Beyond the Code Book: Legal Tools for Accelerating Progress in Obesity Prevention

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Introduction

Each of the five main goals set out in the IOM’s report, Accelerating Progress in Obesity Prevention (“IOM Report”), includes recommended strategies and actions that raise questions of law and legal authority.1 In many instances, the IOM’s recommendations can be accomplished most directly and efficiently through mandatory regulation or legislation — for example, imposing taxes to decrease consumption of sugar-sweetened beverages (SSBs),2 passing laws that require substantial physical education periods in schools,3 or promulgating regulations that ensure nutrition standards for foods and beverages sold or served in educational settings.4 Much has been written on using legislation to support obesity prevention efforts.5 The route of direct legislation, however, is not always readily available — as the so-far-unsuccessful effort to pass taxes on SSBs, for example, vividly illustrates.6

Fortunately, government mandates are far from the only opportunities for action available to policymakers seeking to effect the policy changes set forth in the IOM Report. This paper highlights methods — other than legislative and regulatory directives — through which decision-makers may use law and the legal system to facilitate the systems-wide change that the IOM calls for. These methods apply to each of the IOM’s five goal sectors: (1) integrating physical activity into people’s daily lives; (2) making healthy food and beverage options available everywhere; (3) transforming marketing and messages about nutrition and activity; (4) making schools a gateway to healthy weights; and (5) galvanizing employers and health care professionals to support healthy lifestyles.7 This paper does not provide an exhaustive list of tools, but instead points out several representative methods by which public and private parties can use less obvious forms of legal authority to respond to the obesity epidemic: using contract law to further government policies; employing affirmative litigation to achieve public goals; and exercising legal authority to lay the groundwork for voluntary action in the private sector.

Using Contracts to Further Public Health Policy Goals

Government can play many roles involving the law. In addition to serving as a regulator, or a provider of incentives, government can also act as one party to a contract. Indeed, many government policies can be

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implemented through private contract law much more easily than they could be by regulation. For example, one principal goal outlined by the IOM Report is to “create food and beverage environments that ensure that healthy food and beverage options are the routine, easy choice.” Contracts between governments and suppliers have proved to be a powerful legal tool for promoting healthier food and beverage environments in worksites, health care facilities, and public places such as parks and community centers.

**Implementing Nutrition Standards through Contracts**

Contracts create a kind of private law, establishing legally enforceable rights and obligations between the parties to the contract. Governments, of course, enter into contracts of all kinds with private-sector suppliers serving public hospitals, schools, and government worksites, to name but a few. Increasingly, governments are utilizing contracts to further public health goals: implementing nutrition standards for products sold in parks and government buildings, promoting water and other healthy options over high-calorie drinks through pricing terms, and even restricting advertising on government property. For example, the Boston Public Health Commission has created a healthy beverage toolkit that provides model language that could be included in contracts with vendors.

**Promoting Physical Activity through Contracts**

Contract law is also an effective tool for promoting opportunities for physical activity, particularly in low-income urban and rural communities where access to safe places to play and exercise may be lacking. In these communities, school recreational facilities can be made available for public use outside of school hours through “joint use” or “shared use” agreements. Typically, these agreements are entered by a school district, on one hand, and a city or county agency or local nonprofit organization, on the other. They describe terms and conditions for the collaborative agreements. Further, decision-makers who handle vending or supplier contracts may be disposed to think about these contracts solely from an immediate budgetary perspective rather than a long-term health perspective.

