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Article

Sugary Drinks, Happy Meals, Social Norms, and the Law: The Normative Impact of Product Configuration Bans

LINDSAY F. WILEY

What role should government play in discouraging harmful overconsumption? What modes of government intervention best strike the balance between effectiveness and political acceptability? It is well established that government has a legitimate interest in protecting the health and safety of the people, even from their own choices and actions. Furthermore, there is no fundamental right to sell or purchase particular services or products in particular configurations. The appropriate question, then, is not what government may do to prevent non-communicable diseases that are associated with individual behavior choices, but rather what government should do. This comment on David Friedman's Public Health Regulation and the Limits of Paternalism *focuses on Friedman's insight that visibility is the key distinction between paternalistic measures like the ban on artificial trans-saturated fats in restaurant food—which have faced very little opposition in spite of adopting a heavy-handed approach—and measures like the "Big Gulp Ban" and the "Happy Meal Ordinance"—which are unpopular and have been strongly opposed by industry in spite of intruding less upon individual autonomy. While the high visibility of these regulations makes them less politically palatable, visibility might also be key to their positive impact—through their influence on social norms about appropriate portion size and balanced meals for small children.*

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LINDSAY F. WILEY*

I. INTRODUCTION

What role should government play in discouraging harmful overconsumption? What modes of government intervention best strike the balance between effectiveness and political acceptability? In this Issue, David Friedman fleshes out a useful typology to structure examination of these pressing questions.[1] His project is ambitious and important. I am unconvinced, however, by his argument that "visible, hard paternalism"[2] is not a viable option as part of a "full-court press"[3] to prevent obesity because popular support for it is low and it is not practically effective.

Friedman articulates his argument in terms of political acceptability and practical efficacy because it is difficult to tether anti-paternalism to legal doctrine. It is, in fact, well established that government has a legitimate interest in protecting the health and safety of the people, even from their own choices and actions.[4] In cases where a fundamental right or suspect classification is implicated, a purely paternalistic governmental interest may not be sufficiently compelling to justify infringement.[5] But

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* Associate Professor of Law, American University Washington College of Law.

[1] *See* David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1698–99 (2014) (outlining five levels of interventional efforts).

[2] *Id.* at 1692, 1767.

[3] *Id.* at 1719–20.

[4] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (upholding the constitutionality of an arrest and the jailing of a woman for failure to wear a seatbelt); Simon v. Sargent, 346 F. Supp. 277, 278–79 (D. Mass. 1972) (per curiam) (holding that a statute requiring motorcyclists to wear protective headgear does not violate due process, notwithstanding the claim that "police power does not extend to overcoming the right of an individual to incur risks that involve only himself"), *aff'd without opinion*, 409 U.S. 1020 (1972).

[5] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 507 n.12 (1996) (striking down a regulation prohibiting advertisement of alcohol prices on First Amendment grounds, in part because "[i]t is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance," including taxation, direct regulation establishing minimum prices or maximum per capita purchases, or education); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (striking down a "highly paternalistic" regulation prohibiting pharmacists from advertising the prices of prescription drugs, but noting that the state "is free to require whatever professional standards it wishes of its pharmacists"); Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (rejecting sex discrimination

there is no fundamental right to sell or purchase particular services or products in particular configurations.[6] Thus, Friedman's argument is not about what government *may* do to prevent non-communicable diseases and injuries that are associated with individual behavior choices, but rather what government *should* do. Adopting the same basic frame of inquiry, I would like to focus on the *visibility* of the paternalism that Friedman rejects, rather than on its *hardness*.

II. VISIBILITY AND SOCIAL NORMS

Friedman suggests that visibility is the key distinction between the ban on artificial trans-saturated fats in restaurant food[7]—which has faced very little opposition in spite of adopting a heavy-handed approach—and the sugary drinks portion cap rule[8]—which was rejected by industry and the

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"rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage").

