

REGULATING THE MARKETING OF FOODS TO MINORS

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I. INTRODUCTION

The world is facing nutrition challenges that pit individual rights against public health. Should individual rights always be paramount, or should we sometimes sacrifice unfettered commercial freedom in the interest of the public good? This Article examines one pressing public health issue: should we regulate food marketing in the interest of good diet and nutrition for minors?

The issue has become a critical one as poor nutrition and obesity among minors increasingly threaten their health.¹ Adverse outcomes from childhood obesity include type-2 diabetes, metabolic syndrome, Blount's disease, dyslipidemia, hypertension, left ventricular hypertrophy, atherosclerosis, depression, poor quality of life, pseudotumor cerebri, nonalcoholic fatty liver disease, nonalcoholic steatohepatitis, obstructive sleep apnea, renal proteinuria, and exacerbation of asthma.² Particularly troubling are the growing incidence of type-2 diabetes among minors, disproportionately affecting minority groups.³

While regulatory protection of minors does not seem controversial, such intervention reflects a more expansive notion of public health than was originally embraced in the United States. Early conceptions of public health were narrow, addressing communicable diseases, sanitation, and safety.⁴ Over the years, the notion of public health has broadened, encompassing "what we, as a society, do collectively to assure the conditions for people to be healthy."⁵

These narrow and broad conceptions of public health bring with them the question, should public health initiatives be limited to the protection of individuals from publicly generated perils? Or should public health also aim to improve the wellbeing of the population more broadly, even when the risk is subject to individual personal choices, as in the case of diet and nutrition?

By publicly generated perils, I am referring to the health risks one faces from

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1. See Stephen R. Daniels et al., *Overweight in Children and Adolescents: Pathophysiology, Consequences, Prevention, and Treatment*, 111 CIRCULATION 1999, 1999 (2005).

2. *Id.* at 2002.

3. See Dana Dabelea et al., *Prevalence of Type I and Type II Diabetes Among Children and Adolescents From 2001 to 2009*, 311 JAMA 1778, 1779 (2014) ("Type 2 diabetes is increasingly diagnosed in youth and now accounts for 20% to 50% of new-onset diabetes case patients, disproportionately affecting minority race/ethnic groups. Although few longitudinal studies have been conducted, it has been suggested that the increase in type 2 diabetes in youth is a result of an increase in the frequency of obesity in pediatric populations.").

4. Lawrence O. Gostin & James G. Hodge, Jr., *The Public Health Improvement Process in Alaska: Toward a Model Public Health Law*, 17 ALASKA L. REV. 77, 84 (2000).

5. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, THE FUTURE OF PUBLIC HEALTH 19 (1988).

our exposure to others as well as their behaviors. For example, a person catches a communicable disease from an infected person. Similarly, sanitation and safety-related health risks often are created by, and under the control of, persons other than the individuals being protected, and therefore have been readily subject to public health controls. Human waste disposal can generate disease that public health initiatives such as sewage and garbage treatment aim to counter. Smokers generate second-hand smoke, threatening the health of others around them,⁶ so that regulation of smoking fits comfortably in the framework of counteracting publicly generated perils. Conversely, the dietary habits of minors do not create a direct health threat to those around them,⁷ and they are usually considered to be the choice of the individual and the individual's family.⁸

Regulation to protect minors from questionable food marketing practices seeks to protect children who, while subject to parental guidance and control, nonetheless voluntarily consume the food they eat. It goes beyond the original conception of public health—it aims to protect minors and their families from their own consumption choices, rather than from externally created dangers like public sewage, over which they have no control.⁹

Such expansive public health regulation is susceptible to critiques of invading personal freedom and government overreaching.¹⁰ Nutrition and diet are examples which Harvey identifies as part of the “new frontier” of public health interventions that are prone to public resistance.¹¹

Notwithstanding criticism, the notion of public health initiatives has expanded, at least among academics in the field, to include protecting us from our own individual actions, decisions, and choices. The Association of Schools & Programs of Public Health lists a very broad range of areas that are now included

6. See *Health Effects of Secondhand Smoke*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tobacco/secondhand-smoke/health.html> [<https://perma.cc/Q9RG-MUFC>] (last updated Nov. 1, 2022).

7. Children with poor diets are likely to suffer, but they do not generate health threats to their neighbors in the form of something analogous to disease-breeding garbage or second-hand smoke.

8. The conception of dietary decisions as individual choices has limitations. First, I mention families because food choices among children are directly shared by the child and the child's guardians and providers, who purchase and provide meals. Second, many believe that individual dietary choices are affected by a wide array of external factors, anything from chemicals and pesticides, which may affect hormones related to hunger and satiety, to corporate and school practices and decisions that influence what children eat.

9. Laws and regulations already protect minors in extreme cases should their own parents be grossly neglectful in guarding children's basic welfare. Parents can lose custody of their own children when the well-being of those children is endangered. In the absence of dangerously irresponsible parenting, our culture in the U.S. tends to defer to parental prerogative in child-rearing, emphasizing personal, individual freedoms over government intervention.

10. See *infra* notes 129-33 and accompanying text.

11. Hosea H. Harvey, *Nudging the Public Health: The Political Psychology of Public Health Law Intervention*, 65 DEPAUL L. REV. 57, 67 (2015).

in the expanded conception of the term.¹² For better or worse, an examination of the listed categories indicates that, at least in academic theory, the field of public health has expanded to cover all conceivable areas related to the health of the public in general.¹³

To summarize, the earliest areas of public health policy—communicable disease, sanitation, and safety¹⁴—are less controversial drivers of governmental and social interventions, because all three can be framed as serious external threats to individuals that, if not managed, can cause harm, injury, or death. As perils created by others, they are persuasively and easily framed as the kinds of harms against which the laws have always sought to protect innocent victims. We tend to be most receptive to legal and regulatory protections in these kinds of situations, where behavior or activity beyond our individual control threatens us.¹⁵

This Article explores the notion of a more aggressive, controversial class of regulatory and social policy public health initiatives aimed at changing what and how we eat. It recommends areas of government regulation, and other areas to be left to industry self-regulation.

II. NUTRITION AS AN INCREASINGLY TROUBLESOME PUBLIC HEALTH ISSUE

Food can be classified as either “core” or “non-core” based on overall nutritional value.¹⁶ Core foods have essential nutrients; non-core foods are

12. *All Areas of Study*, THIS IS PUB. HEALTH, <https://www.aspph.org/study/all-areas-of-study/> [https://perma.cc/WW5Z-LQLP] (last visited Mar. 19, 2023).

13. *See id.* These listed categories are aging, biomedical lab sciences, chronic disease, clinical research, communication sciences and disorders, community health, dental public health, environmental health, epidemiology, exercise science, food safety, genetics, global health, health administration, health economics/ finance, health education/behavioral sciences, health law, health promotion and communications, health services research, immunology, infectious diseases, informatics, injury/violence, management and health policy, maternal and child health, mental health, minority health and health disparities, multicultural studies, neuroscience, nutrition/public health nutrition, occupational health/industrial hygiene, parasitology, population and reproductive health, population sciences, preparedness response and recovery, public health ethics, public health leadership, public health medicine, public health policy & practice, risk assessment, social determinants of health, substance use/harm reduction, toxicology, tropical medicine, veterinary public health, and women’s health.

14. *See supra* note 4 and accompanying text.

15. Regulations to protect data privacy are a good example of this. Discussion of such regulatory efforts frequently refers to the need to protect individuals from incursions by outsiders. Protection of individuals from privacy incursions by drone operators is just one subcategory. For discussion of this example, see Toban Platt, *The Drone Wars: The Need for Federal Protection of Individual Privacy*, 13 WASH. J. L. TECH. & ARTS 27, 27 (2017).

16. Zoi Toumpakari et al., *Adolescents’ Non-Core Food Intake: A Description of What, Where, and with Whom Adolescents Consume Non-Core Foods*, 19 PUB. HEALTH NUTRITION 1645, 1645 (2016).

considered surplus to nutritional requirements and are high in fat and sugar.¹⁷ While “surplus” may sound benign, it is not—foods that are high in bad fats and sugar and low in nutrients contribute to poor health.¹⁸ Non-core foods have been found to comprise roughly half of the total fat and sugar in the diets of minors aged two through eighteen, and the proportion increases over the course of that age range.¹⁹

According to the U.S. Healthful Food Council, “American adults on average purchase meals or snacks from fast[]food restaurants almost six times a week, and close to a third of children eat fast food every single day.”²⁰ High intake of the non-nutritious foods often sold by fast food restaurants has been linked to increasing childhood obesity and declining childhood health and fitness.²¹ The incidence of childhood and adolescent overweight has been rising,²² and obesity has been linked to debilitating diseases like heart disease, type-2 diabetes, and cancer,²³ as well as hypertension, arthritis, Alzheimer’s disease, dementia, and infant mortality.²⁴ Obesity also is associated with “significant increases in morbidity and mortality from COVID-19.”²⁵ Given that risks of death from COVID-19 rise very substantially with age,²⁶ these issues strongly affect adults

17. *Id.*

18. See Adam Drewnowski, Commentary, *Concept of a Nutritious Food: Toward a Nutrient Density Score*, 82 AM. J. CLINICAL NUTRITION 721, 721 (2005) (“Rising rates of obesity and type 2 diabetes in the United States continue to be linked to a growing consumption of refined grains (1), added sugars (2), and added fats (3).”).

19. See Toumpakari et al., *supra* note 16.

20. Joseph Higgins, Comment, *Everything is Bigger in Texas: The Growing Problem of Childhood Obesity in Texas and How to Combat It*, 17 TEX. TECH. ADMIN. L.J. 303, 307 (2016) (quoting Press Release, United Nations Int’l Child. Emergency Fund, Poor Diets Damaging Children’s Health Worldwide, Warns UNICEF (Oct. 8, 2019), <https://www.unicef.org/eca/press-releases/poor-diets-damaging-childrens-health-worldwide-warns-unicef>) [<https://perma.cc/N5MB-32UE>].

21. See Press Release, United Nations Int’l Children’s Emergency Fund, Poor Diets Damaging Children’s Health Worldwide, Warns UNICEF (Oct. 8, 2019), <https://www.unicef.org/eca/press-releases/poor-diets-damaging-childrens-health-worldwide-warns-unicef> [<https://perma.cc/N5MB-32UE>] (noting one-third of children under five are either undernourished or overweight, and attributing their declining health and growing obesity in part to growing access to fast food and sweetened drinks).

22. Richard P. Troiano et al., *Overweight Prevalence and Trends for Children and Adolescents*, 149 ARCH. CH. PEDIATRIC ADOLESCENCE MED. 1085 (1995).

