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IT'S NOT A SMALL WORLD AFTER ALL: REGULATING OBESITY GLOBALLY

*Eloisa C. Rodriguez-Dod**

INTRODUCTION

Deemed the “greatest threat to public health today,”¹ obesity is defined as an abnormal accumulation of fat in the body.² Overweight means that one’s weight is greater than generally considered healthy for the body; this weight may be caused by bone or muscle density, water, or excessive fat.³ Having abnormal or excessive fat can lead to various health problems, including cardiovascular disease, diabetes, certain cancers, hypertension, high levels of cholesterol, and risk of stroke.⁴ “Overweight and obesity are major causes of morbidity and mortality in the United States and most industrialized countries of the world.”⁵

The rate of obesity and overweight among the world population has increased dramatically over the past several years in both adults and children.⁶ The most recent statistics compiled

* Professor of Law, Nova Southeastern University Shepard Broad Law Center, Fort Lauderdale, Florida. I would like to thank my colleague, Professor Elena Marty-Nelson, my spouse, Jose Rodriguez-Dod, Esq., and my research assistants, Carolina Pascual and Warren Friedman, for their assistance with this article.

¹ Am. Med. Ass’n, Obesity, <http://www.ama-assn.org/ama/pub/physician-resources/public-health/promoting-healthy-lifestyles/obesity.shtml> (last visited Feb. 16, 2010). According to a study published in 2009, “[o]besity is growing faster than any previous public health issue [the United States] has faced.” UNITED HEALTH FOUND., AM. PUB. HEALTH ASS’N, & P’SHP FOR PREVENTION, THE FUTURE COSTS OF OBESITY: NATIONAL AND STATE ESTIMATES OF THE IMPACT OF OBESITY ON DIRECT HEALTH CARE EXPENSES 2 (2009), available at <http://www.americashealthrankings.org/2009/report/Cost%20Obesity%20Report-final.pdf> [hereinafter FUTURE COSTS OF OBESITY].

² World Health Org., Obesity and Overweight (2006), <http://www.who.int/mediacentre/factsheets/fs311/en/index.html> [hereinafter WHO Obesity].

³ MedlinePlus, Obesity, <http://www.nlm.nih.gov/medlineplus/obesity.html> (last visited Feb. 16, 2010).

⁴ See Ctrs. for Disease Control & Prevention, Overweight and Obesity, <http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm> (last visited Feb. 16, 2010).

⁵ M. Sharma, *Behavioural Interventions for Preventing and Treating Obesity in Adults*, 8 OBESITY REVS. 441, 441 (2007).

⁶ For a discussion of the global trend toward obesity and overweight, see generally WORLD HEALTH ORG., OBESITY: PREVENTING AND MANAGING THE GLOBAL EPIDEMIC 16-

by the World Health Organization show that the United States is one of the top fifteen reporting nations with a high percentage of both obese and overweight adults; other countries with high percentages of both include Bahrain, French Polynesia, Israel, Kuwait, Malta, Saudi Arabia, Seychelles, and the United Kingdom.⁷ Cuba, a country oft-equated with food shortages, recently reported that approximately thirty percent of its adult population is obese and over one-quarter of the island's residents tend toward obesity.⁸

Governments are recognizing the need to take action in trying to control this epidemic. For example, the City of Jerusalem placed solar-powered scales outside shopping centers and fast food outlets and will be creating walking paths with exercise machines in response to an Israeli government report chiding authorities for their lax efforts in controlling obesity.⁹

37 (2000), available at http://whqlibdoc.who.int/trs/WHO_TRS_894.pdf and Int'l Union of Nutritional Sci., The Global Challenge of Obesity and the International Obesity Task Force, <http://www.iuns.org/features/obesity/obesity.htm> [hereinafter IUNS] (last visited Feb. 16, 2010).

⁷ World Health Org., Global Database on Body Mass Index, <http://www.who.int/bmi/index.jsp> [hereinafter Global Database] (last visited Feb. 16, 2010). It is estimated that "[i]f current trends continue [in the United States], 103 million American adults will be considered obese by 2018." FUTURE COSTS OF OBESITY, *supra* note 1, at 2.

The World Health Organization calculates that globally in 2005 at least 20 million children under the age of five were overweight. WHO Obesity, *supra* note 2. It is also estimated that at least 155 million children between the ages of five and seventeen are either obese or overweight; of that number, approximately nineteen to twenty-nine percent are deemed to be obese. Int'l Ass'n for the Study of Obesity, Childhood Obesity, <http://www.iaso.org/childhoodobesity.asp> (last visited Feb. 16, 2010) (citing IASO International Obesity TaskForce, *Obesity in Children and Young People: A Crisis in Public Health*, 5 OBESITY REVS. 4 (2004)). However, estimates of childhood obesity are difficult to derive due to inconsistent measurement standards worldwide. WHO Obesity, *supra* note 3.

⁸ Anita Snow, *Cubans Wage Weight Fight*, MIAMI HERALD, June 16, 2007, at 11A.

⁹ Jewish Fed'n of Pinellas and Pasco Counties, FL, Jerusalem Municipality Lends Its Weight to Fight Against Obesity, <http://pinellas.ujcfedweb.org/page.aspx?id=176868> (last visited Mar. 1, 2010). The City of Jerusalem is not the first nor only municipality to create exercise parks. For example, Chicago, Illinois and Miami, Florida developed outdoor gyms, each after being cited as the "fattest city in America." Tania Veldemoro, *Fitness for Free at Coconut Grove Park*, MIAMI HERALD, Jan. 14, 2010, available at <http://www.miamiherald.com/1374/story/1423977.html> (last visited Mar. 1, 2010). "[Chicago] made a difference by supporting public access to fitness." *Id.* (quoting Aida Johnson, former member Chicago Mayor's Fitness Council).

Childhood obesity is a critical health care concern.¹⁰ There have been well-publicized efforts to regulate children's obesity both in the U.S. and abroad through such measures as mandated nutritional school lunch programs.¹¹ Those efforts are ongoing, and examination of those regulations will undoubtedly continue. This article focuses, however, on a less examined area of regulation—the recent worldwide efforts to curb obesity among adults. The regulations discussed in this article include measures proposed or adopted by either administrative agencies or legislative bodies, whether on a local or national level.

I. THE REGULATIONS

A. *I Can't Believe It's Not Butter*

Until recently, the average person was not particularly aware of trans fat nor its presence in prepared foods.¹² However, as of January 1, 2006, federal regulation required inclusion of trans fat content in the nutrition facts labels of packaged foods.¹³ Trans fat, also referred to as trans fatty acid or partially hydrogenated oil, is created by adding hydrogen to vegetable oils, turning them into solid fats; trans fat is used commercially primarily to extend shelf life and add taste to cooked foods.¹⁴

¹⁰ Ronni Litz Julien, *Healthful Kids*, <http://www.healthfulkids.com>; J. Madeleine Nash, *Obesity Goes Global*, TIME, Aug. 18, 2003, available at <http://www.time.com/time/magazine/article/0,9171,476417,00.html> (last visited Mar. 1, 2010).

¹¹ See, e.g., Jodi Kantor, *As Obesity Fight Hits Cafeteria, Many Fear a Note from School*, N.Y. TIMES, Jan. 8, 2007, at A14, available at <http://query.nytimes.com/gst/fullpage.html?sec=health&res=9801E4DA1530F93BA35752C0A9619C8B63> (last visited Mar. 2, 2010); Martha Mendoza, *Feds Fruitless in Getting Kids Off Junk Foods*, MIAMI HERALD, July 5, 2007, at 1; Janet Frankston Lorin, *Students Cleaning Healthy Plates*, MIAMI HERALD, Jan. 22, 2007, at 10A; Jonathan Watts, *China Targets Childhood Obesity with Compulsory Dancing*, GUARDIAN, June 5, 2007, available at <http://www.guardian.co.uk/world/2007/jun/05/china.schoolsworldwide>; *Burger King to End TV Child Ads*, BBC NEWS, Nov. 14, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/6147326.stm (last visited Mar. 3, 2010).

¹² See, e.g., Fed. Trade Comm'n, *In the Matter of Food Labeling: Trans Fatty Acids in Nutrition Labeling, Nutrient Content Claims and Health Claims; Proposed Rule*, Apr. 17, 2000, <http://www.ftc.gov/be/v000003.shtm> (last visited Mar. 1, 2010) (“[C]onsumer knowledge about trans fats is low”).

¹³ 21 C.F.R. § 101.9 (2009).

¹⁴ Am. Heart Ass'n, *Trans Fat*, <http://www.americanheart.org/presenter.jhtml?identifier=3045792> [hereinafter AHA] (last visited Feb. 16, 2010); U.S.

This “bad” fat contributes to heart disease and obesity.¹⁵ In a study of monkeys that were fed the same amount of calories, those that ate a diet rich in trans fat foods gained more weight and abdominal fat than those that consumed a diet rich in unsaturated fats.¹⁶

The same year that the federal regulation took effect, the New York City Health Department proposed an innovative means to try to lessen the threat of trans fat-related health problems among its constituents, mandating that artificial trans fats be practically removed from foods served by restaurants in the City.¹⁷ The proposed amendment to the City’s Health Code was approved in December 2006.¹⁸ The Health Department specifically noted that it adopted the resolution “in an effort to decrease the well-documented risk of ischemic heart and other disease conditions associated with consumption of such products.”¹⁹

Section 81.08 bans the use of artificial trans fats in restaurant food, “except food . . . served directly to patrons in a manufacturer’s original sealed package.”²⁰ The Health Department followed the U.S. Food and Drug Administration labeling regulations in permitting, however, service of foods that contain less than 0.5 grams of trans fat per serving.²¹

Food & Drug Admin., Revealing Trans Fats, http://www.pueblo.gsa.gov/cic_text/food/reveal-fats/reveal-fats.htm (last visited Feb. 16, 2010). Small amounts of trans fats also may be found naturally in some meats and dairy products. AHA, *supra* note 14.

¹⁵ Tommy G. Thompson, Sec’y of Health & Human Servs., Remarks at Trans Fat Press Conference at U.S. Dep’t of Health & Human Res. (July 9, 2003) *available at* <http://www.hhs.gov/news/speech/2003/030709.html> (last visited Mar. 1, 2010).

