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Cigarettes vs. Soda?: The Argument for Similar Public Health Regulation of Smoking and Obesity

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While smoking and obesity may have nuanced differences as public health problems, this Article briefly argues that those differences should not pose an obstacle to certain paternalistic attempts to regulate them similarly. Specifically, observed successes in reducing smoking through taxation, labeling requirements, and advertising bans could likewise prove successful in reducing obesity.

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LAURA HOFFMAN*

I. INTRODUCTION

Professor David Friedman argues that the types of paternalistic efforts that have been successful in combating smoking as a public health issue are unlikely to work in the case of obesity because of differences in the nature of these problems.[1] Specifically, he argues that the complexity of obesity distinguishes it from smoking and makes it much more problematic for regulators.[2] He even suggests that the complexity of obesity makes it a veritable regulatory nightmare to attempt to solve.[3] In making this point, Friedman fails to recognize that it is impossible to "solve" any public health problem of the magnitude of something like smoking or obesity. That does not mean, however, that valuable regulation opportunities cannot or will not significantly contribute to the reduction of these problems.

For example, while Friedman validly acknowledges that the significant differences between these two public health issues make regulation far more complex in the case of obesity, he also points out that some success has recently been observed on the childhood obesity front.[4] In light of this success, I will argue that although obesity is different from smoking in scope and nature, it can still be regulated in similar paternalistic ways. While Friedman cautions regulators about pursuing different forms of

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[1] David Adam Friedman, *Public Health Regulation and the Limits of Paternalism*, 46 CONN. L. REV. 1687, 1720 (2014).

[2] *Id.*

[3] *See id.* ("If regulators fail to employ rigorous criteria to choose initiatives, a full-court-press could be a waste of regulatory capital and public resources.").

[4] *See id.* at 1718–19 ("Paternalism meshes a bit more effectively with childhood problems, because the regulatory apparatus has means for controlling children's access to food and encouraging physical activity (i.e., public schools). The [childhood obesity rate] reduction has been attributed to myriad factors, such as: increases in breastfeeding, improvements to the Supplemental Nutrition Program for Women, Infants and Children (WIC), school lunch and nutrition improvements, restaurant changes to child menus, and increases in physical activity generated by programs like 'Let's Move!'" (footnotes omitted)).

paternalism to combat obesity, paternalism is a necessity.[5]

Research has shown that regulation is not a problem per se for obesity, as Friedman claims. Rather, the main obstacle in the anti-obesity effort is its lack of a concerted social movement[6]—as is the case for a number of other public health issues. That is, the real problem in the battle to control obesity is the absence of commonality, for there has not been a united commitment to tackle obesity in a particular, effective way. Jonathan Klein and William Dietz described this phenomenon as follows:

> Successful public health social movements are characterized by perception of a common threat and by mobilization of grass-roots groups able to address that threat. Social movement theories describe successful change as a response to events and beliefs that threaten the status quo. Successful framing of a threat or opportunity spreads and, over time, becomes the new, dominant belief.[7]

Klein and Dietz identify a number of other public health dilemmas that have previously been aided by this approach, including "tobacco control, HIV/AIDS, and [the] prevention of drunk driving. These movements were characterized by activists, scientists, and professionals framing new needs, followed by widespread recognition of threats requiring action."[8] Thus, Friedman's argument—that a paternalistic approach, similar to the one used for other public health issues, is unlikely to be successful when applied to the regulation of obesity—deserves careful consideration and inquiry.

II. MAKING THE CASE FOR THE SIMILARITY BETWEEN OBESITY AND SMOKING

In distinguishing obesity from smoking as a public health issue, Friedman overlooks considerable research and literature advocating to the contrary. He seems satisfied in his belief that tobacco use is easily regulated and controlled because, unlike obesity, it is single-dimensional when viewed through the lens of addiction.[9] Friedman suggests that there is a higher level of complexity in addressing obesity, because food is less

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[5] *See id.* at 1753 ("Regulators must have a degree of humility in deploying paternalistic strategies. It is difficult to discern if any single initiative works or can work—but initiatives require resources. A paternalistic strategy, whether soft or hard, should be deployed with an understanding and balancing of the political costs, the financial costs, and the uncertain impacts.").

[6] Jonathan D. Klein & William Dietz, *Childhood Obesity: The New Tobacco*, 29 HEALTH AFF. 388, 388 (2010).