23. *Weight Problems Take a Hefty Toll on Body and Mind*, HARV. T.H. CHAN. SCH. PUB. HEALTH, <https://www.hsph.harvard.edu/obesity-prevention-source/obesity-consequences/health-effects/> [<https://perma.cc/C6MD-D2XV>] (last visited Feb. 15, 2023).

24. Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 981 (2013) (citation omitted).

25. Barry M. Popkin et al., *Individuals with Obesity and COVID-19: A Global Perspective on the Epidemiology and Biological Relationships*, 21 OBESITY REV. 1, 1 (2020).

26. See *Risk for COVID-19 Infection, Hospitalization, and Death by Age Group*, CTR. FOR

as well as children.

That said, childhood is arguably the most critical stage associated with nutrition and public health: “[o]besity in childhood causes a wide range of serious complications and increases the risk of premature illness and death later in life, raising public-health concerns.”²⁷ Moreover, children are still developing and growing, so the stakes of good nutrition to their bodies and minds are especially high.²⁸ Children are a vulnerable population: their brains and their minds have not reached full maturity and cognitive capability,²⁹ as cortical ability becomes fine-tuned over time.³⁰ And of course, children lack full autonomy and depend on the judgment and the decisions of their parents.³¹

While always important, nutrition issues for minors have become even more critical in recent years. Children in 2023 are susceptible to a diet-related chronic disease that rarely affected them just a few decades ago: type-2 diabetes.³² Rates of childhood type-2 diabetes are rising along with rates of childhood obesity.³³

DISEASE CONTROL, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html> [<https://perma.cc/U3LP-9H5G>] (last updated June 2, 2022) (noting that compared to the 18-29 year-old cohort, COVID death rates among 50-64 year olds are 25 times higher, COVID death rates among 65-74 year olds are 65 times higher, COVID death rates among 75-84 year olds are 140 times higher, and COVID death rates among 85-and-above-year olds are 330 times higher).

27. Cara B. Ebbeling et al., *Childhood Obesity: Public Health Crisis, Common Sense Cure* 360 LANCET 473, 473 (2002).

28. See Francisco J. Rosales et al., *Understanding the Role of Nutrition in the Brain of Toddlers and Preschool Children: Identifying and Addressing Methodological Barriers*, 12 NUTRITIONAL NEUROSCIENCE 190 (2009) (discussing the role of nutrition in brain development of children).

29. See *id.* (“The preschool years (i.e., 1-5 years of age) is a time of rapid and dramatic postnatal brain development (i.e., neural plasticity), and of fundamental acquisition of cognitive development (i.e., working memory, attention and inhibitory control).”).

30. B.J. Casey et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development*, 9 TRENDS IN COGNITIVE SCI. 104, 104 (2005).

31. See J.C. Westman, *Children’s Rights, Parents’ Prerogatives, and Society’s Obligations*, 29 CHILD PSYCHIATRY HUM. DEV. 315, 315 (1999) (“[P]arents do not need specifically defined rights. They have prerogatives that flow from the right of their children to nurturing and protective parenting. The idea of individual rights springs from the vulnerability of human beings in the face of stronger forces. The most vulnerable individuals are children.”).

32. Stephen R. Daniels et al., *Overweight in Children and Adolescents: Pathophysiology, Consequences, Prevention, and Treatment*, 111 CIRCULATION 1999, 2002 (2005) (“Concomitant with the rise in the prevalence of overweight and the metabolic syndrome has been a dramatic increase in type 2 diabetes mellitus in youth. Type 2 diabetes mellitus had been primarily a disease of adulthood; however, type 2 diabetes now occurs in adolescents typically with a BMI 30 kg/m², a level that would be considered obese even by adult standards.”).

33. See Shannon Johnson, *The Symptoms of Type 2 Diabetes in Children*, MED. NEWS TODAY, <https://www.medicalnewstoday.com/articles/322919> [<https://perma.cc/P4PU-E4P9>] (last

Moreover, because childhood obesity has been linked to a higher probability of obesity in adulthood,³⁴ the health costs can be long-lasting and cumulative.³⁵

III. CONCERNS REGARDING MARKETING OF JUNK FOODS TO MINORS

Food industry practices contribute to children's high intake of junk foods, as well as the declining health that results from poor eating.³⁶ The industry recognizes children as a "major market force."³⁷ According to a 2012 report by the Federal Trade Commission, food companies spent \$1.79 billion marketing to children and adolescents in 2009.³⁸ Unfortunately, foods targeted to children tend to be high in calories, sugar, salt, and fat, and low in nutritional value.³⁹

For example, cereals targeted to children are less nutritious and have higher sugar content than those targeted to adults.⁴⁰ Studies of promotions targeted to children identify "moderate to strong evidence that these promotions influence children's food preferences, purchase requests, and actual consumption patterns, to the detriment of children's diet-related health."⁴¹

Critics contend that children and adolescents deserve protection from food manufacturers that market less healthful products directly to kids.⁴² By the mid-

updated Nov. 11, 2020).

34. See Frank M. Biro & Michelle Wien, *Childhood Obesity and Adult Morbidities*, 91 AM. J. CLINICAL NUTRITION 1499, 1503 (2010) ("The consequences of childhood and adolescent obesity include metabolic syndrome and type 2 diabetes in youth and in adulthood and the development of obesity in adulthood.").

35. *Id.*

36. See, e.g., Kaye Mehta et al., *Marketing Foods to Children Through Product Packaging: Prolific, Unhealthy, and Misleading*, 15 PUB. HEALTH NUTRITION 1763, 1763 (2012) ("There is little dispute among public health professionals that the marketing of unhealthy foods and beverages to children plays a role in the rising prevalence of childhood obesity across the globe.").

37. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the US*, 18 INT. J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 205, 205 (2004).

38. Press Release, Fed. Trade Comm'n, FTC Releases Follow-Up Study Detailing Promotional Activities, Expenditures, and Nutritional Profiles of Food Marketed to Children and Adolescents (Dec. 21, 2012), <https://www.ftc.gov/news-events/press-releases/2012/12/ftc-releases-follow-study-detailing-promotional-activities> [<https://perma.cc/4R6L-M6D2>].

39. Jennifer L. Pomeranz, *Extending the Fantasy in the Supermarket: Where Unhealthy Food Promotions Meet Children and How Government Can Intervene*, 9 IND. HEALTH L. REV. 117, 123 (2012).

40. Hayeon Song et al., *Marketing Cereal to Children: Content Analysis of Messages on Children's and Adult's Cereal Packages*, 38 INT'L J. CONSUMER STUD. 571, 571 (2014).

41. Belinda Reeve & Roger Magnusson, *Regulation of Food Advertising to Children in Six Jurisdictions: A Framework for Analyzing and Improving the Performance of Regulatory Instruments*, 35 ARIZ. J. INT'L & COMP. L. 71, 74 (2018) (citation omitted).

42. See, e.g., Press Release, World Health Org. W. Pac., Regional Action to Protect Children from Harmful Impact of Food Marketing and Promote Healthy Ageing (Oct. 9, 2019), <https://www.who.int/westernpacific/news/detail/09-10-2019-regional-action-to-protect-children->

1970s, both the Federal Trade Commission and activist groups such as Action for Children's Television became vocal in their concerns about advertising aimed at children.⁴³ More recently, the World Health Organization recommended the use of "nutrient profiling" to identify foods that companies should not be allowed to market to children.⁴⁴ Opponents of such regulation take a freedom-based "personal choice" stance, arguing that we each are responsible for our own dietary decisions.⁴⁵

A 2017 article enumerates issues regarding the marketing of foods to minors: "whether young people represent a vulnerable audience in need of protection; how marketers are reaching children in online and social networking environments; what parents, practitioners, and policy makers can do to help children contend with these messages; and what the marketing industry can teach various stakeholders about encouraging protective behaviors in young people."⁴⁶ Junk food advertising directed at children;⁴⁷ use of packaging graphics, toys, and prizes aimed at children;⁴⁸ and product placement at children's eye-levels in

from-harmful-impact-of-food-marketing [https://perma.cc/E5ED-CVAU].

43. Deborah R. John, *Consumer Socialization of Children: A Retrospective Look at Twenty-Five Years of Research*, 26 J. CONSUMER RSCH. 183, 183 (1999).

44. WORLD HEALTH ORG., NUTRIENT PROFILE MODEL FOR THE MARKETING OF FOOD AND NON-ALCOHOLIC BEVERAGES TO CHILDREN IN THE WHO EASTERN MEDITERRANEAN REGION 5 (2017), available at https://apps.who.int/iris/bitstream/handle/10665/255260/EMROPUB_2017_en_19632.pdf;jsessionid=596D4C45EA6158EC8EF75E338E071BAC?sequence=1 [https://perma.cc/9D4Q-634R]. Nutrient profiling is defined as "the science of classifying or ranking foods according to their nutritional composition for reasons related to preventing disease and promoting health." *Id.* (quoting WORLD HEALTH ORG., GUIDING PRINCIPLES AND FRAMEWORK MANUAL FOR THE DEVELOPMENT OR ADAPTATION OF NUTRIENT PROFILE MODELS page (2019)). Other organizations around the world have created their own food nutrition classification systems, and one study found them consistent with the classifications made by seven hundred nutrition professionals. See Peter Scarborough et al., *Testing Nutrient Profile Models Using Data from a Survey of Nutrition Professionals*, 10 PUB. HEALTH NUTRITION 337 (2007).

45. See Andrea Freeman, Comment, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2223 (2007) ("Too often, advocates of "personal choice" blame low-income people of color for their own weight issues and health crises, linking these problems to individual moral and cultural failures instead of placing the problems in the broader, historical context of long-entrenched policies and practices.").

46. Matthew H. Lapiere et al., *The Effect of Advertising on Children and Adolescents*, 140 PEDIATRICS 152, 153 (2017).

47. See *The Impact of Food Advertising on Childhood Obesity*, AM. PSYCH. ASS'N (Nov. 17, 2010), <https://www.apa.org/topics/kids-media/food> [https://perma.cc/M753-JAK6] ("Research has found strong associations between increases in advertising for non-nutritious foods and rates of childhood obesity. Most children under age 6 cannot distinguish between programming and advertising and children under age 8 do not understand the persuasive intent of advertising. Advertising directed at children this young is by its very nature exploitative.").

48. See, e.g., Jennifer R. Otten, *Food Marketing: Using Toys to Market Children's Meals*,

supermarkets⁴⁹ all have come under scrutiny and criticism.⁵⁰ The following Subsections examine these practices.