¹⁶ Anna Gosline, *Why Fast Foods Are Bad, Even in Moderation*, NEW SCIENTIST, June 12, 2006, *available at* <http://www.newscientist.com/article/dn9318> (last visited Mar. 1, 2010).

¹⁷ N.Y. CITY DEP’T OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (Dec. 5, 2006), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> [hereinafter NOTICE OF AMENDMENT (§ 81.08)] (last visited Mar. 1, 2010).

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 6.

²⁰ N.Y. CITY, N.Y., HEALTH CODE REGULATION § 81.08(a) (2008).

²¹ *Id.* § 81.08(b); *see also* NOTICE OF AMENDMENT (§ 81.08), *supra* note 18.

New York City implemented its trans fat code in two phases.²² Restaurants were required to ensure that by July 1, 2007, oils, shortening, and margarines used for spreads and deep frying contain less than 0.5 grams of artificial trans fat per serving.²³ The second phase, effective July 1, 2008, extended the ban to all foods containing artificial trans fat.²⁴

Other U.S. jurisdictions, whether on a state, county, or municipal level, quickly followed suit.²⁵ As of October 2008, at least twenty-seven states had either proposed or enacted laws limiting trans fats.²⁶ Cities, such as Baltimore, Boston, Chicago, Philadelphia, San Francisco, and Tiburon, California, have also adopted similar ordinances.²⁷ Some of these state and local regulations, however, would encourage only voluntary compliance,²⁸ while others would apply only to schools.²⁹

B. The 1 2 3's of Calorie Counting

Again in the forefront of the battle against obesity, in 2006 New York City also adopted a regulation that would have required restaurants who were already voluntarily disclosing calorie counts of their foods to include such information on their menus and menu boards.³⁰ The New York City Board of Health

²² See § 81.08(d).

²³ *Id.*

²⁴ *Id.*

²⁵ For a comprehensive list of proposed and enacted state legislation, see Nat'l Conference of State Legs., Trans Fat and Menu Labeling Legislation, <http://www.ncsl.org/programs/health/transfatmenulabelingbills.htm> [hereinafter NCSL] (last visited Feb. 16, 2010).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., S.F., CAL., HEALTH CODE art. 37, §§ 3701-11 (2008), available at <http://www.municode.com/content/4201/14136/HTML/ch037.html> (last visited Mar. 10, 2010).

²⁹ See, e.g., CAL. EDUC. CODE § 49431.7 (West 2007).

³⁰ See N.Y. CITY DEPT OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§ 81.50) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE (Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf> (last visited Mar. 10, 2010); see also David B. Caruso, *New Menus Show the Real Costs of Fast Food*, MIAMI HERALD, July 19, 2008, at 10A (calorie count regulation is "first of its kind in any U.S. city"); Paul Frumkin, *Appeal Considered as Court Upholds NYC Labeling Law*, NATION'S REST. NEWS, Feb. 17, 2009,

had enacted the regulation over concerns of an “obesity epidemic.”³¹ Over fifty percent of the population of New York City was found to be overweight or obese.³² Given that “Americans receive an estimated one-third of their caloric intake away from home,”³³ the City presumed that consumers would likely reduce their intake of calories if they knew how much they were eating.³⁴ Although originally thought by some to be less controversial than the elimination of trans fat from restaurant foods,³⁵ this and other similar measures spawned several lawsuits.

As originally enacted, New York City Health Code section 81.50 was struck down in federal court following a complaint filed by the New York State Restaurant Association (“NYSRA”).³⁶ The NYSRA alleged that the regulations violated the federal Nutrition Labeling and Education Act of 1990 (“NLEA”) and the First Amendment.³⁷ Although it lauded the New York City Health Board for its desire to control obesity,³⁸ the U.S. District Court for the Southern District of New York agreed with the NYSRA and held that section 81.50 was preempted by the NLEA, but did not rule on the First Amendment claim.³⁹

21 U.S.C. § 343(r) of the NLEA provides that food is deemed misbranded whenever “a claim is made in the . . . labeling of the food” characterizing the level of nutrient required to be disclosed under § 343(q) of the statute.⁴⁰ The latter subsection

<http://www.nrn.com/breakingNews.aspx?id=363256#> (last visited Mar. 10, 2010) (“New York is the first U.S. jurisdiction to enact such a regulation.”)

³¹ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 353 (S.D.N.Y. 2007) (citing Decl. of Thomas R. Frieden, Comm’r of N. Y. City Dep’t of Health & Mental Hygiene, ¶ 3).

³² *Id.* Specifically, 34.4% were found to be overweight and 21.7% obese. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ See Gregory M. Lamb, *Lead Paint, Cigarettes: Are Trans Fats Next?*, THE CHRISTIAN SCI. MONITOR, Oct. 12, 2006, available at <http://www.csmonitor.com/2006/1012/p13s01-lifo.html> (last visited Mar. 1, 2010) (“A second proposal issued at the same time by the New York City Health Department has garnered less discussion [than the trans fat issue] but is at least as important.”).

³⁶ N.Y. State Rest. Ass’n, 509 F. Supp. 2d at 353.

³⁷ *Id.* at 352.

³⁸ *Id.* at 363 n.18.

³⁹ *Id.* at 352-53, 363.

⁴⁰ 21 U.S.C. § 343(r) (2006). The statute exempts claims that use certain terms permitted by regulations. *Id.*

mandates that “food intended for human consumption and . . . offered for sale” be labeled with certain nutritional information; restaurants are exempted from this requirement.⁴¹ Nevertheless, § 343(r) applies to all food sellers, but only when they voluntarily make claims in food labeling covered by the statute.⁴² However, § 343(r) exempts from its coverage statements made pursuant to § 343(q).⁴³ However, because the § 343(q) mandate does not apply to restaurants, voluntary disclosure by restaurants of calorie counts—a claim characterizing the level of nutrient in a food⁴⁴—implicates § 343(r).⁴⁵

The Court noted that the NLEA contained a provision that expressly preempts state and local regulations regarding nutrient claims that are “not identical to the requirement of section 343(r).”⁴⁶ The Court found that the requirements of section 81.50 were not identical to those found in § 343(r) and its implementing regulations.⁴⁷ First, section 81.50 mandated disclosure of calorie counts on menus and menu boards, whereas regulations enacted pursuant to § 343(r) do not so restrict the form for providing information on claims made by food purveyors, but rather permit various means to do so.⁴⁸ Second, section 81.50 requires that calorie counts be calculated pursuant to 21 C.F.R. § 101.9(c)(1)(i), whereas the federal regulations permit calculation of nutrient amounts in claims covered by § 343(r) “by any reasonable bases.”⁴⁹ Thus, in imposing additional disclosure requirements on restaurants who already voluntarily publicized calorie information, the New York City ordinance implicated § 343(r) and its corresponding preemption provision.⁵⁰ The Court

⁴¹ *Id.* § 343(q).

⁴² *See N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 357.

⁴³ 21 U.S.C. § 343(r) (2006).

⁴⁴ *See N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 361.

⁴⁵ *Id.* at 363.

⁴⁶ *Id.* at 358, 362 (citing 21 U.S.C. § 343-1(a)(5) (2006)). Although the Court cites to § 343-1(a)(5), which specifically refers to preemption of claims under § 343(r), the wording of the opinion refers to the latter as § 403(r), which is the subsection number of that statute in the Federal Food, Drug, and Cosmetic Act, under which the NLEA was enacted. *See id.*; Fed. Food, Drug, and Cosmetic Act, ch. 675, § 403, 52 Stat. 1047 (1938).

⁴⁷ *N.Y. State Rest. Ass’n*, 509 F. Supp. 2d at 362.

⁴⁸ *Id.* at 362 (citing 21 C.F.R. § 101.10).

⁴⁹ *Id.*

⁵⁰ *Id.*

suggested, in dicta, that the City could otherwise have enacted a posting requirement on all restaurants, as such a mandate would not be preempted by either § 343(q) or §343(r)⁵¹; the City, however, had failed to do so.⁵²

Barely one month after losing the federal court challenge to its legislation, the City introduced another version of section 81.50.⁵³ The City paid heed to the Court's "suggestion"⁵⁴ and put forth a similar regulation that now applied to any New York City restaurant that operated as at least one of a group of fifteen or more establishments doing business nationally.⁵⁵ This new regulation continued the mandate that the affected restaurants post calorie counts on their menus and menu boards.⁵⁶ The City was intent in pursuing its goal of a healthier constituency. Noting that consumers generally do not fully comprehend the calorie content of foods⁵⁷ and that those eating fast food generally consume more calories,⁵⁸ the City proclaimed that the calorie count information "would enable New Yorkers to make more informed, healthier choices and can reasonably be expected to reduce obesity and the many related health problems which obesity causes."⁵⁹ However, Dr. Thomas R. Frieden, Commissioner of the City's Department of Health and Mental Hygiene, acknowledged that the City did not have "100 percent proof that it's going to work, but [has] a reasonable expectation it will be successful."⁶⁰ Nonetheless, the City adopted the re-

⁵¹ *Id.* at 363. The court noted that "states are not precluded . . . from establishing requirements for the mandatory nutrition labeling of restaurant food." *Id.* at 357.

⁵² See *id.* at 363; Alan Feuer, *Judge Throws Out New York Rule Requiring Restaurants to Post Calories*, N.Y. TIMES, Sept. 12, 2007, available at http://www.nytimes.com/2007/09/12/nyregion/12calories.html?_r=1.

⁵³ See N.Y. CITY DEPT OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF A RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE NEW YORK CITY HEALTH CODE (Jan. 22, 2008), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf> [hereinafter NOTICE TO REENACT § 81.50] (last visited Mar. 1, 2010).

⁵⁴ See *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 363; see *supra* note 52 and accompanying text.

⁵⁵ N.Y. CITY, N.Y., RULES art. 24 § 81.50(a)(1) (2008).

⁵⁶ *Id.* § 81.50(c).

⁵⁷ NOTICE TO REENACT § 81.50, *supra* note 53, at 5.

