

# OBESITY AND PUBLIC POLICY: A ROADMAP FOR REFORM

*Deborah L. Rhode* \*

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\* Deborah L. Rhode is a Professor of Law and Director of the Center on the Legal Profession, Stanford University.

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*This Article examines the causes and consequences of America's rising rates of obesity and the public policy strategies most capable of addressing it. Discussion explores the complex factors that influence weight and the costs of obesity for individuals and society. Analysis then turns to the justifications for government intervention and evaluates a broad range of policy initiatives including disclosure requirements, taxes, bans on certain sugar-sweetened beverages, food stamp modifications, zoning regulations, children's marketing, physical education, litigation, and education.*

## INTRODUCTION

IN principle, the United States is deeply committed to finding solutions to the rise of obesity and its health consequences. In practice, however, public policy has fallen short. The Surgeon General and the U.S. Centers for Disease Control and Prevention have pronounced obesity to be a national "epidemic," and First Lady Michelle Obama has described it as a "public health crisis."<sup>1</sup> Almost four-fifths of Americans consider adult obesity to be a major public health problem.<sup>2</sup> Yet many policy responses have proven controversial, and those most often recommended have frequently faced an uphill battle at the federal, state, and local level. At the same time that obesity rates have been rising sharply, many jurisdictions have resisted, or rolled back, strategies such as soda taxes or regulation of advertising directed at children.

This Article analyzes leading policy initiatives. It proceeds in three parts. Part I explores the causes and consequences of the obesity problem. Discussion focuses on the complex relationship between environmental, cultural, behavioral, and biological factors that influence weight, as well

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<sup>1</sup> U.S. DEP'T. OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001), available at <http://www.ncbi.nlm.nih.gov/books/NBK44206/pdf/TOC.pdf>; CDC *Vital Signs: Adult Obesity — Obesity Rises Among Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (Aug. 2, 2010), <http://www.cdc.gov/vitalsigns/pdf/2010-08-vitalsigns.pdf>; *HHS Secretary and Surgeon General Join First Lady to Announce Plans to Combat Overweight and Obesity and Support Healthy Choices*, HHS.GOV (Jan. 28, 2010), <http://wayback.archiveit.org/3926/20131018160954/http://www.hhs.gov/news/pres/2010pres/01/20100128c.html>.

<sup>2</sup> LAKE SNELL PERRY & ASSOCS., *Obesity as a Public Health Issue: A Look at Solutions*, PROGRAM FOR HEALTH SYSTEMS IMPROVEMENT 1–2, [http://www.phsi.harvard.edu/health\\_reform/poll\\_results.pdf](http://www.phsi.harvard.edu/health_reform/poll_results.pdf) (last visited Mar. 29, 2015).

as the individual and social costs of obesity-related health conditions. Part II looks at the justifications for government intervention and the objections of paternalism that it evokes. Part III explores those interventions that have achieved the greatest prominence, including disclosure requirements, taxes, bans on certain sugar-sweetened beverages, food stamp modifications, zoning regulations, children's marketing, physical activity initiatives, food policies, litigation, and education.

## I. THE OBESITY PROBLEM: CAUSES AND CONSEQUENCES

### A. *The Rising Costs of Obesity*

America has the world's highest per capita obesity rates.<sup>3</sup> Over the last three decades, the proportion of obese children has tripled; it now constitutes 17%. A third of children are also overweight.<sup>4</sup> The prevalence of obesity among adults has more than doubled; about a third of adults are obese and another third are overweight.<sup>5</sup>

Obesity has a dramatically adverse effect on a population's health. It serves as a major contributor to chronic diseases including type II diabetes, cardiovascular disease, hypertension, and cancer.<sup>6</sup> Obesity is a leading cause of preventable death among adults.<sup>7</sup> Obesity and being overweight are also associated with higher risks of various psychological problems, including depression, anxiety, and low self-esteem.<sup>8</sup> Stigmati-

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<sup>3</sup> Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1719 (2004).

<sup>4</sup> Cynthia L. Ogden et al., *Prevalence of High Body Mass Index in U.S. Children and Adolescents, 2007-2008*, 303 JAMA 242, 242 (2010).

<sup>5</sup> Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among U.S. Adults, 1999-2008*, 303 JAMA 235, 235 (2010); *Prevalence of Overweight, Obesity and Extreme Obesity Among Adults: United States, Trends 1976-1980 Through 2005-2006*, NAT'L CTR. FOR HEALTH STATISTICS (Dec. 2008), [http://www.cdc.gov/nchs/data/hestat/overweight/overweight\\_adult.pdf](http://www.cdc.gov/nchs/data/hestat/overweight/overweight_adult.pdf).

<sup>6</sup> Franca Bianchini et al., *Overweight, Obesity, and Cancer Risk*, 3 LANCET ONCOLOGY 565, 565 (2002); Alison E. Field et al., *Impact of Overweight on the Risk of Developing Common Chronic Diseases During a 10-Year Period*, 161 ARCHIVES INTERNAL MED. 1581, 1582 (2001); Earl S. Ford, David F. Williamson, & Simin Liu, *Weight Change and Diabetes Incidence: Findings From a National Cohort of US Adults*, 146 AM. J. EPIDEMIOLOGY 214, 217 (1997); Aviva Must et al., *The Disease Burden Associated with Overweight and Obesity*, 282 JAMA 1523, 1526 (1999); *Overweight and Obesity: Causes and Consequences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nccdphp/dnpa/obesity/consequences.htm> (last updated Apr. 27, 2012).

<sup>7</sup> David B. Allison et al., *Annual Deaths Attributable to Obesity in the United States*, 282 JAMA 1530, 1537 (1999).

<sup>8</sup> INST. OF MED., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION 36 (Dan Glickman et al. eds., 2012), available at [http://www.nap.edu/openbook.php?record\\_id=13275](http://www.nap.edu/openbook.php?record_id=13275); DEBORAH L.

zation and prejudice based on weight are common, and discrimination is widespread in employment, education, and health care.<sup>9</sup> The annual health care costs associated with obesity have been estimated at between \$147 to \$190 billion.<sup>10</sup> Taxpayers finance nearly half of all direct medical costs through Medicare and Medicaid.<sup>11</sup> The total medical costs linked to obesity account for 10 to 20% of U.S. medical spending and contribute to an unsustainable level of health care expenses.<sup>12</sup> Obesity also imposes costs on the labor market, since employees' absence from work and lost productivity for obesity-related reasons results in significant financial losses.<sup>13</sup>

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RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 6, 15, 29, 41 (2010); *Basics about Childhood Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/childhood/basics.html> (last updated Apr. 27, 2012); Roberta R. Friedman & Rebecca M. Puhl, *Weight Bias: A Social Justice Issue*, YALE RUDD CTR. FOR FOOD POLICY & OBESITY (2012), [http://www.yaleruddcenter.org/resources/upload/docs/what/reports/Rudd\\_Policy\\_Brief\\_Weight\\_Bias.pdf](http://www.yaleruddcenter.org/resources/upload/docs/what/reports/Rudd_Policy_Brief_Weight_Bias.pdf).

<sup>9</sup> RHODE, *supra* note 8, at 15–16, 28, 41–43, 94–95, 102–106, 123–125; Rebecca M. Puhl & C.A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 *OBESITY* 941, 941 (2009); Friedman & Puhl, *supra* note 8, at 4–6. *See generally* WEIGHT BIAS: NATURE, CONSEQUENCES AND REMEDIES (Kelly D. Brownell et al. eds., 2005).

<sup>10</sup> INST. OF MED., *supra* note 8, at 2 (providing the higher estimate); Ross A. Hammond & Ruth Levine, *The Economic Impact of Obesity in the United States*, 3 *DIABETES, METABOLIC SYNDROME & OBESITY: TARGETS & THERAPY* 285, 294 (2010); Eric A. Finkelstein et al., *Annual Medical Spending Attributable to Obesity: Payer- And Service-Specific Estimates*, 28 *HEALTH AFF.* w822, w829 (2009) (providing the lower estimates).

<sup>11</sup> Eric A. Finkelstein et al., *State-Level Estimates of Annual Medical Expenditures Attributable to Obesity*, 12 *OBESITY RES.* 18, 23–24 (2004); Eric A. Finkelstein et al., *Economic Causes and Consequences of Obesity*, 26 *ANN. REV. PUB. HEALTH* 239, 248 (2005).

<sup>12</sup> INST. OF MED., *supra* note 8, at 36 (providing estimates of 20%); Finkelstein et al., *supra* note 10, at 828 (providing estimates of 10%); *see also* Katherine Pratt, *A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes*, 87 *TUL. L. REV.* 73, 119 (2012).

<sup>13</sup> John Cawley, John A. Rizzo & Kara Haas, *Occupation-Specific Absenteeism Costs Associated with Obesity and Morbid Obesity*, 49 *J. OCCUPATIONAL & ENVTL. MED.* 1317, 1317 (2007); Emily D. Durden et al., *Economic Costs of Obesity to Self-Insured Employers*, 50 *J. OCCUPATIONAL & ENVTL. MED.* 991, 994 (2008); Donna M. Gates et al., *Obesity and Presenteeism: The Impact of Body Mass Index on Workplace Productivity*, 50 *J. OCCUPATIONAL & ENVTL. MED.* 39 (2008); Hammond & Levine, *supra* note 10, at 288; Seth A. Serxner et al., *The Impact of Behavioral Health Risks on Worker Absenteeism*, 43 *J. OCCUPATIONAL & ENVTL. MED.* 347, 350 (2001); Y. Tony Yang & Len M. Nichols, *Obesity Health System Reform: Private vs. Public Responsibility*, 39 *J. L. MED. & ETHICS* 366, 381 (2011).

*B. The Causes of Obesity*

The causes of obesity are complex and contested. Biological, behavioral, environmental, and cultural factors all play a role, and there is no consensus on their relative importance. Some research stresses the role of genes.<sup>14</sup> However, genetic influences cannot account for the rapid rise in obesity rates over the last decades.<sup>15</sup> It appears to have more to do with behavioral changes and the environment that encourages them.

One major contributor to the increased rates of weight gain in the United States has been an increasingly sedentary lifestyle. Two thirds of American adults do not engage in any regular physical activity.<sup>16</sup> Only a fifth engage in a "high level" of physical activity.<sup>17</sup> As the Surgeon General notes:

Widespread adoption of multiple technological innovations in the home, workplace, and schools has reduced our daily physical activity. Similarly, the car-dependent design of our communities has made it much harder for our children to walk to school—and much harder for us to shop and do other errands entirely on foot or by bicycle.<sup>18</sup>

Americans' heavy use of television and electronic media has similarly contributed to inactivity, and the tendency to consume high calorie snacks while viewing this media has increased the probability of weight gain.<sup>19</sup> The problem is exacerbated by the decrease in schools' physical

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<sup>14</sup> Jules Hirsch & Rudolph L. Leibel, *New Light on Obesity*, 318 NEW ENG. J. MED. 509, 509–10 (1988); Rudolph L. Leibel, *Energy In, Energy Out, and the Effects of Obesity-Related Genes*, 359 NEW ENG. J. MED. 2603, 2603 (2008); Richard Rosenbaum et al., *Medical Progress: Obesity*, 337 NEW ENG. J. MED. 396, 401 (1997).

<sup>15</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *Contributing Factors of Childhood Obesity*, EDUCATION.COM, <http://www.education.com/reference/article/contributing-factors-obesity> (last updated Sep. 14, 2009).

<sup>16</sup> Joseph P. McMenamin & Andrea D. Tiglio, *Not the Next Tobacco: Defenses to Obesity Claims*, 61 FOOD & DRUG L.J. 445, 466–67 (2006).

<sup>17</sup> Patricia M. Barnes & Charlotte A. Schoenborn, CTRS. FOR DISEASE CONTROL & PREVENTION, *Physical Activity Among Adults: United States, 2000*, 333 ADVANCE DATA FROM VITAL & HEALTH STAT., May 13, 2003, at 19–20, available at <http://www.cdc.gov/nchs/data/ad/ad333.pdf>.

<sup>18</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL'S VISION FOR A HEALTHY AND FIT NATION 2 (2010), available at <http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesityvision2010.pdf>.