[7] *Id.*

[8] *Id.*

[9] *See* Friedman, *supra* note 1, at 1720 (arguing that it has been "comparatively simple" for regulators to address smoking).

easily regulated:

> With smoking, regulators could hone in on an unnecessary habit involving one controlling substance. They deployed a laser-like focus on tobacco—through public education, label mandates, and sales restrictions. Locations for public smoking could be restricted one step at a time. A narrow set of products could be taxed. The success enjoyed by those who targeted tobacco use will be much harder to achieve in this field. With obesity, the inputs are required for everyday living. The tools are fewer, the public appetite for hard paternalism in many spheres can be uneasy, and the theaters of "battle," ranging from public schools to the corner food market are various, plenty, and fraught with complexity.[10]

But Friedman ignores how some foods may ultimately be addictive. While tobacco contains nicotine as an addictive ingredient and food generally does not contain any particular addictive substance, certain processing of food has significantly contributed to creating food addiction.[11] For example, a policy paper from the Urban Institute observed:

> While fattening food does not contain a clearly addictive chemical like nicotine, there is significant and increasing evidence that the food industry adjusts food content, triggering hard-to-control cravings that increase consumption of fattening food, in some cases using the same neurological pathways involved with substance abuse and other classically addictive behaviors. Although most of these efforts increase foods' levels of sugar, fat, and salt, a subtle but telling example is the addition of caffeine, which has a clear pattern of dependence, to foods like potato chips, breakfast cereal, and chocolate bars.[12]

Because of these similar addictive characteristics, both tobacco use and obesity "are major risk factors for chronic disease and premature death, . . . generate significant health care costs, . . . involve aggressive marketing campaigns to consumers by industries that reap significant financial rewards, . . . are disproportionately represented among lower socioeconomic groups, . . . carry a social stigma, and . . . are difficult to

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[10] *Id.* (footnotes omitted).

[11] CAROLYN L. ENGELHARD ET AL., URBAN INST., REDUCING OBESITY: POLICY STRATEGIES FROM THE TOBACCO WARS 10 (2009).

[12] *Id.* (citations omitted) (footnotes omitted).

treat clinically."[13]

Moreover, the issues surrounding both tobacco use and obesity involve individual choice and personal responsibility.[14] Efforts to monitor the impact of tobacco on the nation inevitably led to broader public awareness, greater depth of knowledge about the harmful effects of smoking, and the "stigmatization of the smoker, and smoking, as a threat to nonsmokers' health."[15] As evidence of the harms caused by tobacco use grew—alongside evidence of the tobacco industry's intent to nonetheless keep the activity attractive—public health advocates came up with a recipe to combat it through regulation.[16]

The idea that regulation cannot effectively make change because of the complexity of a given public health problem is surely challenged by the example of tobacco. The successes of tobacco regulation were based on a multi-dimensional policy approach.[17] Klein and Dietz describe the numerous policy mechanisms that were employed to combat tobacco, including "restrictions on public smoking, the adoption of school anti-tobacco curricula, the use of tobacco counter-marketing advertising campaigns, increased taxes, the prevention of sales to minors, and the promotion of smoking cessation programs."[18]

Moreover, tobacco has been conceptualized as a "societal bad" due to its negative health consequences, further galvanizing the success of policy initiatives in this area.[19] Policy changes at the state and local levels "generated the political will necessary for stronger and larger actions, such as the ban on airline and public smoking."[20] The contention that the same strategy could not be employed successfully in the obesity arena is questionable, for there is much evidentiary support to the contrary.

One of Friedman's arguments concerning obesity-related policy solutions is that there has been a failure to meaningfully identify any specific areas in which obesity could be targeted.[21] He suggests that if

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[13] *Id.*

[14] *See* Klein & Dietz, *supra* note 6, at 388 (arguing that tobacco control and the obesity epidemic hold many parallels, one of which is that the "influential corporate forces today seek to frame the [obesity] problem as one of choice and responsibility, just as tobacco companies did for many years").

[15] *Id.* at 389.

[16] *See, e.g.*, *id.* (describing the tobacco industry's efforts "to addict adolescents, to hide the health effects of tobacco, and to vigorously resist control," and noting that such companies "became the common enemy").

[17] *Id.* at 388–89.

[18] *Id.* at 389.

[19] *See* ENGELHARD ET AL., *supra* note 11, at 10 (describing the "social stigma" and negative social costs of tobacco use).

[20] Klein & Dietz, *supra* note 6, at 389 (footnotes omitted).