A. Junk Food Advertising Directed at Children

Researchers and children's advocates have documented harms from advertising nutritionally poor foods to children.⁵¹ A 2019 article from the American Journal of Preventive Medicine studied whether television advertisements directed at pre-school children are associated with consumption levels of the advertised brands of cereals.⁵² The authors found exposure to the advertisements increased intake of the advertised brands, and that "child-directed advertising influences begin earlier and last longer than previously demonstrated, highlighting limitations of current industry guidelines regarding the marketing of high-sugar foods to children under age 6 years."⁵³

Not surprisingly then, advertising of junk food to children is often cited as a contributor to childhood obesity.⁵⁴ And logically, why would companies invest in advertising nutritionally poor cereals directly to children unless they expect the investment to increase consumption and sales?

Minors see thousands of advertisements every year for unhealthful foods and beverages,⁵⁵ yet young children have not yet developed the ability to view these ads critically.⁵⁶ This vulnerability is exacerbated by a particular childhood skill, "pester power," defined as children's "ability to nag their parents into purchasing items they may not otherwise buy."⁵⁷

Is pester power a real thing? Parents have thoughts on this question based on

HEALTH EATING RSCH. (Aug. 2014), http://healthyeatingresearch.org/wp-content/uploads/2014/07/her_marketing_toys_AUGUST_14.pdf [<https://perma.cc/5VF6-J33X>] (observing that marketing of children's meals using toys has been targeted as a public policy initiative to address childhood nutrition).

49. See *infra* note 111.

50. See *infra* §§ II (A-C).

51. See Rita-Marie C. Reid, *Embedded Advertising to Children: A Tactic that Requires a New Regulatory Approach*, 51 AM. BUS. L.J. 721, 722 (2014) ("For decades, researchers and children's advocates have decried the ill effects of advertising to children.").

52. Jennifer A. Emond et al., *Exposure to Child-Directed TV Advertising and Preschoolers' Intake of Advertised Cereals*, 56 AM. J. PREVENTIVE MED. 35 (2019).

53. *Id.*

54. See, e.g., David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 360 (2007).

55. Jennifer L. Harris, *Demonstrating the Harmful Effects of Food Advertising on Children and Adolescents*, in MEDIA & THE WELL-BEING OF CHILD. & ADOLESCENTS 52, 53 (Amy B. Jordan & Daniel Romer eds., 2014).

56. *Id.*

57. *How Marketers Target Kids*, MEDIA SMARTS, <https://mediasmarts.ca/digital-media-literacy/media-issues/marketing-consumerism/how-marketers-target-kids> [<https://perma.cc/MR6W-YHX6>] (last visited Mar. 19, 2023).

their firsthand experiences. The fact that companies shifted their marketing of children's brands in supermarkets from children to adults during COVID-19, when family shopping shifted to just one adult at the store,⁵⁸ suggests that manufacturers were marketing directly to the children before that. Because children do not do the family grocery shopping themselves, the only logical influence they have on grocery store purchase decisions is through pleas to their parents.

Despite parents' ultimate authority, children do affect parents' food purchases. One Canadian report concludes that "young people have a very strong influence on the whole family's food choices, parents often choosing to abdicate with regard to healthy eating issues to surrender to the children's incessant demands."⁵⁹ An American Journal of Law & Medicine article from 2015 notes that "[s]tudies have long shown that children are not only more susceptible to marketing than are adolescents and adults, but also that children have the ability to influence family purchases by nagging and pestering their parents . . ."⁶⁰ The resulting increased consumption of non-nutritious foods can harm children's health, both during childhood and in the future.⁶¹

Both the World Health Organization and the Food and Agricultural Organization of the United Nations recognize the heavy marketing of unhealthy foods and drinks as likely factors contributing to weight gain and obesity.⁶² The ramifications are serious: the American Psychological Association frames childhood obesity as "a serious public health problem that increases morbidity, mortality, and has substantial long term economic and social costs."⁶³

58. See Elizabeth Crawford, *Without Kids in Stores to Drive Impulse Purchases, Good2Grow Pivots Marketing to Focus on Parents*, FOOD NAVIGATOR USA (May 20, 2020), <https://www.foodnavigator-usa.com/Article/2020/05/20/Without-kids-in-stores-to-drive-impulse-purchases-good2grow-pivots-marketing-to-focus-on-parents#> [<https://perma.cc/253H-C64G>] ("Children's brands that previously relied on 'the nag factor,' impulse purchases or being the reward parents give children to behave in stores are pivoting their marketing to target adults now that most families send only one adult to the grocery store to limit exposure to the coronavirus.").

59. Marie-Ève Nadeau, *Food Advertising Directed at Children*, QUE. COAL. ON WEIGHT-RELATED PROBS. (Jan. 2011), http://childhoodobesityfoundation.ca/wp-content/uploads/2015/02/AMorel_food_advertising_directed_at_children.pdf [<https://perma.cc/9LWP-BYNL>] (citing JEAN-FRANÇOIS HENRY, *MARKETING DE LA MALBOUFFE POUR ENFANTS, RAPPORT FINAL DU PROJET DE RECHERCHE PRÉSENTÉ AU BUREAU DE LA CONSOMMATION D'INDUSTRIE CANADA 5* (2006)).

60. Christine Fry et al., *What's in Store: A Vision for Healthier Retail Environments Through Better Collaboration*, 41 AM. J. L. & MED. 331, 338 (2015).

61. Not only is junk food advertising associated with childhood obesity; childhood obesity rates are associated with adult obesity rates, as well as diabetes, cancer, and cardiovascular disease. See *The Impact of Food Advertising on Childhood Obesity*, AM. PSYCH. ASS'N (Nov. 17, 2010), <https://www.apa.org/topics/kids-media/food> [<https://perma.cc/YK68-SW8X>].

62. Benedetta F. Duramy, *Childhood Obesity and Positive Obligations: A Child-Rights Based Approach*, 42 SEATTLE U. L. REV. 87, 97 (2018).

63. *Id.*

B. Food Packaging Issues

Food packaging influences children's purchase requests,⁶⁴ and packaged toys and prizes dominate the marketing of food to children.⁶⁵ I explore packaging generically, the use of toys and prizes specifically⁶⁶ and product placement in supermarket aisles in this Subsection.

1. Food Packaging Practices that Harm Children

Two common types of packaging practices that harm children are addressed in subsections (a) and (b) below. These are the direct emotional appeal to children in design of the package graphics and the deceptive, misleading, or inaccurate nutrition claims that can mislead parents to over-estimate the nutritional value of a product. The latter has a negative impact on not only children, but also adults.

a. Direct emotional appeal to children in design of product graphics

Manufacturers attract children to their food products using various packaging techniques: bright colors, cartoon characters, childish lettering, associations with play and with fun, and associations with celebrities and sportspersons.⁶⁷ These design strategies skew children's brand associations and taste preferences in favor of the products perceived as "fun."⁶⁸ The resulting brand associations lead children to prefer such advertised foods, regardless of whether they are healthful.⁶⁹ Lavriša and Pravst summarize numerous research findings on this:

It is well established that different child-oriented marketing techniques,

64. Pomeranz, *supra* note 39, at 132 (citation omitted).

65. See Jennifer R. Otten, *Food Marketing: Using Toys to Market Children's Meals*, HEALTHY EATING RSCH. (Aug. 2014), http://healthyeatingresearch.org/wp-content/uploads/2014/07/her_marketing_toys_AUGUST_14.pdf [<https://perma.cc/2PQM-X54Y>] ("For restaurants, including toys with children's meals is the leading form of food marketing directed at children by expenditure.").

66. Toys and prizes are combined into one category, because they have not been clearly distinguished and reflect the same phenomenon. Sometimes the inexpensive inserts for children are identified by critics as toys and sometimes as prizes. As the toys by their nature are insubstantial and low-cost gratuities, they can equally accurately be categorized as prizes, such as were classically and historically included in boxes of Cracker Jack, or as prizes. See Karen Knapstein, *Cracker Jack: A Prize Collection That's a Treat for the Ages*, ANTIQUES TRADER (Oct. 4, 2016), <https://www.antiquetrader.com/collectibles/cracker-jack-prize-collecting-treat-for-ages> [<https://perma.cc/E6Y3-9GTC>] (documenting that Cracker Jack identified its inserts as prizes from 1912-1925, as novelties from 1925-1932, and as toys from 1932 forward).

67. Živa Lavriša & Igor Pravst, *Marketing of Foods to Children Through Food Packaging is Almost Exclusively Linked to Unhealthy Foods*, 11 NUTRIENTS 1128, 1129 (2019).

68. *Id.*

69. *Id.* at 1128.

such as the use of cartoon characters and similar elements on food packaging, significantly influence children's food choices and preferences. By using such child-oriented marketing techniques, children are encouraged to like and want products which they see as "fun" and "good tasting[.]" When foods are accompanied with children-familiar characters, children are convinced it tastes and looks better and would more likely ask their parents to buy it for them.⁷⁰

Of course, one should expect companies to advertise their products, and it is not surprising that they focus their advertising using images that directly connect with customers, whatever their age. Society accepts advertising as a commercial practice; it becomes questionable when aimed at a population, like minors, who are vulnerable and lack the fully mature cognitive capabilities to process the advertising responsibly.⁷¹

The problem is exacerbated when companies add deception to this equation. Advertisements targeting children with familiar characters are often deceptive regarding health claims. A 2013 study found that "[n]early three quarters (73%) of food ads targeting children use a familiar character. Most of these ads (72%) promote foods of low nutritional quality, yet 53% employ a health-related message."⁷² This additional problem of deceptive health claims is addressed next.

b. Deceptive or inaccurate nutrition claims that can mislead parents into over-estimating the nutritional value of a product

Growing interest in nutrition and dietary health has created concern over food labeling.⁷³ A Public Health and Nutrition article notes that "[a]dult shoppers are increasingly interested in referring to nutrition information on labels to guide their purchase decisions, and misleading information signals intent on the part of companies to deceive and confuse consumers."⁷⁴ Unfortunately, the authors also observe that misleading nutritional claims are commonplace: 55.5 percent of 119 unhealthful foods that they examined were marketed using claims portraying them as healthy.⁷⁵

Through the Food, Drug, and Cosmetic Act,⁷⁶ the Food and Drug Administration is authorized to protect the public from false claims about the

70. *Id.* at 1133 (citations omitted).

71. *See supra* note 57 and accompanying text.

72. Jessica Castonguay et al., *Healthy Characters? An Investigation of Marketing Practices in Children's Food Advertising*, 45 J. NUTRITION & BEHAV. 571, 571 (2013).

73. Jack Gainey, Note, *An Examination of Trans Fat Labeling: Splitting the Third & Ninth Circuit*, 23 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 461, 463 (2017) (citation omitted).