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 2.

⁶⁰ Stephanie Saul, *Conflict on the Menu*, N.Y. TIMES, Feb. 16, 2008, at B1, available at <http://www.nytimes.com/2008/02/16/business/16obese.html>.

vised measure on January 22, 2008, to become effective March 31, 2008.⁶¹

Shortly thereafter, the NYSRA once again sued the City, alleging the same grounds as in the first lawsuit.⁶² On April 16, 2008, the Court issued its opinion, in which it denied the NYSRA's claims for injunctive relief and summary judgment, and this time sided with the City in holding that section 81.50, as revised, was not preempted by federal law.⁶³

The Court also addressed the NYSRA's First Amendment claim. It found that, although section 81.50 mandated disclosure of calorie counts, it did not compel endorsement of a particular message⁶⁴—the regulation only strives to ensure the disclosure of “factual and uncontroversial” information.⁶⁵ Therefore, the Court concluded that the mandatory disclosure of calories is not the type of compelled speech prohibited under the First Amendment.⁶⁶ The Court, citing precedent, also found that the rational basis test, rather than heightened scrutiny, was the proper standard to apply in deciding a commercial free speech claim wherein factual disclosures are required.⁶⁷ The Court weighed all the evidence, including the NYSRA's expert's testimony that there was no “scientific certainty” at the time to prove that disclosing the calorie information would reduce obesity.⁶⁸ Nonetheless, the Court found that the City's means for reducing obesity was rationally related to its stated purpose.⁶⁹ It agreed with the City's premise, stating:

Based on the evidence presented by the City, as well as common sense, it seems reasonable to expect that some consumers will use the information disclosed pursuant to Regulation 81.50 to select lower calorie meals when eating at covered res-

⁶¹ NOTICE TO REENACT § 81.50, *supra* note 53, at 14.

⁶² N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08 Civ. 1000(RJH), 2008 WL 1752455, at *1 (S.D.N.Y. Apr. 16, 2008).

⁶³ *Id.* at *13.

⁶⁴ *Id.* at *9.

⁶⁵ *Id.* at *8-9.

⁶⁶ *Id.* at *9.

⁶⁷ *Id.*

⁶⁸ *Id.* at *11-12.

⁶⁹ *Id.* at *12.

taurants and that these choices will lead to a lower incidence of obesity.⁷⁰

This litigation pushed back the effective date of the regulation to April 22, 2008. However, the NYSRA appealed and also requested a stay pending appeal.⁷¹ The City did not begin actual enforcement until July 19, 2008,⁷² once the appellate court issued its order denying a stay.⁷³

The NYSRA promptly appealed the district court's decision on both the preemption and First Amendment claims.⁷⁴ On February 17, 2009, the U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision.⁷⁵ The NYSRA is considering whether to appeal the decision.⁷⁶

While New York City was struggling to implement a regulation that would withstand challenge, other jurisdictions jumped on the bandwagon.⁷⁷ For example, the King County (Washington) Board of Health had adopted a regulation on July 19, 2007, requiring County chain restaurants that had at least ten establishments nationwide to include calories of its foods, among other information, on the restaurant's menus and menu boards.⁷⁸ The regulation was later amended on April 17, 2008, to apply to chains of fifteen or more restaurants.⁷⁹ The Washington Restaurant Association cooperated with the King County

⁷⁰ *Id.* (citations omitted).

⁷¹ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08-1892-cv (2d Cir. Apr. 18, 2008) (appeal docketed).

⁷² James Barron, *Restaurants That Lack Calorie Counts Now Face Fines*, N.Y. TIMES, July 19, 2008, available at <http://www.nytimes.com/2008/07/19/nyregion/19calorie.html?ref=nyregion> (last visited Mar. 1, 2010) ("the Second Circuit . . . denied the restaurant association's request to extend the no fine period beyond midnight [July 18, 2008].").

⁷³ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No. 08-1892-cv (2d Cir. Apr. 29, 2008) (order denying initial motion for a stay); N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, No 08-1892-cv (2d Cir. June 16, 2008) (order denying renewed motion for a stay).

⁷⁴ N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

⁷⁵ *Id.* at 136-37.

⁷⁶ See Frumkin, *supra* note 30.

⁷⁷ For a list of jurisdictions that had proposed or enacted bills through October 2008, see NCSL, *supra* note 25.

⁷⁸ KING COUNTY, WASH., BD. OF HEALTH REGULATION #07-01 (2007).

⁷⁹ KING COUNTY, WASH., BD. OF HEALTH REGULATION #08-02 (2008).

Board of Health when the Board drafted the amended regulation.⁸⁰

The City of Philadelphia had introduced its own bill,⁸¹ which was adopted by the City Council in November 2008⁸² and signed into law by Governor Michael Nutter in December 2008.⁸³ The law, which took effect on January 1, 2010, is similar to those passed in New York City and King County, where chain restaurants of fifteen or more outlets are required to post calories on their menus and menu boards.⁸⁴ However, Philadelphia's ordinance also requires posting the amount of saturated fat, trans fat, carbohydrates, and sodium,⁸⁵ thus making it "one of the strongest restaurant labeling laws in the nation."⁸⁶

However, when the City and County of San Francisco and the County of Santa Clara passed their own menu labeling ordinances,⁸⁷ the California Restaurant Association ("CRA") filed suits alleging that the ordinances were preempted by federal law.⁸⁸ Although the CRA demanded that these regulations be overturned, it was simultaneously sponsoring a bill before the

⁸⁰ Metro. King County Council, *Restaurant Industry Agrees to Post Nutritional Information for Diners: Agreement Between Board of Health and Restaurant Industry First of Its Kind in Nation*, Mar. 12, 2008, http://www.kingcounty.gov/council/news/2008/March/JP_menu.aspx.

⁸¹ See Phila., Pa., Bill No. 080167-A (2008), available at <http://webapps.phila.gov/council/attachments/5677.pdf>.

⁸² Michael Klein, *What's New on Menu? Labeling*, PHILLY.COM, Nov. 7, 2008, http://www.philly.com/philly/restaurants/20081107_What_s_new_on_menu_Labeling.html (last visited Mar. 1, 2010).

⁸³ *Philly Orders Up Strong Nutritional Labeling Law: Bill Covers More Items, Fewer Exemptions for Providing Fat and Calorie Info*, MSNBC, Dec. 18, 2008, available at <http://www.msnbc.msn.com/id/28299792/> [hereinafter MSNBC] (last visited Mar. 1, 2010).

⁸⁴ See Phila., Pa., Bill No. 080167-A, *supra* note 81 (to be codified in PHILA., PA., HEALTH CODE § 6-102(6.1), 308(1)).

⁸⁵ *Id.* (to be codified in PHILA., PA., HEALTH CODE § 6-308(1)(a)).

⁸⁶ MSNBC, *supra* note 83.

⁸⁷ S.F., CAL., HEALTH CODE art. 8 § 468.3 (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>; SANTA CLARA COUNTY, CAL., ORDINANCE No. NS-300.793 (2008), available at http://www.publichealthadvocacy.org/printable/CCPHA_SClaracountyordinance.pdf.

⁸⁸ See Cal. Rest. Ass'n, *CRA Sues to Overturn S.F. Menu Labeling Ordinance*, July 7, 2008, <http://www.calrest.org/go/CRA/news-events/cra-news/california-restaurant-association-committed-to-statewide-standard-for-nutritional-information-disclosure-sues-to-overturn-san-francisco-ordinance/index.cfm>; Cal. Rest. Ass'n, *CRA Files Second Menu Labeling Lawsuit*, July 23, 2008, <http://www.calrest.org/go/cra/news-events/newsroom/press-releases/cra-files-second-menu-labeling-lawsuit/> (last visited Mar. 1, 2010).

California State Legislature that would create uniform menu labeling standards within the state.⁸⁹ The effort to pass a statewide initiative was successful. On September 30, 2008, Governor Arnold Schwarzenegger signed into law Senate Bill No. 1420,⁹⁰ which requires that chain restaurants with at least twenty outlets in California post calorie count information on their menus and menu boards.⁹¹ This new law, being phased in commencing July 1, 2009 with full implementation by January 1, 2011,⁹² preempts any local regulations.⁹³ Thus, the City and County of San Francisco suspended and the County of Santa Clara repealed their respective ordinances.⁹⁴

The state and local regulations may be preempted should the federal government be successful in enacting a new health-care initiative.⁹⁵ Bills passed by both the U.S. Senate and the House of Representatives contain identical language regarding disclosure of calories “contained in [] standard menu item[s], as usually prepared and offered for sale” and “a succinct statement concerning suggested daily caloric intake as specified . . . by regulation.”⁹⁶ As do other proposed and existing state and local laws, the federal provision would apply to chain restaurants and other retail food establishments with twenty or more locations.⁹⁷

⁸⁹ *Id.*; see also Cal. Rest. Ass'n, *CRA Agrees to Statewide Standard for Menu Labeling*, Sept. 2, 2008, <http://www.calrest.org/go/CRA/news-events/newsroom/cra-agrees-to-statewide-standard-for-menu-labeling/> (last visited Mar. 1, 2010).

⁹⁰ S.B. 1420, 2007-2008 Sess. (Cal. 2008) (codified in CAL. HEALTH & SAFETY CODE § 114094 (West 2009)).

⁹¹ CAL. HEALTH & SAFETY CODE § 114094(a)(1), (b)(2) (West 2009).

⁹² *Id.* § 114094(b)(1), (c).

⁹³ *Id.* § 114094(j).

⁹⁴ S.F., CAL., HEALTH CODE art. 8 § 468.9 (2008), available at <http://library.municode.com/index.aspx?clientId=14136&stateId=5&stateName=California>; SANTA CLARA COUNTY, CAL., ORDINANCE No. NS-300.795 (2008), available at <http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2008/November%20,%202008/202166708/TMPKeyboard202467821.pdf>.

⁹⁵ See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2572(c) (2009) (as passed by House, Nov. 7, 2009); Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 4205(c) (2009) (as passed by Senate, Dec. 24, 2009).

