewish passengers to group at the rear of the airplane during prayer times. It is often highly inconvenient for both flight crew and other passengers wishing to use the bathroom or to have peace and quiet. Yet, religious needs do not serve as a basis for an extra "prayer charge" in flight tickets. Religious practices are, in our current sensibility, intimate enough to the self to justify refraining from price distinction. I contend that bodily weight should be too.

Both passengers in wheelchairs, who take up more space and add weight to the airplane, and older passengers, who need to be escorted from check-in to the gate, are not required to cover their extra costs. This might be due not only to company image interests, but also to legal bans on disability and age

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Founding Fathers adopted the First Amendment in order to prevent the U.S. government from continuing the practice then rampant in the colonies of shaping the doctrines and precepts of the people by taxing or punishing them for failing to comport with the predominant belief. *See also* *Everson v. Board of Education*, 330 U.S. 1, 15-17 (1947) ("Neither a state nor the Federal Government can . . . pass laws which aid one religion, aid all religions, or prefer one religion over another. No person can be punished for entertaining or professing religious beliefs or disbeliefs"). Prohibiting the government from sanctioning or even disadvantaging citizens maintaining beliefs that society finds offensive or disagreeable is not a mere procedural technicality, but rather the bedrock principle motivating the enactment of the First Amendment. *See Texas v. Johnson*, 491 U.S. 397 (1989); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The question of what degree of scrutiny should be applied in examining the constitutionality of different policies centered on body size is important, but it is premature in the context of this Article, whose main goal is to provide principled preliminary justifications for the right to be fat. However, there is undoubtedly room for future development of the intricate doctrinal framework of this right.

discrimination.<sup>231</sup> Indeed, it is likely that part of the reason that age and disability are socially and legally viewed as more worthy of accommodation than body size is because these traits are considered immutable. But another important aspect of airlines' decision to refrain from charging the disabled or the elderly more has to do, I believe, with dignity. Many consider it morally wrong to burden people because of their age or physical ability, due to the paradigm of universal egalitarian humanism. This paradigm, in turn, stresses our dignity and inherent value as human beings. Once weight is recognized not as a moral flaw or as a sign of weakness of character, but as a legitimate choice that belongs to one's intimate sphere in which no one should interfere, then it would be less legitimate to cast extra charges on fat people.

If insurers and airlines are not targeting many other groups that jeopardize their profitability, it is not only a case of inefficient market distortion, but also a testament to the (conscious or unconscious) fat-phobic bias that prompts such price distinctions. Here, bias might be dressed up as inaccurate efficiency considerations. If this is the case, then once contemporary legal systems have recognized the importance of being left alone regarding body size—once we recognize the right to be fat—there is room to conclude that these price distinctions are in fact illegitimate price discrimination against a stigmatized group. In sum, such price differentiations should be considered illegitimate because they are based on bias rather than on straightforward efficiency considerations, and also, because the personal characteristics that prompt this price distinction are aspects of personhood that should be respected by society, including private contracting parties.<sup>232</sup>

Third, fat bodies are considered a costly burden often as a result of the absence of a more imaginative, inclusive social vision. This sentiment is an expression of the ways in which social and physical design is based on some problematic ideal notion of a "normal body." The theory and doctrinal directions emanating from the field of Disability Legal Studies (DLS) have illuminating potential for the present discussion.<sup>233</sup> The DLS analysis reveals how public buildings, restaurants, and workplaces are inaccessible not as a natural fact of life, but due to ableist assumptions about average or normal bodies.<sup>234</sup> A ramp

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231. The extent to which age or disability discrimination is legally forbidden in the private goods and services sectors is a complex question, which is not the focus of the current discussion. *See supra* note 218.

232. Evidence from other stigmatized groups, such as racial minorities, reinforce the concern that insurers' decisions are not solely based on efficiency considerations. *See, e.g.*, Ana E. Balsa & Thomas G. McGuire, *Statistical Discrimination in Health Care*, 20 J. HEALTH & ECON. 881, 901-03 (2001).

233. Some weight-based discrimination cases are litigated under the Americans with Disabilities Act, but protection under the disability framework is off the mark for the present discussion because fatness is not discussed here as a disability.

234. *See generally* Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241, 247-48 (2003) (presenting the human rights model for

instead of a staircase could easily render a venue accessible to more people. But DLS delves deeper by addressing areas that require even more imagination and accommodation effort, such as employers using text-based communication for the hearing impaired or schools changing the pace and methods of studying and testing to cater to those who have difficulty concentrating or reading and writing.