74. Mehta et al., *supra* note 36, at 1768.

75. *Id.*

76. 21 U.S.C. §§ 301-399(g) (codified as amended by Pub. L. No. 117-103 (2022)).

composition and nutrition of products.⁷⁷ False and misleading food labeling are prohibited in the highly detailed provisions of Section 343 of the statute.⁷⁸ In a 2007 “Dear Manufacturer” letter, the FDA reminded industry that their oversight governs a wide variety of labeling claims, relating to health, product structure, product function, nutrients, and dietary guidance.⁷⁹

Package nutritional claims are made in two separate places: in the standardized nutrition charts and in the bold generic claims often made as part of a package’s graphics. Accuracy of nutrition claims made directly in the standardized nutrition charts is, of course, important,⁸⁰ as false or deceptive information can mislead parents to purchase products they might otherwise avoid for their children.⁸¹ While consumers vary in how often they consult food nutrition labels, most do report using them frequently when buying food products.⁸²

Arguably even more influential, though, are the nutrition claims that are hard for any consumer to miss because they are made outside the nutrition chart, typically in big, bold, eye-catching letters and graphics. FDA oversight over food labeling is broad and applies not only to the nutrition chart, but also to any general claims made anywhere on the package.⁸³ Consumers are more likely to see the bold packaging claims on a product’s marketing graphics than the small print label, and parents frequently misinterpret the meaning of such claims.⁸⁴

77. *Milestones in U.S. Food and Drug Law History*, FDA, <https://www.fda.gov/about-fda/fda-history/milestones-us-food-and-drug-law> [<https://perma.cc/2MDL-DXSR>] (last updated Jan. 30, 2023) (hereinafter “Milestones”).

78. *See* 21 U.S.C. § 343.

79. FDA, FDA-1998-N-0050, GUIDANCE FOR INDUSTRY AND FDA: DEAR MANUFACTURER LETTER REGARDING FOOD LABELING (2007).

80. For detailed discussion of nutritional information in the labeling itself, see generally Danielle M. Haikal, *An Unsealed Package: The Ninth Circuit Creates a Circuit Split When Interpreting FDA Regulations on Food Label Nutrient Claims in Reid v. Johnson & Johnson*, 57 B.C. L. REV. E-SUPPLEMENT 124 (2016).

81. Of course, the value of nutrition information on labels depends on whether consumers use the information, and such consumer use can be variable. *See* Judith A. Garretson & Scot Burton, *Effects of Nutrition Facts Panel Values Nutrition Claims, and Health Claims on Consumer Attitudes, Perceptions of Disease-Related Risks, and Trust*, 19 J. PUB. POL’Y & MARKETING 213 (1990) (finding that consumer evaluations and perceptions of disease risk are affected by information regarding fat, but not by information regarding fiber).

82. Ramu Govindasamy & John Italia, *The Influence of Consumer Demographic Characteristics on Nutrition Label Usage*, 5 J. FOOD PROD. MARKETING 55 (2000).

83. Chelsea M. Childs, Note, *Federal Regulation of the “Smart Choices Program”*: *Subjecting Front-of-Package Nutrition Labeling Schemes to Concurrent Regulation by the FDA and the FTC*, 90 B.U. L. REV. 2403, 2406 (2010) (“In exercising its broad grant of jurisdiction over food labeling, the FDA considers the claims made or suggested on the package, as well as any material omissions, to determine whether a product’s label is misleading.”) (citation omitted).

84. Jennifer L. Harris et al., *Nutrition-related Claims on Children’s Cereals: What do They Mean to Parents, and Do They Influence Willingness to Buy?*, 14 PUB. HEALTH NUTRITION 2207,

Despite broad FDA oversight⁸⁵ and ubiquitous state consumer protection laws, liability for misleading food claims can be spotty. Some courts allow questionable food product claims under an assumption that “where a product’s marketing leaves some ambiguity as to its ingredients, reasonable consumers would read the label.”⁸⁶ This approach is troubling.

What the courts label as ambiguity might not be what you or I would consider to be ambiguous. One example comes from the Northern District of Illinois, where the court determined that the claim “100% Grated Parmesan” was ambiguous, and therefore the consumer should refer to the nutrition label to see if the product in fact contained other substances.⁸⁷ Despite its acknowledgment that the product’s ingredient list is smaller and less conspicuous than the nutrition label, and that the product contained up to 8.8% of filler,⁸⁸ the court found the labeling to be non-deceptive under the applicable consumer protection laws.⁸⁹

This approach is regrettable. A product that the manufacturer calls “100% Grated Parmesan” might be ambiguous to some, but it also will appear clear and unambiguous to other buyers. They will believe the product will contain all grated parmesan cheese, and not nearly one-tenth filler. The consumer should not be expected to verify the company’s claim by going to the nutrition label to be sure it does not mean something other than what many reasonable consumers will view as the clear, obvious interpretation.

If a product nutrition claim is ambiguous, that ambiguity should be deemed unacceptable under the laws that purport to protect us. Companies should be clear in the factual claims they make about the ingredients in their products. We should not condone and accommodate unclear marketing claims by placing the onus on the consumer to (1) recognize an ambiguity they may not even see, and then (2) resolve that ambiguity.

It is not asking too much to require companies to make ingredient and nutrition claims that are clear, unambiguous, and accurate. These companies of course employ highly sophisticated, expensive research to market their food products effectively to consumers.⁹⁰ Consumers are more casual and less

2207 (2010) (reporting their study findings that “[t]he majority of parents misinterpreted the meaning of claims commonly used on children’s cereals. They inferred that cereals with claims were more nutritious overall and might provide specific health-related benefits for their children; and these beliefs predicted greater willingness to buy the cereals.”).

85. See *supra* notes 76-79 and accompanying text.

86. Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. CIN. L. REV. 1, 17 (2018).

87. *In re 100% Grated Parmesan Cheese Mktg. & Sales Practices Litig.*, 275 F. Supp. 3d 910, 923 (N.D. Ill. 2017) (“[T]he description ‘100% Grated Parmesan Cheese’ is ambiguous—as are the other, similar descriptions of Defendants’ products—so Plaintiffs’ claims are doomed by the readily accessible ingredient panels on the products that disclose the presence of non-cheese ingredients.”).

88. *Id.* at 914.

89. *Id.* at 919-25.

90. See Luke LaBorde & Winifred W. McGee, *Food For Profit: Marketing Your Food*

sophisticated in exercising our part of the transaction with these companies. Many people do not routinely consult nutrition labels,⁹¹ and they should not be expected to fact-check every generic front-of-package claim that manufacturers make. Companies should be accountable for the accuracy of all their nutrition claims, including the big, bold, eye-catching package language that most consumers cannot miss seeing.

2. Marketing Food Directly to Children with Included Toys

By the 2020s, anyone reading this article grew up with a variety of foods sold with a toy or prize included. Ipatenco summarizes the strategy, as well as the problems associated with including toys with food⁹²:

One of the most powerful marketing tools that fast food restaurants use is the promise of a toy with the purchase of any kids' meal. The food inside the meal is far less important to most children than the toy that comes with it, the Colorado State University Extension reports. When fast food restaurants offer versions of the most popular toys on the market, children want to eat the food so they can get the toy. The problem isn't the toy, but the lack of nutritious food that children eat to obtain the toy.⁹³ Most kids' meals are high in fat, calories, and salt, but low in essential nutrients such as vitamin C, potassium, and iron.

Fast food restaurants spend more money on toy promotions than any other category of child-oriented marketing.⁹⁴ All of the major fast-food restaurants have

Product, PENNSTATE EXTENSION (Apr. 26, 2019), <https://extension.psu.edu/food-for-profit-marketing-your-food-product> [<https://perma.cc/CD35-GFBC>] (discussing this process, and observing, “[m]arketing is more than advertising. It is everything you do to promote your business and your food products from the moment you conceive of a product to the point at which customers buy it.”).

91. Most studies on nutrition label access have been done outside the United States. *See, e.g.*, Klaus G. Grunert et al., *Use and Understanding of Nutrition Information on Food Labels in Six European Countries*, 18 J. PUB. HEALTH 261, 261 (2010) (finding that “[a]cross six product categories, 16.8% of shoppers were found to have looked for nutrition information on the label, with the nutrition grid (table or list), GDA labels and the ingredients list as the main sources consulted and calories, fat and sugar the information most often looked for.”).

92. Sara Ipatenco, *What Attracts Kids to Fast Food?*, SFGATE (Nov. 27, 2018), <https://healthyeating.sfgate.com/attracts-kids-fast-food-1589.html> [<https://perma.cc/Z22E-26QR>]. The terms “prizes” and “toys” are indistinguishable, with toys being slightly more expensive and sophisticated than the very cheap prizes that came in certain candy and cereal boxes back in the 1960s. From the standpoint of this discussion, they can be treated as the same, as they both serve the same marketing functions and they both play the same role of engaging children.

93. *Id.*

94. Alexis M. Etow, Comment, *No Toy for You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?*, 61 AM. U. L. REV. 1503, 1511 (2012).

“Happy Meal Ban.”¹⁰⁴ The Ordinance isn’t a blanket ban on inclusion of toy prizes with food; rather, it prohibits including free incentive items with children’s meals that do not meet threshold nutritional guidelines.¹⁰⁵ Specifically, take-out meals can only include incentive items if they are sufficiently low in calories, fat, and sodium, and include threshold servings of fruit and vegetables.¹⁰⁶

Two restaurant chains reviewed in one study both adopted the same creative strategy to comply with the letter rather than the spirit of the ordinance: instead of altering the meals to meet the threshold nutritional requirements for including a free toy, they charge ten additional cents to customers who decide to purchase the toy along with the meal.¹⁰⁷ Of the meal purchases surveyed in the study, 88 percent of consumers opted to buy the ten-cent toy.¹⁰⁸

The authors concluded that banning only “free” toys can inadvertently reduce the chances that restaurants will improve the nutritional content of children’s meals to comply with the law.¹⁰⁹ Rather than either eliminating toy prizes or improving meal quality, these restaurants in San Francisco simply developed a creative loophole that subverts the purpose and the effectiveness of the regulation.

C. Product Placement at Children’s Eye-Levels in Supermarkets

Supermarket design is not haphazard or random. Rather, “[g]rocery shopping, start to finish, is a cunningly orchestrated process. Every feature of the store—from floor plan and shelf layout to lighting, music, and ladies in aprons offering free sausages on sticks—is designed to lure us in, keep us there, and seduce us into spending money.”¹¹⁰

Food manufacturers pay supermarkets “slotting fees” to have their products placed at advantageous levels on grocery shelves.¹¹¹ For cereals targeted toward

%20San%20Francisco,majority%20of%208-3%2C%20effectively%20bans%20the%20Happy%20Meal [https://perma.cc/6DQY-T352].

103. SAN FRANCISCO HEALTH CODE, ART. 8 § 471.2 (DEC. 1, 2011).

104. See, e.g., *McDonald’s finds a way around San Francisco’s “Happy Ban,”* NBC News (Nov. 30, 2011), <https://www.nbcnews.com/business/markets/mcdonalds-finds-way-around-san-franciscos-happy-meal-ban-flna1c7100983> [https://perma.cc/9RMC-PGPK].