⁹⁶ Affordable Health Care for America Act, § 2572(b)(H)(ii); Patient Protection and Affordable Care Act, § 4205(b)(H)(ii).

⁹⁷ Affordable Health Care for America Act, § 2572(b)(H)(i); Patient Protection and Affordable Care Act, § 4205(b)(H)(i). Establishments, such as smaller chains, not subject to the federal law may elect to be covered by the federal provisions and, thus, exempt themselves from state or local laws. Affordable Health Care for America Act, § 2572(b)(H)(ix); Patient Protection and Affordable Care Act, § 4205(b)(H)(ix).

These establishments would also have to make nutritional information available upon customer request.⁹⁸ The current federal proposals, however, take a step further and require that the calorie count of food sold from a vending machine that is operated by a person who owns or operates at least twenty such machines be displayed “in close proximity to each article of food.”⁹⁹ Although the restaurant industry initially opposed these disclosure provisions, the National Restaurant Association currently supports the proposed legislation as it would create a national uniform standard.¹⁰⁰ However, the National Automatic Merchandising Association continues to urge its members to lobby Congress with concerns over the costs of the form of required disclosures on vending machines.¹⁰¹

C. *Big Mac Attack on Advertisements*

“Big Mac attack!”¹⁰² Rather than being a sign of hunger pangs, nowadays this slogan would more likely refer to governmental attacks against the onslaught of advertisements by fast food establishments. While cities, counties, and states in the U.S. have required labeling on menus listing calories and have introduced laws on trans fat in their efforts to fight obesity, authorities in Europe have taken a slightly different track. In Europe, efforts have been directed at restaurants’ main marketing tool—their advertising campaigns.¹⁰³

⁹⁸ Affordable Health Care for America Act, § 2572(b)(H)(ii)(III); Patient Protection and Affordable Care Act, § 4205(b)(H)(ii)(III).

⁹⁹ Affordable Health Care for America Act, § 2572(b)(H)(viii); Patient Protection and Affordable Care Act, § 4205(b)(H)(viii).

¹⁰⁰ Richard Tannenbaum, *Health Care Provisions on Menu Board Calorie Counts Would Trump New York’s Local Laws*, EXAMINER.COM (Nov. 16, 2009), <http://www.examiner.com/x-29918-NY-Environmental-Policy-Examiner-y2009m11d16-Health-care-provisions-on-menu-board-calorie-counts-would-trump-New-Yorks-local-laws> (last visited Mar. 1, 2010); Robert Pear, *Labels and Gay Benefits in Health Bill*, N.Y. TIMES, Nov. 7, 2009, available at http://www.nytimes.com/2009/11/08/health/policy/08benefits.html?_r=2 (last visited Mar. 1, 2010).

¹⁰¹ Nat’l Automatic Merchandising Ass’n, Legislative Alert (Jan. 15, 2010), available at http://www.vending.org/pdf/NAMA_January_15_2010_Leg_Alert.pdf.

¹⁰² “Big Mac attack” refers to a great desire to consume a Big Mac sandwich produced by McDonald’s restaurants.

¹⁰³ There have been challenges in the United States against fast food restaurants, but those have been in the form of lawsuits rather than legislation. See, e.g., *Pelman ex*

Spain seems to have been a pioneer in regulating (albeit through voluntary programs) the advertisement to its citizens of foods deemed to cause obesity.¹⁰⁴ In 2006, Spain's Ministry of Health and Consumer Affairs lambasted Burger King for advertising its XXL burger on television.¹⁰⁵ The Ministry claimed that the advertising campaign contravened a national initiative against obesity.¹⁰⁶ Furthermore, the Ministry stated that the commercial violated the terms of a voluntary agreement entered into between the Ministry and the Spanish Federation of Hoteliers and Restaurateurs (FEHRCAREM),¹⁰⁷ of which Burger King is a member.¹⁰⁸ The agreement stipulated among other items that the members of the federation would not "encourage

rel. Pelman v. McDonald's Corp., 396 F.3d 508, 510 (2d. Cir. 2005) (allegations that "McDonald's various promotional representations . . . create[d] the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily").

¹⁰⁴ Spain was the first country to create a plan against obesity after approval of the Global Strategy on Diet, Physical Activity and Health by the World Health Organization. Ministerio de Sanidad y Política Social, *Notas de Prensa*, (2006), <http://www.msc.es/gabinetePrensa/notaPrensa/desarrolloNotaPrensa.jsp?id=773> [hereinafter *Notas de Prensa*] (last visited Mar. 1, 2010). When Spain adopted its Strategy for Nutrition, Physical Activity and Prevention of Obesity (NAOS), part of its plan recognized that, notwithstanding a dearth of scientific information, advertisement of food products influenced diets. SPANISH MINISTRY OF HEALTH AND CONSUMER AFFAIRS, STRATEGY FOR NUTRITION, PHYSICAL ACTIVITY AND PREVENTION OF OBESITY 31 (2005) [hereinafter NAOS]. Admittedly, regulatory efforts in the U.S. and abroad have dealt with advertisements and obesity concerns; however, these have focused on advertisements to children, not adults. See, e.g., David Darwin, *Advertising Obesity: Can the U.S. Follow the Lead of the UK in Limiting Television Marketing Of Unhealthy Foods To Children?*, 42 VAND. J. TRANSNAT'L L. 317 (2009); Food Standards Agency, *Restrictions on TV Advertising of Foods to Children Come into Force*, Mar. 31, 2007, <http://www.food.gov.uk/news/newsarchive/2007/mar/tvads> (last visited Mar. 1, 2010); *EU Takes Aim at Junk Food Adverts*, BBC NEWS, Jan. 20, 2005, available at <http://news.bbc.co.uk/2/hi/business/4190313.stm> (last visited Mar. 1, 2010); *Burger King to End TV Child Ads*, *supra* note 12; Michael Kelly, *Taking Child Obesity Off the Menu*, IRISHTIMES.COM, Nov. 25, 2008, available at <http://www.irishtimes.com/newspaper/health/2008/1125/1227486541949.html> (last visited Mar. 1, 2010).

¹⁰⁵ Giles Tremlett, *Spain Tries to Remove Burger Ads*, GUARDIAN, Dec. 6, 2006, at 6, available at www.guardian.co.uk/media/2006/dec/06/spain.advertising (last visited Mar. 1, 2010).

¹⁰⁶ *Spain Chews Out Burger King*, MIAMI HERALD, Nov. 17, 2006, at 3C.

¹⁰⁷ FEHRCAREM is the acronym for Federación Española de Hostelería y Restauración y la Asociación Empresarial de Cadenas de Restauración Moderna—the Spanish Federation of Hoteliers and Restaurateurs. See *Notas de Prensa*, *supra* note 104.

¹⁰⁸ *Spain Chews Out Burger King*, *supra* note 106.

the consumption of huge individual portions”¹⁰⁹ and thus help in furthering the initiatives taken by the Spanish government to control obesity.¹¹⁰ In 2005, the same year the agreement was signed,¹¹¹ Spain had implemented the Strategy for Nutrition, Physical Activity and Prevention of Obesity (NAOS).¹¹²

The NAOS plan was devised to promote healthy lifestyles and eating habits among all of Spain’s citizens in recognition of the increased incidences of obesity and overweight.¹¹³ Studies reflected that 38.5% of the Spanish adult population was overweight and 14.5% was obese.¹¹⁴ Among children and young adults, 26.3% of the population was overweight and 13.9% were obese.¹¹⁵ These figures reflected that Spanish adults were in the median range for obesity among Europeans;¹¹⁶ however, obesity among young children was quite prevalent, placing Spain fourth among European countries after Italy, Malta, and Greece.¹¹⁷ Recognizing that childhood obesity would likely turn into adulthood obesity, Spain drafted a plan that would impact its entire constituency.¹¹⁸ The Spanish government also recognized that effective “implementation of the NAOS Strategy require[d] . . . the cooperation of all sections of society,”¹¹⁹ including the food and restaurant industries.¹²⁰

When Burger King aired its XXL burger commercials nearly two years later in Spain, the Health Ministry asserted that the fast food chain had breached its promise to cooperate with the NAOS plan.¹²¹ The Ministry alleged that the advertisement’s featured sandwich violated the voluntary agreement because it contained approximately 971 calories, almost one-half

¹⁰⁹ See NAOS, *supra* note 104, at 34.

¹¹⁰ Notas de Prensa, *supra* note 104.

¹¹¹ The agreement between the Ministry and FEHRCAREM was signed on January 19, 2005. *Id.*

¹¹² NAOS, *supra* note 104.

¹¹³ *Id.* at 17.

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 10-11.

¹¹⁸ *Id.* at 9, 17.

¹¹⁹ *Id.* at 21.

¹²⁰ *Id.* at 17, 31.

¹²¹ Notas de Prensa, *supra* note 104.

of the recommended daily allowance for an active teenager.¹²² Burger King did not heed the Ministry's repeated requests to pull the commercials off the air.¹²³ Rather, the company followed the XXL burger campaign with advertisements of its Double Whopper—further challenging the Health Ministry's demands.¹²⁴ Although Burger King eventually started airing new commercials promoting the quality of its burgers rather than their size, the company refused to agree not to promote larger burgers again in the future.¹²⁵

Subsequently, the Ministry terminated the voluntary agreement with FEHRCAREM, preferring to execute direct agreements with individual members of the federation.¹²⁶ Additionally and shortly thereafter, a law was enacted expanding the regulatory powers of the Spanish Food Safety and Nutrition Agency (AESAN). Among other matters, the new law permits AESAN to bring a cause of action to enjoin false or misleading advertisements to consumers concerning the nutritional value of food products.¹²⁷

Although Spain has been a leader in Europe, it has not been alone in its attempts to control advertisements of food products that are conducive to the obesity epidemic. For example, around the same time that Burger King was advertising its XXL burger in Spain, the company agreed to cease advertising of its products during children's television programming in the United Kingdom—preempting a possible ban by Ofcom, the U.K.'s media regulator.¹²⁸ Likewise, the European Union's

¹²² *Spain Chews Out Burger King*, *supra* note 106.

¹²³ Notas de Prensa, *supra* note 104; *see also Spain Chews Out Burger King*, *supra* note 106 (Burger King “had no plans to abandon the campaign.”).