<sup>19</sup> Katharine A. Coon & Katherine L. Tucker, *Television and Children's Consumption Patterns: A Review of the Literature*, 53 MINERVA PEDIATRICA 1, 11–12 (2001); Robert W. Jeffery & Simone A. French, *Epidemic Obesity in the United States: Are Fast Foods and Television Viewing Contributing?* 88 AM. J.

education (PE) programs. Adolescent participation in such programs dropped from 42% in 1991 to 28% in 2003. Less than a third of high school students meet currently recommended levels of physical activity.<sup>20</sup>

Changes in eating patterns also play a role in rising obesity rates. Americans' caloric intake has increased substantially over the last half century.<sup>21</sup> We live in what researchers refer to as a "toxic food environment," characterized by an increase in cheap, tasty, high-calorie food.<sup>22</sup> Massive agricultural subsidies for products such as corn, wheat, and soy have encouraged overproduction of inexpensive, processed products high in fat and carbohydrates.<sup>23</sup> These products are much cheaper than higher nutrient foods that are less likely to contribute to obesity.<sup>24</sup> Women's increased participation in the paid labor force means that more meals are prepared and consumed outside the home, and such meals are higher in calories and lower in nutritional value.<sup>25</sup> Americans "now spend half of their food budget and consume one-third of their ly ...[calories] on meals and drink consumed outside the home"; fast

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PUB. HEALTH 277, 278 (1998); M.H. Proctor et al., *Television Viewing and Change in Body Fat From Preschool to Early Adolescence: The Framingham Children's Study*, 27 INT'L J. OBESITY 827, 827 (2003).

<sup>20</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 15.

<sup>21</sup> TRUST FOR AMERICA'S HEALTH, *F AS IN FAT: HOW OBESITY THREATENS AMERICA'S FUTURE* 103 (2013), <http://healthyamericans.org/assets/files/TFAH2013FasInFatReportFinal%209.9.pdf>.

<sup>22</sup> See INST. OF MED., *supra* note 8, at 164; Thomas Christian & Inas Rashad, *Trends in U.S. Food Prices, 1950-2007*, 7 ECON. & HUM. BIOLOGY 113, 114-16 (2009); *Obesity Prevention Source: Toxic Food Environment*, HARVARD SCH. PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/food-environment-and-obesity> (last visited Mar. 19, 2015).

<sup>23</sup> DANIEL IMHOFF, *FOOD FIGHT: THE CITIZEN'S GUIDE TO A FOOD AND FARM BILL* 33-36, 90-92 (2007); MICHAEL POLLAN, *IN DEFENSE OF FOOD* 116-17 (2009); Zoltan J. Acs et al., *The Infrastructure of Obesity*, in OBESITY, BUSINESS AND PUBLIC POLICY 135, 135 (2007); Christopher Moraff, *Agriculture Policy Blamed for Obesity*, PHILADELPHIA TRIB., Sept. 4, 2012, at A4; Michael Pollan, *You Are What You Grow*, N.Y. TIMES MAG., April 22, 2007, at 15.

<sup>24</sup> 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>.

<sup>25</sup> David N. Cutler et al., *Why Have Americans Become More Obese?* 17 J. ECON. PERSP. 93, 105-107 (2003); Joanne F. Guthrie et al., *Road of Food Prepared Away from Home in the American Diet, 1977-78 Versus 1994-1996, Changes and Consequences*, 34 NUTRITION EDUC. & BEHAV. 140, 140 (2002); Jennifer M. Poti & Barry M. Popkin, *Trends in Energy Intake Among U.S. Children by Eating Location and Food Source, 1977-2006*, 111 J. AM. DIETETIC ASS'N 1156 (2011).

food constitutes half of all restaurant sales.<sup>26</sup> Since 1970, the amount spent on fast foods has increased from \$6 billion to over \$110 billion, and these products are high in fats, sugar, and calories.<sup>27</sup> A related problem is that restaurants have continued to increase portion sizes as well as price incentives for purchasing larger portions.<sup>28</sup>

Environmental factors also contribute to obesity. Low-income individuals often live in “food deserts,” neighborhoods with high concentrations of fast food restaurants and convenience stores and limited access to full service supermarkets, fresh fruits, and vegetables.<sup>29</sup> An estimated 29 million Americans, particularly racial and ethnic minorities, lack access to healthy, affordable foods.<sup>30</sup> Low-income communities “have four times more access to unhealthy than healthy food options.”<sup>31</sup> So too, the design of most communities encourages driving rather than walking or biking, and often includes inadequate parks and other recreational spaces.<sup>32</sup> Again, low-income communities are particularly likely to lack access to safe recreational opportunities.<sup>33</sup>

Advertising also shapes the human environment. Children inhabit a world of omnipresent food marketing “on television, on the radio, on the Internet, in magazines, through product placement in movies and videogames, in schools, on product packages, as toys, on clothing and other merchandise, and almost anywhere a logo or product image can be

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<sup>26</sup> Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1171 (2004).

<sup>27</sup> ERIC SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL 3 (2001) (discussing the increase in American spending on fast foods); Robert Creighton, Commentary, *Cheeseburgers, Race, and Paternalism*, 30 J. LEGAL MED. 249, 249 (2009); Michelle M. Mello et al., *The McLawsuit: The Fast Food-Food Industry and Legal Accountability for Obesity*, 22 HEALTH AFF. 207, 209 (2003).

<sup>28</sup> Jodi Schuette Green, *Cheeseburger in Paradise? An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 739 (2010).

<sup>29</sup> Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 26–27 (2010); *Food Access Research Atlas*, U.S. DEP’T OF AGRICULTURE, <http://www.ers.usda.gov/data-products/food-access-research-atlas.aspx> (last updated Mar. 11, 2014). The extent to which food deserts contribute to the obesity problem is subject to dispute. See Heather Tirado Gilligan, *Food Deserts Aren’t the Problem*, SLATE (Oct. 31, 2014, 7:00 AM), [http://www.slate.com/articles/life/food/2014/02/food\\_deserts\\_and\\_fresh\\_food\\_access\\_aren\\_t\\_the\\_problem\\_poverty\\_not\\_obesity.html](http://www.slate.com/articles/life/food/2014/02/food_deserts_and_fresh_food_access_aren_t_the_problem_poverty_not_obesity.html).

<sup>30</sup> TRUST FOR AMERICA’S HEALTH, *supra* note 21, at 59.

<sup>31</sup> LYNN PARKER ET AL., INST. OF MED., LEGAL STRATEGIES IN CHILDHOOD OBESITY PREVENTION: WORKSHOP SUMMARY 42 (2011), available at <http://iom.edu/Reports/2011/legal-strategies-childhood-obesity.aspx>.

<sup>32</sup> TRUST FOR AMERICA’S HEALTH, *supra* note 21, at 101.

<sup>33</sup> See *infra* text accompanying note 189.

shown.”<sup>34</sup> Food companies spend an estimated \$10 billion yearly on marketing their products to children.<sup>35</sup> Most of these advertisements, particularly those on television, are for fast foods and sweets, and they have a well-demonstrated effect on children’s behaviors.<sup>36</sup> In a review of 123 studies, the Institute of Medicine found links between food marketing and children’s food preferences, requests, consumption, and beliefs about nutrition.<sup>37</sup> Children under the age of eight are particularly vulnerable, because they do not understand the persuasive intent of marketing messages.<sup>38</sup> The pervasiveness of advertising in children’s media compounds the problem. A survey of American schoolchildren found that 96% could identify Ronald McDonald. “The only fictional character with a higher degree of recognition was Santa Claus.”<sup>39</sup>

Adults are also subject to misleading marketing. The great majority of food advertisements promote unhealthy products; ads for healthy food account for no more than 1% of all ads.<sup>40</sup> Advertisements for unhealthy foods link them with a healthy lifestyle by employing professional athletes and highly attractive models as their spokespeople. Such advertising contains powerful food consumption cues by showing positive images and emotions linked to eating.<sup>41</sup>

### C. *The Limits of Individual Responses*

Only a small percentage of obese individuals successfully maintain weight loss.<sup>42</sup> Most studies suggest that about 95% of adult dieters re-

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<sup>34</sup> *Food Marketing to Children*, CTR. FOR SCI. IN THE PUB. INTEREST [http://www.cspinet.org/new/pdf/food\\_marketing\\_to\\_children.pdf](http://www.cspinet.org/new/pdf/food_marketing_to_children.pdf) (last visited Mar. 28, 2015); see also INST. OF MED., *supra* note 8, at 102.

<sup>35</sup> *Food Marketing to Children*, *supra* note 34.

<sup>36</sup> Shin-Yi Chou et al., *Fast-Food Restaurant Advertising on Television and Its Influence on Childhood Obesity*, 51 J.L. & ECON. 599, 599–600 (2008).

<sup>37</sup> INST. OF MED., *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY?* 307 (2006), available at <http://www.nap.edu/catalog/11514.html>.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> Eric Schlosser, *Fast Food Nation Part One: The True Cost of America’s Diet*, ROLLING STONE MAG., Sept. 3, 1998.

<sup>40</sup> TRUST FOR AMERICA’S HEALTH, *supra* note 21, at 71.

<sup>41</sup> Jennifer L. Harris & John A. Bargh, *Television Viewing and Unhealthy Diet: Implications for Children and Media Interventions*, 24 HEALTH COMM. 660, 672 (2009).

<sup>42</sup> Traci Mann et al., *Medicare’s Search for Effective Obesity Treatments: Diets Are Not the Answer*, 62 AM. PSYCHOLOGIST 220, 223 (2007); Mary Madeline Rogge et al., *Obesity, Stigma, and Civilized Oppression*, 27 ADVANCES NURSING SCI. 301, 306 (2004).

gain any lost weight within five years.<sup>43</sup> Part of the reason is that when dieters reduce their caloric intake and increase their exercise, their metabolism slows down to compensate and makes any weight loss difficult to sustain.<sup>44</sup> In addition, individuals are hardwired to prefer foods that are high in calories. Such tastes were likely adaptive in early human environments, in which food was scarce, but are maladaptive in current settings where food is abundant.<sup>45</sup>

In making food choices, individuals are also subject to bounded rationality.<sup>46</sup> Most people do not have an accurate understanding of the caloric count of food or how it relates to their weight and health.<sup>47</sup> Nor do they often notice, or accurately interpret, the nutritional information in small print on food packages.<sup>48</sup> Nine out of ten people underestimate the calorie content of unhealthy food by an average of 50%.<sup>49</sup> Even nutritional experts misjudge the calories of such food.<sup>50</sup> Only 9% of Americans can accurately gauge the number of calories they should consume in a day.<sup>51</sup> Even where calorie information is available, some studies find that food selection is not significantly affected.<sup>52</sup>

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<sup>43</sup> RHODE, *supra* note 8, at 6; Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1021 (2010).

<sup>44</sup> GINA KOLATA, RETHINKING THIN 117–125 (2007); RHODE, *supra* note 8, at 42; J. P. Kassirer & Maria Angell, *Losing Weight—An Ill-Fated New Year's Resolution*, 338 NEW ENG. J. MED. 52 (1998).

<sup>45</sup> Katherine Pratt, *A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 116 (2012).

<sup>46</sup> For general discussion, see Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998).

<sup>47</sup> Russell L. Rothman et al., *Patient Understanding of Food Labels: The Role of Literacy and Numeracy*, 31 AM. J. PREVENTIVE MED. 1, 5 (2006).

<sup>48</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., CALORIES COUNT: REPORT OF THE WORKING GROUP ON OBESITY 17 (2004), <http://www.fda.gov/Food/FoodScienceResearch/ConsumerBehaviorResearch/ucm081770.htm>.

<sup>49</sup> Brief of Professor Robert Post et al. as Amici Curiae in Support of Defendants and in Opposition to Plaintiff's Motion for Declaratory Relief and Preliminary Injunction, *Cal. Rest. Ass'n v. City and Cnty. of San Francisco* (N.D. Cal. July 31, 2008) (No. CV-08-34247CW), 2008 WL 7321851 at \*2-3; Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 FOOD & DRUG L.J. 901, 916 (2010).

<sup>50</sup> YALE RUDD CTR. FOR FOOD POLICY & OBESITY, MENU LABELING IN CHAIN RESTAURANTS: OPPORTUNITIES FOR PUBLIC POLICY 9 (2008), <http://www.uconnruddcenter.org/files/Pdfs/RuddMenuLabelingReport2008.pdf>.