105. Matthew J. Parlow, *Health Zoning*, 44 FORDHAM URBAN L.J. 33, 43 (2017).

106. See *supra* note 104.

107. Jennifer J. Otten et al., *Impact of San Francisco’s Toy Ordinance on Restaurants and Children’s Food Purchases 2011-2012*, 11 PREVENTING CHRONIC DISEASE 1,1 (2014).

108. *Id.*

109. *Id.*

110. Rebecca Rupp, *Surviving the Sneaky Psychology of Supermarkets*, NAT’L GEOGRAPHIC (June 4, 2015), <https://www.nationalgeographic.com/culture/food/the-plate/2015/06/15/surviving-the-sneaky-psychology-of-supermarkets/> [https://perma.cc/2ETK-R749].

111. Sophia Mitrokostas, *Why cereal boxes are at eye level with kids*, INSIDER (Jan. 14, 2019), <https://www.insider.com/cereal-boxes-eye-level-kids-marketing-2019-1> [https://perma.cc/58HA-ESAV].

children, these are the lower shelf levels, i.e., children’s eye levels.¹¹² The strategy is simple: “[k]eeping items like sugary cereal visually and physically accessible to kids is an effective way to sell more product.”¹¹³

This approach has been fine-tuned to reach even the smallest of toddlers and children in low-level strollers. Whereas characters on adult cereal boxes tend to look straight ahead, the cartoon characters featured on cereal boxes aimed toward children tend to gaze downward.¹¹⁴ The resulting eye contact increases connection with the brand, as well as trust in it.¹¹⁵

Placement of sweetened cereals where children can see them and make eye contact with their mascots is a rational—indeed, an ingenious—marketing strategy. If children are a substantial market segment, then attracting them to the product makes sense. But while the strategy may be highly effective, is socially responsible?

Whatever the answer, companies have not to date curtailed this practice as a matter of corporate social responsibility. There is no evidence that they consider it unethical to market unhealthy products directly to the vulnerable populations of toddlers and children. If the practice is to cease, it will only be through regulations that prohibit it as a matter of public health and consumer protection.

D. The Controversy Over Public Health Interventions to Curb These Practices

Policy recommendations to curb these industry practices are controversial. Solutions balance “the relationship between juvenile neurodevelopmental factors, legal and social norms, stakeholder interests, and institutional considerations.”¹¹⁶ This Section addresses arguments for and against public health interventions around food marketing.

1. Arguments in Favor of Public Health Interventions Around Food Marketing

The case for food marketing interventions usually relies on two prongs. First, children historically have been recognized as a vulnerable population deserving legal protections.¹¹⁷ Second, intervention into food marketing can improve overall

112. *Id.*

113. *Id.*

114. Marisa Taylor, *Cereal Offense: The Marketing Ploy Behind Kids’ Breakfast*, ALJAZEERA AM. (Apr. 2, 2014), <http://america.aljazeera.com/articles/2014/4/2/cap-n-crunch-cerealseyecontactchildren.html> [https://perma.cc/8QZL-N36Q].

115. Emily Cohn, *You’ll Never Look at Cereal Boxes the Same Again*, HUFF POST (Dec. 6, 2017), https://www.huffpost.com/entry/cereal-boxes-gaze_n_5078704 [https://perma.cc/LU5Z-TS3V].

116. Michael N. Tennison & Amanda C. Pustilnik, “*And if your friends jumped off a bridge, would you do it too?*”: *How Developmental Neuroscience Can Inform Legal Regimes Governing Adolescents*, 12 IND. HEALTH L. REV. 533, 586 (2015).

117. For example, children have been protected from rigid enforcement of contracts since the

population health and reduce medical costs borne by individuals and society alike.

a. Children are a vulnerable population deserving legal protections

The law has long recognized minors as vulnerable and deserving of protection. For example, contracts made by minors have been voidable under many circumstances for centuries.¹¹⁸ Sexual relations with persons below the age of consent is statutory rape because any purportedly “consenting” minors are still developing mentally and emotionally vulnerable, such that any ostensible consent is vitiated.¹¹⁹

Government intervention to protect children can, however, become controversial when the threats addressed are considered less serious than these examples, and therefore arguably best kept under the control of parents.¹²⁰ How serious, then, are the threats to children created by unhealthful diet and nutrition?

Unhealthful foods do pose substantial threats to children, from which they deserve protection. Consider that we have come to replace the old term “adult-onset diabetes,” because it is no longer accurate, with the broader term “Type-2 diabetes.”¹²¹ The poor diets that once caused only adults to develop insulin resistance now cause many children to develop insulin resistance and Type-2 diabetes as well, threatening an array of ills including retinopathy, stroke, heart attacks, nephropathy, neuropathy, and ketoacidosis.¹²²

If children are worthy of protection from unscrupulous businesses through voidability of contract, and from sexual exploitation through statutory rape laws, are they not also worthy of protection from disease and early death from poor

15th century, in recognition of their inexperience. See Steven Wolfe, *Reevaluation of the Contractual Rights of Minors*, 57 UMKC L. REV. 145, 145 (1988).

118. See *id.* (“Beginning in the fifteenth century, courts determined that minors needed protection ‘from those who might take advantage of their inexperience [and] from the consequences of their own rash and ill-advised acts. As a result of this determination, courts began to hold that minors were not bound by contracts entered during their minority.’”) (citation omitted).

119. See Nancy Findholt & Linda C. Robrecht, *Legal and Ethical Considerations in Research with Sexually Active Adolescents: The Requirement to Report Statutory Rape*, 34 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 259, 259 (2002) (“Historically, the reason most often provided to justify punishment for statutory rape is that children below a certain age are incapable of making significant decisions: They are unable to consent to sexual intercourse, and thus, they are vulnerable and deserve state protection.”).

120. See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

121. See *Type 2 Diabetes Mellitus*, HARV. HEALTH PUB. (Feb. 23, 2022), https://www.health.harvard.edu/a_to_z/type-2-diabetes-mellitus-a-to-z (“Type 2 diabetes is also called type 2 diabetes mellitus and adult-onset diabetes. That’s because it used to start almost always in middle- and late-adulthood. However, more and more children and teens are developing this condition.”).

122. *Complications of Diabetes*, DIABETES UK, <https://www.diabetes.org.uk/guide-to-diabetes/complications> (last visited Nov. 1, 2022).

nutrition?¹²³ In this light, harmful marketing of unhealthy foods aimed at toddlers and young children may be irresponsible at best, and deadly at worst.

b. Regulation can improve overall population health and reduce medical costs borne by individuals and society

Critics of regulation view it as the parents' role, not the state's role, to protect children's nutrition and food choices: they suggest that the government should not interfere with parental responsibility and prerogative around children's nutrition.¹²⁴ Proponents of regulation are likely to see this argument as a red herring. No one is trying to take away the role of parents in selecting and buying food for their children. No proposed reforms to date seek to shift the final food purchase and consumption decisions from parents to the state.

Instead, proposed public health regulations seek to curtail well-heeled companies from practices that make it harder for parents to make healthy choices. And while such actual public health intervention is unobtrusive, the harms it addresses go beyond the children themselves. These harms affect us all. Consider data Min discussed in 2013:

More than half of the adult New York City population (58%) and nearly 20% of New York City public school students (kindergarten through eighth grade) are now overweight or obese. In 2006, obesity cost the nation \$147 billion in direct medical costs—insurers in New York State alone spent \$11.1 billion in obesity-related medical costs, including \$2.7 billion spent by Medicare and \$4 billion by Medicaid. By 2012, obesity-related medical costs increased to \$190 billion for the uninsured, with annual medical spending for each obese person totaling \$3,271, compared to \$512 for the non-obese. Additional indirect costs include decreased productivity, increased insurance premiums, and increased disability costs. Thus, in this context, food choices affect not only the individual who makes them, but also all taxpayers.¹²⁵

2. Arguments Against Regulating Food Marketing

Arguments against regulating the marketing of foods and beverages focus on individual rights and responsibilities, specifically the right and responsibility of

123. See Sheldon E. Litwin, *Childhood Obesity and Adult Cardiovascular Disease*, 64 J. AM. COLL. OF CARDIOLOGY. 1588, 1589 (2014) (“[W]e cannot forestall embarking on the monumental effort that will be required to find methods to control or, better yet, prevent the growing crisis of childhood obesity.”).

124. See, e.g., Reps. Lee Terry & Paul Broun, *Terry, and Broun: Nutritional Guidelines are Nanny State Run Amok*, ROLL CALL (Sept. 20, 2011), <https://rollcall.com/2011/09/20/terry-and-broun-nutritional-guidelines-are-nanny-state-run-amok/>.

125. Hery Min, *Large-Sized Soda Ban as an Alternative to Soda Tax*, 23 CORNELL J. L. & PUB. POL'Y 187, 195 (2013).

parents to guide their children's eating choices¹²⁶ without government interference. Public health initiatives against obesity trigger backlash from both the food industry and consumer rights groups, based on civil liberties arguments grounded in freedoms of speech, choice, and contract.¹²⁷

Detractors of public health interventions couch their opposition in the vernacular of a "national nanny" or "nanny state."¹²⁸ They seek to decrease or eliminate government influence on the market transactions between food manufacturers and consumers.¹²⁹ For opponents of public health intervention, it is solely to role of parents to protect their children.¹³⁰ From their perspective, public health policies can be objectionable if they "undermine[] individual freedom and personal responsibility."¹³¹ They "worry that the state may remove more and more individual choices in the service of better population health[.]"¹³²

Of course, government regulatory forbearance still allows for, and may even encourage, free self-regulation by companies and industry groups.¹³³ Self-regulation has an additional benefit of avoiding any First Amendment challenges that could be triggered by the regulation of advertising.¹³⁴ Skeptics might argue that if self-regulation were a viable alternative to government control, it would have been implemented by now. Research is still needed to explore the extent to which the food and drink industries have or have not stepped up to moderate their own behavior to date.¹³⁵

126. See Cheryl "Shelly" Taylor Page, *Childhood Obesity, and Its Effects on Students' Academic Performance*, 21 U.C. DAVIS J. JUV. L. & POL'Y 79, 82 (2017) (observing a belief of many that "the most important participants in creating a healthy lifestyle for a child are the child and the child's parents.").

127. Michelle M. Mello et al., *Obesity—The New Frontier of Public Health Law*, 354 NEW ENG. J. MED. 2601, 2601 (2006).

128. See Janet Hoek, *Informed Choice, and the Nanny State: Learning from the Tobacco Industry*, 129 PUB. HEALTH 1038, 1041 (2015) (discussing various "nanny state" arguments put forth by industry in response to public health proposals).