Realizing that there is nothing natural or immanent in the way buildings, airplanes, or insurance policies are designed prompts new questions about the way fat bodies are spatially and symbolically positioned as abnormal and unfitting. Just as a ramp can unmark the person on a wheel chair, so might a different design of the airplane rid fat people from the need to pay double for a ticket. Also, we should be mindful that fat people who pay for two seats get more space, but they do not receive what thin people do: a seat that fits. They get a seat with an armrest in their back that might present a safety hazard in case of an accident. Additionally, although they pay twice as much, they only get one set of frequent flyers miles. What if rather than the uniform seat size in the economy class of the plane, there would be rows with different seat sizes? Or, even better, what if seat width was changeable by horizontally shifting the hand rests? This would not only be an inclusive adjustment that would cater to fat people, but it would also represent a more accurate and efficient pricing system. Today, thin or short people enjoy extra arm and leg space without paying for it, as they free ride on the design that assumes a normal body that is wider or taller than theirs.

Once we start looking at thin people in airplanes (thus doing away with our treatment of their bodies as unremarkable and natural), different directions for solutions open up. The cost of redesigning adjustable seats might be lower than the profits stemming from the airline's ability to offer each passenger a seat fit for their size, thereby saving the space that is currently wasted on thin and short people.

I am not suggesting that price differentiation based on body size would never be legitimate. I am arguing that once the right to be of any body size, including fat, is recognized as part of personhood and as a matter that concerns autonomy, dignity, and liberty, then price distinction schemes will need to be much more carefully crafted than they are today. Factual assumptions about the efficiency of a fat premium would need to be scrutinized in light of these dignity-based costs and carefully balanced vis-à-vis the right to be of any body size. Furthermore, pricing schemes would need to be considered in light of the effect of price distinction on creating false notions of a normal body.<sup>235</sup> Just as with other basic

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disability); Sagit Mor, *Between Hope and Evil: Reframing Disability Allowance* 7-14 (2009) (unpublished manuscript), available at [http://works.bepress.com/sagit\\_mor/](http://works.bepress.com/sagit_mor/) (challenging the seemingly immanent relationship between disability and poverty).

235. As already mentioned, I am deliberately refraining from conducting a detailed discussion on the exact constitutional formulation of the right. For discussions on balancing public rights against private interests see, for example, Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. L. REV. 503, 506 (1985).

liberties that are sometimes protected despite the cost of this protection, we should expect that, at times, the interest of protecting the right to be fat would override efficiency considerations.<sup>236</sup>

Fourth, the empirical assumptions that underlie price distinctions should be carefully scrutinized, for there are reasons to suspect that the difference in pricing is not based on actual relevant differences of the fat body, but on perceived differences resulting from fat bias.<sup>237</sup> Both air carriers and health insurers base their price distinction on the assumption that fat people would be more costly to them than other groups, but these assumptions might be based on cognitive biases, which do not promote market efficiency.<sup>238</sup>

Consider the characteristics of other customers that airlines and insurers should target from an efficiency perspective, and yet they refrain from doing so. Life insurance providers ask applicants about their weight in order to determine their admissibility and their premium, but as far as I can tell, they do not ask whether the insurance applicant has a high-stress job. Stress has been known to have adverse effects on health and longevity that are probably no less severe than what is often argued about weight,<sup>239</sup> but perhaps it is cognitively harder to identify that esteemed and high-earning members of society are casting a burden on the insurer's pocket. It may be also harder in terms of the insurance company's image to charge higher premiums and attach labels to clients from a prominent and esteemed professional segment of society. Fat people, on the other hand, internalize their inferiority and blame themselves for their unworthy bodies, thus making it easier for their high premium to pass muster.<sup>240</sup> Fat people

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236. See Daphne Barak-Erez & Aeyal M Gross, *Introduction* to *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 5-6 (Daphne Barak-Erez & Aeyal M Gross eds., 2007) (noting that both traditional civil liberties and newer social rights often cost money); see also HOLMES & SUNSTEIN, *supra* note 207, at 35-45 (claiming that all rights are positive, in the sense that they cast a monetary burden on the government in enforcing them); *id.* at 20-21 ("The individual rights of Americans . . . are generally funded by taxes, not by fees. This all-important funding formula signals that, under American law, individual rights are public not private goods." (citations omitted)).

237. Excellent accounts are available on biased inefficient price discrimination based on race and ethnicity in the business sector. See, e.g., John Yinger, *Evidence on Discrimination in Consumer Markets*, 12 J. ECON. PERSP. 23, 38 (1998); see also John J. Donohue, *Antidiscrimination Law*, in 2 *HANDBOOK OF LAW AND ECONOMICS* 1387 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (assessing the extent to which discrimination is based on bias from an experimental economic perspective).