<sup>51</sup> INT'L FOOD INFO. COUNCIL FOUND., 2011 FOOD AND HEALTH SURVEY: CONSUMER ATTITUDES TOWARD FOOD SAFETY, NUTRITION & HEALTH 30 (2011).

<sup>52</sup> Christian M. Gunneson, *Why Fast Food Bans are the Wrong Solution to Address America's Obesity Problem and What Should Be Done Instead*, 15 QUINNIPIAC HEALTH L. 209, 238 (2010).

Cognitive biases also compromise individuals' ability to make healthy decisions. One is the tendency to disproportionately value immediate rewards over future gains.<sup>53</sup> The pleasure of current consumption can trump the satisfaction of eventual weight loss. A related problem is the role of emotional factors, which crowd out more deliberative decision-making and shorten time horizons, leading consumers to opt for instant gratification at the expense of long-term preferences.<sup>54</sup> The distance between the consumption of unhealthy food and its cumulative effects makes it difficult for individuals to make responsible decisions.<sup>55</sup> Many people also engage in, what Brian Wansink terms, "mindless eating"; they are unaware of the environmental factors, such as portion size, that affect their caloric intake.<sup>56</sup> Restaurant customers often see large servings as good value, and fail to make a causal connection with weight gain.<sup>57</sup>

## II. JUSTIFICATIONS FOR GOVERNMENT INTERVENTION

Although there is widespread concern about the rising rates of obesity, there is no corresponding consensus about what to do about it. Part of the dispute centers on whether the government has any right or responsibility to intervene to shape individual behavior. Supporters of government intervention to combat obesity generally rely on two arguments. The first stresses the market failures arising out of imperfect rationality by consumers. Children are not rational actors when it comes to diet and exercise because they do not purchase their own food, control their own time, or have full information about the health consequences of their actions.<sup>58</sup> Nor are adults, for all the reasons just mentioned, often well positioned to unravel the relationship between various eating patterns and obesity.<sup>59</sup> A second justification involves externalities, the medical expenses connected with obesity that are paid by taxpayers or payers of insurance policies rather than by obese individuals themselves. Although the extent of externalities is subject to debate, the argument is that "individuals acting in their own self-interest . . . will not effectively address

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<sup>53</sup> See generally George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, 3 J. ECON. PERSP. 181 (1989).

<sup>54</sup> George Loewenstein, *Out of Control: Visceral Influences on Behavior*, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 272, 273 (1996).

<sup>55</sup> Lang Liu, *Reshaping the American Concept of Consumer Interest in the Food Policy Debate*, 12 YALE J. HEALTH POL'Y L. & ETHICS 171, 197 (2012).

<sup>56</sup> BRIAN WANSINK, MINDLESS EATING, 47-52 (2006).

<sup>57</sup> Pratt, *supra* note 12, at 102.

<sup>58</sup> Merav W. Efrat & Rafael Efrat, *Tax Policy and the Obesity Epidemic*, 25 J. L. & HEALTH 233, 246 (2012).

<sup>59</sup> Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, 78 S. CAL. L. REV. 1221, 1255-56 (2005).

the problem because they do not internalize some of the major costs or benefits of action or nonaction.”<sup>60</sup>

Government anti-obesity policies fall across a spectrum, depending on their degree of intervention. At one end of the spectrum are restrictive policies, such as preventing the use of Supplemental Nutrition Assistance Program (SNAP) benefits (food stamps) for unhealthy foods or beverages. At the other end is what some behavioral economists refer to as libertarian paternalism: strategies to alter people’s behavior “in a predictable way without forbidding any options or significantly changing their economic incentives.”<sup>61</sup> Richard Thaler and Cass Sunstein call these interventions “nudges”: they encourage people to make healthy choices but do not mandate them.<sup>62</sup>

### A. *Opposition to Paternalistic Interventions*

Opponents of anti-obesity interventions generally view them as unwarranted paternalism. Although definitions of paternalism vary, the basic concept involves interfering with the liberty of individuals without their consent, for the purpose of advancing their own interests.<sup>63</sup> Objections to paternalism build on two premises. The first is that individuals have more information and incentives to promote their own concerns than do third parties.<sup>64</sup> A second premise is that overriding individual preferences violates individuals’ autonomy and fails to respect their standing as rational, moral beings.<sup>65</sup> Accordingly, there is a “moral presumption against all ‘liberty-limiting’ measures.”<sup>66</sup>

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<sup>60</sup> Mark A. Hall, *The Scope and Limits of Public Health Law*, 46 PERSP. IN BIOLOGY & MED. S199, S204 (2003); see also Kelly D. Brownell & Thomas R. Frieden, *Ounces of Prevention—The Public Policy Case for Taxes on Sugared Beverages*, 360 NEW ENG. J. MED. 1805, 1806 (2009); Eric Finkelstein et al., *Pros and Cons of Proposed Interventions to Promote Healthy Eating*, 27 AM. J. PREVENTIVE MED. 163, 169 (2004). For challenges to the externalities claim, see Jay Bhattacharya & Neeraj Sood, *Who Pays for Obesity?*, 25 J. ECON. PERSP. 139, 153 (2011).

<sup>61</sup> RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (Penguin Books 2009) (2008).

<sup>62</sup> *Id.*

<sup>63</sup> Gerald Dworkin, *Paternalism*, in PHILOSOPHY OF LAW 271, 271 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

<sup>64</sup> John Stuart Mill, *On Liberty*, in PHILOSOPHY OF LAW, *supra* note 63, at 262, 262.

<sup>65</sup> Richard J. Arneson, *Mill Versus Paternalism*, 90 ETHICS 470, 475–477 (1980); William Glod, *How Not to Argue Against Paternalism*, REASON PAPERS, Fall 2008, at 13–17.

<sup>66</sup> JOHN KULTGEN, *AUTONOMY AND INTERVENTION: PATERNALISM IN THE CARING LIFE* 176 (1995).

In the context of obesity, critics of paternalism argue that individuals are a better judge than government as to whether the pleasure and expense involved in a particular food choice, on balance, leave them better off than the healthy decisions that interventions are designed to advance.<sup>67</sup> Paternalistic policies erode individual responsibility. Bans or taxes “trea[t] us all as children who can neither be trusted to make our own choices or be held responsible for those choices.”<sup>68</sup> As the American Beverage Association puts it: “Health cannot be legislated, mandated or decreed – it must be learned and practiced by individuals.”<sup>69</sup> From critics’ perspective, “the real solution to obesity isn’t more government regulation, but more personal responsibility.”<sup>70</sup> Proposed federal legislation that would have prevented consumers from suing food companies on obesity-related grounds was titled the “Personal Responsibility in Food Consumption Act.”<sup>71</sup> Bans on the toys in unhealthy fast foods have been condemned on similar grounds. As a McDonald’s representative stated, “Parents tell us it’s their right and responsibility—not the government’s—to make their own decisions and to choose what’s right for their children.”<sup>72</sup>

Such perceptions underlie the frequent characterization of anti-obesity interventions as actions of a “nanny state,” enforced by “food police,” “Food Fascists,” “Food Nazis,” a “Grease Gestapo,” and “Big Brother.”<sup>73</sup> Similar attitudes underpin the equally common claim that

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<sup>67</sup> See Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1245 (2005); Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 711 (2009); Radley Balko, *Government Gets Fat Fighting Obesity*, FOXNEWS.COM (Feb. 26, 2004), <http://www.foxnews.com/story/2004/02/26/government-gets-fat-fighting-obesity/>; Jacob Sullum, *The War on Fat: Is the Size of Your Butt the Government’s Business*, REASON MAG. (Aug. 1, 2004), <http://reason.com/archives/2004/08/01/the-war-on-fat/print>.

<sup>68</sup> Betsy McKay, *Big Issues—What Role Should Government Play in Combating Obesity*, WALL ST. J. Sept 18, 2012, at B10 (quoting Michael Tanner).

<sup>69</sup> Schuyler Velasco & Laurent Belsie, *Soda Ban Overturned, but the Battle Is Far from Over*, CHRISTIAN SCI. MONITOR, Mar. 12, 2013, at 21 (quoting the American Beverage Association).

<sup>70</sup> Kathleen Parker, *Health Reform and Obesity: Eat, Drink, and Watch Out*, WASH. POST (May 20, 2011), [http://www.washingtonpost.com/opinions/health-reform-and-obesity-eat-drink-and-watch-out/2011/05/20/AFoQ427G\\_story.html](http://www.washingtonpost.com/opinions/health-reform-and-obesity-eat-drink-and-watch-out/2011/05/20/AFoQ427G_story.html).

<sup>71</sup> Karl Hulse, *Vote in House Offers a Shield in Obesity Suits*, N.Y. TIMES, Mar. 11, 2004, at A1.

<sup>72</sup> Sharon Bernstein, *San Francisco Bans Happy Meals*, L.A. TIMES (Nov. 2, 2010) (quoting a McDonald’s spokesperson).

<sup>73</sup> For the “nanny state,” see Mark Trumbull, *Bake Sale Ban in Massachusetts Sparks Outcries over “Food Police”*, CHRISTIAN SCI. MONITOR (May 8, 2012); *The Daily Show with Jon Stewart* (Comedy Central television broadcast Jan. 3, 2011), <http://www.thedailyshow.com/watch/mon-januaru-3-2011/san-francisco-s-happy-meal-ban>. For “food police,” see Trumbull, *supra*; *Food Po-*

even modest interventions are steps down a slippery slope.<sup>74</sup> Will taxes on sugared beverages lead to “warning labels on fettuccine alfredo?”<sup>75</sup> What comes after bans on supersized beverages: limits on “the number of French fries you can eat” or “what meals restaurants can offer or even how frequently we can eat out?”<sup>76</sup> “Today it’s soda, tomorrow it’s the guy standing behind you making you eat your broccoli . . . .”<sup>77</sup> Anti-obesity initiatives are condemned as:

Symptoms of a government that knows no bounds. Americans must ask themselves: Do we really want government bureaucrats in charge of how much soda we can drink and what amount of salt can go into a can of soup? Is this really fitting for a country of free citizens with a limited government?<sup>78</sup>

Opponents of certain government interventions, such as soda taxes, also object that they are regressive.<sup>79</sup> Other strategies, such as proposed bans

*lice, Ten Dumbest Food Cop Ideas*, CTR. FOR CONSUMER FREEDOM (Sept. 27, 2004), <http://www.consumerfreedom.com/issuepage.cfm/topic/26>; Jacob Solum, *The Anti-Pleasure Principle: The “Food Police” and the Pseudoscience of Self-Denial*, REASON MAG. (July 1, 2003), <http://reason.com/archives/2003/07/01/the-anti-pleasure-principle/print>. For “Food Fascists,” see Kelly D. Brownell & Kenneth E. Warner, *The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar Is Big Food?* 87 MILBANK Q. 259, 265 (2009); Pratt, *supra* note 21, at 106. For “Food Nazis,” “Grease Gestapos,” and “Big Brother,” see Pratt, *supra* note 21, at 106.

<sup>74</sup> Jonathan Cummings, *Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages*, 34 SEATTLE U. L. REV. 273, 295 (2010).

<sup>75</sup> Robert P. Murphy, *Soda and the Sin Tax*, MISES DAILY (Mar. 29, 2006), <http://mises.org/library/soda-and-sin-tax>.

<sup>76</sup> Tina Susman, Editorial, *Super-size Me? Not So Fast; New York Goes Through with a Limit on Big Sugary Drinks at Restaurants*, L.A. TIMES, Sept. 14, 2012, at A14 (quoting Matt Greller, spokesperson for the National Association of Theater Owners of New York State); Michael L. Marlow, *The Skinny on Anti-Obesity Soda Laws: Imposing Per-Ounce Levies or Limiting Serving Sizes is a Futile Pursuit*, WALL ST. J. (Mar. 31, 2013, 6:40 PM), <http://www.wsj.com/articles/SB10001424127887324789504578380271797966326>.

<sup>77</sup> Sarah Conly, Op-Ed., *Three Cheers for the Nanny State*, N.Y. TIMES, Mar. 25, 2013, at A23.

<sup>78</sup> Julie Gunlock, Op-Ed., *Keep the State off My Plate: Healthy Choices Need to be Made by Individuals, Not Governments*, L.A. TIMES, Nov. 29, 2012, at A19.