[6] *See, e.g.*, Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 697, 703–07 (D.C. Cir. 2007) (en banc) (holding that terminally ill adult patients had no fundamental right protected by the Due Process Clause to have access to investigational drugs, after surveying the long history of safety and efficacy regulation of drugs for personal use); Lange-Kessler v. Dep't of Educ. of N.Y., 109 F.3d 137, 139 (2d Cir. 1997) (holding that the right to privacy does not encompass a woman's right to choose a direct-entry midwife to assist during childbirth); *see also* Samuel R. Wiseman, *Liberty of Palate*, 65 ME. L. REV. 737, 744 (2013) (concluding that there is no constitutionally protected right to consume the foods of one's choosing, based on "the long history of curtailment of food choice, and the lack of any constitutional protection or tradition of broadly protecting food rights"). "[T]he Court declared decades ago its 'abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise.'" *In re* Late Fee & Over-Limit Fee Litig., 741 F.3d 1022, 1029 (9th Cir. 2014) (Reinhardt, J., concurring) (quoting Ferguson v. Skrupa, 372 U.S. 726, 731 (1963)) (citing Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14 (1980) (noting that *Lochner* and similar cases are "now universally acknowledged to have been constitutionally improper"); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265 (reviewing the historical development and demise of enhanced constitutional protection of economic liberties under the substantive due process doctrine, assessing proposals to revive it, and ultimately concluding that such a revival would be inadvisable).

[7] New York City's Board of Health pioneered a ban on the use of artificial trans-saturated fats in restaurant food in 2006. N.Y.C. HEALTH CODE § 81.08 (2014); N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE 1, *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf. Similar bans were adopted by several other local and state governments in the years that followed. *See About Artificial Trans Fat*, CENTER FOR SCI. PUB. INT., https://cspinet.org/transfat/about.html (last visited Apr. 17, 2014) (listing cities and states that have banned trans fats). The success of restaurant-food trans fat bans inspired the FDA to announce in 2013 that it was taking action to designate artificial trans fats as no longer "generally recognized as safe" for human consumption, effectively banning their use in restaurant and packaged foods nationwide. Tentative Determination Regarding Partially Hydrogenated Oils; Request for Comments and for Scientific Data and Information, 78 Fed. Reg. 67,169, 67,169 (2013).

[8] The New York City portion rule's origins can be traced to a multi-agency obesity task force created by New York City Mayor Michael Bloomberg in 2012. N.Y.C., REVERSING THE EPIDEMIC:

public in spite of intruding less upon individual autonomy.[9] It is certainly true that customers are more aware of the size of the drinks they purchase than the ingredients in their baked goods. If we had truly safe, affordable, and appealing alternatives to sugar, salt, and fat, then a "stealth health" approach might be possible for all food and beverage products. Regulators could insist that healthier substitutes be used and consumers could go on eating as much junk food as manufacturers could convince them to buy, without paying the price in healthy years lost. But that is not the world live in.

Given the limited reach of stealth health strategies, Friedman instead

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THE NEW YORK CITY OBESITY TASK FORCE PLAN TO PREVENT AND CONTROL OBESITY 2–3 (2012), *available at* http://www.nyc.gov/html/om/pdf/2012/otf_report.pdf. Among the Task Force's twenty-six recommendations for addressing the obesity crisis in New York City was a proposal to limit the size of the containers food service enterprises use to sell sugary drinks. *Id.* at 14. The rule was incorporated into the New York City Health Code. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.53) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE 1 [hereinafter NOTICE OF ADOPTION: PORTION CAP RULE], *available at* http://www.nyc.gov/html/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf. Its final language provided, "A food service establishment may not sell, offer, or provide a sugary drink in a cup or container that is able to contain more than 16 fluid ounces." 24 R.C.N.Y. § 81.53(3)(b) (2013). The rule defined a sugary drink as one that: (1) is non-alcoholic; (2) is sweetened with a caloric sweetener; (3) contains more than twenty five calories per eight fluid ounces; and (4) does not contain more than 50 percent of milk or milk substitute. *Id.* § 81.53(1). The Board of Health emphasized that the choice of sixteen ounces as the designated maximum portion size was intended to balance health impacts with the needs of food establishments, as that size is both widely available at most regulated establishments and familiar to customers. *See* Letter from Susan Kansagra, Assistant Comm'r, Bureau of Chronic Disease Prevention & Tobacco Control, to the Members of the Bd. of Health and Thomas A. Farley, Chairman, Bd. of Health (Sept. 6, 2012), *available at* http://www.nyc.gov/html/doh/downloads/pdf/boh/article81-response-to-comments.pdf (answering comments and concerns raised at the public hearing that addressed the health impact of the regulation and the regulation's feasibility for businesses).