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Employing Litigation to Achieve Obesity Prevention Objectives

Ligitation can be a powerful tool in advancing public health goals. At its most basic level, litigation serves as a method of enforcing existing beneficial standards. Public and private litigation can also serve to effectuate change where legislation has not succeeded or would be too slow or unwieldy. In the tobacco control context, for example, the Master Settlement Agreement (MSA) powerfully illustrates how strategic litigation can help propel social norm change. The MSA, which settled a group of consumer protection lawsuits brought by state attorneys general (AGs) against the major tobacco companies to recover tobacco-related health care costs, resulted in huge financial recoveries for the states, helped preserve public access to previously secret industry documents, and produced important outcomes that would have been much harder to achieve through legislation.\(^1\)

Using Litigation to Enforce Laws and Legal Authority That Protect Health

Through litigation, the executive branch (or private citizens) can enforce laws at all levels of government. For example, a law requiring that a certain amount of physical education be provided in elementary schools has little meaning without proper enforcement. In one notable California case, a third-grade student and his father filed a successful lawsuit against the school district for failing to comply with the state Education Code, which required “not less than 200 minutes” of physical education every two weeks in elementary schools.\(^2\) The student’s victory in the lawsuit, which compelled the school district to increase the amount of time dedicated to athletic activity, gave notice to school districts throughout California that there could be consequences for failing to provide sufficient physical education opportunities for their students.

Ligitation can also be used to prevent local authority from being preempted by state action. A recent lawsuit brought by the City of Cleveland against the State of Ohio provides a vivid example. In 2011, Cleveland passed a regulation that restricted artificial trans fat in restaurant foods.\(^3\) The regulation was part of an on-going initiative called “Healthy Cleveland,” which also aimed to increase physical activity, reduce smoking, improve mental health, and promote better access to healthy foods. In response, in the final days before Ohio’s 2011 omnibus budget bill was passed, the Ohio Restaurant Association orchestrated the insertion of language designed to nullify Cleveland’s artificial trans fat ban on the basis of preemption.\(^4\) The amendment, buried deep in a bill with pages numbering in the thousands,\(^5\) vested exclusive authority in the state agriculture department to designate food as “healthy” or “unhealthy” and to regulate toys and other incentive items provided with meals. The amendment also prohibited local governments from taking action based on “food-based health disparities.”\(^6\) In effect, the amendment’s only function was to preempt municipal legislative authority over restaurants, immunizing fast food chains from local laws such as Cleveland’s artificial trans fat restriction.

Cleveland sued the State of Ohio, claiming that the amendment violated the state constitution because it improperly limited the City’s municipal government authority and also broke the rule that state legislation may address only one subject at a time. The trial court and the court of appeals in Ohio agreed, striking down the amendment and handing Cleveland a complete victory.\(^7\)

Although the ruling is specific to Ohio, this type of litigation and the subsequent publicity served to further the national conversation about local governments’ responsibility, and ability, to address public health crises in their communities.

Employing Litigation to Achieve Change in Industry Conduct

Lawsuits can also be brought to challenge industry practices that are harmful to the health and well-being of the public. Lawsuits addressing tobacco industry misconduct have been brought not only by state AGs,\(^8\) but also by private plaintiffs,\(^9\) and the federal government.\(^10\) These cases have resulted in significant changes to the way that tobacco is sold and marketed in this country, with corresponding gains for public health.

 There has yet to be a lawsuit in the obesity prevention arena with anything like the impact of the state AG lawsuits. The state AGs and at least one city attorney have gained some traction through investigations and lawsuits focused on unsubstantiated food labeling. In the 1980s, a group of about ten state AGs (informally known as the “food cops”) challenged several claims being made by food companies as being false and misleading, including claims such as “real cheese,” “lean meal,” “hypoallergenic,” and “energy releasing.”\(^11\) These cases were important forces behind the passage of the federal Nutrition Labeling and Education Act of 1990, which regulates health claims and requires the Nutrition Facts Panel on packaged foods.\(^12\)

More recently, the Connecticut AG announced in 2009 that he and several other AGs were investigating the Smart Choices Program – an industry-sponsored voluntary rating system that allowed a “Smart Choices” logo to appear on packaging for food products that met certain nutrition standards.\(^13\) The program
was widely ridiculed once it became clear that Fruit Loops, Frosted Flakes, and Cracker Jack qualified for the “Smart Choices” logo. After the Connecticut AG’s announcement, the FDA declared it was also going to investigate the program, and it was suspended.\textsuperscript{27} Also in 2009, the San Francisco City Attorney and the Oregon AG issued letters to Kellogg demanding it substantiate a front-of-package claim Kellogg was making on its “Krispies” line of cereals that the cereal “Now helps support your child’s IMMUNITY.”\textsuperscript{28} Kellogg quickly agreed to stop making this claim on its cereal products. Thus far, however, private lawsuits relating to the negative health effects of obesogenic foods have been less successful.\textsuperscript{29}