<sup>79</sup> Sayward Byrd, *Civil Rights and the “Twinkie” Tax: The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303, 332–33 (2004); Rachel E. Morse, *Resisting the Path of Least Resistance: Why the Texas “Pole Tax” and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189, 208 (2009); Heather Knight, *Supervisors’ Soda Tax Vote Isn’t Good Omen*

on the use of food stamps for sugary beverages, appear similarly objectionable because they target poor people and suggest that they are too “ignorant and culturally deficient” to make appropriate nutritional decisions.<sup>80</sup>

### B. Responses to Opponents

In responding to such concerns, supporters of government intervention point out that leaving unhealthy consumption untaxed is “equally unfair to those taxpayers supporting public healthcare.”<sup>81</sup> Moreover, to the extent that taxing sugared beverages has the desired effect of reducing consumption, the poor should also benefit from the decreased health costs associated with fewer overweight individuals. And if, as supporters often suggest, the revenues raised from a sugared beverage tax were directed to obesity prevention and subsidies of fresh fruits and vegetables for underserved populations, that would help mitigate regressive effects.<sup>82</sup> As to concerns about paternalism and the slippery slope, there are logical distinctions between the government interventions at issue. Unlike many of the hypothesized prohibitions, bans on supersized soda or the use of food stamps to subsidize sugared beverages do not entirely foreclose choice. Consumers can buy two beverages, and food stamp recipients can use their own funds to purchase high calorie drinks. Democratic checks on the regulatory process are likely to prevent the slide into ever more intrusive policies.<sup>83</sup>

Objections to paternalism often proceed on the assumption that without government intervention, individuals would be free to act on their own preferences. Yet as Lawrence Gostin points out, there is “no such thing as unfettered free will . . . [T]he built environment, social networks, marketing and a range of situational cues drive complex behaviors . . . . The job of public health is to make healthy living the easier choice.”<sup>84</sup> If paternalistic policies succeed, their often negligible limits on personal choice seem a “very small price to pay for ameliorating the devastation to the individual and families from chronic diseases. The

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for *Backers*, S.F. CHRON., July 22, 1014, at A1 (quoting Richard Salazar). For discussion of the regressive nature of sin taxes, see Cummings, *supra* note 74 at 294; Jendi B. Reiter, Essay, *Citizens or Sinners? The Economic and Political Inequity of Sin Taxes on Alcohol and Tobacco Products*, 29 COLUM J.L. & SOC. PROBS. 443, 446 (1996).

<sup>80</sup> Patrick McGeehan, *U.S. Rejects Mayor's Plan to Ban Use of Food Stamps to Buy Soda*, N.Y. TIMES, Aug. 20, 2011, at A15 (quoting Joel Berg).

<sup>81</sup> Cummings, *supra* note 74, at 294.

<sup>82</sup> Efrat & Efrat, *supra* note 58, at 263.

<sup>83</sup> Cummings, *supra* note 74, at 297.

<sup>84</sup> Lawrence O. Gostin, *Bloomberg's Health Legacy: Urban Innovator or Meddling Nanny?*, HASTINGS CTR. REP., Sept.-Oct. 2013, at 23.

opportunity for a healthy life is the primary freedom, as it underwrites so many of life's options."<sup>85</sup>

Moreover, some forms of government paternalism, such as requiring disclosure of calorie content on menus, seek to inform, not preempt, choice. Other strategies, such as soda taxes, do not infantilize consumers, but rather recognize their cognitive limitations and seek to counteract the toxic food environment in which their decisions occur. So too, the role of externalities, and the burden on taxpayers from unhealthy eating patterns, can justify some form of regulation regardless of the costs and benefits to individuals. Finally, insofar as initiatives are targeted at children, they fall well within the province of paternalism long justified for individuals too young to make fully rational decisions for themselves.

This is not to suggest that all paternalistic interventions are necessarily good policy. As Part III suggests, each of these strategies demands closer scrutiny. The point here is simply that denouncing them as regressive, paternalistic, or fascist does not constitute a sufficient indictment.

### III. POLICY INTERVENTIONS

#### A. Disclosure Requirements

One of the least intrusive, and therefore least controversial, forms of government intervention are disclosure requirements. According to the Rudd Center for Food Policy and Obesity, 80% of consumers desire information about calorie content, and efforts to provide it are well underway.<sup>86</sup> A number of states and localities require such information, and under the Patient Protection and Affordable Care Act, chain restaurants with twenty or more locations must post the caloric value of food offerings on menu and drive-through signs.<sup>87</sup> Vending machines must post caloric value next to the snacks displayed.<sup>88</sup>

Evidence on the effectiveness of such requirements is mixed. Some, but not all, studies find that disclosure decreases the number of calories purchased.<sup>89</sup> In one survey of New York City residents, over four-fifths of consumers reported that labeling influenced their food choices.<sup>90</sup> Cus-

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<sup>85</sup> *Id.* at 24.

<sup>86</sup> YALE RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 50, at 5.

<sup>87</sup> Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573-76 (2010) (codified at 21 U.S.C.A. § 343(h)(5)(H)(i) (2010)).

<sup>88</sup> *Id.*

<sup>89</sup> See sources cited in Michelle M. Mello, *New York City's War on Fat*, 360 NEW ENG. J. MED. 2015, 2018 (2009); Katherine Wilbur, Note, *The Informed Consumer Is a Healthy Consumer? The American Obesity Epidemic and the Federal Menu Labeling Law*, 23 LOY. CONSUMER L. REV. 505, 523 (2011).

<sup>90</sup> TECHNOMIC INC., CONSUMER REACTION TO CALORIE DISCLOSURE ON MENUS/MENU BOARDS IN NEW YORK CITY (Feb. 2009),

tomers of Subway restaurants who observed calorie information in the store purchased food with 52 fewer calories than those who did not see the information.<sup>91</sup> Disclosure requirements have also prompted some restaurants to introduce lower calorie options.<sup>92</sup> However, other research yields less positive results. In one study of 4000 people, less than 1% looked at calorie counts before deciding what to eat.<sup>93</sup> Another study by the New York Board of Health of 12,000 customers found that most had not seen the nutritional information displayed in the restaurant where they had just purchased food.<sup>94</sup>

Such mixed results suggest that it may be important to couple disclosure requirements with public education or other interventions discussed below. It also makes sense to expand the requirements to other settings such as airplanes, smaller chain restaurants, and movie theaters, where the costs of supplying information are modest. Federal law exempts more than 75% of restaurants nationwide, as well as other settings in which high calorie items are consumed.<sup>95</sup> As the director of the Center for Science in the Public Interest points out, the exemption for theaters makes especially little sense “given the huge calorie counts of popcorn, beverages, candy and other foods that movie theatres are serving up.”<sup>96</sup>

Another possible method of disclosure is color-coding nutritional labels. The traffic light system used by the British Food Standards Agency employs red, yellow, and green lights to express high, medium and low levels of sugars, overall fat, saturated fat, and salt.<sup>97</sup> Such a system could

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[http://www.cspinet.org/new/pdf/nyc\\_consumer\\_reaction\\_to\\_calorie\\_disclosure\\_-\\_9-2008\\_-\\_kg-rsg\\_jmw\\_-\\_13109.pdf](http://www.cspinet.org/new/pdf/nyc_consumer_reaction_to_calorie_disclosure_-_9-2008_-_kg-rsg_jmw_-_13109.pdf).

<sup>91</sup> Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City, 2007*, 98 AM. J. PUB. HEALTH 1457, 1457 (2008).

<sup>92</sup> Wilbur, *supra* note 89, at 521; Lang Liu, *supra* note 55, at 197.

<sup>93</sup> David Gratzer, *Dr. Meddlesome*, CITY J, (May 27, 2009), <http://www.city-journal.org/2009/eon0527dg.html>.

<sup>94</sup> Tamara Schulman, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 598 (2010).

<sup>95</sup> Wilbur, *supra* note 89, at 522.

<sup>96</sup> Andrew Zajac, *FDA Proposes Rules for Calorie Counts on Menus: Restaurant and Fast-Food Chains Would be Affected, but Not Movie Theaters*, L.A. TIMES, Apr. 2, 2011, at B1 (quoting Margo Wootan).

<sup>97</sup> FOOD STANDARDS AGENCY, FRONT OF PACK NUTRITIONAL SIGNPOST LABELLING TECHNICAL GUIDANCE (Jan. 2007), *available at* [http://www.5aldia.org/datos/60/pdf\\_13\\_6051.pdf](http://www.5aldia.org/datos/60/pdf_13_6051.pdf). For evaluation, see Anne N. Thorndike et al., *A 2-Phase Labeling and Choice Architecture Intervention to Improve Healthy Food and Beverage Choices*, 102 AM. PUB. HEALTH 527, 530–31 (2012) (finding that green purchases increased and red purchases decreased); Anastasia M. Snelling & Teha Kennard, *The Impact of Nutrition Standards on Competitive Food Offerings and Purchasing Behaviors of High School Students*, 79 J. OF SCH. HEALTH 541, 541 (2009) (finding decrease in purchase of red foods, and a decrease in offerings of red foods).

be adopted for labeling on the front of packages of food products, as well as on school lunch items and menus at chain restaurants.<sup>98</sup> This scheme could be coupled with more rigorous efforts to ensure that the information on nutrition labels is not undercut by questionable health claims.<sup>99</sup> More research is necessary to determine whether such color-coding is an effective way to influence food choices.

### B. Taxes

Taxes on unhealthy food and beverages have a long and checkered history. At the federal level, such taxation began during World War I as an attempt to raise funds for the war effort and to deter consumption of luxury goods.<sup>100</sup> At the state level, such taxation began during the Great Depression in an effort to replace property tax revenues.<sup>101</sup> By the 1960s, sales taxes were widely applicable to soft drinks and candy, although those taxes have been too small to affect consumption, and the revenues have not gone to health programs.<sup>102</sup> Some states also imposed special excise taxes on those products. However, starting in the 1990s, after intense lobbying efforts by the food and beverage industry, about a dozen jurisdictions repealed such taxes.<sup>103</sup> Over the past decade, a growing number of legislative bodies have considered taxing unhealthy food and beverages, but these measures have been met with almost universal defeat, and a federal proposal to tax sugar-sweetened beverages as part of health care reform efforts was dropped in 2009.<sup>104</sup>

Many health policy experts advocate an excise tax on the manufacture of sugar-sweetened beverages, as a way to discourage consumption,

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<sup>98</sup> MICHAEL FAIRHURST, *TRAFFIC-LIGHT-LABELING ON RESTAURANT MENUS: A CALL FOR THE COMMUNICATION OF NUTRITION INFORMATION THROUGH COLOR-CODED TEXT* (2012), available at [http://works.bepress.com/michael\\_fairhurst/1/](http://works.bepress.com/michael_fairhurst/1/); INST. OF MED., *LEGAL STRATEGIES IN CHILDHOOD OBESITY PREVENTION: WORKSHOP SUMMARY 37* (2011), available at [http://www.nap.edu/openbook.php?record\\_id=13123](http://www.nap.edu/openbook.php?record_id=13123).

<sup>99</sup> Colin Hector, *Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform*, 67 *FOOD & DRUG L.J.* 103, 115–16 (2012).

<sup>100</sup> Efrat & Efrat, *supra* note 58, at 252.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 253; Kelly D. Brownell et al, *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 *NEW ENG. J. MED.* 1599, 1599 (2009); Hery (Michelle) Min, Note, *Large-Sized Soda Ban as an Alternative to Soda Tax*, 23 *CORNELL J.L. & PUB. POL'Y* 187, 224 (2013).

<sup>103</sup> Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 *AM. J. PUB. HEALTH* 854, 855 (2000).