129. *Id.*

130. *Id.*

131. Jacquelyn H. Flaskerud, *The Nanny State, Free Will, and Public Health*, 35 ISSUES IN MENTAL HEALTH NURS. 69, 70 (2014).

132. *Id.*

133. J. Howard Beales, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 887 (2004).

134. See Pomerantz, *supra* note 39.

135. See Parke Wilde, *Self-regulation, and the Response to Concerns About Food and Beverage Marketing to Children in the United States*, 67 NUTRITION REV. 155, 165 (2009) ("Improving and evaluating the current self-regulatory system has reached a critical juncture. Sound economic and legal perspectives motivate an attempt at self-regulation, but both perspectives also offer justification for stronger measures if self-regulation is insufficient to meet important public-interest goals. Leading reports and influential policymakers describe the current system of self-regulation as an experiment to be evaluated critically with an eye toward possible changes in government policy in the future.").

The threat of potential government regulation can provide impetus for corporate self-regulation, as in the case of big tobacco.¹³⁶ Massive public and government pressure threatened the industry with increased oversight and regulation, paving the way for the Master Settlement under which industry voluntarily agreed to constraints on its marketing practices.¹³⁷ This analogy is examined in the following Section.

IV. GOING FROM PUBLIC HEALTH INTERVENTIONS REGARDING TOBACCO TO PUBLIC HEALTH INTERVENTIONS REGARDING FOOD AND NUTRITION

As previously shown, the debate over public health interventions pits protection of individual freedom against regulation to improve health outcomes.¹³⁸ The author recommends in the following Section preserving the ultimate decision-making authority of parents while embracing reasonable regulation to help parents make decisions that benefit their children.

This kind of intervention has precedent in our recent history. Tobacco products were not banned in the United States, but public health policies dramatically reduced smoking through nudges. Subsection (A) discusses the tobacco example as a model for regulating children's nutrition without overly aggressive interventions; subsection (B) makes specific recommendations for moderate public health policies that can save lives and enhance the quality of lives among children, as well as the adults we want them to live to be.

A. The Tobacco Example as a Model for Moderate Regulation

An ambitious public health agenda has addressed smoking-related issues, yielding dramatic health improvements that benefit us all. I offer the tobacco case as a tried-and-true example of broad social support for public health intervention, short of product bans, to achieve vast gains in the public well-being while keeping ultimate free choice in the consumer's hands.

The tremendous health risks associated with cigarette smoking were not always as clearly identified and as comprehensively understood as they are today. They became widely recognized in the 1950s due to studies linking cigarette tar to cancer in mice and demonstrating correlation between smoking and lung cancer.¹³⁹ In the 21st century, these serious risks are well documented and widely understood.¹⁴⁰ As summarized by Peterson:

136. See *The Master Settlement Agreement*, NAT'L ASS'N OF ATTY'S GEN., <https://www.naag.org/our-work/naag-center-for-tobacco-and-public-health/the-master-settlement-agreement/> [<https://perma.cc/WC7A-2DA8>] (last visited Nov. 1, 2022).

137. *Id.*

138. See Flaskerud, *supra* notes 131-32.

139. See *Williams v. Philip Morris, Inc.*, 48 P.3d 824, 831 (Or. Ct. App. 2002).

140. Elizabeth Mendes, *The Study That Helped Spur the U.S. Stop Smoking Movement*, AM. CANCER SOC. NEWS (Jan. 9, 2014), <https://www.cancer.org/latest-news/the-study-that-helped-spur-the-us-stop-smoking-movement.html> [<https://perma.cc/N2JZ-TWWU>] (noting that most Americans

Cigarette smoking accounts for 400,000 deaths annually—more than AIDS, alcohol, cocaine, heroin, homicide, suicide, motor vehicle crashes, and fires combined—making cigarettes the leading preventable cause of death in the United States. Tomorrow, approximately 4,000 children under the age of eighteen will experiment with cigarettes for the first time and another 1,500 will become regular smokers. Of those that smoke regularly, about half will eventually die from tobacco use. Tobacco-related illnesses in the United States alone cost approximately \$193 billion each year in lost productivity and health care expenditures.¹⁴¹

With increased awareness of these health risks came a number of public health initiatives that successfully and substantially reduced smoking rates in the U.S. Whereas around half a century ago, 42 percent of American adults smoked, 15.5 percent smoked in 2016, and 13.9 percent smoked in 2017.¹⁴² This stunning achievement was the orchestrated result of a uniquely effective public health campaign that, among other things, modified the marketing practices of tobacco companies.¹⁴³

Some of the public health initiatives around tobacco could, of course, be characterized by individual rights proponents as incursions on personal freedoms. Cigarette price increases were achieved through steep excise taxes that raised the cost of choosing to smoke.¹⁴⁴ They were a government intervention in the market transaction between seller and buyer that altered the individual economic value proposition of smoking.¹⁴⁵ Anti-smoking campaigns sponsored by the public's tax dollars likewise were a centralized government initiative to mold beliefs and behaviors, with a goal of altering individual decision-making.¹⁴⁶

born post-baby boom have known all their lives that smoking can cause cancer).

141. Ashley Peterson, Comment, *Lighting a Fire Under Free Speech: The FDA's Graphic Attempts to Reduce Smoking Rates*, 48 U. RICH. L. REV. 799, 799 (2014).

142. *Smoking in America: Why more Americans are Kicking the habit*, AM. HEART ASS'N NEWS (Aug. 30, 2018), <https://www.heart.org/en/news/2018/08/29/smoking-in-america-why-more-americans-are-kicking-the-habit> [<https://perma.cc/HN83-U8HB>].

143. David T. Levy et al., *The Impact of Implementing Tobacco Control Policies: The 2017 Tobacco Control Policy Scorecard*, 24 PUB. HEALTH MGMT. & PRACTICE 448 (2018).

144. See Gary Lucas, *Saving Smokers from Themselves: The Paternalistic Use of Cigarette Taxes*, 80 U. CIN. L. REV. 693, 693 (2012) (noting that cigarette tax revenue exceeded \$32 billion in 2010).

145. This is not necessarily to say that cigarette taxes that raise consumer prices are repugnant to free market principles. The taxes enable government to collect funds that might cover smoking-related externalities that are not paid for in the transaction between seller and buyer. These externalities potentially include pollution, health costs to bystanders due to passive smoke inhalation, and health costs to the public as payers of insurance premiums.

146. See Kristin M. Sempeles, Comment, *The FDA's Attempt to Scare the Smoke Out of You: Has the FDA Gone Too Far with the Nine New Cigarette Warning Labels?*, 117 PENN. STATE L. REV. 223, 224 (2012) (suggesting that FDA-mandated warning labels “cross over the line of

Moreover, whereas individuals had wide berth in choosing where and when to smoke in the 1950s and 1960s, smoke-free laws increasingly eroded free choice on where and when a smoker could light up.¹⁴⁷ Even smoking cessation programs, the least intrusive of these public health initiatives, have been supported by government dollars and policy choices.¹⁴⁸

This ambitious public health approach to tobacco successfully improved our collective lives, without ever taking tobacco products off the market. Today, poor diet contributes to individual suffering and public expense, analogous to the effects of smoking. Like public health interventions regarding tobacco, policy choices around food and nutrition can reduce disease, delay death, improve quality of life, and avoid unnecessary health care costs that are currently borne by the public.

B. Proposed Regulation and Self-Regulation to Address Public Health Issues Around Nutrition

From a public health perspective, junk food is the new tobacco.¹⁴⁹ Pennel observes:

Tobacco's position has been usurped. Cigarette products are no longer responsible for the greatest share of preventable illnesses. Rather, obesity, resulting from a combination of the "food industry" and the American appetite, now holds the crown as the most expensive, preventable health care cost. While public animosity towards the food industry may lag behind animosity towards the tobacco industry, public attitude has shifted, demanding tighter control over the food industry. This shift toward holding fast-food, junk-food, and manufacturers of unhealthy food products partially responsible for the growing obesity epidemic is necessary before legislation and judicial action against the food industry can occur. Indeed, a similar shift in public opinion helped to tighten regulations on the tobacco industry and eventually hold it liable for the harms associated with tobacco use.¹⁵⁰

As previously noted, critics dislike public health regulations, evoking images

informative warnings into anti-smoking advocacy).

147. One example is the curtailment of smoking on airplanes, where back rows once actually permitted smoking, but where smoking of course is now prohibited. *See* 49 U.S.C. § 41706 (2018).

148. One example of this is smoking-cessation programs as a component of wellness programs under the Health Insurance Portability and Accountability Act and the Affordable Care Act. For detailed discussion of these, see Lindsay F. Wiley, *Access to Health Care as an Incentive for Healthy Behavior? An Assessment of the Affordable Care Act's Personal Responsibility for Wellness Reforms*, 11 IND. HEALTH L. REV. 635, 666-91 (2014).

149. *See* Joshua L. Pennel, *Big Food's Trip Down Tobacco Road: What Tobacco's Past Can Indicate About Food's Future*, BUFF. PUB. INT. L.J. 101 (2009).

150. *Id.*

of a “national nanny,” arguing that responsibility for children’s nutrition should remain on parents.¹⁵¹ Indeed, placing all responsibility for poor nutrition on individual consumers and on the parents of minors could make reasonable sense if food choices were solely under their control. Unfortunately, much of the control of individual consumer food choices is aggressively influenced by powerful external forces. Diller observes, “[b]ehavioral scientists have understood for decades that when it comes to food, we are anything but fully autonomous. One’s choice of what and how much to eat is strongly influenced by environment and context.”¹⁵²

We like to see ourselves as discerning, rational actors who recognize marketing manipulation; in reality, we remain susceptible to marketing practices in our purchasing and consumption choices.¹⁵³ Why would companies spend millions on marketing if it did not work?

Hoek eloquently summarizes the dynamics at work here:

Deliberate industry interference has often created situations where consumers have access only to incomplete and inaccurate information. These contexts, coupled with consumers’ inherent cognitive biases, mean truly ‘informed choices’ are an academic concept far removed from lay consumers’ everyday experiences. Whether the risk behavior involves smoking, consumption of unhealthy foods or unsafe alcohol intake, individuals’ actions largely reflect their commercially constructed environments. Unfortunately, these are rarely conducive to considered evaluations of the costs and benefits they might incur immediately and in the future.¹⁵⁴

This vulnerability is, of course, exacerbated when the ultimate consumer is a child. Given that responsible parenting will vary, and children are worth protecting, reasonable regulations to protect those children just make good sense. Woodhouse provides another important perspective on the “national nanny” critique: we think of regulation as interfering with parental prerogative, yet mass marketing does the same thing.¹⁵⁵ She observes, “[i]n our times, mass-media marketing has displaced parents as the primary force in the socialization of children. It has compromised true parental autonomy by bombarding our children, and their parents, with toxic images designed to sell unhealthy products.”¹⁵⁶

From this vantage, moderate regulation that does not outlaw any food products is most accurately cast as government mitigation of corporate influence,

151. See *supra* notes 128-32 and accompanying text.

152. Paul A. Diller, *The Illusion of Autonomy in “Food” Litigation*, 41 AM. J. L. & MED. 274, 274 (2015).

153. Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1691 (2004).