¹²⁴ Tremlett, *supra* note 105, at 6.

¹²⁵ Notas de Prensa, *supra* note 104.

¹²⁶ *Id.*

¹²⁷ *Id.*; Ley 44/2006, de 29 de diciembre, de mejora de la protección de los consumidores y usuarios, B.O.E. 2006, 312, *available at* http://www.boe.es/ges/bases_datos/doc.php?coleccion=iberlex&id=2006/22950 (last visited Mar. 1, 2010).

¹²⁸ *Burger King to End TV Child Ads*, *supra* note 12. Ofcom was established as a corporate body by the Office of Communications Act 2002. Ofcom is the regulator for the U.K. communications industries, with responsibilities across television, radio, telecommunications, and wireless communications services. Ofcom, Statutory Duties and Regulatory Principles, <http://www.ofcom.org.uk/about/sdrp/> (last visited Feb. 16, 2010).

commissioner of health and consumer affairs had called for voluntary measures from the food industry regarding advertisements aimed at children; otherwise, the commissioner threatened to introduce legislation to control such advertisements.¹²⁹ However, Spain's stance seems to be the first to target advertisements aimed at both children and adults alike.

D. Adopting BMI Measures

Body mass index (BMI) has long been extolled as a fairly easy and reliable method for determining whether a person may be overweight or obese. The BMI is a number calculated based on a person's weight relative to height.¹³⁰ The Centers for Disease Control and Prevention¹³¹ states that the use of BMI "is one of the best methods for population assessment of overweight and obesity . . . [because] it is inexpensive and easy to use."¹³² Standard weight categories have been created to interpret a person's BMI.¹³³ Adults with a BMI below 18.5 are underweight. A BMI between 18.5 - 24.9 indicates a normal weight status. However, an adult person with a BMI of 25.0 - 29.9¹³⁴ is considered overweight and any higher BMI reflects obesity.¹³⁵ Determining whether an individual may be overweight or obese helps

¹²⁹ *EU Takes Aim at Junk Food Adverts*, *supra* note 104.

¹³⁰ Ctrs. for Disease Control & Prevention, About BMI for Adults, http://www.cdc.gov/nccdphp/dnpa/bmi/adult_BMI/about_adult_BMI.htm [hereinafter About BMI] (last visited Feb. 16, 2010). The formulaic measure for BMI in the United States is based on pounds and inches—weight in pounds divided by height in inches squared and the result is multiplied by a factor of 703 ($703 \times \text{weight}(\text{lbs.}) / [\text{height}(\text{in.})]^2$). *Id.* In countries which use the metric system, weight in kilograms is divided by height in meters squared with no multiplier ($\text{weight}(\text{kg}) / [\text{height}(\text{m})]^2$). *Id.*

¹³¹ The Centers for Disease Control and Prevention is an agency of the U.S. Department of Health and Human Services. U.S. Dep't of Health & Human Servs., About HHS, <http://www.hhs.gov/about/index.html#agencies> (last visited Feb. 16, 2010).

¹³² About BMI, *supra* note 130.

¹³³ *Id.* Weight categories for adults are the same for men and women. However, the BMIs of children and teens are interpreted based on both sex and age. *Id.*

¹³⁴ The World Health Organization refers to this range as "pre-obese" in its International Classification of BMI. *Global Database*, *supra* note 7. It also divides the obese category into three classes—obese class I range is 30.00 - 34.99; obese class II range is 35.00 - 39.99; and obese class III is any BMI equal to or greater than 40.00. *Id.*

¹³⁵ About BMI, *supra* note 130. There also exist weight categories for those that are underweight, i.e., under an 18.50 BMI. Mid-thinness is categorized in a BMI range of 17.00 - 18.499. Moderate thinness ranges from 16.00 - 16.99. Severe thinness refers to anyone with a BMI below 16.00. *Global Database*, *supra* note 7.

in assessing that individual's increased risk for certain diseases and health problems such as hypertension, diabetes, cardiovascular disease and even some cancers.¹³⁶

Effective May 2007, the Chinese government added the BMI index to its list of criteria in determining whether a person would be eligible to adopt a Chinese child.¹³⁷ The new regulations stipulate that, among other criteria, adopting parents must not have a BMI of 40 or more.¹³⁸ Under the BMI categorizations, any such person would be class III or morbidly obese.¹³⁹

This measure was immediately met with much backlash, citing discrimination toward the obese.¹⁴⁰ Dr. David Katz, from the Yale University School of Medicine, labeled the measure as "misguided, discriminatory, and shameful."¹⁴¹ In a commentary for ABC News, Dr. Katz noted that it is well-established in medical literature that children generally resemble their parents and that obesity in children of obese parents is due to genes rather than quality of life.¹⁴² He pointed to a study published in the *New England Journal of Medicine* that found that there was no relation between the weight index of adoptive parents and adoptive children.¹⁴³

Notwithstanding the foregoing, the China Centre of Adoption Affairs ("CCAA") has stated that foreign adoption authorities and agencies have supported China's efforts to improve its adoption procedures in more quickly placing children with

¹³⁶ See About BMI, *supra* note 130.

¹³⁷ See U.S. Dep't of State, Intercountry Adoption: China, <http://adoption.state.gov/country/china.html> [hereinafter Intercountry Adoption] (last visited Feb. 16, 2010).

¹³⁸ *Id.*

¹³⁹ *Global Database*, *supra* note 8; Intercountry Adoption, *supra* note 137.

¹⁴⁰ See David L. Katz, *Chinese Babies for Adoption; Fat Need Not Apply*, Dec. 20, 2006, available at <http://www.davidkatzmd.com/admin/archives/Chinese%20Babies%20for%20Adoption.Katz.12-21-06.doc>; see also *Stricter Rules for Adoption by Foreigners*, CHINA DAILY, Dec. 26, 2006, available at http://www.chinadaily.com.cn/citylife/2006-12/26/content_767670.htm (last visited Mar. 1, 2010) (BMI index for adoption of Chinese children was "highly disputed").

¹⁴¹ Katz, *supra* note 140, at 1.

¹⁴² *Id.*

¹⁴³ *Id.*; see also A.J. Stunkard, et al., *An Adoption Study of Human Obesity*, 314 NEW ENG. J. MED. 193 (1986).

qualified parents.¹⁴⁴ The Chinese government's stated rationale for adopting the new criteria, including the BMI index, is that it wishes to place children in "the best possible environment to grow in."¹⁴⁵ The director of the CCAA stated that China wanted "to pick the most qualified so that our children can grow up in even better conditions."¹⁴⁶ He expressed concern that morbidly obese people are more prone to diseases and may have a shorter life expectancy.¹⁴⁷ The CCAA director said that the Chinese government "does not mean [to be] prejudiced against less qualified applicants, who can still apply."¹⁴⁸ Thus, the CCAA will consider applicants of those that do not meet the criteria, but only after reviewing the applications of those parents that qualify under the set criteria.¹⁴⁹ Nonetheless, those who are morbidly obese may not ultimately have that opportunity. Thus, in effect, morbidly obese applicants are being forced to lose weight or abandon pursuing the adoption of a Chinese child.

E. Waist Not

Although the BMI is one of the more widely accepted means of measuring obesity and thus the potential for serious health risks, recent studies have suggested that it is also the "poorest" for predicting cardiovascular health.¹⁵⁰ Waist size, not BMI, is a better indicator of a person's propensity for hypertension, diabetes, and high cholesterol.¹⁵¹ A study published in the *Journal of Clinical Epidemiology* concluded that waist circumference or waist to hip ratios are "more accurate predictors of obesity-related cardiovascular risk and [for] clinical diagnosis of meta-

¹⁴⁴ Guan Xiaofeng, *Adoption Rules Well Received*, CHINA DAILY, Aug. 4, 2007, available at http://www.chinadaily.com.cn/china/2007-08/04/content_5448235.htm (last visited Mar. 1, 2010).

¹⁴⁵ Intercountry Adoption, *supra* note 137.

¹⁴⁶ Guan Xiaofeng, *New Criteria Spelt Out for Adoption by Foreigners*, CHINA DAILY, Dec. 25, 2006, available at http://www.chinadaily.com.cn/china/2006-12/25/content_766420.htm (last visited Mar. 1, 2010).

¹⁴⁷ *Id.*

¹⁴⁸ *Stricter Rules for Adoption by Foreigners*, *supra* note 140.

¹⁴⁹ Intercountry Adoption, *supra* note 137.

¹⁵⁰ Tara Parker-Pope, *WAIST; Watch Your Girth*, N.Y. TIMES, May 13, 2008, available at <http://query.nytimes.com/gst/fullpage.html?res=9A0DE7D7153CF930A25756C0A96E9C8B63> (last visited Mar. 1, 2010).

¹⁵¹ *Id.*

bolic syndrome.”¹⁵² Metabolic syndrome is a combination of medical disorders associated with elevated blood pressure, glucose, cholesterol, and abdominal fat.¹⁵³

On the heels of these studies, Japan enacted a law in early 2008 requiring companies and local governments to police the waist size of Japanese aged forty to seventy-four during their annual checkups or suffer financial consequences.¹⁵⁴ Men with waist circumferences larger than eighty-five centimeters (about 33.5 inches) and women with waistlines larger than ninety centimeters (about 35.5 inches), who also suffer from an obesity-related illness, will be given dieting guidance and re-educated as to eating habits if the their waist size does not shrink within six months.¹⁵⁵ Companies are measuring the waistlines of their employees, employees’ families, and retirees.¹⁵⁶

The aim of the Japanese government is to curb the rising costs of healthcare.¹⁵⁷ In furtherance of this goal, the government has enacted these measures in an effort to reduce obesity “by 10 percent over the next four years and 25 percent over the next seven years.”¹⁵⁸ Companies and local governments must meet certain targets to avoid financial penalties.¹⁵⁹ For example, certain companies “must measure at least 80 percent of their employees.”¹⁶⁰ If ten percent of those exceeding the prescribed measurements do not lose weight within the four-year time period, and twenty-five percent do not do so within the seven-year

¹⁵² Crystal Man Ying Lee, et al., *Indices of Abdominal Obesity Are Better Discriminators of Cardiovascular Risk Factors Than BMI: A Meta-Analysis*, 61 J. CLINICAL EPIDEMIOLOGY 646, 646 (2008).