<sup>104</sup> *Id.* at 855; Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, *REUTERS* (Apr. 27, 2012, 9:03 AM), <http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0E D20120427>.

and to increase revenue for obesity prevention measures.<sup>105</sup> Half of the population consumes at least one sugary beverage every day.<sup>106</sup> Research on the effectiveness of such taxes is mixed.<sup>107</sup> However, considerable evidence indicates that demand for soda is reasonably elastic, and that significant taxes influence body weight.<sup>108</sup> Estimates suggest that a 10% tax on sugar-sweetened sodas would reduce consumption by 8 to 11.5%.<sup>109</sup> According to a U.S. Department of Agriculture study, a 20% increase in the price of sweetened beverages could result in significant weight loss among soda consumers.<sup>110</sup> Sodas are a particularly appropriate target because they are the single largest contributor of calorie intake in the United States and a major contributor to obesity.<sup>111</sup> However, an excise tax should include all sugar-sweetened beverages, in order to pre-

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<sup>105</sup> An excise tax is preferable to a sales tax because it increases the base price of the product; a sales tax occurs at the point of payment after consumers have generally decided to buy the product. Excise taxes are also more readily dedicated to a specified use than general sales taxes. See Jennifer L. Pomeranz, *Taxing Food and Beverage Products: A Public Health Perspective and a New Strategy for Prevention*, 46 U. MICH. J.L. REFORM 999, 1007–08 (2013).

<sup>106</sup> Cynthia Ogden et al., *Consumption of Sugar Drinks in the United States, 2005-2008*, 71 NCHS DATA BRIEF, Aug. 2011, at 2, available at <http://www.cdc.gov/nhs/data/databriefs/db71.pdf>.

<sup>107</sup> For sources questioning the effect of soda taxes, see Laura Hoffman, Note, *The Fight Over Fizz: Soda Taxes as a Means of Curing Childhood Obesity?*, 5 PITT. J. ENVTL. & PUB HEALTH L. 123, 145–46 (2011).

<sup>108</sup> Tatiana Andreyeva et al., *The Impact of Food Prices on Consumption: A Systematic Review of Research on the Price Elasticity of Demand for Food*, 100 AM. J. PUB. HEALTH 216, 216 (2010); Eric A. Finkelstein et al., *Impact of Targeted Beverage Taxes on Higher- and Lower-Income Households*, 22 ARCHIVES INTERNAL MED. 2028 (2010); Dragan Miljkovic et al., *Economic Factors Affecting the Increase in Obesity in the United States: Differential Response to Price*, 33 FOOD POL'Y 48, 58 (2008); Lisa M. Powell & Frank J. Chaloupka, *Food Prices and Obesity: Evidence and Policy Implications for Taxes and Subsidies*, 87 THE MILBANK Q. 229, 249 (2009); James J. White, *Taxing the Platypygous*, 46 U. MICH. J.L. REFORM 975, 981 (2013).

<sup>109</sup> YALE RUDD CTR. FOR FOOD POLICY & OBESITY, RUDD REPORT: SOFT DRINK TAXES: A POLICY BRIEF 3 (2009), [http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2009/rwjf48503](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2009/rwjf48503) (11.5%); Brownell et al., *supra* note 102, at 1602 (8-10%).

<sup>110</sup> Trish Choate, *Tobacco-Like Tax on Sodas Mulled*, TIMES RECORD NEWS (Nov. 11, 2010, 12:01 AM), <http://www.timesrecordnews.com/news/tobacco-like-tax-on-sodas-mulled>.

<sup>111</sup> INST. OF MED., *supra* note 8, at 167; YALE RUDD CTR. FOR FOOD POLICY & OBESITY, *supra* note 109, at 2; Brownell et al., *supra* note 102, at 1599–1600; Vasanti S. Malik et al., *Sugar-Sweetened Beverages, Obesity, Type 2 Diabetes Mellitus, and Cardiovascular Disease Risk*, 121 CIRCULATION 1356, 1356 (2010); Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?* 14 PUB. HEALTH NUTRITION 499, 502–04 (2010); and sources cited in Wilbur, *supra* note 89, at 528.

vent substitution of other calorie-dense drinks for soda. Although new taxes are generally unpopular, one survey of New York residents found that almost three quarters supported a soda tax, if its revenue would be used for prevention of obesity.<sup>112</sup> In California, two thirds of voters backed such a requirement, and ballot initiatives to impose a 1 cent per ounce soda tax went before voters in Berkeley and a 2 cents tax went before voters in San Francisco in November 2014.<sup>113</sup> The ban passed in Berkeley, with 75% of voters backing the measure, but was defeated in San Francisco, where it achieved 54.5% support, but needed 66.67% to become law.<sup>114</sup>

Federal, state, and local governments could also make greater use of tax credits to promote healthy behaviors. Tax credits could be available to attract supermarkets and grocery stores to underserved neighborhoods.<sup>115</sup> Such credits could also be available to employers who provide wellness programs.<sup>116</sup> Although some commentators have also proposed deductions for individuals for physical fitness programs, such incentives demand more research and evaluation. Such deductions might prove grossly over-inclusive if they are used primarily by individuals who are least likely to be overweight or obese.

### C. Bans on Sugar-Sweetened Beverages

In 2012, New York City Mayor Michael Bloomberg received national attention for a proposal to ban sales of sugar-sweetened beverages larger than 16 ounces in food establishments regulated by the Board of Health, including restaurants, movie theaters, and sports arenas.<sup>117</sup> The

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<sup>112</sup> For New York, see Brownell & Frieden, *supra* note 60, at 1806.

<sup>113</sup> Mark DiCamillo & Mervin Field, *Broad Voter Support for Posting a Health Warning Label on Sodas and Sugary Drinks and Taxing Their Sale to Provide Funds for School Nutrition and Physical Activity Programs*, THE FIELD POLL, Release #2461, Feb. 20, 2014, available at <http://www.field.com/fieldpollonline/subscribers/RIs2461.pdf>; Heather Knight, *S.F. Soda Tax Would Drop Consumption 31 Percent, Report Says*, SFGATE (July 22, 2014, 7:59 AM), <http://www.sfgate.com/bayarea/article/S-F-soda-tax-would-drop-consumption-31-percent-5636558.php>.

<sup>114</sup> Amanda Covarrubias, *Results Mixed on California Soda Taxes, Fracking, Marijuana Measures*, L.A. TIMES (Nov. 5, 2014, 9:32 PM), <http://www.latimes.com/la-me-pol-election-notebook-20141106-story.html>.

<sup>115</sup> INST. OF MED., LOCAL GOVERNMENT ACTIONS TO PREVENT CHILDHOOD OBESITY 6 (Lynn Parker et al. eds., 2009), available at [http://books.nap.edu/openbook.php?record\\_id=12674](http://books.nap.edu/openbook.php?record_id=12674); Paul A. Diller & Samantha Graff, *Regulating Food Retail for Obesity Prevention: How Far Can Cities Go?*, 39 J.L. MED. & ETHICS 89, 91 (2011).

<sup>116</sup> For proposals, see Efrat & Efrat, *supra* note 58, at 257–58.

<sup>117</sup> Michael M. Grynbaum, *Health Panel Approves Restrictions on Sale of Large Sugary Drinks*, N.Y. TIMES (Sept. 13, 2012), <http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html>.

ban responded to growing rates of obesity among New York residents, over half of whom were obese or overweight.<sup>118</sup> The measure followed unsuccessful attempts to convince the New York state legislature to approve a tax on sugar-sweetened beverages and the New York City Council to tax large sugary beverages or place warning labels on them.<sup>119</sup> Excluded from the super-size ban were businesses not subject to oversight by the Board of Health, such as supermarkets, grocery and convenience stores, and gas stations. Also exempt were alcohol and drinks containing more than 50% milk. The ban was challenged on grounds that it violated separation of powers principles and that the exemptions made it arbitrary and capricious. The New York County Supreme Court agreed, and an appellate court affirmed the ruling on separation of powers grounds without reaching the arbitrary and capricious finding.<sup>120</sup> The New York Court of Appeals concurred and found that the city's Board of Health "exceeded the scope of its regulatory authority."<sup>121</sup>

The proposal drew criticism from liberal and conservative commentators alike.<sup>122</sup> Opposition to the idea was, as one critic noted, the "rare idea that Jon Stewart and John Boehner can agree on."<sup>123</sup> Another opponent invoked the kind of slippery slope argument noted earlier: "What's next? Limits on the width of a pizza slice, size of hamburger, or amount of cream cheese on your bagel?"<sup>124</sup> The public was evenly divided, with 51% opposed to the ban.<sup>125</sup> Businesses subject to the prohibition claimed that it was "riddled with irrational exclusions, loopholes, and

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For discussion of the ban, see Min, *supra* note 102.

<sup>118</sup> Gostin, *supra* note 84, at 20.

<sup>119</sup> Anemona Hartocollis, *Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES, July 3, 2010, at A14; Velasco & Belsie, *supra* note 69, at 21.

<sup>120</sup> N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, No. 653584-12, slip op. at \*2-3 (N.Y. Sup. Ct. Mar. 11, 2013); *In re* N.Y. Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene, 970 N.Y.S.2d 200, 213 (N.Y. App. Div. 2013).

<sup>121</sup> Michael M. Grynbaum, *New York's Ban on Big Sodas Is Rejected by Final Court*, N.Y. TIMES (June 26, 2014), [http://www.nytimes.com/2014/06/27/nyregion/city-loses-final-appeal-on-limiting-sales-of-large-sodas.html?\\_r=0](http://www.nytimes.com/2014/06/27/nyregion/city-loses-final-appeal-on-limiting-sales-of-large-sodas.html?_r=0).

<sup>122</sup> Even the *New York Times* was critical. Editorial, *A Ban Too Far*, N.Y. TIMES, June 1, 2012, at A26.

<sup>123</sup> Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 150, n. 151 (2013) (quoting Sarah Kliff, *Why Ban Soda When You can Tax It?*, WASH. POST WONKBLOG (June 1, 2012 1:16 PM), [http://www.washingtonpost.com/blogs/wonkblog/post/why-ban-soda-when-you-can-tax-it/2012/06/01/gJQAT27E7U\\_blog.html](http://www.washingtonpost.com/blogs/wonkblog/post/why-ban-soda-when-you-can-tax-it/2012/06/01/gJQAT27E7U_blog.html)).

<sup>124</sup> Olufemi J. Watson, *Bloomberg's War on Sugar*, N.Y. AMSTERDAM NEWS, Apr. 16, 2013, at 3.

<sup>125</sup> John Mariani, *New York City Voters Divided on Sugary Soda Ban, Survey Says*, POST-STANDARD, Mar. 1, 2013.

random classifications.”<sup>126</sup> Many consumers found it intrusive.<sup>127</sup> Tapping into those reactions, a group funded by restaurants ran ads branding Bloomberg as a “nanny,” and showing him in a dowdy dress and neck scarf.<sup>128</sup> However, the fact that a ban is under-inclusive is not of itself grounds for invalidation; policy makers are generally held to be able to deal with problems piecemeal.<sup>129</sup> Nor does the ban constitute a significant infringement of liberty; consumers can still buy the same amount of soda. The limit on portion size simply constitutes a nudge in a healthy direction.<sup>130</sup> As the Board argued on appeal, patterns of “human behavior indicate that consumers overwhelmingly gravitate towards the default option,” and the ban will simply require customers “intent upon consuming more than 16 ounces [to] . . . make conscious decisions to do so.”<sup>131</sup>

In the end, although a ban is defensible on policy grounds, its effect may be too limited to justify the political costs. In the absence of data on the impact of such prohibitions, jurisdictions may do well to throw their efforts behind other measures less likely to arouse resentment and more likely to yield substantial behavioral change. Bloomberg opted for the “big cup” ban only after other options proved politically impossible; other policymakers should take a similar tact.

One less controversial measure is to use the government’s purchasing power to limit access to sugar-sweetened beverages. A growing number of jurisdictions have adopted “healthy procurement policies” that establish standards for beverages purchased with government funds or sold in vending machines and concession stands on government property.<sup>132</sup> Such a targeted regulation would be less likely to arouse wide-

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<sup>126</sup> Michael Howard Saul, *Foes Hit Curbs on Soda*, WALL ST. J., Oct. 13, 2012, at A15 (quoting Caroline Starke).

<sup>127</sup> See Jacob Sullum, *Bloomberg’s Big Beverage Ban*, REASON, Oct. 2012, at 8; Armstrong Williams, *Bloomberg and a Healthy America*, N.Y. AMSTERDAM NEWS, March 28, 2013, at 13; Katrina Trinko, *Soda Ban? What About Personal Choice?*, USA TODAY (Mar. 10, 2013 5:40 PM), <http://www.usatoday.com/story/opinion/2013/03/10/soda-ban-what-about-personal-choice-column/1977091/>.

<sup>128</sup> Brian Vastag & N.C. Aizenman, *New York’s Plan to Curb Soda Size Stirs New Controversy over Obesity*, WASH. POST, June 3, 2012, at A3.