[9] Friedman's thesis hinges on the unpopularity of the portion cap rule as the paradigm of visible "hard paternalism." *See* Friedman, *supra* note 1, at 1749 (noting that, unlike the portion cap rule, the trans fat ban's "tangible impact on consumers" is minimal). He discusses—and largely dismisses—popular acceptance of two other Bloomberg-pioneered public health regulations: the trans fat ban, discussed above, and a calorie-labeling mandate for chain restaurant menus. Bloomberg pioneered calorie labeling in 2006. The measure was challenged by industry groups, *see* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351, 352–53 (S.D.N.Y. 2007) (striking down the initial version of the N.Y.C. menu labeling requirement as preempted by the federal Nutrition Labeling and Education Act), and was eventually implemented in slightly modified form in 2008, 24 R.C.N.Y. § 81.50. Several other state and local governments quickly adopted similar mandates, and Congress made calorie labeling mandatory nationwide through a provision of the Affordable Care Act passed in 2010, which is still in the process of being implemented by the Food and Drug Administration. *See* 21 U.S.C. § 343(q)(5)(H) (2012) (requiring disclosing food nutritional contents for chain restaurants). Friedman dismisses the calorie labeling measure because it is not "hard" and the trans fat ban because it is not "visible." *See* Friedman, *supra* note 1, at 1709, 1729–30 (analogizing the trans fat ban to "soft paternalism" due to its "hidden" characteristics and categorizing calorie disclosures as "soft paternalism"). Indeed, it is difficult to argue that the trans fat ban is any less hard in its paternalism than the portion rule. It would seem to be significantly more so, given that the portion rule does nothing to prohibit consumption of sugary drinks in whatever quantity a consumer desires, so long as the purchase is configured in sixteen-ounce portions.

argues for a visible, but non-regulatory, role for government. In addition to "gently-induced free market voluntarism" (e.g., McDonald's adding sliced apples and cutting back on fries in Happy Meals[10]) and "hidden hard paternalism"[11] (e.g., the trans fat ban), Friedman praises educational efforts (especially "strong-form debiasing" with an emphasis on storytelling) as the best way to promote healthier eating and physical activity.[12]

A N.Y.C. Health Department advertisement depicting an overweight man with his leg amputated below the knee and bearing the message "portion sizes have grown: so has diabetes, which can lead to amputations"[13] would seem to be exactly what Friedman has in mind. Other ads released as part of the City's "Pouring on the Pounds" campaign (launched a few years before the portion rule) depict two-liter bottles, energy drink cans, and XXL fast food cups (sometimes standing alone, sometimes being guzzled by actors) brimming with yellow globs of what appears to be human fat.[14] These messages—like anti-tobacco ads emphasizing the cosmetic effects of smoking (stained teeth, wrinkled skin, bad breath, etc.)[15] or anti-formula-feeding ads depicting women putting their babies at risk[16]—adopt a "social denormalization" strategy for changing consumption.[17]

Friedman describes New York City's healthy consumption education campaign as a "fallback" strategy, indicating that the Mayor was backing

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[10] *See* Julie Jargon, *Under Pressure, McDonald's Adds Apples to Kids Meals*, WALL ST. J., July 27, 2011, at B1 (describing the fast food chain's decision as "the company's latest move[] to fend off more regulation of what kids eat" and linking it to a San Francisco ordinance prescribing minimum nutritional requirements for meals that include toys or other incentive items aimed at children).