¹⁵³ See, e.g., Mayo Clinic, *Metabolic Syndrome*, <http://www.mayoclinic.com/health/metabolic%20syndrome/DS00522> (last visited Feb. 16, 2010); Am. Heart Ass’n, *Metabolic Syndrome*, <http://www.americanheart.org/presenter.jhtml?identifier=4756> (last visited Feb. 16, 2010); Parker-Pope, *supra* note 150.

¹⁵⁴ Norimitsu Onishi, *Japanese Are Too Fat? A Tale of the Tape*, INT’L HERALD TRIB., June 13, 2008, at 1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 2.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 2.

time frame, the government could impose financial penalties, which could be in the millions.¹⁶¹

Some critics have asserted that the government has set unrealistic goals.¹⁶² These critics are concerned that too many Japanese will fail to meet the guidelines and that this, in turn, may lead to overmedication.¹⁶³ Others have suggested that controlling the high rate of smoking, rather than obesity of Japanese, should be the government's priority, as smoking is one of the causes of metabolic syndrome.¹⁶⁴ Nevertheless, Japan is moving forward with these preventive measures with the hope of reducing the waistlines and healthcare costs of its aging population.¹⁶⁵

F. Putting the Brakes on Fast Food—but No Way, San Jose!

The communities of the South Los Angeles area became subject to a one-year moratorium, effective September 14, 2008, on the establishment of new fast food restaurants in the area.¹⁶⁶ On July 29, 2008, the Los Angeles City Council unanimously approved an ordinance that would permit city planners to study alternatives to attracting greater and healthier food options for citizens of South Los Angeles.¹⁶⁷

With nearly one-half of the area restaurants being fast food outlets and “where rates of obesity and diseases related to it are disproportionately high,”¹⁶⁸ the City Council desired to “address the over-concentration of [commercial] uses which are detrimental to the health and welfare of the people of the

¹⁶¹ *Id.* On the other hand, however, those companies that exceed the targets may be rewarded by being able to lower their contributions to the healthcare system. *Id.*

¹⁶² *Id.* at 1-2.

¹⁶³ *Id.* at 2.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 1.

¹⁶⁶ L.A., CAL., ORDINANCE 180103 (2008) [hereinafter L.A. ORDINANCE].

¹⁶⁷ *Id.* The City is currently exploring “incentives to attract dining establishments, grocery stores and other options to enhance the quality of life for community stakeholders.” *Id.* at 1.

¹⁶⁸ Kim Severson, *Los Angeles Stages a Fast Food Intervention*, N.Y. TIMES, Aug. 18, 2008, at D1. In the preamble to the ordinance, the City Council took note of a Los Angeles Times report which found that 45% of the South Los Angeles restaurants were fast food outlets as compared to only 16% in west Los Angeles. L.A. ORDINANCE, *supra* note 167, at 1.

community.”¹⁶⁹ Thus, the ordinance placed a moratorium on permits for any new fast food restaurants. The ordinance defines fast food restaurant as an establishment that serves food for eat-in or take-out, and which has “a limited menu, items prepared in advance or prepared or heated quickly, no table orders, and food served in disposable wrapping or containers.”¹⁷⁰ The ordinance is to remain in effect for one year, unless permanent regulations are adopted beforehand;¹⁷¹ the City Council may, however, extend the temporary moratorium for two additional six-month periods if it is found that the City is diligently pursuing permanent regulations.¹⁷² According to a *New York Times* article, it seems as if this may be the first time a government has prohibited the establishment of a particular type of restaurant for health rather than aesthetic reasons.¹⁷³

The City of San Jose, California, attempted to enact a similar ordinance shortly after the Los Angeles City Council approved its fast food moratorium.¹⁷⁴ On August 14, 2008, three San Jose council members recommended adoption of an ordinance establishing a city-wide moratorium on new fast food restaurants;¹⁷⁵ during this time, the City was to draft another ordinance which would prohibit opening new fast food restaurants within 1,000 feet from school sites.¹⁷⁶ The council members were concerned with the rapid growth of obesity rates, particularly among minority groups and children. The proposal specifically noted the “need to provide racially-diverse and low-income communities with healthier eating options and . . . to curtail the increase in high-fat, low-nutrition options like fast

¹⁶⁹ L.A. ORDINANCE, *supra* note 166, at 1.

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 3.

¹⁷² *Id.* at 9.

¹⁷³ Severson, *supra* note 168.

¹⁷⁴ See San Jose, Cal., Memorandum to Rules and Open Government Committee re: Development of Conditional Zoning Prohibiting the Establishment of New Fast-Food Restaurants in Close Proximity to Schools, Aug. 14, 2008, available at http://www.sanjoseca.gov/clerk/CommitteeAgenda/Rules/20080820/Rules20080820_g2.pdf [hereinafter San Jose Memorandum].

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* The San Jose Memorandum noted that other jurisdictions, such as Detroit, had enacted similar proposed ordinances regulating the establishment of fast food restaurants near schools. *Id.*

food.”¹⁷⁷ The proposal further focused on concerns over the devastating effects of fast food restaurants on children’s health.¹⁷⁸

Despite these legitimate concerns, the proposed moratorium was defeated.¹⁷⁹ The City’s Rules and Open Government Committee voted against the ban on new fast food restaurants, stating that this was not the solution to obesity prevention, although it did opt to pursue discussion among the City and schools regarding health and nutrition.¹⁸⁰

G. The Biggest Loser

In early 2008, Mississippi Representative W. T. Mayhall, Jr. proposed a bill that would prohibit restaurants from serving food to patrons deemed to be obese.¹⁸¹ Food establishments that seated five or more were subject to the restriction.¹⁸² If any such establishments repeatedly violated the proposed legislation, the Mississippi Department of Health would have been permitted to revoke a restaurant’s license.¹⁸³ The standard for determining a person’s obesity would be set by the Department of Health with input from the Mississippi Council on Obesity Prevention and Management.¹⁸⁴ Restaurants could then rely on the established criteria in deciding whom they could serve.¹⁸⁵

The bill’s co-author, Representative John Read, had expressed concern over Mississippi’s “number one problem.”¹⁸⁶ In 2007, Mississippi was ranked as having the highest obesity rate

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* The San Jose Memorandum considered studies which found a correlation between obesity in children and fast food outlets. *Id.*

¹⁷⁹ Transcript of San Jose, Cal., Rules and Open Government Committee Meeting, Aug. 20, 2008, at 13, available at <http://www.sanjoseca.gov/clerk/transcript/committees/rules/r082008.pdf> [hereinafter San Jose Transcript].

¹⁸⁰ *Id.*

¹⁸¹ H.B. 282, 2008 Leg., Reg. Sess. (Miss. 2008) [hereinafter Miss. H.B. 282].

¹⁸² *Id.*

¹⁸³ *Id.* at 1-2.

¹⁸⁴ *Id.* at 1.

¹⁸⁵ *Id.*

¹⁸⁶ Miss. Considers Restaurant Ban for Obese: Lawmaker from Fattest State in U.S. Says He Wants to Draw Attention to Obesity Epidemic, CBS News, Feb. 5, 2008, available at <http://www.cbsnews.com/stories/2008/02/05/national/main3790418.shtml> (last visited Mar. 1, 2010).

in the United States; approximately thirty-two percent of the state's adult population was considered obese.¹⁸⁷

Notwithstanding the Representatives' intentions to bring attention to this epidemic, Mississippi House Public Health and Human Services Committee Chairman Steve Holland was quoted as saying about the bill: "It's dead on arrival at my desk."¹⁸⁸ Needless to say, the bill never moved through the committee.¹⁸⁹

II. WHAT'S THE SKINNY?

Should governments intervene in a matter that is basically about choice? It has been suggested that poor eating habits and little physical activity are the main causes of overweight and obesity.¹⁹⁰ Physical and emotional problems may contribute to weight gain as well.¹⁹¹ For example, low metabolism, depression, and even genetic predisposition may influence one's risk of obesity.¹⁹² However, excessive fat generally occurs because caloric intake is greater than what is burned.¹⁹³ Thus, a person's own behavioral choices may lead to overweight and obesity.

This type of behavioral choice may be differentiated from smoking. While smoking cigarettes may initially be a personal choice, evidence has proven that chemical additives in cigarettes often lead to nicotine addiction and incessant smoking, which in

¹⁸⁷ Trust for America's Health, Mississippi State Data, <http://healthyamericans.org/states/?stateid=MS> (last visited Feb. 16, 2010). The study conducted by Trust for America's Health and the Robert Wood Johnson Foundation is based on data reported during 2005-2007. *Id.* Mississippi's obesity rate increased during those three consecutive years. *Id.*

¹⁸⁸ Posting of isaaph to Sari-Saring Pinoy, <http://isaaph.wordpress.com/2008/02/06/its-dead-jim-mississippi-hb-282-doa-in-mississippi-legislature/> (Feb. 6, 2008).

¹⁸⁹ Miss. H.B. 282, *supra* note 181.

¹⁹⁰ *See, e.g.*, eMedicineHealth, Obesity, http://www.emedicinehealth.com/obesity/article_em.htm ("Overeating and sedentary habits (inactivity) are the most important risk factors for obesity.") (last visited Feb. 16, 2010).

¹⁹¹ *See, e.g.*, Weight-control Information Network, Understanding Adult Obesity, <http://www.win.niddk.nih.gov/publications/understanding.htm> (last visited Feb. 16, 2010).