238. For evidence that health costs and insurance premiums did not go up due to laws mandating health insurers cover obese people and fund surgery, see Wang, *supra* note 8, at 1941-42.

239. On stress as a health risk factor, see, for example, Anita DeLongis et al., *The Impact of Daily Stress on Health and Mood: Psychological and Social Resources as Mediators*, 54 J. PERSONALITY & SOC. PSYCHOL. 486, 492-94 (1988) (finding significant relationship between daily stress and health problems); and Stanislav V. Kasl, *Stress and Health*, 5 ANN. REV. PUB. HEALTH 319, 327-35 (1984) (reviewing evidence for the correlation between stress and health risks).

240. There are myriad illustrations of such cognitive biases in business and in public mores.

are also likely to be generally poorer than people in professional high stress jobs,<sup>241</sup> and thus it is probably easier to give up on them as customers.

### 3. *Employment Discrimination*

Fat people are clearly subjected to adverse treatment and lack of equal opportunity in the workplace.<sup>242</sup> The animosity against fat employees includes verbal harassment<sup>243</sup> and discrimination in hiring, wages, and promotion.<sup>244</sup> Fat people must often also face demeaning work practices such as periodical weighing of employees<sup>245</sup> or the recent growing phenomenon of mandatory wellness programs sponsored by the employer, which frequently involve “aggressive” policies such as “charging higher health insurance premiums or deductibles to those employees who do not participate in the wellness program, or who engage in unhealthy behavior.”<sup>246</sup> Such policies send a repeated message

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*See, e.g.,* PAUL FUSSELL, CLASS: A GUIDE THROUGH THE AMERICAN STATUS SYSTEM 25-26 (1983) (discussing the double standards by which the media reports on working class accidents versus the outcry that would occur if a similar number of corporate executives were killed at work).

241. For the correlation between weight and socioeconomic status, see *supra* Section II.A.

242. *See, e.g.,* SOLOVAY, *supra* note 7, at 99-121 (discussing the evidence and the law of weight-based employment discrimination); Dor et al., *supra* note 34, at 10 (noting that female employees who are obese earn \$1,855 less annually compared to female employees who are not obese (and 6% lower than the median women annual wage)); Kari Horner, *A Growing Problem: Why the Federal Government Needs To Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589 (2005) (reviewing and assessing the available legal paths to claim weight-based discrimination at work, and arguing for federal legislation to protect against such discrimination); Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 789-90 (2001) (noting that the obese tend to earn lower wages for the same job performed by non-obese counterparts and may be at a substantial disadvantage even before the interview process begins, as they are assumed to lack self-discipline, be lazy, sloppy, and so on); Mark Roehling, *Weight-Based Discrimination in Employment: Psychological and Legal Aspects*, 52 PERSONNEL PSYCHOL. 969, 971-88 (1999) (reviewing the available empirical evidence on weight-based discrimination in the workplace); Esther D. Rothblum et al., *The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization*, 37 J. VOCATIONAL BEHAV. 251, 260 (1990) (noting that very obese subjects reported more types of employment discrimination than did non-obese subjects); Theran, *supra* note 7, at 153-62 (reviewing evidence of weight-based discrimination in employment).

243. *See, e.g.,* *Figgins v. Advance Am. Cash Advance Ctr. of Mich., Inc.*, 476 F. Supp. 2d 675, 680 (E.D. Mich. 2007) (describing plaintiff’s manager’s questioning her on whether she made sure she got diet soda, and documenting other similar remarks).

244. Puhl & Heuer, *supra* note 21, at 941-43 (reviewing recent research findings that point to consistently prevalent weight discrimination in hiring, promotion, and wages).

245. *See, e.g.,* *Frank v. United Airlines, Inc.*, 216 F.3d 845, 848 (9th Cir. 2000) (indicating that plaintiffs, all female flight attendants working for the defendant, “attempted to lose weight by various means, including severely restricting their caloric intake, using diuretics, and purging” in order to comply with the defendant’s weight requirements); *see also* RHODE, *supra* note 5, at 106 (describing contemporary weighing practices by employers).

246. Ann Hendrix & Josh Buck, Comment, *Employer Sponsored Wellness Programs: Should Your Employer Be the Boss of More Than Your Work?*, 38 SW. L. REV. 465, 469 (2009); *see also id.* at 470 (describing an Arkansas program under which “government employees receive a heavily

that being fat is bad and that employees must reduce their size once their body transgresses its prescribed bounds.<sup>247</sup> Therefore, these policies infringe the right to body size. Under the current legal framework, some cases of weight-based employment discrimination can be remedied under disability antidiscrimination law—where a fat plaintiff successfully demonstrates that his weight is limiting major life activities, or when he demonstrates that he was regarded as disabled because of his weight.<sup>248</sup> Fat plaintiffs can also argue that their employer used weight as a proxy to discriminate on the basis of a recognized suspect category, such as sex<sup>249</sup> or race.<sup>250</sup> But framing fat discrimination as disability discrimination or as sex or race discrimination would undermine the underlying rationale of the present project, because, as this Article stresses, fat often serves as an independent cause for limiting employment opportunities.<sup>251</sup> Should there

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reduced deductible for having a low height-to-weight ratio, measured at on-site annual physicals”).