<sup>129</sup> N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114, 133–34 n.22 (2d Cir. 2009).

<sup>130</sup> See WANSINK, *supra* note 56, at 69–70 (showing the relation of caloric intake to portion size and the size of the container in which food is served); see also MARION NESTLE, WHAT TO EAT 504–06 (2006) (describing portion distortion and the powerful unconscious “eat me” effect of large portions).

<sup>131</sup> Brief for Appellant at 62, *In re N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y. City Dep’t of Health & Mental Hygiene*, 16 N.E.3d 538 (N.Y. 2014) (No. 2013-00291) (quoting N.Y. City Dep’t of Health & Mental Hygiene).

<sup>132</sup> CHANGLAB SOLUTIONS, SUGAR-SWEETENED BEVERAGES PLAYBOOK 7 (2013), <http://changelabsolutions.org/publications/SSB-playbook>.

spread resentment than a ban on all supersized sugar-sweetened beverages and could help lay the foundations for broader changes.

#### *D. Bans on Sodas Purchased with Food Stamps*

Another of then-Mayor Bloomberg's initiatives was a request to the U.S. Department of Agriculture to operate a two year pilot program under which beneficiaries of the Supplemental Nutrition Assistance Program (SNAP) could not use benefits to purchase sugar-sweetened beverages in New York City.<sup>133</sup> Joined by the state of New York, city officials argued that sugar-sweetened drinks are the "single biggest contributor to the obesity epidemic and, as such they should not be subsidized with federal dollars."<sup>134</sup> Public opinion polls in other states revealed strong support for such proposals.<sup>135</sup> As one commentator put it, "[w]hen we are telling New Yorkers in every possible way that sugar-sweetened beverages cause obesity and diabetes, how can we justify giving vouchers to get these products for free, especially as part of a nutrition program?"<sup>136</sup> Given that over 44 million people—one in seven Americans—receive aid through the program, the stakes in the debate are substantial.<sup>137</sup>

The Department of Agriculture denied the request based on difficulties in administering and evaluating the ban and a preference for incentive-based solutions such as increased SNAP benefits for purchases of produce.<sup>138</sup> Similar requests from other states have similarly proved unsuccessful, and Congress previously rejected the idea in debates over the 2008 farm bill.<sup>139</sup> The proposal has drawn criticism from anti-hunger

<sup>133</sup> Patrick McGeehan, *supra* note 80.

<sup>134</sup> MICHAEL R. BLOOMBERG ET AL., REMOVING SNAP SUBSIDY FOR SUGAR-SWEETENED BEVERAGES 2 (Oct. 2010), available at <http://www.docstoc.com/docs/104907011/Removing-SNAP-Subsidy-for-Sugar-Sweetened-Beverages>; see also Rebecca L. Goldberg, *No Such Thing as a Free Lunch: Paternalism, Poverty, and Food Justice*, 24 STAN. L. & POL'Y REV. 35, 59 (2013).

<sup>135</sup> Sarah Kliff, *Mississippi Comes to the Defense of Large Sodas with Anti-Bloomberg Bill*, WASH. POST WONKBLOG (Mar. 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/12/mississippi-comes-to-the-defense-of-large-sodas-with-anti-bloomberg-bill> (75% of U.S. residents supported the ban); see also DiCamillo & Field, *supra* note 113, at 1 (70% of Californians supported the ban).

<sup>136</sup> Thomas Farley, *A Healthier Urban Jungle*, SCI. AM., Feb. 2011, at 46.

<sup>137</sup> Robert Pear, *Soft Drink Industry Fights Proposed Food Stamp Ban*, N.Y. TIMES, Apr. 30, 2011, at A11.

<sup>138</sup> Letter from Jessica Shahin, Assoc. Adm'r, Supplemental Nutrition Assistance Program, to Elizabeth R. Berlin, Exec. Deputy Comm'r, N.Y. State Office of Temporary and Disability Assistance (Aug. 19, 2011), available at <http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf>.

<sup>139</sup> Minnesota sought a waiver from the USDA, and several other states have asked Congress to modify SNAP to increase states' ability to deny benefits

and minority groups on grounds that it stigmatizes the poor as “somehow ignorant or culturally deficient” and uniquely unable to make appropriate food choices.<sup>140</sup> As one commentator put it, “Why do [food stamp recipients] get the honor of the government telling them what to do, and not the rest of us? Why do *they* get that ‘protection’ and not all of us?”<sup>141</sup> “What next?” asked a *Los Angeles Times* op-ed. “Outlawing corn chips with one’s salsa?”<sup>142</sup> Some commentators also questioned the effectiveness of the ban because beneficiaries covered about a third of their food budgets with their own funds, and presumably would use that money to buy soda.<sup>143</sup> The proposed limitation on SNAP benefits seemed particularly offensive in light of evidence that beneficiaries do not consume more amounts of unhealthy food than non-beneficiaries.<sup>144</sup> A much “fairer alternative,” noted the director of the New York City Coalition Against Hunger, would be to “increase the purchasing power of SNAP and ensure that more stores both accept those benefits and stock healthier foods.”<sup>145</sup>

These arguments are difficult to evaluate in the absence of actual evidence. Pilot programs would be one way of testing the effects of a food stamp ban and evaluating the extent of stigma against any positive health outcomes. Policy makers should also explore other related alternatives, including rebates for using food stamps to purchase fresh fruits and vegetables.

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for unhealthy purchases. Goldberg, *supra* note 134, at 60 & n.172; *see also* Kelly D. Brownell & David S. Ludwig, *The Supplemental Nutrition Assistance Program, Soda, and USDA Policy: Who Benefits?*, 306 JAMA 1370, 1370 (2011). For a discussion of Congress’ rejection of the idea, *see* Anemona Hartocollis, *Food Stamps As New Front in Soda Wars*, N.Y. TIMES, Oct. 7, 2010, at A1.

<sup>140</sup> *See* McGeehan, *supra* note 80 (quoting Joel Berg); *see also* Brownell & Ludwig, *supra* note 139, at 1370; FOOD RESEARCH & ACTION CTR., A REVIEW OF STRATEGIES TO BOLSTER SNAP’S ROLE IN IMPROVING NUTRITION AS WELL AS FOOD SECURITY 13 (January 2013), <http://frac.org/wp-content/uploads/2011/06/SNAPstrategies.pdf>. Eighteen members of the Congressional Black Caucus wrote to the Secretary of Agriculture in opposition to the plan. Pear, *supra* note 137.

<sup>141</sup> Erika Nicole Kendall, *Why the Food Stamp Soft Drink Ban is BS*, A BLACK GIRL’S GUIDE TO WEIGHT LOSS (Oct. 11, 2010, 8:07 AM), <http://blackgirlsguidetoweightloss.com/the-op-es/why-the-food-stamp-soft-drink-ban-is-bs/>.

<sup>142</sup> Op-Ed., *Wait a New York Minute!*, L.A. TIMES, Oct. 15, 2010, at A20.

<sup>143</sup> Diane Whitmore Schanzenbach, *Proposals to Ban Purchase of Sugary Drink with Food Stamps Won’t Work*, CHRISTIAN SCI. MONITOR, Mar. 13, 2013, at 23.

<sup>144</sup> FOOD RESEARCH & ACTION CTR., *supra* note 140, at 13–14.

<sup>145</sup> Cyril Josh Barker, *Food Fight: Mayor, Governor Attempt to Ban Food Stamp Soda Purchases*, N.Y. AMSTERDAM NEWS, Oct. 14, 2010, at 1.

*E. Zoning*

The use of zoning laws to influence food-purchasing behavior is a relatively recent development. In 2008, Los Angeles gained national prominence by enacting a moratorium on opening free-standing fast food restaurants in South Los Angeles, a predominantly minority low-income neighborhood.<sup>146</sup> Fast food restaurants accounted for 45% of all the eating establishments in the area.<sup>147</sup> Other cities have banned fast food restaurants or mobile street vendors from locating near schools.<sup>148</sup> Some localities also have attempted to encourage supermarkets or vendors of fresh fruits and vegetables to move into underserved areas by exempting them from certain zoning or permit requirements.<sup>149</sup>

Although the Los Angeles moratorium was supported by two-thirds of area residents who were aware of the ban, it attracted considerable controversy.<sup>150</sup> Supporters of the measure framed the problem in terms of equality and characterized the nutritional landscape of Los Angeles as one of “food apartheid.”<sup>151</sup> By contrast, opponents of the ordinance saw the issue as one of paternalism, and objected to the apartheid characterization. According to William Saletan, “Opening a McDonald’s in South Central LA is not government-enforced racial discrimination. But telling McDonald’s it can open franchises only in the white part of town—what do you call that?”<sup>152</sup> In his view, the Los Angeles City council had a “disturbingly paternalistic way of solving the problem” of unequal food options between poor and well-off neighborhoods, and was effectively “depicting poor people, like children, as less capable of free choice.”<sup>153</sup>

In evaluating those objections, it bears emphasis that the moratorium was adopted with the support of the local community and local grassroots organizations.<sup>154</sup> In that sense, as a *Los Angeles Times* editorial

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<sup>146</sup> Roland Sturm & Deborah Cohen, *Zoning for Health? The Year-Old Ban on New Fast-Food Restaurants in South LA*, 28 HEALTH AFF. 1088, 1088 (2009).

<sup>147</sup> Sharon Bernstein, *Fast Food Battle Comes to L.A.: Restaurant Group Plans to Fight Proposed Curbs on New Establishments*, L.A. TIMES, Nov. 11, 2010, at B1.

<sup>148</sup> Diller & Graff, *supra* note 115, at 92.

<sup>149</sup> *Id.* at 91.

<sup>150</sup> See *South Los Angeles Residents Ask, What Fast-Food Ban?*, NATION’S RESTAURANT NEWS (Sept. 22, 2008), <http://nrn.com/corporate/south-los-angeles-residents-ask-what-fast-food-ban>.

<sup>151</sup> Karl Vick, *L.A. Official Wants a Change of Menu*, WASH. POST (July 13, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/12/AR2008071201557.html>.

<sup>152</sup> William Saletan, *Food Apartheid: Banning Fast Food in Poor Neighborhoods*, SLATE (July 31, 2008 8:21 AM), [www.slate.com/articles/health\\_and\\_science/human\\_nature/2008/07/food\\_apartheid.html](http://www.slate.com/articles/health_and_science/human_nature/2008/07/food_apartheid.html).

<sup>153</sup> *Id.*

<sup>154</sup> Goldberg, *supra* note 134, at 88.

noted, the measure was an exercise in self-governance.<sup>155</sup> It seemed like an “insult to the people of South Los Angeles to tell them that they, and they alone, must be subject to decisions by developers and franchisees.”<sup>156</sup> Given the role of the environment in shaping unhealthy food behaviors, communities should have wide latitude in attempting to change the landscape through zoning regulations. On that logic, the Institute of Medicine has recommended that local governments adopt ordinances that prevent sellers of unhealthy foods from locating near schools, public playgrounds, and in neighborhoods already saturated with such establishments.<sup>157</sup>

#### F. Marketing to Children

As noted earlier, many experts believe that the marketing of unhealthy products to children is a major cause of obesity.<sup>158</sup> Food products are “the most highly advertised category on television networks that children watch most, and 98% of advertised foods are of low nutritional value.”<sup>159</sup> Many other nations restrict advertising to children, and similar restrictions have been proposed for this country.<sup>160</sup> In 1978, the FTC attempted to prohibit all television advertisements targeted to young children. The proposal was shelved after significant industry lobbying, and Congress passed legislation preventing the FTC from prohibiting such advertisements.<sup>161</sup> Even in the absence of that prohibition, the U.S. Supreme Court’s commercial speech doctrine would significantly limit regulatory efforts.<sup>162</sup> Any restrictions must be narrowly tailored, and the government must show that less restrictive means are unavailable or ineffective.<sup>163</sup> That burden is difficult to meet, as the Court made clear in a decision striking down state prohibitions on tobacco advertising within

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<sup>155</sup> Op-Ed., *A Fast Food Stop*, L.A. TIMES (July 22, 2008), <http://articles.latimes.com/2008/jul/22/opinion/ed-fast22>.

<sup>156</sup> *Id.*

<sup>157</sup> INST. OF MED., *supra* note 115, at 63.