154. Hoek, *supra* note 128, at 1042.

155. Barbara Bennett Woodhouse, *Reframing the Debate About the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. L. FORUM 85, 164 (2004).

156. *Id.*

rather than government prohibition of parental prerogative. Even in our sometimes fiercely freedom-oriented, individual rights-focused culture in the U.S., many people do believe “that the government should actively address the obesity crisis”¹⁵⁷

V. RECOMMENDATIONS

We have discussed the ideological tension around public health interventions, pitting individual freedom/anti-regulation advocates against proponents of public policies to improve nutrition and reduce disease. My approach in attempting to bridge these two perspectives is to resist bans that eliminate ultimate consumer options, while encouraging public policy nudges toward healthier personal choices.

The recommendations in this Section never ultimately prohibit any consumer food options. Rather, they seek to provide some balance against the powerful influence of companies, which often is not apparent to consumers, and to help parents make healthy choices for the children they strive to support and protect.

Inherent in this approach is a recognition of a central fact: while personal freedom advocates may ideally wish for institutions to keep entirely out of their business and concerns, food companies already sway consumers. Reasonable government policies to improve public health can balance the well-financed influence that companies already exert on us.

Some of the recommendations below are for the public, including parents and others, to advocate aggressively for industry self-regulation. Other recommendations here go further, suggesting government intervention through law, regulation, or ordinance. What kinds of initiatives, then, can improve public health while avoiding unnecessarily harsh product bans?

A. Advocate for Voluntary Industry Self-Regulation of Serving Sizes of Sugary Drinks

A big contributor to increasing child obesity and overweight is the “supersize” or “big gulp” phenomenon. We tend to consume more as portion sizes increase.¹⁵⁸ Thus when companies enlarge the size of sugary drinks, total consumption of sugary drinks can be expected to increase as well. Sugary drinks are made up of empty calories that provide no nutritional value, and their high processed sugar content can cause harmful rapid spikes in blood sugar.¹⁵⁹

157. Cynthia A. Baker, *Bottomless Lines and Waistlines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 188 (2008).

158. See B.J. Rolls et al., *Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women*, 76 AM. J. CLIN. NUTRITION 1207 (2002) (observing diners served macaroni and cheese ate 30 percent more when the serving contained 1000 grams than when the serving contained 500 grams).

159. See *Sugary Soft Drinks and Diabetes*, DIABETES.CO.UK (Jan. 15, 2019), <https://www.diabetes.co.uk/sugary-soft-drinks.html> (“Sweetened, sugary drinks can cause sharp rises in blood

Regulatory efforts that restrict serving sizes by law may make sense to many, but they are also lightning rods that can increase resistance to effective public health intervention. Some might consider regulation restricting serving sizes as offensive governmental interference in free choice. While I personally would support regulation restricting serving sizes as a modest intervention that does not force anyone not to drink as much sugary drink as they want, such regulation can trigger resistance and be counterproductive as a result.

What is a workable solution? Persuasion. We need to persuade companies to sign on for voluntary commitments, uncoerced by legal or regulatory fiat, to limit individual sugary drink serving sizes as part of their commitment to corporate social responsibility and their efforts to enhance public health.

Voluntary limits to these serving sizes should not be a prohibitively hard sell to companies, provided they feel assured that there will be widespread industry adoption of the limits. The supersize movement attracted customers with perceived value, and the costs to restaurants became nominal as agricultural policies subsidized the commodities the foods contain.¹⁶⁰ The fast-food restaurants all do it, and if they all voluntarily stop doing it, any possible competitive disadvantage to socially responsible sizing would vanish. If anything, all the companies would experience a savings in cost as reasonably priced drinks become smaller.

The trick is to get all the players on board to make this change, so that none of them believe they are competitively disadvantaged by it. How might this be done? Through a well-planned, persuasive campaign that raises public consciousness of the issue without triggering concerns around individual freedoms. The very moderation of a voluntary approach, rather than a regulatory forced approach, increases the chances that the campaign can be framed in a non-threatening way, indeed as an all-parties-can-win solution.

B. Advocate for Voluntary Industry Self-Regulation of Bundling Practices

Like the previous recommendation, this second recommendation intentionally avoids regulatory edict. As with soda serving sizes, bundling directly concerns the products or product combinations that consumers can choose. Consumption choices are sensitive because they relate to consumer freedom. They are more sensitive and delicate than the remaining recommendations in this Section, which will recommend actual government regulation of practices that do not directly

sugar levels for people with diabetes or glucose intolerance (including prediabetes and gestational diabetes) and so it's usually best to avoid drinking sugary drinks.”).

160. Elizabeth Weise, *Why Are Portions in U.S. Restaurants So Big?*, USA TODAY (June 2, 2014), <https://www.usatoday.com/story/opinion/2014/06/02/food-portions-restaurants/9734413/> [<https://perma.cc/4YKG-PAPC>] (“Following World War II, agricultural policy in the U.S. expanded. Farmers were able to grow food more cheaply by using fertilizers, pesticides and herbicides. In the 1970s, the government began subsidizing farmers to grow more food. Over time, companies have increased their serving sizes to increase their profits, and we all caught on. Why have less when you can have more for only a little bit more money?”).

limit consumer product options.

Voluntary restrictions on how children's meals are bundled by restaurants are reasonable because they can improve nutritional value while still allowing parents to order any of the products they want, just à la carte rather than bundled. Voluntary industry self-regulation to ensure that bundled kids' meals include healthier drink options, for example, nudge the consumer in that direction, but they do not preclude consumers from ordering exactly what they want for their children, including a less healthful drink. And once again, because this approach is one of persuasion that asks for industry-wide adoption of the socially responsible practices, it is more palatable for all parties than government-mandated regulation of consumption options.

There have been government efforts to regulate kids' meal bundling practices. Chicago recently passed such an ordinance, prohibiting less healthful beverages from being packaged as part of kids' meals in restaurants.¹⁶¹ According to the city's press release, the ordinance mandates that "only healthy, non-sugary beverages be marketed as part of kids' meals at restaurants, making the healthy choice the default choice. Parents will be able to ask for sugary drinks, if they wish, preserving consumer choice."¹⁶²

While such government regulation of consumption options will seem reasonable to many, it also can trigger backlash and resistance. For example, in 2011, the United States Department of Agriculture (USDA) denied a request from New York State to initiate a pilot program eliminating Supplemental Nutrition Assistance Program (SNAP) benefits for sugar-sweetened soft drinks.¹⁶³ This typifies opposition in the U.S. generally toward government intervention, despite the fact that in this case, "[t]he primary aim of the Food Stamp Act, now the Food and Nutrition Act of 2008, . . . [was] 'to provide for improved levels of nutrition among low-income households.'"¹⁶⁴

Public health regulations are more promising when the intervention relates to increasing information for consumers, and when the intervention does not prohibit consumer options, but protects consumers while maintaining all market choices. The next few recommendations in this Section are bolder than the two discussed so far. They propose government regulation rather than campaigns for voluntary industry self-regulation. These recommendations concern the marketing of unhealthy foods, rather than the direct limitation of consumer product or product-bundle options. Because such recommendations do not eliminate free consumption offerings, they are less inflammatory to proponents of consumer freedom.

161. Press Release, Cty. of Chi., Off. of the Mayor, Only Healthy Beverages Can be Marketed with Kids' Meals at Restaurants Under New Ordinance (Dec. 15, 2021).

162. *Id.*

163. Kelly D. Brownwell & David S. Ludwig, Commentary, *The Supplemental Nutrition Assistance Program, Soda, and USDA Policy*, 306 JAMA 1370, 1370 (2011).

164. *Id.* at 1371.

*C. Address Misleading Nutritional Packaging Claims on Food Products
Beyond the Official Nutrition Label*

The official nutrition labels that are placed on packaged food products are informative and useful, covering protein, fat, fiber, sodium, micronutrients, sugar, and added sugar content. Unofficial nutritional claims on packages outside of the nutrition label are less scrutinized by law, yet they can be deceptive, misleading, or ambiguous.

A 2011 study examined consumer interpretation of children's cereal package claims such as "supports your child's immunity," "whole grain," "fiber," "calcium and vitamin D," and "organic."¹⁶⁵ The study found that "[t]he majority of parents misinterpreted the meaning of claims commonly used on children's cereals. They inferred that cereals with claims were more nutritious overall and might provide specific health-related benefits for their children; and these beliefs predicted greater willingness to buy the cereals."¹⁶⁶

The authors summarize the study's conclusions: "[t]hese findings indicate that common front-of-package nutrition-related claims are potentially misleading, especially when placed on products with high levels of nutrients to limit (e.g., sugar, sodium) and low levels of other nutrients to encourage (e.g., fiber, protein). Additional regulation is needed to protect consumers in the USA."¹⁶⁷

What kind of regulation would address this concern, while also maintaining First Amendment protections?¹⁶⁸ My recommendation is bold, but it is also the cleanest, simplest, and most thorough: simply prohibit health claims on food packaging entirely. Such a regulation would likely be challenged under the First Amendment, but there are strong arguments supporting it, as it doesn't prohibit food manufacturers from making health claims in their other advertising; rather, it is arguably a time, place, or manner restriction that limits such claims to venues other than the food package itself.¹⁶⁹ Given that the restriction would apply to all food products, no company would be competitively harmed by the restriction. All companies would be equally constrained, while continuing to be allowed to communicate about their products through other forms of advertising.

Critics might argue that this is only a half-step that does not go far enough. Why not restrict food nutrition claims entirely? The First Amendment protects commercial speech, so nutrition claims that are technically true and therefore are not a deceptive trade practice must be permitted in at least some time, place, and

165. Jennifer L. Harris et al., *Nutrition-Related Claims on Children's Cereals: What Do They Mean to Parents, and Do They Influence Willingness to Buy?*, 12 PUB. HEALTH NUTRITION 2207 (2011).

166. *Id.*

167. *Id.*

168. While this Article does not analyze the Constitutional considerations around limitations of marketing unhealthful products to children, Pomerantz has analyzed the issue in detail. *See Pomerantz, supra* note 39, at 175-84.

169. *See id.*

manner.¹⁷⁰ This is true even if a nutritional claim is arguably harmful because some customers will lack the nutrition knowledge to understand fully whether the product is healthful or otherwise.