247. Indeed, in other liberty-based rights, such as the right to abortion, applying aggressive policies against the right (such as the duty to undergo ultrasound) is not unconstitutional as long as the fundamental right is not unduly burdened. But the right to be fat is different from the right to abortion. Most women undergoing abortion would not view abortion as a positive or welcomed experience in itself. Fatness, as argued above, should be conceived as an experience that can be inherently positive, a productive locus of meaning for the individual. Thus the right to be fat is more similar to religious freedom. Employers cannot subject employees to a religion class, nor demand their employees to declare their religion. Similarly, employers should not be permitted to monitor employees' weight or to encourage them to lose it.

248. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12102(1)(A) (2006). For scholarly treatments of the possibility to protect weight discrimination under the ADA and similar discrimination acts, see KIRKLAND, *supra* note 5, at 126-46, which observes that identification as disabled will result in fat accommodation, but at the same time hamper the political solidarity needed for forging a positive group identity; and SOLOVAY, *supra* note 7, at 122-27. *See also* Korn, *Fat*, *supra* note 7 (arguing that the ADA should protect obesity as either an actual or perceived disability); *id.*, *Too Fat*, *supra* note 7, at 3 (“While the [2009 Americans With Disabilities Act Amendments Act] appears to provide more protection for most people with disabilities, this amendment will probably not protect people who are obese absent a significant change in our thinking about obesity.”); Kramer & Mayerson, *supra* note 7, at 210 (“Specific features of obesity and common reactions to the condition make it especially suited for protection under a perceived disability theory [under the ADA].”).

249. *See, e.g.*, *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602 (9th Cir. 1982) (accepting a claim that different weight requirements for female employees amounted to a violation of Title VII's ban on sex discrimination). The airline cases demonstrate that sometimes the plaintiffs would not be considered fat by conventional standards, but the employer sets a weight standard that only fits thin employees.

250. *See, e.g.*, *Murray v. John D. Archbold Mem'l Hosp., Inc.*, 50 F. Supp. 2d 1368 (M.D. Ga. 1999) (rejecting the plaintiffs' argument that employer's weight requirements amounted, among other things, to race discrimination in violation of Title VII of the Civil Rights Act, because it disparately impacted black applicants).

251. An analogous debate on whether disability law should be the recourse exists in the literature on transgender people. *See, e.g.*, Jennifer L. Levi & Bennett H. Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS 74-77* (Paisley Currah et al. eds., 2006) (arguing that while the fear of stereotyping transgender people as abnormal or inferior is understandable, the transgender community should not shy away from coverage by disability laws, for the contemporary disability movement had instilled new positive

be, then, a distinct category for weight in antidiscrimination clauses?<sup>252</sup> Should such language enter Title VII and similar state and local employment discrimination rules? The answer to this question is not simple, and it merits examination in a separate article. Here I will only briefly map the key arguments for and against such antidiscrimination legislation.

It is important to stress that unlike previous scholarly treatments of this question, my answer is informed by my liberty-centered approach to body size, and, therefore, contains serious reservations about including weight in the antidiscrimination legal framework.

*a. Arguments in Support of Banning Weight-Based Employment  
Discrimination*

First, as already mentioned, there is consistent empirical evidence suggesting that fat people pay in opportunities and income because of their weight. Fat people are often judged not on their merits (i.e. their education, skills, or experience) but on the assumed meanings of their size. This is not only unjust, but also inefficient for employers, because by focusing on weight they might miss qualified employees.<sup>253</sup> Fat people are also frequently subjected to hostile environments where co-workers and managers peck at them for eating certain foods or make humiliating remarks.<sup>254</sup>

Second, it is legitimate to interfere with the contractual freedom of employers in this context even if we stick with one of this Article's preliminary assumptions—that weight is a mutable characteristic within the person's control. Antidiscrimination clauses contain not only immutable traits (such as race, sex, age, or nationality), but also traits that are within the control of the individual, such as religion or marital and parental status. The rationale for marking the latter characteristics as suspect categories is that they concern matters so central to the core of personhood that people should not be required to change them in order to gain access to equal employment opportunities. According to the theoretical

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and critical meanings to disability).