¹⁹² *Id.*

¹⁹³ MedlinePlus, *supra* note 3; Global Database, *supra* note 7.

turn leads to health risks, such as lung cancer or cardiovascular disease.¹⁹⁴ Because chemicals introduced into cigarettes have influenced these risky behaviors, governmental intervention is warranted.¹⁹⁵ Given, however, that overeating appears thus far to be truly a personal choice, can a case be made for government regulation?¹⁹⁶

An argument in favor of legislative or regulatory action is that governments were created, among other reasons, to protect the health and welfare of its citizens. Given that overweight and obesity are one of the major causes of health problems throughout the world, governments should step in to fulfill one of its purposes.¹⁹⁷ This reasoning has not, however, persuaded everyone. Some find such arguments paternalistic and an unacceptable excuse for governmental intrusion on private lives. A member of the Stamford (Connecticut) Board of Representatives suggested as much, albeit in somewhat less than diplomatic terms. In opposing a proposed ordinance banning trans fats, Joseph Coppola, Jr., stated, "Government has to stay out of our lives It's about choice. If people are stupid enough to fill their diet with trans fats, they're just stupid."¹⁹⁸ Nonetheless, when polling is done, it appears that most Americans agree that

¹⁹⁴ NAT'L INST. ON DRUG ABUSE, CIGARETTES AND OTHER TOBACCO PRODUCTS, at 1-2 (Sept. 2008), available at <http://www.drugabuse.gov/pdf/infofacts/Tobacco08.pdf>; Am. Heart Ass'n, Nicotine Addiction, <http://www.americanheart.org/pre-senter.jhtml?identifier=4753> (last visited Feb. 16, 2010).

¹⁹⁵ See, e.g., Prabhat Jha, et al., *Tobacco Addiction*, in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 869, 873-74 (2d ed. 2006).

¹⁹⁶ Science may yet reveal that choice is not the only controlling factor. Moreover, as discussed in this article, some medical problems may also lead to overeating. See *supra* notes 190-91 and accompanying text.

¹⁹⁷ The problems associated with excess weight not only affect the individual but also affect the public as a whole as increased medical costs associated with overweight and obesity place an additional burden on the health care system. This concern was the impetus for Japan imposing its waist measurement program in trying to reduce incidences of metabolic syndrome. See *supra* notes 156, 164 and accompanying text. As Steve Levy, Suffolk County (NY) Council Executive, was quoted in discussing a county ordinance banning trans fats and requiring posting of calorie counts, "[i]t's for the taxpayer, too, because it's the taxpayer who also foots the bill for the consequences of obesity." Stacey Stowe, *Another Blow Against Trans Fats in Foods*, N.Y. TIMES, Feb. 22, 2009, available at <http://www.nytimes.com/2009/02/22/nyregion/long-island/22Rfats.html?ref=health> (last visited Mar. 1, 2010).

¹⁹⁸ Stowe, *supra* note 197.

government intervention is necessary in the fight against obesity.¹⁹⁹

Philosophical differences as to when governments should intervene for the health of its citizens will continue. One important underlying question that helps to focus the debate is whether these laws, if enacted, would or could actually improve such health. A study on methods of preventing and treating obesity suggested that community-wide policies would be helpful in influencing behavioral changes in eating habits and physical activity.²⁰⁰ In regard to a public hearing concerning its then-proposed trans fat ban, the New York City Department of Health and Mental Hygiene stated:

When clear and conclusive evidence of significant harm is well established, as is now the case for trans fat, it should spur action to protect the public. Had public policy been more rapidly introduced to eliminate lead in paint, require seatbelts, reduce drunk driving, warn of tobacco risks—to note but a few—thousands of lives would have been saved.²⁰¹

What should governments do, then, to combat overweight and obesity? As we have seen throughout this article, there exists a myriad of ways to attack this issue.²⁰²

Some jurisdictions have proposed legislation or enacted regulations that target what are deemed to be unhealthy foods, beverages, or substances in either. The most notable example is the banning of trans fats from restaurant fare.²⁰³ Spain targeted advertising campaigns that promoted high-calorie foods.²⁰⁴ The moratorium imposed in Los Angeles went even further by prohibiting establishment of new restaurants serving a

¹⁹⁹ Cynthia A. Baker, *Bottom Lines and Waist Lines: State Governments Weigh in on Wellness*, 5 IND. HEALTH L. REV. 185, 188 (2008).

²⁰⁰ Sharma, *supra* note 5, at 448.

²⁰¹ Memorandum from Lynn D. Silver, Assistant Comm'r, Bureau of Chronic Disease Prevention & Control, & Sonia Y. Angell, Dir., City Cardiovascular Disease Prevention & Control Program 7 (Dec. 4, 2006), available at <http://nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-comments-response.pdf>.

²⁰² One commentator suggested that governments use what she terms “redistributive, education, and community design efforts to encourage wellness.” Baker, *supra* note 199, at 198.

²⁰³ See discussion *supra* Part I(A).

²⁰⁴ See discussion *supra* Part I(C).

particular type of food—fast food—even if temporarily.²⁰⁵ However, some attempts to regulate particular products for purposes of controlling obesity have been unsuccessful.²⁰⁶ For example, efforts have been made to impose taxes on junk food—often referred to as “fat taxes”—to deter consumption of unhealthy foods and beverages.²⁰⁷ A study published in 2000 reported that, in the United States, seventeen states and two cities had enacted laws imposing taxes on snacks, candy, soft drinks, or soft drink syrups.²⁰⁸ Even as recently as December 2008, New York Governor David A. Paterson proposed an 18% tax on sodas and other sugary drinks,²⁰⁹ which the Governor and his staff referred to as a tax on obesity.²¹⁰ The 2000 study, however, also revealed that eleven other similar laws had been repealed by then as well.²¹¹ Many of the repeals have been attributed to heavy lobbying on behalf of beverage and food manufacturers.²¹² Governor Paterson’s proposal is already being met with much criticism.²¹³ Barely two months after the tax initiative was announced, it was reported that the governor is

²⁰⁵ See discussion *supra* Part I(F).

²⁰⁶ Taxes have not necessarily been imposed merely for such altruistic purposes; other reasons have included the revenue these taxes generate. See Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 854 (2000); Chris L. Winstanley, Comment, *A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm*, 86 OR. L. REV. 1151, 1172-74 (2007).

²⁰⁷ Baker, *supra* note 199, at 190. *But see supra* note 206 and accompanying text.

²⁰⁸ Jacobson & Brownell, *supra* note 207, at 855. The report also noted that both Canada and several of its provinces had imposed taxes on the sale of soft drinks and snacks. *Id.* at 854.

²⁰⁹ See Clyde Haberman, *People Behaving Poorly May Be the Ones to Save the State from the Poorhouse*, N.Y. TIMES, Dec. 18, 2008, at A39, available at <http://www.nytimes.com/2008/12/19/nyregion/19nyc.html> (last visited Mar. 1, 2010).

²¹⁰ Nicholas Confessore, *Paterson Lowers Expectations on Soda Tax, Calling Approval Unlikely*, N.Y. TIMES, Feb. 13, 2009, at A17, available at <http://www.nytimes.com/2009/02/14/nyregion/14sodatax.html> (last visited Mar. 1, 2010).

²¹¹ *Id.* at 856. The study also reflected that, effective 2001, South Carolina repealed a tax on soft drink containers and syrups. *Id.*

²¹² Baker, *supra* note 199, at 191; Winstanley, *supra* note 206, at 1172.

²¹³ See Cara Matthews, *Soda Tax Part of Paterson’s Wider Anti-Obesity Campaign*, LOHUD.COM, Jan. 9, 2009, <http://www.lohud.com/article/20090109/NEWS05/901090338/1/rss01> (last visited Mar. 1, 2010). *But see, e.g.*, Kelly Brownell, *Want a Healthier State? Save Gov. Paterson’s Tax on Sugar Soda*, N.Y. DAILY NEWS, Feb. 17, 2009, available at http://www.nydailynews.com/opinions/2009/02/18/2009-02-18_want_a_healthier_state_save_gov_paterson.html (last visited Mar. 1, 2010) (urging passage of the soft drink tax).

now retreating a bit from his proposal.²¹⁴ A beverage industry lobbyist stated, “The governor is responding to the obvious hue and cry, not only from the food and beverage industry people, but from the general public, who have shown in poll after poll that this is not an idea that they feel is worth embracing.”²¹⁵ Would a permanent moratorium on new fast food restaurants meet the same challenge or demise? Anyone proposing food-targeted legislation should be prepared for the onslaught of critics and lobbyists.

Others have tried to curb obesity by encouraging healthier lifestyles or discouraging unhealthy habits. The Chinese adoption policy is one such regulation. Interestingly, unlike the other regulations discussed in this article which aim to benefit those who are overweight and obese, the Chinese policy, in fact, adversely affects the morbidly obese who wish to adopt Chinese children; instead, its focus is to encourage healthy living on the part of the adoptive child.²¹⁶ Another means of encouraging healthier eating habits and increased physical activity is by enactment of regulations that are concomitant with zoning issues. For example, the moratorium on new fast food restaurants was enacted in Los Angeles, California, to give the City an opportunity to study and plan redevelopment of the South Los Angeles area,²¹⁷ “address the over-concentration of uses which are detrimental to the health and welfare of the people of the community,”²¹⁸ and provide healthier food options for the community.²¹⁹ A similar measure failed to pass in San Jose, California. During the moratorium period, the City was to prepare a change in its zoning code prohibiting establishment of new fast food restaurants within 1,000 feet of a school zone; its intent was to provide healthier food options for its citizens in a city where “fast food restaurants are disproportionately

²¹⁴ See, e.g., Confessore, *supra* note 210.

²¹⁵ *Id.* (quoting Richard Lipsky).

²¹⁶ See discussion *supra* Part I(D).

²¹⁷ Press Release, Jan C. Perry, City of L.A. Councilwoman, 9th Dist., South Los Angeles Fast Food Interim Control Ordinance Unanimously Approved by Los Angeles City Council: (July 29, 2008) (on file with author) [hereinafter Perry Press Release].

²¹⁸ L.A. Ordinance, *supra* note 166, at pmbl.

²¹⁹ Perry Press Release, *supra* note 217.

concentrated around schools in lower-income communities.”²²⁰ The City, however, decided to refer these health matters to the School/City Collaborative and the Healthy Neighborhood Venture Fund, both of which explore and address educational issues.²²¹ Some of these efforts may end up being too costly. Another example is the placement of solar-powered scales and the design and construction of exercise trails that the City of Jerusalem, Israel, is considering; any such endeavor entails a great expenditure of funds, especially for construction costs, that are not necessarily readily available.²²² Thus, although zoning seems promising, actual implementation of zoning efforts may not be feasible where much government funding is necessary. Perhaps these zoning efforts would be most cost-effective when a community is undergoing new urban planning rather than on a piecemeal basis.