[11] Friedman, *supra* note 1, at 1767–68.

[12] *Id.* at 1734–37.

[13] Patrick McGeehan, *Blame Photoshop, Not Diabetes, for This Amputation*, N.Y. TIMES, Jan. 25, 2012, at A22. Controversy over the advertisement's use of digitally altered stock photos perhaps reinforces Friedman's preference for "truthful narratives." *See id.* (reporting that Mayor Bloomberg's administration put an advertisement in circulation featuring a photo of an amputee, which was in fact an altered stock image of a man who had both legs); *see also* Friedman, *supra* note 1, at 1698 ("[A] truthful narrative of harm adds a degree of intervention beyond pure information about the presence of [harm].").

[14] *See* Sewell Chan, *New Targets in the Fat Fight: Soda and Juice*, N.Y. TIMES, Sept. 1, 2009, at A22 (discussing the ad campaign and providing an example of a poster from it); *see also Pouring on the Pounds Ad Campaign Archive*, N.Y.C. DEP'T HEALTH & MENTAL HYGIENE, http://www.nyc.gov/html/doh/html/living/sugarydrink-media-archive.shtml (last visited Mar. 22, 2014) (featuring print and video advertisements released between 2009 and 2014).

[15] *See FDA Designs New Smoking Prevention Ad Strategy to Target Teens*, PBS NEWSHOUR (Feb. 4, 2014), http://www.pbs.org/newshour/bb/fda-designs-smoking-prevention-strategy-target-teens/ (describing the launch of a new FDA ad campaign that targets teens by "playing into fears about the superficial effects of smoking").

[16] *See* Roni Rabin, *Breast-Feed or Else*, N.Y. TIMES, June 13, 2006, at F1 (describing advertisements that compared failure to breast-feed to riding a mechanical bull while pregnant).

[17] *See* Lindsay F. Wiley, *Shame, Blame, and the Emerging Law of Obesity Control*, 47 U.C. DAVIS L. REV. 121, 133 (2013).

off of visible hard paternalism,[18] but education and social marketing were always an important part of the Bloomberg administration's strategy. So much so, that the portion rule is best understood as one component of a broader effort to change social norms around over-consumption of sugary drinks. The portion regulation's visibility may have made it less politically palatable, but visibility might also have been key to the regulation's positive impact—through its influence on social norms.

Friedman's article misunderstands the use of law as a tool for preventing obesity-related illness in a number of ways, but it suffers particularly from his narrow view of the role of law in shaping social norms. Health-related behaviors are "encased in a multitude of norms."[19] Public health advocates savvy to this connection have developed strategies for combating positive, industry-promoted social norms around unhealthy products (e.g., smoking is sexy and liberating; drinking Pepsi evinces a carefree, "you only live once" attitude toward life)[20] by promoting negative counter-messages. On the flip side of the normativity coin, public health strategies have also aimed to destigmatize certain statuses and behaviors in an effort to more effectively address health risks. For example, public health advocates have adopted a destigmatization strategy for HIV in an effort to ensure that people get tested for the virus so that they can take steps to protect themselves and others.

Denormalization and destigmatization strategies are perhaps most transparent in social marketing campaigns—advertisements and educational materials that go beyond straightforward information about health risks to tap into powerful social norms.[21] But *law* also plays an important role in influencing social norms.[22] Bans on smoking in restaurants, workplaces, and even public parks and beaches mean that fewer people—kids in particular—see smoking as a normal, everyday activity going on around them. Regulations giving nursing mothers the right to feed their infants anywhere that they have a legal right to be present[23] make life easier for breastfeeding families while also promoting

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[18] Friedman, *supra* note 1, at 1732.

[19] W.A. BOGART, PERMIT BUT DISCOURAGE: REGULATING EXCESSIVE CONSUMPTION 91 (2011).