[21] *See* Friedman, *supra* note 1, at 1768 ("Difficulty in untangling the root causes [of obesity] makes prioritization of underlying problems difficult, which in turn is compounded by the challenge of finding palatable and effective solutions to these problems.").

such particulars were identified, then effective obesity-related regulation could be possible. Specific behaviors, however, have already been targeted in connection with the obesity epidemic. For example, the Centers for Disease Control and Prevention ("CDC") has promoted "reductions in sugar-sweetened beverage use, fast-food consumption, and screen time (computers, TV, video games) as well as increased breastfeeding, physical activity, and consumption of fruits and vegetables."[22]

Additionally, the CDC and the Institute of Medicine ("IOM") have crafted recommendations for curbing obesity to help instruct policymakers on the subject.[23] Among their recommendations are "making healthful food and beverages more widely available; providing access to healthier food by locating stores in underserved areas; and decreasing the availability of less healthful food and beverages."[24] To accomplish these goals, there is recognized need to adopt "new child care regulations and policies or ordinances to discourage consumption of sugar-sweetened beverages; increased support for breastfeeding; linkages between local farms and institutions to increase fruit and vegetable consumption; shifts in agricultural policy; and improved community infrastructure to promote biking, walking, and use of public transit."[25]

Changing people's perspectives on obesity is also necessary to advance the policies described above. Klein and Dietz aptly observe that "[t]he disjunction between public concern and personalization of the threat poses a major barrier to acceptance of policy and environmental initiatives necessary to control obesity."[26] Put differently, Klein and Dietz do not contend that obesity cannot be regulated—instead they assert that a social component is necessary for any such regulations to be effective.[27] Thus, the issue must be framed in such a way as to make regulation possible:

> Advocacy to promote breastfeeding, to encourage physical activity, or to promote more fruit and vegetable consumption is often not coordinated, and advocates for these (and other) intervention strategies often do not cooperate in or support each other's efforts. Widespread support for changes in nutrition and physical activity requires alternative framing—that is, engaging interest groups not traditionally focused on childhood obesity—to achieve the critical mass necessary for

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[22] Klein & Dietz, *supra* note 6, at 389.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*

a social movement.[28]

In the meantime, the regulation of obesity cannot simply be avoided because it has not reached complete societal acceptance. There are several legislative avenues that could be taken with respect to obesity, similar to those previously taken in the case of smoking, which could be pivotal in reducing the prevalence of obesity in the United States.

III. DETERMINING A LEGISLATIVE SOLUTION TO COMBATING OBESITY

While the issues surrounding tobacco and obesity are not identical, they present similar needs that suggest similar strategic legislative solutions to combating these problems. In reflecting on obesity, "[a]uthoritative health reports have made clear recommendations about the action we need—not identical to tobacco, but a similar mix of public education, legislation and product control."[29] Yet there is concern that the persistence of obesity flows from soft paternalism. That is, governments "will continue to involve the junk food industry in policy discussions, run soft education programs, and back off from any tough measures. We should not kid ourselves that there is any real intent to tackle the problem. Obesity is here to stay."[30]

Several legislative strategies that could be embraced by the campaign against obesity, which were adopted similarly in combating smoking, include: (1) taxing fattening foods; (2) labels indicating the risks associated with consuming fattening foods; and (3) banning the advertisements of fattening foods.[31]

A. *Taxing Obesity and Smoking*

A number of commenters maintain that tobacco and sugar products are similarly well suited to regulation through taxation.[32] This policy connection has historic origins, as underscored by Adam Smith's observation that "[s]ugar, rum and tobacco are commodities which are nowhere necessities of life, which . . . become objects of almost universal consumption, and which are therefore extremely proper subjects of

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[28] *Id.*

[29] Mike Daube, *Big Junk Is Just as Evil as Big Tobacco*, SYDNEY MORNING HERALD (Oct. 28, 2013), http://www.smh.com.au/comment/big-junk-is-just-as-evil-as-big-tobacco-20131027-2w9kg.html.

[30] *Id.*

[31] ENGELHARD ET AL., *supra* note 11, at 19.

[32] *See, e.g.*, 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) ("Taxes on tobacco products have been highly effective in reducing consumption, and data indicate that higher prices also reduce soda consumption.").

taxation."[33]

There is already considerable support in the United States for taxing food and beverages with high sugar contents, as demonstrated by the majority of states that currently have moderate taxing schemes in place.[34] Internationally, much more significant taxes along these lines are tolerated.[35] Moreover, a study has even shown that states repealing such taxes were thirteen times more likely to witness increased obesity levels than the states that retained the taxes.[36]

The impact of taxation on smoking is well documented, showing that cigarette price increases have contributed to reductions in smoking among youths and adults.[37] In fact, researchers have found that "every 10 percent increase in the real price of cigarettes reduces overall cigarette consumption by approximately three to five percent, reduces the number of young-adult smokers by 3.5 percent, and reduces the number of kids who smoke by six or seven percent."[38]