This can happen when a poorly informed buyer believes the claim means the product is healthful, when in fact it may not be. A claim that a product is “low fat” can be true, even though the product is also made palatable and attractive by being exceptionally high in unhealthy processed sugar. Nonetheless, there is no Constitutional legal basis for entirely prohibiting this potentially misinterpreted low-fat claim.

The Constitutionally defensible compromise I propose here eliminates package claims outside the nutrition label entirely, relegating such claims to other venues that are less immediately prominent and influential than point-of-purchase claims. Is this compromise likely, though, to help improve the prevalence of healthful food choices by parents?

Point of purchase is where any health claims are most salient, and the most immediate of these are right on the product packaging that buyers see while shopping. A parent who is concerned about the health of their child may well be less likely to put a sugary cereal in the cart if it does not have a low-fat claim boldly announced on front of the box.

Misinterpreted nutritional claims in places other than the product package can, of course, also influence customers to buy unhealthy products. Any claims made by the manufacturer in advertising, for example, at least are subject to extant laws that govern deceptive trade practices and misleading advertising. This means that, while the regulation proposed here would limit a prohibition of product marketing claims solely to the product’s package itself, such claims made by the manufacturer elsewhere will not be entirely unmonitored. As always, false nutritional claims in their other marketing venues will be subject to FTC oversight.¹⁷¹

What about ambiguous nutritional claims? We saw earlier that some courts allow companies to make ambiguous, potentially misleading claims, under the theory that the onus is on the consumer to resolve ambiguities by going to the formal product label.¹⁷²

This is unacceptable, both because it requires the consumer to scrutinize nutritional claims for any plausible alternative interpretations, and because companies ought to bear responsibility to be clear in their marketing claims. Accordingly, the appropriate state and federal bodies should promulgate regulation designating ambiguities in nutritional claims as inherently misleading. If these ambiguities cause consumers to believe a product is more healthful than unambiguous, accurate claims suggest, they should be considered a deceptive

170. *See id.*

171. *See* Erika Kincaid, *5 Misleading Label Claims Struck Down by the FTC*, FOOD DIVE (Oct. 16, 2017), <https://www.fooddive.com/news/labeling-claims-ftc-misleading/507201/> [<https://perma.cc/63AU-3CGF>].

172. *See supra* note 86 and accompanying text.

trade practice.

D. Promulgate Reasonable Advertising Regulations That Will Reduce Exposure of Unhealthy Foods and Drinks to Children

A UK Department of Health and Social Care spokesperson describes a British initiative along these lines: “As part of our obesity strategy to get the nation fit and healthy, we are . . . restricting advertising of foods high in fat, salt and sugar being shown on television before 9 pm and in paid-for advertising online, as well as restricting less healthy food promotions in stores and online.”¹⁷³

While the specifics of the British advertising restriction may or may not be a good fit for the U.S., it provides an example of the spirit of regulation that we should explore, and eventually adopt, to fit our own culture and legal framework here. The goal should be to fashion public health policy that reduces the exposure of minors to the marketing of unhealthy food products.

In fashioning regulation that fits U.S. laws and culture, lawmakers should focus their attention on these questions: (a) how do we define less healthy food products in terms of threshold levels of sugar, sodium, and fat that trigger inclusion within the regulatory restriction?; and (b) what would be optimal marketing restrictions of television and Internet advertising—in other words, where are the lines drawn regarding when and in what media certain unhealthful foods and drinks cannot be advertised?

While the specifics will require careful consideration, there are some obvious advertising limitations that have the potential to reduce exposure of minors to marketing of unhealthy products. The law should prohibit advertising of unhealthful foods during children’s primary television viewing hours. As already noted, this will require careful consideration and determination of what thresholds will be developed to classify food and drink products as unhealthful.

Current advertising exposure to minors is high on both television and the Internet.¹⁷⁴ This means that we also need to delineate Internet site criteria that define sites that are targeted to or that have very substantial viewing from minors and promulgate the same advertising restrictions there as we do for television.

E. Promulgate Reasonable Retail Regulations That Will Reduce Exposure of Unhealthy Foods and Drinks to Children in Stores

Regulatory restriction on the shelf placement of less healthful foods and drinks in retail stores, such as supermarkets and convenience stores, should be a palatable regulation even for staunch proponents of individual freedoms averse to aggressive regulation. Such limitations would leave adult consumers’ options

173. Andrew Gregory, *UK Obesity Plan Will Fail Without Action on Unhealthy Food*, THE GUARDIAN (Dec. 27, 2021), <https://www.theguardian.com/society/2021/dec/27/uk-obesity-strategy-unhealthy-food-environment-report> [<https://perma.cc/GLZ2-9RZ7>].

174. See Melinda Wenner Moyer, *Kids as Young as 8 Are Using Social Media More Than Ever, Study Finds*, N.Y. TIMES (Mar. 20, 2022), <https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html> (reporting recent increases in screen use among children).

entirely intact and are helpful to adult consumers in decreasing toddler pestering for the unhealthful products that are currently intentionally placed in their view.

Such regulatory restrictions can improve overall children's health without costing large manufacturers significant competitive advantage or profit. How would these restrictions work, and why would they have no negative impact on the manufacturers?

Shelf placement regulation needs to start, as in the previous Subsection and potentially using the same metrics, by defining the less healthful products using a formula for added sugar, sodium, and fat content. Once these products are defined, the law should delineate the specific product placement restrictions in retail stores. Research is needed to specifically determine the eye-level of the protected class, so that regulation can mandate that less healthful products be placed above that level on shelves.

Since the market for cereals and snacks has long been dominated by large-scale players that manufacture both more-healthful and less-healthful products,¹⁷⁵ this proposed regulation is unlikely to impose a competitive advantage on any manufacturer; rather, it would impose a desirable competitive disadvantage on each manufacturer's less healthful products, relative to their more healthful products. And that is exactly the goal we should seek—to support the companies while also shifting consumption, by reasonable regulatory nudge, toward the companies' more nutritious offerings.

Because the regulation proposed here would create threshold levels of added sugar, sodium, and fat to distinguish more-healthful from less-healthful options, it would encourage manufacturers to develop and support the healthful products that qualify for the children's eye-level shelves. Should this happen, there would be an overall trend among manufacturers to make their sweet, child-attractive products more healthful than they are right now.

*F. Do Not Regulate the Inclusion of Toys and Prizes with Children's Meals;
Rather, Lobby Companies to Discontinue Voluntarily the
Association of Their Meals with Toys and Prizes*

As we saw earlier, San Francisco attempted to eliminate toy and prize incentives that encourage children to ask for unhealthy food products.¹⁷⁶ Companies have successfully circumvented the law by charging a minimum price for the added toy, which a large majority of consumers actually do purchase.¹⁷⁷

175. Eighty-six percent of the U.S. cereal market is concentrated among just four companies, all of which manufacture a wide variety of products that are healthful: General Mills, Kellogg Company, Post Consumer Brands, and Quaker Oats. Karen Perry Stillerman, *How Cereal Companies and Consumers Can Make Breakfast Better*, THE EQUATION (July 24, 2019), <https://blog.ucsusa.org/karen-perry-stillerman/how-cereal-companies-and-consumers-can-make-breakfast-better> [https://perma.cc/Q4SU-YA9A].

176. See *supra* notes 102-06 and accompanying text.

177. See *supra* notes 107-08 and accompanying text.

This loophole suggests that municipalities and states should either refine ordinances and regulations to close the loophole or focus on other ways to improve children's health.

The pragmatic best choice here is to choose our battles wisely and focus on other ways to improve children's nutrition while lobbying companies to stop bundling meals with toys and prizes as a matter of corporate social responsibility. While the loophole technically might be closed by prohibiting all bundling of meals and toys, regardless of whether the toys are free or merely reduced in price, this could be a hollow victory. It would engender consumer animus and pushback, as parents roll their eyes at the perceived assault on perceived family fun in fast food restaurants.

Even if we prohibit all bundling of meals and toys, including both free toys and charging a nominal fee for toys with kids' meals, there is still potential for effective loopholes. For example, companies could simply sell the toys entirely unbundled from any particular meal, thereby still making their restaurant attractive to kids. And realistically, few of these children, once in the fast-food restaurant, are likely to consume one of the healthful options sometimes offered, unless so directed by their parents.

Legally attacking the bundling of unhealthful fast-food options with free toys and prizes is a losing battle. It is likely to be unpopular with the public, undermining support for other reasonable public health initiatives while also being unlikely to achieve much if anything in terms of children's nutrition. This one is best left alone, apart from efforts to persuade companies to stop offering toys as a matter of socially responsible business practice.

V. CONCLUSION

This Article has examined public health challenges associated with poor nutrition, especially regarding minors. It identified company practices that contribute to the problem and explored public health interventions that have the potential to benefit minors. I have attempted to acknowledge tensions between proponents of regulatory public health initiatives and opponents of such initiatives who ground their opposition to regulation in a philosophy of individual freedom and personal responsibility and autonomy. My goal is to be pragmatic, intentionally avoiding any resolution of the philosophical tension itself, and proposing practical solutions, grounded in sound scientific research,¹⁷⁸ that can be positioned as mutually palatable, common-sense efforts.

My recommendations avoid consumer bans—none of the proposals eliminate any ultimate consumer choice. While self-regulation in industry may be seen as unrealistic,¹⁷⁹ self-regulation is proposed only in areas where broadly embraced

178. For detailed discussion of the nature of scientifically sound nutrition research, see generally David L. Pelletier et al., *Expanding the Frontiers of Population Nutrition Research: New Questions, New Methods, and New Approaches*, 4 *ADV. NUTRITION* 92 (2013).

179. Individual rights proponents who are critical of regulation typically propose relying on the marketplace to protect us, imposing pressures on industry to self-regulate as needed. Simon

corporate social responsibility by businesses will not likely hurt profitability. Regulation is proposed in some areas, but not in a way that removes ultimate consumer freedom and choice, instead nudging consumers toward more healthful selections—something most consumers will want for their children anyway. These proposed changes are moderate, but they might be achievable, resulting in greater public health gains than more ideologically pure, but less pragmatically feasible, proposals might yield.

asks, “can we trust the food industry to self-regulate?” She contends that “[s]elf-regulation presupposes that corporations can recognize their role in society as responsible citizens and will act accordingly. Corporations, in general, have no such ability and are, by definition, designed to further one goal and one goal only: to increase profits for shareholders.” Michele Simon, *Can Food Companies be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health*, 39 LOY. L.A. L. REV. 169, 171 (2006). See Allyn T. Taylor et al., *The Increasing Weight of Regulation: Countries Combat the Global Obesity Epidemic*, 90 IND. L.J. 257, 265 (2015) (arguing “self-regulatory initiatives have proven insufficient to stem the childhood obesity epidemic, even in high-income countries where resources and political will exist to monitor industry actions.”).