[20] *See* Katrina Radic, *"Live for Now"—Pepsi's First Ever Global Campaign*, BRANDING MAG. (Jan. 5, 2012), http://www.brandingmagazine.com/2012/05/01/live-for-now-pepsis-first-global-campaign/ (describing Pepsi's advertisement campaign encouraging consumers to "live to the fullest").

[21] *See* Sonya Grier & Carol A. Bryant, *Social Marketing in Public Health*, 26 ANN. REV. PUB. HEALTH 319, 319–20 (2005) ("Social marketing [is] the use of marketing to design and implement programs to promote socially beneficial behavior change . . . .").

[22] There is a rich body of legal literature on the complex interaction between law and social norms. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 349 (1997).

[23] *See, e.g.*, ARK. CODE ANN. § 20-27-2001 (2013) ("A woman may breastfeed a child in a public place or any place where other individuals are present.").

breastfeeding as a normal activity that need not be hidden from view.

III. DENORMALIZATION AND OBESITY

Applying these strategies to obesity, diabetes, and heart disease prevention presents significant challenges. Recent proposals to ramp up a social denormalization strategy for obesity have generated considerable interest and controversy.[24] These proposals have focused almost exclusively on denormalizing fatness itself, rather than unhealthy products or overconsumption of them. I have argued elsewhere that stigmatizing fat people as a public health strategy—politically palatable though it may be—is wrong-headed and counterproductive.[25] An individual's size says far less about their eating habits or physical activity than people typically assume.[26] Thin people may engage in—and be harmed by—unhealthy overconsumption. And large people may be physically fit and healthy.[27] Rather than motivating healthy behaviors, body shaming is associated with poorer self-care and poorer health.[28]

The goal should be to denormalize unhealthy products and consumption patterns and re-normalize reasonable portion sizes and balanced eating for everyone, without singling out particular people for stigmatization based on their size or shape. But that is a difficult line to walk, especially given the widespread stigmatization of fatness that exists independent of any public health strategy to promote it.[29]

Denormalizing overconsumption of unhealthy food and beverage

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[24] *See* M. Gregg Bloche, *Obesity and the Struggle Within Ourselves*, 93 GEO. L.J. 1335, 1337, 1351 (2005); Daniel Callahan, *Obesity: Chasing an Elusive Epidemic*, 43 HASTINGS CTR. REP. 34, 36 (2013).

[25] Wiley, *supra* note 17.

[26] Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self-Interest*, 66 J. PERSONALITY & SOC. PSYCHOL. 882, 883 (1994) (noting that studies examining the hypothesis that obesity is primarily caused by overeating have found that, on average, obese subjects consume the same amount or less than normal weight subjects); I-Min Lee et al., *Physical Activity and Coronary Heart Disease in Women*, 285 JAMA 1447, 1450 tbl.1 (2001) (indicating that the average weight difference between the most sedentary and the most active study participants was about 1.5 BMI units).

[27] *See* M. Fogelholm, *Physical Activity, Fitness and Fatness: Relations to Mortality, Morbidity and Disease Risk Factors: A Systematic Review*, 11 OBESITY REVS. 202, 219 (2009) ("[T]he risk for all-cause and cardiovascular mortality was lower in individuals with high BMI and good aerobic fitness, compared with individuals with normal BMI and poor fitness.").

[28] *See generally* Craig A. Johnston et al., *The Application of the Yerkes-Dodson Law in a Childhood Weight Management Program: Examining Weight Dissatisfaction*, 37 J. PEDIATRIC PSYCHOL. 674 (2012); Rebecca M. Puhl et al., *Internalization of Weight Bias: Implications for Binge Eating and Emotional Well-Being*, 15 OBESITY 19 (2007); K.R. Sonneville et al., *Body Satisfaction, Weight Gain and Binge Eating Among Overweight Adolescent Girls*, 36 INT'L J. OBESITY 944 (2012).