**Hospital Breastfeeding Policies**

Voluntary breastfeeding programs have increased in recent years, with concomitant benefits for public health. The need for these programs is clear: despite the documented positive health (and obesity prevention) benefits of breastfeeding,\textsuperscript{31} rates in the United States remain low by international standards.\textsuperscript{32} The IOM Report recommends that health care facilities promote breastfeeding by adopting policies consistent with the Baby Friendly Hospital Initiative (BFHI), a voluntary program for hospitals launched by UNICEF and the World Health Organization. One of the criteria for the program is that hospitals refrain from distributing free formula samples on behalf of formula companies unless there is a medical need.\textsuperscript{33} Mothers who receive formula company-produced sample packs are less likely to breastfeed compared to women who do not receive these samples.\textsuperscript{34}

To date, the most successful comprehensive efforts to remove formula samples have involved hospital policies that are encouraged, but not mandated, by government. For example, all maternity hospitals in Rhode Island and Massachusetts have voluntarily stopped distributing free formula samples to new mothers, and many hospitals in New York City have done the same.\textsuperscript{35} State law provides an important foundation for these voluntary programs. Massachusetts and New York both have regulations requiring hospitals to support breastfeeding and discourage the routine distribution of formula samples.\textsuperscript{36} One of the criteria for New York City’s “Latch On” initiative (a voluntary program) is that hospitals enforce the state regulation against supplemental feedings unless medically indicated.\textsuperscript{37} The use of law in tandem with a voluntary program has so far proven to be successful in achieving what formal regulation alone has not been able to achieve — more hospitals refusing to distribute free formula samples to new mothers.

The Massachusetts experience is particularly telling: the recent success of the voluntary program sharply

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**Potential Drawbacks to Litigation**

There are, of course, disadvantages to litigation. Lawsuits are more bludgeons than scalpels. They are inherently adversarial, they can fail, and they may appear to be more about money than about public health. What is more, lawsuits are simply tools — they can be used as easily by parties who oppose obesity-prevention efforts (for example, to challenge the constitutionality of a public health law) as by advocates for public health.\textsuperscript{38} Nonetheless, litigation (or the threat of litigation) can provide a means to accomplish public health goals that could not otherwise be achieved, at least as a tool of last resort when other approaches have not succeeded.

**Exercising Legal Authority to Promote and Support Voluntary Action**

Although the role of law and legal authority is perhaps most visible in the context of regulation and litigation, the law can also play a role in creating a scaffold for voluntary efforts. It does so by providing incentives, whether positive or negative, and by establishing a framework on which voluntary efforts can build. The examples, which focus on the issues of breastfeeding and junk food marketing respectively, illustrate how law can support voluntary programs that further the IOM’s goals.
contrasts with the attempt in 2005 by the Massachussets Public Health Council to include a ban on free formula distribution in the state’s hospital licensing regulations.\textsuperscript{38} The measure drew fire from the Governor’s office and had to be withdrawn and replaced with a less comprehensive restriction. Yet it was likely this very measure that laid the groundwork for the current successful voluntary program. Although the effort took several years to come to fruition, the routine distribution of free formula samples in Massachussets hospitals has come to an end.