<sup>158</sup> Alexis M. Etow, *No Toy For You! The Healthy Food Incentive Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503, 1505 (2012).

<sup>159</sup> See Harris & Bargh, *supra* note 41, at 661.

<sup>160</sup> Derek Yach et al., *The World Health Organization’s Framework Convention on Tobacco Control: Implications for Global Epidemics of Food-Related Deaths and Disease*, 24 J. PUB. HEALTH POL’Y 274, 283 (2003); David G. Yossifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 541 (2006).

<sup>161</sup> Lauren Kaplin, *A National Strategy to Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL’Y 347, 396 (2011); Tracy Westen, *Government Regulating of Food Marketing to Children: The Federal Trade Commission and Kid-Vid Controversy*, 39 LOY. L. REV. 79, 83–84 (2006).

<sup>162</sup> Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

<sup>163</sup> *Id.* at 565–66; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 538 (2001).

one thousand feet of schools.<sup>164</sup> As a result, marketing to children is primarily self-regulated. In 2011, federal regulators proposed voluntary guidelines for food makers' marketing to children. The guidelines were developed by the Interagency Working Group composed of the FTC, the U.S. Food and Drug Administration, the Centers of Disease Control and Prevention, and the Department of Agriculture.<sup>165</sup> Under these guidelines, foods marketed to children ages 2-17 would have to contain healthy items and limit sodium, sugar, fat, and calories. Past history leaves doubt about the effectiveness of voluntary standards.<sup>166</sup> Characterizing one such initiative, Senator Harkin of Iowa called it a "poster child for how not to conduct self-regulation." The measure had no "sanction authority [and] no teeth."<sup>167</sup>

In the face of restrictions on advertising regulation, some jurisdictions have attempted more modest efforts to control marketing of unhealthy products to children. One target has been free toys in children's meals.<sup>168</sup> Toy promotions have doubled or tripled the weekly sales of kids' meals.<sup>169</sup> The FTC estimates that restaurants sell 1.2 billion meals yearly with toys to children under age 12.<sup>170</sup> Well under 1% of these meals meet nutrition criteria for healthy meals.<sup>171</sup>

In 2010, the Boards of Supervisors for the County of Santa Clara and the City of San Francisco attracted national attention by voting to prohibit toys in children's meals that contain unhealthy levels of calories, salt, or fat.<sup>172</sup> The "Happy Meals" bans prompted considerable backlash,

<sup>164</sup> *Lorillard*, 533 U.S. at 565.

<sup>165</sup> Julie Jargon, *Under Pressure, McDonald's Adds Apples to Kids Meals*, WALL ST. J. (July 27, 2011), <http://www.wsj.com/articles/SB10001424053111903999904576469982832521802>.

<sup>166</sup> INST. OF MED., *supra* note 8, at 254-255; LYNN PARKER ET AL., *supra* note 31, at 34; YALE RUDD CTR. FOR FOOD POLICY, RUDD REPORT: TRENDS IN TELEVISION FOOD ADVERTISING TO YOUNG PEOPLE: 2011 UPDATE 5 (2012), [http://www.uconnruddcenter.org/resources/upload/docs/what/reports/RuddReport\\_TVFoodAdvertising\\_5.12.pdf](http://www.uconnruddcenter.org/resources/upload/docs/what/reports/RuddReport_TVFoodAdvertising_5.12.pdf).

<sup>167</sup> Joan R. Rothenberg, *In Search of the Silver Bullet: Regulatory Models to Address Childhood Obesity*, 65 FOOD & DRUG L.J. 185, 212 (quoting Senator Tom Harkin).

<sup>168</sup> JENNIFER L. HARRIS ET AL., YALE RUDD CENTER FOR FOOD POLICY, FAST FOOD F.A.C.T.S.: EVALUATING FAST FOOD NUTRITION AND MARKETING TO YOUTH 13 (2010), [http://www.fastfoodmarketing.org/media/FastFoodFACTS\\_report.pdf](http://www.fastfoodmarketing.org/media/FastFoodFACTS_report.pdf).

<sup>169</sup> See Schlosser, *supra* note 39, at 46.

<sup>170</sup> Jennifer J. Otten et al., *Food Marketing to Children Through Toys: Response of Restaurants to the First U.S. Toy Ordinance*, 42 AM. J. PREVENTIVE MED. 56 (2012).

<sup>171</sup> *Id.*

<sup>172</sup> San Francisco requires that all meals offering a toy incentive must include a fruit and a vegetable and contain less than 600 calories. S.F., Cal., Health Code art. 8, §§ 471.1-1.9 (2011). Santa Clara's ordinance prevents any

and two states passed legislation removing city and county power to enact such bans.<sup>173</sup> A parody on *The Daily Show* with Jon Stewart pictured the “Crappy Meal”—composed of a Periodic Table of Elements, CPR instructions, and a toy figurine of Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services.<sup>174</sup> The California Restaurant Association distributed posters picturing a child with a toy in handcuffs, accompanied by the headline, “Who Made Politicians the Toy Police?”<sup>175</sup>

Despite the negative publicity, the ordinances have had some positive effects. A study of the Santa Clara measure found that restaurants responded either by offering the toys only with healthy meals or, more commonly, eliminating the toy altogether.<sup>176</sup> Jack in the Box introduced a healthier child’s meal and discontinued selling toys.<sup>177</sup> McDonald’s made healthy changes to Happy Meals and allowed parents to buy toys for meals not complying with the ordinance for ten cents.<sup>178</sup> Although opponents have presented the ordinances as offensive interferences with parental choice, the actual impact is minimal.<sup>179</sup> Parents can still order unhealthy meals and obtain a toy by paying a nominal surcharge; that possibility obviously limits the effectiveness of such ordinances. But at a minimum, they may have a constructive influence by encouraging healthier restaurant policies, and by drawing parents’ attention to the issue of health at the time of purchase.

Another strategy is for schools to exercise their broad authority to control commercial speech on campus. For example, Maine prohibits brand-specific advertising of foods and beverages on school grounds.<sup>180</sup>

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child’s meal from providing a toy incentive if the meal contains more than 485 calories, 600 milligrams of sodium, 35% of total calories from fat, more than 10% of total calories from saturated fats, and more than 10% of calories from added sugars. Santa Clara, Cal., Code of Ordinances, § A18-352 (2010); Sharon Bernstein, *It’s a Sad Day for Happy Meals in Santa Clara County*, L.A. TIMES (Apr. 28, 2010), <http://articles.latimes.com/2010/apr/28/business/la-fi-happy-meals-20100428>; Bernstein, *supra* note 72.

<sup>173</sup> Sharon Bernstein, *Fast-Food Industry Is Quietly Defeating Happy Meals Bans*, L.A. TIMES (May 18, 2011), <http://articles.latimes.com/2011/may/18/business/la-fi-happy-meal-backlash-20110518> (discussing defeat of bans in Florida and Arizona).

<sup>174</sup> *The Daily Show with Jon Stewart*, *supra* note 73.

<sup>175</sup> Liu, *supra* note 55, at 173.

<sup>176</sup> Otten et al., *supra* note 170, at 60.

<sup>177</sup> Lisa Jennings, *Jack in the Box Makes Big Menu Changes*, NATION’S RESTAURANT NEWS (June 18, 2011), <http://nrn.com/latest-headlines/jack-box-makes-big-menu-changes>.

<sup>178</sup> Julie Jargon, *supra* at 165; Stephanie Strom, *For a Dime, McDonald’s Beats a Toy Ban*, N.Y. TIMES, Dec. 1, 2011, at B5.

<sup>179</sup> For objections, see Liu, *supra* note 55, at 177.

<sup>180</sup> CHANGELAB SOLUTIONS, *supra* note 132, at 13.

Given the adverse influence of advertising on food choices, such restrictions make sense.

### G. Physical Activity

Changes in school physical education programs and community design are two other important strategies for increasing healthy behavior. Half of adults and almost three quarters of high school students “do not meet the Centers for Disease Control and Prevention’s recommendations for physical activity.”<sup>181</sup>

Although every state has some form of physical education (PE) requirement for students, these requirements are often limited, underfunded, and under-enforced.<sup>182</sup> The pressure to improve academic performance, together with budget constraints, has diverted focus from improving PE programs. Only 6% of middle and high schools require daily PE or its equivalent for the entire school year.<sup>183</sup> Improving the quality of PE is as important as increasing its quantity, so the Institute of Medicine has recommended that federal, state, and local governments ensure quality programs for all students, as well as set minimum standards for preschool and childcare facilities.<sup>184</sup>

Local governments, for their part, must also take affirmative steps to encourage fitness. As the White House Task Force on Childhood Obesity noted, community design plays an important role in preventing or promoting physical activity in both adults and children.<sup>185</sup> People in environments that foster activity have a lower risk of obesity.<sup>186</sup> Streets that are suitable and safe for walking or biking, as well as adequate parks and recreational facilities, are necessary, particularly in poor communities.<sup>187</sup> As one civil rights activist noted, all too often “there are virtually no parks where low income people of color live, and where there are parks, there are virtually no low-income people of color.”<sup>188</sup>

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<sup>181</sup> TRUST FOR AMERICA’S HEALTH, *supra* note 21, at 83.

<sup>182</sup> Wiley, *supra* note 123, 159.

<sup>183</sup> Rothenberg, *supra* note 167, at 201. *See generally* INST. OF MED., PREVENTING CHILDHOOD OBESITY: HEALTH IN THE BALANCE (Jeffrey P. Koplan et al. eds., 2004).

<sup>184</sup> INST. OF MED., *supra* note 8, at 329; INST. OF MED., *supra* note 115, at 81.

<sup>185</sup> WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 78 (2010), *available at* [http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf).

<sup>186</sup> INST. OF MED., *supra* note 115, at 29; Lawrence D. Frank, Martin A. Andresen, & Thomas L. Schmid, *Obesity Relationships with Community Design, Physical Activity, and Time Spent in Cars*, 27 AM. J. PREVENTIVE MED. 87, 87 (2004).

<sup>187</sup> INST. OF MED., *supra* note 115, at 73.

<sup>188</sup> LYNN PARKER ET AL., *supra* note 31, at 47 (quoting Robert Garcia).

Even without substantial expenditures, local governments have a variety of ways to support fitness. Communities can often stretch their resources through joint-use agreements with schools that allow public use of school facilities in off hours.<sup>189</sup> Where necessary, local governments may need to adopt regulatory and legislative policies to address liability issues that could otherwise block such sharing arrangements. A growing number of states and localities have also adopted “complete streets” laws to ensure that public roadways are safe and convenient for all users, including pedestrians, bicyclists, and mass transportation riders.<sup>190</sup> New York has established a Center for Active Design, which promotes strategies that encourage daily physical activity. Examples include making stairways a prominent part in the design of new buildings and retrofitting old staircases to ensure that they stay open, clean, and well lighted.<sup>191</sup> Communities do not lack for cost effective strategies to reduce obesity; what is now required is a political commitment to make them a priority.

#### H. Food Policies

Any long term strategy for combatting obesity should also focus attention on farm policies.<sup>192</sup> For more than a century, the government has supported the production of commodities such as corn, grain, and oil seeds, which are used to produce high fructose corn syrup, meat, and dairy products.<sup>193</sup> The effect has been to encourage the production of major sources of saturated fat and carbohydrates.<sup>194</sup> By contrast, in the absence of comparable subsidies, the prices of lower calorie commodities such as fruits and vegetables have continued to increase.<sup>195</sup> Chang-

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<sup>189</sup> *Id.* at 45–46; INST. OF MED., *supra* note 115, at 81.

<sup>190</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, PROMOTING HEALTHY COMMUNITIES AND PREVENTING CHILDHOOD OBESITY: TRENDS IN RECENT LEGISLATION 18–20 (2010), *available at* [http://www.deltastate.edu/PDFFiles/hper%20outdoor%20program/Marywood/promoting\\_healthy\\_communities\\_and\\_preventing\\_childhood\\_obesity1.pdf](http://www.deltastate.edu/PDFFiles/hper%20outdoor%20program/Marywood/promoting_healthy_communities_and_preventing_childhood_obesity1.pdf); LYNN PARKER ET AL., *supra* note 31, at 44.