[29] Notably, New York City's "Pouring on the Pounds" campaign has evolved over time to place less emphasis on weight and more emphasis on health. The 2009 ads reference obesity, fatness, and pounds (e.g., "Don't Drink Yourself Fat"), whereas ads from 2013 place more emphasis on diabetes and heart disease. *See Pouring on the Pounds Ad Campaign Archive*, *supra* note 14.

products is far more complicated than denormalizing tobacco products. Consumption of an unhealthy meal in a social setting might be highly visible and therefore subject to the same kind of negative social norms that have now attached to smoking a cigarette. But one meal says only so much about a person's lifestyle. Balanced eating is not a matter of a single meal or a single food or beverage product. It involves complex patterns over the course of days, weeks, and months. It can include enjoying sugary, fatty, salty treats or splurging on a high-calorie meal from time to time. Unfortunately, our current norms seem to endorse occasional treats or splurges for some people, but not others. A thin person might consume a large meal or a sugary treat without raising an eyebrow, while fat people are regularly harassed at restaurants and grocery store checkout lines for their food choices. Rather than promoting a culture of balanced consumption for all, the effort to denormalize unhealthy overconsumption easily degenerates into the same old stigmatization of particular people based on their size.[30]

IV. CONFIGURATION BANS AS A TOOL FOR DENORMALIZING UNHEALTHY OVERCONSUMPTION

Honing in on particular categories of products like sugary drinks and kids meals is tempting because it reduces some of the complexity involved in promoting healthy eating. Reducing consumption of sugary drinks is not a comprehensive strategy for healthy eating, but it has been adopted by many public health advocates as a reasonable starting point. The amount of calories consumed from sugary drinks nearly tripled between 1977 and 2001.[31] These drinks have been identified as the primary source of added sugars in the American diet,[32] and high consumption of them is associated with an increased risk of type 2 diabetes, hypertension, and coronary heart disease.[33] It appears that sugary drinks may increase risk of type 2 diabetes and cardiovascular disease independent of their impact on obesity, because they contain high amounts of rapidly absorbable carbohydrates.[34]

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[30] In spite of the positive move toward health-focused rather than weight-focused ads in the "Pouring on the Pounds" campaign, the ads get a lot of mileage out of their use of images of body fat, which provoke reactions of disgust, blurring the lines between health risks and social costs associated with norms about physical appearance.

[31] Samara Joy Nielsen & Barry M. Popkin, *Changes in Beverage Intake Between 1977 and 2001*, 27 AM. J. PREVENTIVE MED. 205, 206 (2004).

[32] *See* Gladys Block, *Foods Contributing to Energy Intake in the US: Data from NHANES III and NHANES 1999–2000*, 17 J. FOOD COMPOSITION & ANALYSIS 439, 441 (2004).

[33] *See* Vasanti S. Malik et al., *Sugar-Sweetened Beverages and Risk of Metabolic Syndrome and Type 2 Diabetes: A Meta-Analysis*, 33 DIABETES CARE 2477, 2481–82 (2010) (finding that there is a significant link between the consumption of sugar-sweetened beverages and type 2 diabetes and metabolic syndrome, an illness that contributes to heart conditions).

[34] *See, e.g.*, Andrew O. Odegaard et al., *Soft Drink and Juice Consumption and Risk of Physician-Diagnosed Incident Type 2 Diabetes*, 171 AM. J. EPIDEMIOLOGY 701, 706 (2010) (finding that the

Essentially, overconsumption of sugary drinks is making a lot of people sick, while also making some of them fat.

The profit margin on fountain drinks sold at fast food restaurants is estimated to be around ninety percent[35] and bonus pricing is ubiquitous. It should come as no surprise then that the average portion size of sugary drinks offered as fountain drinks in restaurants and in bottles packaged by manufacturers has grown dramatically.[36] The smaller portions that were typical just a few decades ago now seem tiny. And the super-size portions that seemed laughable are rapidly becoming the norm.