Children’s Food Marketing Standards
Attempts to limit junk food marketing to children nationwide through voluntary actions by industry actors have produced less impressive results. The IOM calls on the food, beverage, restaurant, and media industries to take “broad, common, and urgent voluntary action” to improve standards for food marketing aimed at children and adolescents aged 2-17, adding that if improved marketing standards are not adopted within two years by a substantial majority of the relevant companies, government should impose mandatory nutritional standards. This latest call echoes and updates the 2006 IOM report, which concluded that if industry did not strengthen its self-regulatory efforts, then the federal government should impose standards.\textsuperscript{39} The food industry responded to the 2006 report by creating a voluntary pledge program called the Children’s Food and Beverage Advertising Initiative (CFBAI).\textsuperscript{40} This program has taken some steps but has been largely ineffective in improving the nutritional profile of foods marketed to children.\textsuperscript{41}

Once again, legislative action provided the spur to improved self-regulatory conduct. In 2009, Congress established an Interagency Working Group (IWG), comprised of representatives from the Federal Trade Commission, the Centers for Disease Control and Prevention, the Food and Drug Administration, and the United States Department of Agriculture, to develop principles to guide voluntary industry efforts to improve the nutritional profile of foods marketed to children.\textsuperscript{42} This action inspired some improvements in the CFBAI, including a commitment to adopt a common set of nutritional standards rather than a separate set for each member company.\textsuperscript{43}

It is true that a law based on the IOM’s recommendations would establish more rigorous nutrition standards and more robust enforcement than does the CFBAI’s self-regulatory industry regime. But regulatory proposals related to food marketing practices have provoked fierce opposition from the food and media industries,\textsuperscript{44} which have lobbied for laws to preempt state and local governmental efforts to change industry practices.\textsuperscript{45} Moreover, government efforts to mandate or restrict marketing practices must contend with the U.S. Supreme Court’s evolving interpretation of the First Amendment, which has come to be highly protective of the rights of commercial speakers and which has extended protection to commercial activities that had not previously been considered “speech.”\textsuperscript{46} In sum, given the political and legal obstacles to direct legislative action in this field, the self-regulatory efforts of the CFBAI are notable.

Potential Drawbacks of Voluntary Action
The example of the CFBAI provides an illustration of the drawbacks as well as the benefits of voluntary action. The CFBAI has critical shortcomings: it does not include media companies (though Disney has announced independently that it will adopt nutritional standards for foods advertised through its media outlets);\textsuperscript{47} its narrow definition of marketing practices “directed” towards kids excludes a great deal of marketing that reaches children (for example, the program excludes packaging); it only covers marketing aimed at children under age 11; and its processes for handling complaints and enforcing standards are unclear.\textsuperscript{48} These types of problems with industry-friendly standards and lack of enforcement are hallmarks of self-regulatory regimes. But in a context where direct government action is not viable, self-regulation may be the best available option.

Conclusion
Questions of law and legal authority permeate the strategies and actions urged by the IOM Report, across all five goal sectors. Although the term “law” may most readily bring to mind statutes that forbid or require particular conduct, there are often political or constitutional obstacles to such governmental directives. Fortunately, the law is a subtle and multifaceted tool. Many of the goals contained in the IOM Report can be furthered by the use of legal doctrines to achieve through contract or litigation or voluntary action which might not be possible by direct regulation. In any of its protean forms, the law remains a necessary and vital tool for accomplishing these transformations.

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References

2. Id., at Strategy 2-1.

3. Id., at 336.


7. See IOM, supra note 1.

8. Id., at 430.


11. See Boston Public Health Commission, supra note 9, at 48 (model contract language par. 1.3, setting forth a procedure for addressing any demonstrated adverse financial impact to vendors from the healthy beverage requirements); see also, J. DelliFraine et al., “Cost Comparison of Baby Friendly and Non-Baby Friendly Hospitals in the United States,” Pediatrics 127, no. 4 (2011): e899-e994 (finding that cost of implementing BFHI program was relatively cost-neutral).

12. For example, the federal Randolph-Sheppard Act (and its state law counterparts) gives legally-blind vending machine and cafeteria operators on government property preferences and protections not enjoyed by other vendors. 20 U.S.C. § 107 et seq.


25. Id.

26. Id.

27. Id.

28. Id., at 3.


30. See, e.g., New York State Restaurant Ass’s v. Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (rejecting challenge on preemption and First Amendment grounds to NYC menu labeling law).


43. See Better Business Bureau, supra note 40.