<sup>191</sup> Mona El-Naggar, *Next Steps in Bloomberg’s Obesity Fight: Up the Stairs*, N.Y. TIMES, July 18, 2013, at A19.

<sup>192</sup> INST. OF MED., *supra* note 8, at 208.

<sup>193</sup> Patricia L. Farnese, *Remembering the Farmer in the Agriculture Policy and Obesity Debate*, 65 FOOD & DRUG L.J. 391, 392 (2010).

<sup>194</sup> DAVID IMHOFF, FOOD FIGHT: THE CITIZEN’S GUIDE TO THE NEXT FOOD AND FARM BILL 91–92 (2d ed. 2012); MICHAEL POLLAN, THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS 200–01 (2006). *See generally* Keith E. Sealing, *Attack of the Balloon People: How America’s Food Culture and Agricultural Policies Threaten the Food Security of the Poor, Farmers, and Indigenous Peoples of the World*, 40 VAND. J. TRANSNAT’L L. 1015 (2007).

<sup>195</sup> Farnese, *supra* note 193 at 392.

ing the subsidy structure to support healthy foods could make them more affordable and accessible.<sup>196</sup>

### I. Litigation

In 2002 and 2003, two high profile class action lawsuits against McDonald's sparked interest in the role of litigation as a strategy for obesity prevention. The first suit was brought by a man who claimed damages for illnesses attributable to overconsumption of fast foods; it was withdrawn shortly after filing before any published opinion.<sup>197</sup> The second suit, *Pelman v. McDonald's Corporation*, was filed on behalf of children by parents who alleged that eating at the defendant's restaurants had caused them to become obese and to develop related health problems.<sup>198</sup> In particular, the plaintiffs claimed that McDonald's had misled them to believe that its food products were nutritious and safe for daily consumption, and had failed to disclose health risks associated with its products. Four obstacles confront plaintiffs in this kind of product liability claim. They must prove that "(1) the danger was not apparent to the average consumer; (2) the product is unreasonably dangerous for its intended use; (3) the plaintiff's obesity was caused by the food in question; and (4) the harm would not have occurred had an adequate warning been given."<sup>199</sup> In rejecting the plaintiffs' claim in *Pelham*, the federal trial court reasoned that the plaintiffs' "own excesses" contributed to their obesity and that it was "common knowledge" among consumers that eating too much fast food would have adverse health consequences.<sup>200</sup>

The cases resulted in swift legislative backlash. The U.S. House of Representatives and many state legislatures considered or enacted "cheeseburger bills" that granted immunity to manufacturers and retailers from civil liability based on weight gain and associated health problems.<sup>201</sup> That legislation, coupled with the difficulties of proving that

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<sup>196</sup> *Id.*; Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, 112 ENVTL. HEALTH PERSP. A821, A821 (2004); Wilbur, *supra* note 89, at 536.

<sup>197</sup> Franklin E. Crawford, *Fit for Its Ordinary Purpose?: Tobacco, Fast Food, and the Implied Warranty of Merchantability*, 63 OHIO ST. L.J. 1165, 1218-19 (2002); Jeremy H. Rogers, *Living on the Fat of the Land: How to Have Your Burger and Sue it Too*, 81 WASH. U. L. REV. 859, 860-61 (2003).

<sup>198</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), *amended by Pelman ex rel. Pelman v. McDonald's Corp.*, No. 02-Civ-7821, 2003 W.L. 22052778 (S.D.N.Y. Sept 3, 2003), *vacated in part*, 396 F.3d 508 (2d Cir. 2005), *remanded*, 396 F. Supp. 2d 439 (S.D.N.Y. 2005) (requiring more definitive statement of claims).

<sup>199</sup> Mello et al., *supra* note 27, at 208-09.

<sup>200</sup> *Pelman*, 237 F. Supp. 2d at 517-18, 533.

<sup>201</sup> The House passed a bill, but it died in the Senate. PUBLIC HEALTH LAW AND ETHICS: A READER 221 (Lawrence O. Gostin ed., 2010). For discussion of the 21 states that enacted bill limiting liability, see Lawrence O. Gostin, *Law as*

any particular products “caused” obesity and associated conditions, makes tort litigation an ineffective strategy to hold manufacturers and retailers accountable for the sale of unhealthy foods.<sup>202</sup> However, there remains the possibility of more narrowly focused lawsuits under state consumer protection laws challenging deceptive marketing practices. Because the FTC lacks authority to regulate children’s advertising, these suits could help fill a regulatory gap.<sup>203</sup> For example, in *Parham v. McDonald’s Corp.*, the plaintiff, a regional program manager for child nutrition, filed a class action claiming that the defendant violated consumer protection laws by using deceptive advertising tactics to target children.<sup>204</sup> Threats of litigation have also convinced some manufacturers to improve the nutritional content of foods marketed to children.<sup>205</sup> Still, these suits are at best an indirect way of countering obesity. An example is a challenge to Ben and Jerry’s ice cream based on its use of the term “natural” on the label. The company agreed to change the label. But as one attorney put it, “you can’t make ice cream a health food [through litigation]. It is what it is.”<sup>206</sup>

In the final analysis, the main function of such litigation may be to heighten public awareness of the risks of unhealthy diets and to intensify pressure on manufacturers to dial back marketing claims and to increase the nutritional content of targeted products.<sup>207</sup>

### J. Education

A final obesity prevention strategy is public education. The effort should start in elementary school, with material on nutrition and fitness integrated into the core curricula, and included on posters and cafeteria displays.<sup>208</sup> Although virtually all schools offer some nutrition education,

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*a Tool to Facilitate Healthier Lifestyles and Prevent Obesity*, 297 JAMA 87, 87 (2007); NATIONAL CONFERENCE STATE LEGISLATURES, FOOD VENDOR LAWSUIT IMMUNITY (Feb. 2005), <http://www.ncsl.org/issues-research/health/food-vendor-lawsuit-immunity.aspx>.

<sup>202</sup> See *Pelman*, 237 F. Supp. 2d at 538; McMenamin & Tiglio, *supra* note 16, at 454.

<sup>203</sup> LYNN PARKER ET AL., *supra* note 31, at 54.

<sup>204</sup> *Parham v. McDonald’s Corp.*, No. CGC-10-506178 (Cal. Super. Ct. Jan. 5, 2011). The suit was dismissed. See Sarah Mirando, *McDonald’s Happy Meal Class Action Lawsuit Dismissed*, TOP CLASS ACTIONS (Apr. 6, 2012), <http://topclassactions.com/lawsuit-settlements/lawsuit-news/1746-mcdonalds-happy-meal-class-action-lawsuit-dismissed/>.

<sup>205</sup> LYNN PARKER ET AL., *supra* note 31, at 55.

<sup>206</sup> *Id.* at 58 (quoting Joseph Price).

<sup>207</sup> Mello et al., *supra* note 27, at 213.

<sup>208</sup> For a call for nutrition education, see *Nutrition and the Health of Young People*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/healthyouth/nutrition/facts.htm> (last updated Oct. 6, 2014).

a majority lack the coordination to ensure a focused approach, and evaluation of the effectiveness of their initiatives is lacking.<sup>209</sup>

School messages need reinforcement through social marketing. Experience with anti-smoking initiatives demonstrates that well-devised educational campaigns can be powerful tools in reducing unhealthy behaviors.<sup>210</sup> Early efforts at obesity prevention efforts suggest that they too can be effective in influencing public attitudes.<sup>211</sup> An example is New York City's sugar-sweetened beverages campaign, which asked residents if they "were pouring on the pounds," and warned them not to "drink themselves fat."<sup>212</sup> Media campaigns promoting physical activity have shown positive effects on awareness, attitudes, and beliefs, but effects on behavior have been mixed.<sup>213</sup> Some evidence suggests "achieving behavioral change requires very high levels of awareness, which are difficult to achieve without substantial investment."<sup>214</sup>

Other approaches target particular groups. One strategy is directed at parents in an effort to create more healthy home environments, such as using fruits rather than junk food as snacks, and encouraging physical activity.<sup>215</sup> Children can also be targeted. An example is a campaign developed by the Center on Disease Control and Prevention (CDC). "VERB: It's What You Do" portrayed physical activity as fun and socially desirable, and sedentary behavior as dull and boring.<sup>216</sup> Preliminary analysis found that the campaign was successful in increasing physical activity.<sup>217</sup> More such initiatives, together with research on their effectiveness, should be a high priority.

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<sup>209</sup> *Nutrition Education in Public Elementary and Secondary Schools*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/surveys/frss/publications/96852/> (last visited Mar. 29, 2015).

<sup>210</sup> Matthew C. Farrelly et al., *Evidence of a Dose-Response Relationship Between "Truth" Anti-Smoking Ads and Youth Smoking Prevalence*, 95 AM J. PUB. HEALTH 425 (2005); David T. Levy et al., *The Effects of Tobacco Control Policies on Smoking Rates: A Tobacco Control Scorecard*, 10 J. PUB. HEALTH MGMT. & PRAC. 338, 343 (2004); Michael Siegel & Lois Biener, *The Impact of an Antismoking Media Campaign on Progression to Established Smoking: Results of a Longitudinal Youth Study*, 90 AM. J. PUB. HEALTH 380 (2000).

<sup>211</sup> CHANGELAB SOLUTIONS, *supra* note 132, at 6.

<sup>212</sup> *Id.*

<sup>213</sup> Nick Cavill & Adrian Bauman, *Changing the Way People Think About Health-Enhancing Physical Activity: Do Mass Media Campaigns Have a Role?*, 22 J. SPORTS SCI. 771 (2004); Marian Huhman et al., *Effects of a Mass Media Campaign to Increase Physical Activity Among Children: Year-1 Results of the VERB Campaign*, 116 PEDIATRICS 277 (2005).

<sup>214</sup> Huhman et al., *supra* at note 213, at 278.

<sup>215</sup> W. Douglas Evans et al., *Social Marketing as a Childhood Obesity Prevention Strategy*, 18 OBESITY S23 (2010).

<sup>216</sup> Huhman et al., *supra* note 213, at 283.

<sup>217</sup> *Id.*

Messaging through the Internet is another possibility. Kidnetic.com is a noncommercial healthy living website for children ages 9-12 and their families. The site, developed by the International Food Information Council in partnership with various scientific and professional organizations, encourages physical activity and supplies healthy recipes for dishes that kids and parents can make together.<sup>218</sup>

The goal of public education campaigns is not simply to promote more healthy lifestyles among individuals. It is also to build support for government interventions that will assist individuals in that effort. In the long run, the best guarantee of sound public policy is an informed public that is aware of the costs of obesity and the strategies that can best address it.

### CONCLUSION

Lawyers and policy makers have a broad array of strategies to promote healthier behaviors. In evaluating their relative effectiveness, a number of considerations bear emphasis. The most obvious involve costs, both financial and political. From this perspective, litigation is a dubious investment, given the high price of lawsuits, their evidentiary difficulties, and the likelihood of political backlash. Although litigation can help raise public awareness and deter misleading marketing practices, it is unlikely to play a major role in obesity prevention. Other strategies also may be insufficiently effective to justify the costs. Bans on supersized soft drinks are easily evaded and politically unpopular. Bans on using food stamps for sugar-sweetened beverages need more evaluation to assess their health and stigmatic effects.

By contrast, some strategies, such as public education, or access to parks and quality PE programs, are less controversial and potentially more effective, but expensive to do well. The best hope for financing such initiatives is through greater public awareness of their importance. One way of increasing awareness is through campaigns subsidized through additional taxes on sugar-sweetened beverages. Such taxes have the double benefit of raising revenue and deterring consumption, and polling data suggests that they become more politically acceptable if the funds raised are targeted to obesity prevention.

Other strategies are less expensive. Zoning regulations are a revenue neutral way of restricting the location of fast food restaurants near schools or in over-served areas, and increasing the location of healthy food retailers in underserved neighborhoods. Calorie disclosure requirements could cover more establishments and employ more effective color-coding systems. Restrictions on marketing unhealthy foods to children, through bans on toy promotions and school advertising, are cost effective ways of changing the environment in which food choices are made.

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<sup>218</sup> Rothenberg, *supra* note 167, at 213.

First Lady Michelle Obama titled her campaign to combat child obesity “Let’s move.” The message applies to politics as well as physical activity. Although we need more evaluation of policy strategies, we know enough about what works to chart a course of reform. We should act now on what we know.