The portion cap rule is promising from a public health standpoint for many reasons,[37] including its potential to successfully "denormalize" excessive portions.[38] Just as bans on smoking in workplaces, restaurants, and even wide-open public spaces have successfully denormalized smoking as a socially accepted behavior by reducing our everyday exposure to the sight of people smoking, the portion cap rule could denormalize XXL cup sizes and "re-normalize" smaller portions that have begun to look tiny by comparison. Like smoking in the sixties, the sight of someone consuming a thirty-two—or even sixty-four—ounce cup of soda has become quite routine. The portion cap rule (accompanied by other public health interventions aimed at increasing disclosure of calorie information on menu boards and raising awareness of the health risks associated with overconsumption of sugary drinks) has potential to change that. If the rule is ever implemented, smaller cups would become far more visible in social settings and extra-large cups less so. As many critics have

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association between sugary drinks and diabetes incidence was only partially mediated through body mass index changes); Julie R. Palmer et al., *Sugar-Sweetened Beverages and Incidence of Type 2 Diabetes Mellitus in African American Women*, 168 ARCHIVE INTERNAL MED. 1487, 1490–91 (2008) (finding that the association between sugar-sweetened sodas and diabetes incidence was mediated through body mass index changes, while the association between sugar-sweetened fruit drinks and diabetes incidence was not).

[35] Paul Ziobro, *McDonald's Bets Pricing Drinks at $1 Will Heat Up Summer Sales*, WALL ST. J., Mar. 18, 2010, at B6.

[36] *See* Lisa R. Young & Marion Nestle, *Portion Sizes and Obesity: Responses of Fast-Food Companies*, 28 J. PUB. HEALTH POL'Y 238, 238–41 (2007) (finding significant increases in soft drink sizes offered by such major fast food retailers as McDonald's and Burger King).

[37] Depending on how retailers respond to the regulation, the portion cap rule might also raise the per-ounce price of sugary drinks, which research suggests would reduce consumption. The relationship between price and consumption undergirds taxation strategies for sugary drinks, but none of the soda taxes currently in effect in cities and states across the country rise to the level that research suggests would be required to reduce consumption significantly. It is hard to know with any certainty how retailers would respond to the portion cap rule, but it is unlikely that they would sell sixteen-ounce portions at half the current price for thirty-two-ounce portions. If they attempt to stick somewhat close to the current price point for a fountain soda, the per-ounce price could be significantly higher.

[38] *See* NOTICE OF ADOPTION: PORTION CAP RULE, *supra* note 8 (stating that the rule will "reacquaint[] New Yorkers with more appropriate portion sizes").

pointed out,[39] the portion rule does nothing to stop a consumer from drinking thirty-two, forty-eight, or sixty-four ounces in a sitting. But by requiring that he do so by purchasing two, three, or four separate cups, the measure sends a strong signal that he is consuming two, three, or four times the socially appropriate amount.

Researchers and law and policy experts are working together to identify similar strategies that extend beyond sugary drinks. Much of their attention is focused on regulating the configuration of food and beverage products that can be packaged and marketed as a "kids meal." At least two local governments—San Francisco and Santa Clara—pioneered the adoption of healthy food incentive ordinances (better known as "Happy Meal ordinances") establishing minimal nutritional standards for restaurant meals sold with toys or other youth-focused incentive items.[40] The incentive ordinance and the portion rule represent the cutting edge of the public health law toolkit. Both are best understood as "configuration bans"[41]—the portion rule permits retailers to sell and consumers to buy as much soda as they like, but not in a single extra-large container; the incentive ordinance permits retailers to sell and parents to buy soda, cheeseburgers, fries, and a toy designed to appeal to very young kids, but not configured into a single package. Just as the portion rule sends a strong signal that sixteen ounces is the "normal" portion for sugary drinks, the incentive ordinance signals that fruit and low-fat milk—rather than fries and soda—are the "normal" accompaniments for a young child's meal.[42]

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[39] *See, e.g.*, Mary MacVean, *New York Soda Ban Won't Work, Marketing Experts Say*, L.A. TIMES (June 4, 2012), http://articles.latimes.com/2012/jun/04/news/la-heb-soda-ban-20120602 (explaining that, according to Professor David Just, some will comply with the letter of the soda ban, if not the spirit, by simply "drink[ing] three sodas").