252. A small number of states and municipalities did introduce “weight,” “appearance,” and similar phrases as forbidden grounds in their employment discrimination law. *See, e.g.*, District of Columbia Human Rights Act, D.C. CODE ANN. § 2-1402.11 (2002); Elliott-Larcen Civil Rights Act, MICH. COMP. LAWS § 37.2101-2804 (1976) (a Michigan law prohibiting an employer from discriminating on the basis of, inter alia, weight). Litigation is, however, still too scant to allow for assessing the effects of such laws.

253. *See, e.g.*, RHODE, *supra* note 7 (providing ample evidence for appearance-based employment discrimination and suggesting legal reform to prevent such discrimination). *But cf.* William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153, 178 (2007) (arguing that the logic of U.S. antidiscrimination law does not extend to banning appearance-based discrimination).

254. *See, e.g.*, Leanne Joannis & Anthony Synnott, *Fighting Back: Reactions and Resistance to the Stigma of Obesity*, in *WEIGHTY ISSUES: FATNESS AND THINNESS AS SOCIAL PROBLEMS*, *supra* note 185, at 49, 56.

framework developed in this Article, weight is a core part of personhood and, therefore, should be free of societal intervention. As such, it is similar to religious freedom or family status, with which, in general, employers cannot interfere.

Questions of merit-based hiring and promotion are always complicated, and the area of body size is no exception. In what jobs would employers be permitted to consider damage to company image caused by a service giver who is “unaesthetic,” for example? Should they be allowed to consider the health insurance costs of fat employees? These questions should be determined by drawing from analogies found in the existing tools of employment discrimination doctrine.<sup>255</sup> What is clear, however, is that many assumptions about skills, professionalism, and performance of fat people are shaped by bias rather than evidence. Indeed, in certain occupations, there might be bona fide occupational qualifications to justify excluding many fat candidates, but the criterion used for assessment should not be the candidate’s weight per se, but the candidate’s abilities. For example, police officers should be agile and able to operate quickly. While many fat people might not meet this job requirement, some fat people might be fit enough to qualify, and many thin people would not qualify as well. Additionally, since the right to be fat also has positive aspects, recognizing it would create duties for employers to create reasonable accommodations, similar to their duties under disability law.<sup>256</sup> For example, employers would have the duty to provide office furniture that would fit their employees’ sizes, or a big enough sitting space in the bus or truck that they would drive.

#### *b. Arguments Against a Legal Ban on Weight-Based Employment Discrimination*

First, the most disconcerting potential consequence of introducing weight to the list of suspect categories in employment antidiscrimination laws is that such laws would pave the way for a whole new spectrum of oppressive legal discourse about the fat body. Despite good intentions to protect fat people from discrimination, the legal gaze at fat plaintiffs’ bodies might produce more humiliating outcomes than the harm of discrimination itself. The concern here is that the legal discourse on weight would normalize the medical framework for

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255. For example, courts have been very careful not to construe customer preferences as Bona Fide Occupational Qualifications, and this principle should apply to the case of body size as well. See, e.g., Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 196-201 (2004) (analyzing the cases in which courts do permit recognizing customer preferences as BFOQ). For an excellent account of the extent to which antidiscrimination law can remedy weight-based discrimination, see generally KIRKLAND, *supra* note 6.

256. See generally Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. PA. L. REV. 1423 (1991) (discussing the scope of the employer’s duty to provide accommodation under the ADA).

talking about the fat body. The law would thereby partake in disciplining it, rather than assisting in its liberation. This, in my view, is a central weakness of antidiscrimination discourse: While it focuses on equalizing the treatment of the protected group to that of others, there are no internal mechanisms within this discourse to guarantee that the protected group will not still be portrayed by this discourse as inferior and pitiful, albeit worthy of tolerance. This is why, as I argue here, a liberty-based protection of body size should underlie any weight-based antidiscrimination rule.<sup>257</sup>

In reading existing weight discrimination cases, we can witness the emergence of discursive conventions, or trends in speech, that tell the story of the fat body in a vocabulary that is governed by the medical understanding of the fat body, finding no trace of, and leaving no room for, competing meanings of corpulence. Figures, measurements, body organs and physical functions such as glandular activity, genetic makeup, and various metabolites are all meant to establish a seemingly objective viewpoint on which the legal gaze can comfortably rely in assessing the legitimacy of the fat body. To illustrate, consider this statement, from a case arguing, among other things, weight-based discrimination: “[A]t the time her employment was terminated, she was fifty-five years old, 5’7” tall and weighed about 240 pounds and . . . previously, she had weighed as much as 311 pounds.”<sup>258</sup>

As another example, we read that the plaintiff did not present evidence to show that his weight was a result of a genetic or metabolic condition.<sup>259</sup> Sometimes, such medicalized measurements of bodies in the workplace do not stop at describing the plaintiff’s body, but spread to descriptions of the bodies of colleagues and supervisors.<sup>260</sup> As should be clear by now, I find this way of talking and writing about the fat body to be reductive as it provides a partial and non-humanist account of the body as a machine devoid of complex meanings and multiple motivations.<sup>261</sup>

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257. For a discussion of the impact of disability movements on identity politics, see generally Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996).