This leads to the least costly efforts – educational interventions to curb obesity.²²³ It has been advocated that “the way to address obesity is through education, not legislation.”²²⁴ As Vice Admiral Richard H. Carmona, who served as United States Surgeon General, remarked during a 2003 speech, people need to be educated on “health literacy”—a phrase he coined and defined as “the ability of an individual to understand, access, and use health-related information and services.”²²⁵ Several of the regulations discussed in this article focused on educating the public, whether through dissemination of information or wellness programs. The calorie count mandate, in New York City and other U.S. jurisdictions, is the most evident educational intervention, as legislation requires posting of this information so that consumers may make informed on-

²²⁰ San Jose Memorandum, *supra* note 174.

²²¹ San Jose Transcript, *supra* note 179, at 12-13.

²²² Cal. Rest. Ass’n, *San Jose Legislative Update: Proposed Ban Defeated*, <http://www.calrest.org/go/cra/news-events/newsroom/san-jose-legislative-update-proposed-ban-defeated/?keywords=san%20jose%20legislative%20update> (last visited Feb. 16, 2010).

²²³ *Id.* at 192.

²²⁴ Feuer, *supra* note 52.

²²⁵ Vice Admiral Richard H. Carmona, U.S. Surgeon Gen., Remarks at the Am. Enter. Inst. Obesity Conference (June 10, 2003), *available at* <http://www.surgeongeneral.gov/news/speeches/obesity061003.htm> (last visited Mar. 1, 2010).

the-spot food consumption choices.²²⁶ Spain initiated a program promoting healthy eating; as part of that national program, it eventually introduced measures regarding the advertisement of nutritional value of foods.²²⁷ Japan's obesity measures took the form of a tape measure.²²⁸ In targeting waist size, the country is educating its people on the importance of reducing excess fat and healthy eating habits.²²⁹ Educational programs can be easily implemented to reach a wide audience.

For example, a campaign in Clarksburg, [West Virginia], encouraged consumers to switch from higher fat to lower fat milk to reduce intakes of saturated fat. After the 7-week campaign, the market share of 1% or fat-free milk increased from 18% to 41%. Most of that change was sustained for at least 1 year. The cost of the campaign, which used paid television and radio messages, was only 22 cents per resident.²³⁰

The author noted that “[a] campaign reaching about 200 000 [sic] people would cost about the same as 1 coronary-bypass operation.”²³¹ Given the comparatively low cost coupled with the ability to affect many quite easily and effectively, educational-type legislation should be encouraged.

Thus, throughout the world, several different means have been introduced in an attempt to reduce the incidences of overweight and obesity. Some of these efforts have been voluntary in nature, but most are mandatory and impose penalties for violations of the same. Restaurants that violate New York City's ban on the use of trans fat or that fail to post calorie counts on menus or menu boards may be fined between \$200 and \$2000.²³² Violators of California's calorie count statute will be guilty of an infraction, punishable by a fine between \$50 and \$500.²³³ The City of Philadelphia likewise will assess a fine of no more than \$500 for failure to abide by its calorie count

²²⁶ See discussion *supra* Part I(B).

²²⁷ See discussion *supra* Part I(C).

²²⁸ See discussion *supra* Part I(E).

²²⁹ See discussion *supra* Part I(E).

²³⁰ Jacobson & Brownell, *supra* note 206, at 857 (citations omitted).

²³¹ *Id.*

²³² N.Y. CITY, N.Y., HEALTH CODE REGULATION § 3.11 (2008).

²³³ CAL. HEALTH & SAFETY CODE § 114094(k) (West 2009).

ordinance.²³⁴ Japan plans on imposing up to a 10% surcharge on companies that fail to reduce the waist sizes of employees and their dependents.²³⁵ The fast food moratorium in Los Angeles is a penalty in itself by not allowing establishment of new restaurants.²³⁶ And even the Chinese adoption restrictions penalize a class of persons—those who are morbidly obese—in preventing them from easily adopting children from that country.²³⁷

When regulations concern a matter of choice—excess eating—should they penalize individuals and entities? Or do voluntary programs or financial incentives work best?

Unfortunately, the Spanish program was voluntary in nature but somewhat ineffective, forcing Spain to adopt regulatory penalizing measures.²³⁸ Spain's Ministry entered into only voluntary agreements with restaurants without providing any monetary or other type of incentive.²³⁹

Thus, governments should consider adopting programs/regulations that provide incentives to participants, such as tax credits²⁴⁰ or subsidies. Several scholars have suggested that, in many contexts, a system of rewards, rather than penalties, may be more effective in inducing desired behavior and may reap greater benefits for all in the long run.²⁴¹

When a positive attitude is linked to one's change in behavior, the probability that the desired behavior will become a social

²³⁴ Phila., Pa., Bill No. 080167-A, *supra* note 82 (to be codified in PHILA., PA., HEALTH CODE § 6-308(7)).

²³⁵ See Justin McCurry, *Japanese Firms Face Penalties for Overweight Staff*, GUARDIAN, Mar. 19, 2008, available at <http://www.guardian.co.uk/world/2008/mar/19/japan> (last visited Mar. 1, 2010).

²³⁶ See discussion *supra* Part I(F).

²³⁷ See discussion *supra* Part I(D).

²³⁸ See discussion *supra* Part I(C).

²³⁹ See discussion *supra* Part I(C).

²⁴⁰ For an excellent discussion proposing a “refundable tax credit for money spent on qualifying healthy foods,” see Winstanley, *supra* note 206, at 1157.

²⁴¹ See, e.g., ROBERT B. BECHTEL & ARZA CHURCHMAN, HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 530-31 (2002); Josef Falkinger, *Rewards Versus Penalties: On a New Policy Against Tax Evasion*, 19 PUB. FIN. REV. 67-79 (1991); Mary Agnes Carey, *Bigger Rewards--and Stronger Penalties--May Help Improve Health Care Quality*, *Experts Say*, CQ POLITICS, Sept. 9, 2008, available at <http://www.cqpolitics.com/wmspage.cfm?docID=hbnews-000002946414> (last visited Mar. 1, 2010).

norm increases. Positive attitudes are more likely to follow an incentive/reward approach than a disincentive/penalty intervention because the former approach is more likely to be perceived as “voluntary” and no threat to individual freedom. In fact, perceiving a threat to one’s freedom can lead to behavior contrary to compliance with a mandate.²⁴²

Lastly, the weightiest matter needs to be addressed – whether regulations to curb obesity should be enacted on a local or regional level, or should they be on a more widespread national scale (please forgive the puns)? This issue is highlighted in the extended litigation in New York City wherein the NYSRA challenged a locally enacted regulation based on a federal preemption claim.²⁴³ Likewise, in California, local regulations led to eventual state-wide preemption.²⁴⁴ Given the health crisis that the world is facing, legislation and programs at all levels should be allowed and encouraged. Preemption on a state-wide or national level, however, is warranted in those instances where local regulations would be so disparate as to discourage mobility or enforcement would cause more harm than good, and where a cost-benefit analysis would prove a more uniform regulation to be more effective. “[T]here is a need to change both policies and environments so that these are supportive of entire communities in eating healthy foods.”²⁴⁵ Community programs and regulations are thus essential from the top down and from the bottom up.

CONCLUSION

There is no “magic bullet”²⁴⁶ in legislating to prevent overweight and obesity in the world’s population. And there is no evidence yet to show whether any of the regulations have, in fact, affected people’s eating habits. One writer suggests that

²⁴² BECHTEL & CHURCHMAN, *supra* note 241, at 531 (citations omitted).

²⁴³ See discussion *supra* Part I(B).

²⁴⁴ See discussion *supra* Part I(B).

²⁴⁵ Sharma, *supra* note 5, at 448.

²⁴⁶ N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 354 (In challenging the New York City calorie count ordinance, the NYSRA argued that “caloric intake is just one component of a healthy lifestyle, and its reduction is not a ‘magic bullet’ to combat obesity.”).

New Yorkers are paying attention to the calorie count postings and “switching to a healthier lifestyle,”²⁴⁷ but this assessment was based on mostly anecdotal evidence.²⁴⁸ As these regulations have only recently been implemented, more time is needed to study their impact. Even then, it may be difficult to determine whether any particular legislation was indeed effective in preventing or reducing incidences of overweight and obesity.

And there are skeptics. For example, some question whether Japan’s program to reduce metabolic syndrome by forced waist measurements “is little more than a fad that will, in time, burn out.”²⁴⁹ In this regard, a Japanese professor of medical informatics was quoted as saying: “[T]he government will cancel the ‘metabo’ exams in a few years, after realising [sic] that they won’t save any money.”²⁵⁰ Others suggest that companies will find other means to market foods that have been targeted by some of these regulations by, for instance, reducing the price on higher calorie items.²⁵¹

Notwithstanding the cynics and critics, whatever can fairly be done should be done to lessen this health crisis. “While menu labeling [and other regulations] alone will not solve the problem of obesity, [they can each] play a vital role in a multipronged effort to combat the epidemic.”²⁵²

²⁴⁷ Eduardo Porter, Editorial, *About That Doughnut*, N.Y. TIMES, Aug. 30, 2008, at A18, available at <http://www.nytimes.com/2008/08/30/opinion/30sat4.html> (last visited Mar. 1, 2010).

²⁴⁸ *Id.*

²⁴⁹ Alex Wood, *Japan Addresses Incidence of “Metabolic Syndrome”*, CLINICA, Jan. 13, 2009 (on file with author).

²⁵⁰ *Id.*

²⁵¹ See, e.g., Porter, *supra* note 247.

²⁵² Harold Goldstein & Patricia Wakimoto, *Menu Labeling Will Help San Franciscans Lighten Up*, S.F. CHRON., Feb. 7, 2008, at B7, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/07/ED1GUSSD3.DTL> (last visited Mar. 1, 2010).