B. *Warnings on Food Labels*

Another strategy that has been successful with respect to smoking and has the potential for growth with regard to obesity is labeling foods with vital information detailing the potential health problems associated with consumption.[39] Current U.S. food labeling guidelines do not focus on the health risks associated with consuming certain foods.[40] Instead, those guidelines concentrate on educating individuals about nutrition.[41] Other countries, however, have already begun to shift to new systems that educate people about potential health dangers. Great Britain, the European Union, Australia, and New Zealand have considered front-of-package ("FOP") "signpost" labeling that "uses simple, graphic symbols to convey the health risks and benefits of packaged food items."[42] This practice "has already become widespread in Europe and England, on a voluntary

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[33] *Id.* at 1805 (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 1016 (Edwin Cannan ed., Random House 1994) (1776)).

[34] *See* ENGELHARD ET AL., *supra* note 11, at 21 ("Presently, 40 states impose relatively modest taxes on sugared beverages and snack foods.").

[35] The United Kingdom has applied a 17.5% value-added tax ("VAT") to such food items as ice cream, sugared drinks, and candy. *Id.* As of 2009, France placed a 19.6% VAT on "foods like sweets, chocolate, and margarine, while other foods [were] taxed at a [rate of] 5.5[%]." *Id.*

[36] *Id.*

[37] ANN BOONN, CAMPAIGN FOR TOBACCO-FREE KIDS, RAISING CIGARETTE TAXES REDUCES SMOKING, ESPECIALLY AMONG KIDS (AND THE CIGARETTE COMPANIES KNOW IT) 1–4 (2012), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0146.pdf.

[38] *Id.* at 1.

[39] ENGELHARD ET AL., *supra* note 11, at iv, 34.

[40] *Id.* at 34.

[41] *Id.*

[42] *Id.*

basis."[43]

The FOP system has proven more effective than the current U.S. food labeling system when it comes to supporting healthy eating habits.[44] By changing its system, the United States could significantly alter eating habits in favor of healthier eating that could, in turn, reduce obesity. As a 2009 report explains, "Australian researchers found that consumers were five times as likely to correctly identify healthy food when they were exposed to such traffic-light labels rather than black-and-white, non graphic numerical boxes like those used in the United States."[45] Further, there is evidence that implementing FOP labeling has changed eating habits in many different venues.[46]

Another suggestion has been to use graphic labels—a strategy that has certainly been a vital part of the campaign against tobacco use[47]—to warn of the health dangers associated with eating certain foods.[48] In the case of tobacco, "[w]arning labels were first required on cigarette packs by the Federal Cigarette Labeling and Advertising Act of 1965."[49] Unfortunately, the requirements became outdated, the labels were reduced in size and overwhelmed by packaging designs, and their effectiveness drastically weakened.[50] Smokers became "habitualized to the style of labels, to the point that the labels [went] unnoticed altogether."[51]

Five years ago, the United States Congress promulgated legislation requiring the use of graphic warning labels on tobacco products that must "comprise the top 50 percent of the front and rear panels of the package."[52] This law purportedly rests on "the best available science and real world experience regarding warning labels."[53] One study found that "the most effective way to convey health risks to smokers is with graphic, large and comprehensive warning labels."[54] More specifically, others noted that labels with "graphic, fear-arousing depictions of smoking's effect on the body are the most effective because they are associated with increases in

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[43] *Id.*

[44] *Id.* at 35.

[45] *Id.*

[46] *See id*. at 36–38 (describing changes in food-purchase habits at vending machines and in supermarkets).

[47] *Id.* at 8–9, 35.

[48] *Id.* at 8–9, 38–39.

[49] MEG RIORDAN, CAMPAIGN FOR TOBACCO-FREE KIDS, TOBACCO WARNING LABELS: EVIDENCE OF EFFECTIVENESS 1 (2013), *available at* https://www.tobaccofreekids.org/research/factsheets/pdf/0325.pdf; *see also* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, § 2, 79 Stat. 282, 282 (1965).

[50] RIORDAN *supra* note 49, at 1.

[51] *Id.*

[52] Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, § 201, 123 Stat. 1776, 1843 (2009).

[53] RIORDAN, *supra* note 49, at 1.

[54] *Id.* at 3.

motivation to quit smoking, thinking about health risks and engaging in cessation behavior."[55] Similarly, the International Tobacco Control Policy Evaluation Project surveyed smokers in nineteen countries and found that "adult and youth smokers report that large, comprehensive warning labels reduce smoking consumption, increase motivation to quit and increase the likelihood that they will remain abstinent following a quit attempt."[56]

Some researchers suggest the possibility of borrowing from graphic tobacco labels and placing "large labels featuring simple, hard-hitting words and powerful images" on the front of fattening food packages.[57] "For example, one image label might say, 'Fattening food can give you diabetes,' and an accompanying photo would graphically illustrate symptoms of diabetes."[58] If the use of warning labels for tobacco is any indication, obesity-reduction efforts may similarly benefit if labels are changed to provide more easily understood information to consumers and more meaningful warnings of specific health risks associated with the consumption of particular food and beverage products.