258. *Lamoria v. Health Care & Retirement Corp.*, 584 N.W.2d 589, 589 (Mich. Ct. App. 1998). Other examples abound. See, e.g., *Phil. Elec. Co. v. Commonwealth*, 448 A.2d 701, 214 (Pa. Commw. Ct. 1982) (“On the date in question, [Petitioner] was 27 years old, 5’ 8” tall and weighed 341 pounds. There is no question that on April 26, 1977 [Petitioner] was morbidly obese.”). On the normalization of the discourse on fat, see KIRKLAND, *supra* note 7, at 112-14. See also *id.* at 112 (“[M]ore and more concerns about fat are expressed with demographics, Body Mass Index (BMI) ranges, and cost projections.”).

259. See, e.g., *Delta Air Lines v. N.Y. State Div. Human Rights*, 689 N.E.2d 898, 91 N.Y.2d 65, 73 (1997) (“Appellants did not proffer evidence or make a record establishing that they are medically incapable of meeting Delta’s weight requirements due to some cognizable medical condition.”).

260. See, e.g., *Figgins v. Advance Am. Cash Advance Ctrs. of Mich., Inc.*, 476 F. Supp. 2d 675, 679 (E.D. Mich. 2007) (describing the weights of the plaintiff’s area manager, regional director of operations, and assistant manager).

261. These concerns are raised by the critical disability literature as well, which stresses the

Indeed, similar problems, concerning the normalizing effects of the legal discourse, have been addressed by scholars with regard to subjecting sex, race, or sexuality to the gaze of antidiscrimination law. I suspect, however, that the damage in the case of weight might be even more severe, since being a woman or a person of color are statuses that do not require as intrusive and clinical of an inquiry into whether or not they fall into the protected category as weight does, and do not burden the plaintiffs with a detailed depiction of their “condition.”<sup>262</sup> The antidiscrimination framework entails that a plaintiff classify his or her specific body size according to a ready-made legal categorization of bodies. This is bound to come with the price of reifying the medical taxonomy of body size, thereby stifling competing perspectives on body size and its role in human experience.

If protecting fat people from discrimination would require subjecting plaintiffs to a legal inquiry about their weight, metabolic function, genetic makeup and lifestyle, then perhaps antidiscrimination law is not the appropriate means for protecting fat people against discrimination. An alternative dignity- or liberty-based legal framework for providing remedies for workplace infringements might be better suited in this context, in that it might rid litigation of the need to require plaintiffs to define their identity and fit it into the protected category.<sup>263</sup> Liberty or dignity claims do not require that the plaintiff prove that he or she belongs to a certain protected group. Rather, they are based on a conception of universal humanness, thus avoiding the need to meticulously examine the weight of the plaintiff or the reasons that brought about his or her body size. It is precisely because weight is extremely meaningful to individuals—imbued with meanings that often resist representation in language

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need to differentiate between impairment (referring to the physical limitation) and disability (referring to the social exclusion, which is not a necessary outcome of impairment, but a result of social organization that takes little or no account of people who have physical impairment and, thus, excludes them from participation in the mainstream of social activities). See UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION, FUNDAMENTAL PRINCIPLES OF DISABILITY 20 (1975). However, I think the question of body size presents an even bigger challenge to the dilemma of whether to surrender the body to representation in language, because there is something about the status of weight in our culture that is so loaded with shame and negative judgment that it is virtually impossible to surrender it to language without oppressive and normalizing outcomes. I explored this question in Tirosh, *supra* note 5. I am therefore much more reserved about introducing weight to the antidiscrimination framework than I am about disability.

262. The experience of transgender people seeking legal recognition of their transition can provide an analogy to the level of intrusiveness of the judicial gaze. See Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENER RIGHTS, *supra* note 251, at 32, 35-39 (arguing that judicial concern for the privacy of litigants disappears when it comes to transgender and transsexual litigants, whose body, medical history, and sex lives are subject to detailed scrutiny).

263. See generally Tirosh, *supra* note 122 (developing the argument about the advantage of liberty-based justifications over discrimination-based protections in the context of appearance claims).

and that challenge the mainstream negation of fatness—that one’s weight should not be subjected to inquiries into whether it falls within the legal rubric of a protected class.