[40] S.F., CAL., HEALTH CODE art. 8, §§ 471.1–471.9 (2014); SANTA CLARA, CAL., CODE OF ORDINANCES tit. A, div. 18, §§ 350–355 (2014).

[41] The use of the term "ban" is perhaps problematic, given how politically charged it is and how useful critics of the "Big Gulp Ban" and "Happy Meal Ban" have found it to be. "Configuration" is a somewhat cumbersome term, but I have not yet landed on a more ear-pleasing alternative for this category.

[42] *See supra* notes 37–39 and accompanying text (discussing the normalization of balanced eating). Other examples might be found outside of healthy food regulation. For example, the Consumer Product Safety Commission prohibits the sale of lawn darts with metal tips. Ban of Hazardous Lawn Darts, 16 C.F.R. §§ 1306.1–1306.5 (2013). Commentators point out that lawn darts and metal tips may still be purchased separately and assembled for use by lawn dart enthusiasts who prefer metal-tipped darts. *See Lawn Darts Are Back, Ready to Party Like Its 1980!*, COOLTHINGS.COM (Mar. 31, 2009), http://www.coolthings.com/lawn-darts-are-back-ready-to-party-like-its-1980-again/. But that criticism overlooks the normative power of the ban. When lawn darts are sold configured with metal tips, the result is a strong signal to consumers that metal-tipped lawn darts are safe and appropriate for recreational use. Indeed, many product safety regulations are easily circumvented by consumers who wish to purchase components separately and do their own configuration. By prohibiting the sale of products configured in a certain way, the bans still effectively protect consumers

V. CONCLUSION

Law is a reinforcing expression of social norms. Communities across the country are converging on the idea that unhealthy consumption patterns promoted by profit-seeking manufacturers and retailers are burdening the public's health and quality of life. A wide range of strategies are being developed. Denormalization of unhealthy products, portions, and meal configurations and re-normalization of healthier alternatives are particularly promising avenues, but these strategies demand innovative law and policy tools and pioneering state and local governments willing to pilot their use.

The initial version of the incentive ordinance adopted by San Francisco and Santa Clara—and the social signal it was designed to send—were easily circumvented by retailers who simply added a separate, nominal charge to the customer's bill for the toy while continuing to market unbalanced meals to young children.[43] It may be that the portion rule in its current form could be similarly short-circuited. The incentive ordinance's designers, however, are back at the drawing board, equipped with new information about retailers' responses. The portion rule idea could benefit from similar experimentation and evolution over time.

The impact on social norms of measures like the portion cap rule, the incentive ordinance, and other regulations for kids' meals that are in the works will take time to evolve. They will require supporting educational strategies and interventions to ensure the accessibility of healthier alternatives. The impact of a regulation on social norms about consumption is virtually impossible to assess before widespread adoption by a major city like New York. Friedman focuses on the likely ineffectiveness of visible hard paternalism. But the problem is that unless a city like New York adopts and implements such measures, we will not have the opportunity to find out how well they work. Already, the proposed portion rule has done a great deal to raise awareness of the harms associated with overconsumption of sugary drinks. The controversy surrounding the rule led to an immeasurable amount of free air time to supplement the social marketing and education campaigns that pre-dated it. Imagine what it might do—and what we might learn—if it is actually implemented.

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who rely on the fact that a product sold by reputable retailers in a country with considerable product safety regulation is likely to be safe.

[43] *See* Stephanie Strom, *Toys Stay in San Francisco Happy Meals, for a Charge*, N.Y. TIMES (Nov. 30, 2011), http://www.nytimes.com/2011/12/01/business/toys-to-cost-extra-in-san-francisco-happy-meals.html (detailing how McDonald's was able to avoid San Francisco's incentive ban on free toys "by [charging] an extra 10 cents" for the toys).