C. *An Advertisement Ban on Junk Food*

Recently, advertisers traditionally known for promoting unhealthy foods have shifted gears toward trying to promote healthier choices. For example, McDonald's diversified the options for children's Happy Meals by offering apple slices in place of french fries—the company is now the nation's largest buyer of apples.[59] This shift comes after the food industry faced increasing regulation around the world constricting its freedom to advertise.[60]

The food industry spends astronomical amounts on advertising—including more than $30 billion in 2004 alone.[61] Research has shown the detrimental impact of this commitment:

> An estimated 97.8 percent and 89.4 percent of such advertisements seen by children and adolescents, respectively, are for products classified as having poor nutritional content because of high sugar, high saturated fat, or high salt levels. Much evidence shows that exposure to

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[55] *Id.*

[56] *Id.* at 2.

[57] ENGELHARD ET AL., *supra* note 11, at 39.

[58] *Id.*

[59] Bruce Horovitz, *Apple of Its Eye (Not in a Pie): Burger King's Fresh Apple Fries*, USA TODAY, Sept. 12, 2007, at 3B.

[60] *See* ENGELHARD ET AL., *supra* note 11, at 41 (providing an example where companies are prohibited from advertising food that is classified as "less healthy" in any program aimed at children fifteen years old and younger).

[61] *Id.* at 40.

> food advertisements significantly and directly affects consumption of fattening foods by both children and adults.[62]

If the United States would actively regulate advertisements for food and beverages, the obesity level of children would be significantly impacted. One study found that food advertising causes between fourteen and thirty-three percent of obesity among American children.[63] Another study estimated that banning fast food advertisements would decrease obesity in children aged three to eleven by eighteen percent, and in children aged twelve to eighteen by fourteen percent.[64] Many countries have already taken aggressive action in trying to combat obesity through advertising practices.[65]

Although food and beverage advertising bans could face constitutional challenges, similar bans of broadcast advertising for tobacco have survived constitutional scrutiny.[66] As obesity becomes more prevalent and gains even more attention in the public health world, legislative bans of certain advertising practices could be achieved.[67] Such legislation might face issues surrounding "the factual record that Congress or a state legislature would need to establish for a restriction to pass constitutional muster; whether legislative goals should focus on marketing to children or marketing to adults; and policy options for tailoring any advertising ban narrowly to fit the objectives chosen by lawmakers."[68]

According to the CDC, "[t]here is sufficient evidence to conclude that there is a causal relationship between tobacco company advertising and promotion and the initiation and progression of tobacco use among youth people."[69] Tobacco use has already changed as a result of federal laws that significantly regulate advertising.[70] The success of tobacco advertising regulations and bans should be expanded into the parallel arena of obesity.

IV. CONCLUSION

While Friedman challenges the validity of paternalism in public health today, as well as the ability to use it to tackle obesity, there is considerable evidence to the contrary. Specifically, a strategic plan that would be nearly

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[62] *Id.* at 40–41 (citation omitted) (footnotes omitted).

[63] *Id.* at 41.

[64] *Id.* (citation omitted).

[65] *See id.* ("At least 50 countries regulate television advertising aimed at children.").

[66] *Id.* at 42.

[67] *Id.*

[68] *Id.* at 43 (footnote omitted).

[69] *Tobacco Industry Marketing*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/tobacco_industry/marketing/index.htm (last updated July 31, 2013).

[70] *See* Lyndsey Layton, *New FDA Rules Will Greatly Restrict Tobacco Advertising and Sales*, WASH. POST, Mar. 19, 2010, at A8 (describing FDA restrictions on tobacco advertising and sales).

identical to that which has been successful in combating smoking—combining public education, legislation, and product control—is possible for obesity. The tobacco and obesity dilemmas share similarities that not only allow, but encourage, addressing the problems head-on in a like manner. While legislation per se can never be expected to change people's attitudes, it does provide a mechanism or vehicle by which policymakers provide guidance to people on what constitutes behavior that can result in harm. The enhancement and improvement of people's lives by encouraging healthy living is the goal of such legislation, and is one that deserves careful attention and consideration. It is said that history repeats itself—what is learned from combating tobacco certainly can and should be a prime consideration for framing a legislative solution for combating obesity.