Second, some jurisdictions, such as the State of Michigan, Washington D.C., or Santa Cruz, California, have already introduced appearance or weight as forbidden grounds for discrimination. In the decade since introducing those laws, we find surprisingly little litigation because plaintiffs do not file claims about their weight-based discrimination.<sup>264</sup> One likely reason for this failure to use the law to mobilize fat rights is that fat plaintiffs are hesitant to expose themselves publicly as fat. For example, if they file a weight discrimination claim, a simple online search of their name would expose this fact, thus marking them publically as fat. Perhaps potential fat plaintiffs are not ready to stably occupy the position of people who have been wronged due to their weight. Perhaps they are not ready to come out of the fat closet,<sup>265</sup> a move that would entail claiming with conviction that they are entitled to equal opportunity. This hypothesis is supported by Solovay and Vade’s observation that plaintiffs in employment discrimination cases who are unapologetic about their weight fare worse than plaintiffs who tell the court that they know something is wrong about their body, and they have tried every possible method for weight loss.<sup>266</sup>

Another possible reason for the scant number of weight discrimination lawsuits is that potential plaintiffs are unable to admit to themselves that they are going to remain fat (that is, they internalize the future-grounded understanding of fat identity as one that is only pending metamorphosis). The legal venue, then, has thus far not proven to be effective or significant in preventing weight-based discrimination. This Article takes a liberty-based approach to weight because it does not raise the problems associated with employment discrimination approaches.

#### 4. *Smoking, Skydiving, and Other Dangerous and Idiosyncratic Behaviors*

My argument has normative implications for other behaviors that can be categorized as body-centered and as dangerous to one’s health, such as smoking

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264. See Kristen, *supra* note 7, at 101 (indicating that “only eight to ten cases of weight-related discrimination had been pursued” since the law reform in Michigan); see also RHODE, *supra* note 7, at 126 (“No jurisdiction [that explicitly prohibits appearance or weight discrimination] has experienced the flood of frivolous litigation and business backlash that critics have predicted.”); Kristen, *supra* note 7, at 105-08 (indicating that no cases were litigated under Santa Cruz and San Francisco’s explicit ban on weight discrimination). For a recent statistical analysis of the little change that obesity antidiscrimination laws made in the lives of fat legal subjects see Shinall, *supra* note 5, at 20-30.

265. For a discussion of the fat closet, see *infra* Subsection III.C.2.

266. Sondra Solovay & Dylan Vade, *No Apology: Shared Struggles in Fat and Transgender Law*, in THE FAT STUDIES READER, *supra* note 11, 167, 167-69 (noting that for obesity, there is a sense of moral failure that prevents accepting it as primarily a physiological disorder).

or engaging in extreme sports.<sup>267</sup> These behaviors, which are sometimes dubbed “expensive tastes,”<sup>268</sup> are controllable and unhealthy. Perhaps due to the cultural grip of the dualistic approach to body and mind discussed above,<sup>269</sup> the law generally does not tend to protect physical behaviors that might be considered eccentric or peculiar, while recognizing and protecting eccentric activities more associated with the mind, such as speech or thought. I believe the account provided here about the intimate and non-generalizable nature of embodied experience can contribute to our understanding of the law’s approach to such practices. Smokers are attached to the sense of peace, pause, and release that a cigarette provides. They often feel that their cigarette smoking time is a cherished time and that there are no equivalent replacements for the feelings that smoking provides for them.

Indeed, one of the implications of my argument is that we should begin to develop a set of criteria for determining which activities or lifestyle choices merit legal recognition and protection. These criteria will attempt to rate the extent to which a certain bodily habit is close to the core of our person. Smoking, for example, is different from eating in that it is not essential for survival. We cannot completely abolish eating from our lives, and in that sense, regulation of smoking would be ranked as farther from the core of our person than regulation of eating—an activity inherent to human existence. Additionally, “the individual makes the initial decision on whether to pick up the cigarette, [but a] person struggling with obesity has often been dealing with weight issues since childhood and did not really make the choice to become obese.”<sup>270</sup> Furthermore, smoking poses direct damages to others in the proximity of the smoker, unlike being fat.

Another criterion would be the extent to which such bodily aspects of experience define our sense of who we are, both “from the inside out” (for ourselves) and “from the outside in” (by society’s gaze). I mentioned earlier<sup>271</sup> that being fat today entails a persona; an entire set of characteristics that seemingly emanate from body size. It reflects substantial qualities in the fat person such as lack of self-control or laziness, but also perhaps a sense of humor and ability to enjoy life.<sup>272</sup> We are not there with regard to smoking or with

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267. Like smoking, fat is sometimes theorized as contagious. See, e.g., Nicholas A. Christakis & James H. Fowler, *The Spread of Obesity in a Large Social Network over 32 Years*, 357 N. ENG. J. MED. 370 (2007); Gina Kolata, *Find Yourself Packing It On? Blame Friends*, N.Y. TIMES, July 26, 2007, <http://www.nytimes.com/2007/07/26/health/26fat.html>.

268. On expensive tastes, see, for example, John Rawls, *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND 159, 168-69 (Amaryta Sen & Bernard Williams eds., 1982); and Simon Keller, *Expensive Tastes and Distributive Justice*, 28 SOC. THEORY & PRAC. 529, 529-32 (2002).

269. See *supra* Section III.A.

270. DeVries, *supra* note 7, at 165.

271. See *supra* Section I.A.

272. Even ascriptions of traits that seem positive still stereotype and lock fat people within a particular social role. See, e.g., Gina Cordell & Carol Rambo Ronai, *Identity Management Among*

extreme sports. Indeed smokers in the United States are today viewed as lacking self-control, risking harm to themselves and others, and casting a burden on the public budget with their expected illnesses. However, these attributes do not amount to a sense that smokers are primarily defined by their smoking. There are exceptions, but we usually say “his profession is *X*, he is age *Y*, and he is a smoker.” With fat people, their size comes earlier in our perceiving and talking about them. This is another reason that there should not be an automatic leap from the right to be fat to a right to smoke or to skydive.

In sum, it is certainly expected that the set of tools that would hopefully develop in the process of broadening and applying the right to be fat could be extrapolated to our way of thinking about other volitional bodily practices. Determining whether the legal anchoring of a right to be fat should be extended to other self-risking behaviors would depend on the extent to which the practice in question is in close proximity to the core of the person and to one’s sense of self.

#### CONCLUSION

[W]e need to make our bodies just as central to our moral theorizing as they are in our moral practices.<sup>273</sup>

This Article has argued that American law’s current constitutional commitments to liberty, autonomy, and human dignity entail that it legally recognize the right to be of any body size, including the right to be fat. This analysis has traced the tradition of mind-body dualism as a central cause for our ongoing neglect of body size as a significant domain of rights and presented affirmative approaches to the fat body as an alternative to its prevalent negation. Recognizing the recent critique of this dualism, and the potential contribution of phenomenological accounts of body size, this Article has argued that we can no longer omit the realm of bodily existence—of eating, moving and generally existing corporeally—from the rights framework.<sup>274</sup>

Being directly or indirectly targeted by laws and regulations that mark the fat body as a body that merits correction makes it difficult for fat persons to maintain a sense of dignity and of self worth. Current legal arrangements deprive fat

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*Overweight Women*, in INTERPRETING WEIGHT: THE SOCIAL MANAGEMENT OF FATNESS AND THINNESS, *supra* note 93, at 29, 35-40 (providing a sociological account of resistance to the notion that fat people are jolly or funny).

273. GAIL WEISS, BODY IMAGES: EMBODIMENT AS INTERCORPOREALITY 5 (1999).

274. Indeed, there are other aspects of embodied experience that such recognition would render worthy of renewed consideration, such as nudity or dress style. The latter topic has been the subject of legal scholarship in recent years. *See, e.g.*, sources cited *supra* note 138-139. As I maintained throughout this Article, focusing on weight is particularly timely and important because recently it has become the focus of extensive and innovative legal regulation and because it is a central axis of meaning in the lives of many individuals in American society.

persons of a sense of equal entitlement to take part in the social, political, and economical realms. Body size is intrinsically valuable both for one's sense of personhood and for one's interactions with the physical and social world. The antidiscrimination framework does not fully and accurately capture what is being denied to fat people when their body size is targeted. Because embodied existence is an important locus of human experience, liberty is a more appropriate basis for the right to any body size. The legal protections that would derive from liberty have the power to guard individuals against legal and social interference with the intimate domain of body size and the practices associated with it.

Indeed, the argument that our contemporary map of basic rights should open up to include rights related to bodily practices in general and to body size in particular is far from conceptually trivial or simple to apply. The implications of a legal recognition of the right to be fat will unfold if and when such a right is recognized. Until then, my hope is that it would no longer be possible to offhandedly recruit the law to "the war against obesity." Every time the law is invited to take part, whether directly or indirectly, in narrowing the scope of liberties or in limiting the opportunities of fat people, lawmakers should pause to consider fatness not merely through the reductive and impoverished medical and instrumental vocabularies, but also through a humanist framework that recognizes the potential richness and uniqueness of experiences of every body size.