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Improving Public Health through Behavioural Rules: A Legitimate Legislative Project?

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Abstract

This article concerns the proper role of governments when adopting legislative rules to improve public health. These rules have led to claims that governments embrace paternalism as a legislative principle which, in turn, facilitates the creation of the ‘Nanny State’. However, whilst the ‘Nanny State’ controls or even prohibits behaviour which the State deems to be harmful, the ‘Nudge State’ merely influences and manipulates peoples’ choices by making non-wanted behaviour economically expensive or socially undesirable. This article provides examples of ‘Nudge State’ intervention in the health sector. It analyses the rise of the ‘Nudge State’ and critically assesses this development. The article argues that ultimately, ‘Nudge State’ measures are futile and obstruct the proper role of government.

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1. Introduction

One of the perennial legal and political issues of our time concerns the proper role of government in society. During the last decades, governments have been very interventionist to ensure that citizens are protected against many evils, identified by the legislator. This intervention led to the creation of the ‘Nanny State’ which, in relevant cases, largely replaced the free choice of individuals with the decision-making power of the government. This intervention generated

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a discussion about the extent to which governments should embrace paternalism as a principle of legislation. However, this principle has proven an unpopular and burdensome imposition upon society because it resulted in governments taking decisions which presumably should be able to be taken by individuals. For this reason, supporters of ‘Nanny State’ interventionism have more recently sought to ‘moderate’ their approach through the medium of a ‘Nudge State’, though in goal and philosophy they are very similar. This similarity arises from the fact that the ‘Nudge State’ seeks to achieve the same objectives, not by prescriptively controlling, forbidding or compelling the behaviour of individuals (as is usual under ‘Nanny State’ interventionism), but by making this behaviour economically expensive or socially undesirable.

This paper deals with the issue of ‘Nudge State’ interventionism involving the legislative adoption of behavioural rules to improve public health. In addressing this issue we consider whether improving health through behavioural rules is a legitimate legislative project that comes within, and is supported by, the proper role of government.

Following this Introduction, the second part of this paper examines two competing philosophies of the appropriate role of the State in relation to public health: the ‘Nudge State’ versus the libertarian approach. This part also contrasts the relatively non-interventionist approach of the common law developed by judges with the sternly interventionist tendencies of legislatures, which consists of politicians. The third part surveys the myriad of ‘Nudge State’ measures that governments have seen fit to introduce in recent years. The fourth part considers the undesirability of such measures as a matter of policy. The findings of this paper are summarised in the final section.

2. Two Competing Philosophies of the Proper Role of the State

2.1 *The Nanny State and the Nudge State: A Distinction without a Difference?*

The term ‘Nanny State’ is a familiar description of the tendency of many modern governments to “treat [their] citizens as children in a nursery”,¹¹ supervising and influencing their choices according to the government’s view of their well-being. Such an approach is “authoritarian and paternalistic ... imposing on people what is good for them, for ‘nanny knows best’.”²²

The supporters of the Nudge philosophy seek to make Nanny less obvious and to preserve free choice. They rather wordily define a ‘nudge’ as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives”.³ According to Richard Thaler, the Nanny State is coercive (such as by banning cigarettes) while the Nudge State seeks to make it easier for people to move in a pre-determined direction that is favoured by the State (such as quitting smoking).⁴ The Nudge state philosophy thus seeks to manipulate and influence peoples’ choices, not by banning these choices, but by making it more difficult to freely choose or by making the choice socially undesirable. As such, although Nanny does not make the decisions (for example, that people should not smoke), it influences individuals’ choices to smoke. The philosophy is manipulative and Nanny is still behind the curtain, still superintending what everyone is doing.

The Nudge State philosophy is cut from the same cloth from which the Nanny State was fashioned. Both philosophies are zealously paternalistic: “At the core of nudging is the belief that people do not always act in their own self-interest.”⁵ Underlying that philosophy is the notion that the state can make better choices for citizens than those citizens will make for themselves if left to their own devices. This worldview seeks to protect consumers even where they do not want protection, “overriding consumer preferences to improve public health”.⁶

A patronising sense of entitlement to a guiding role over the lives of others pervades such policies. The Nudge

¹ * This paper is based on an earlier paper co-authored with Rajesh Sharma, Senior Lecturer in Law, RMIT University, Melbourne.

¹ R W Holder, *How Not To Say What You Mean: A Dictionary of Euphemisms* (4th ed, Oxford: Oxford University Press, 2007), 269.

² John Ayto and Ian Crofton, *Brewer’s Dictionary of Modern Phrase and Fable* (2nd ed, London: Weidenfeld & Nicolson, 2006), 520.

³ Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (New Haven, Conn: Yale University Press, 2008), 5-6.

⁴ Interview with Richard Thaler, *HARDtalk*, BBC World Service, 24 October 2012, available at <http://www.bbc.co.uk/podcasts/series/ht/all>.

⁵ Katrin Bennhold, “The Ministry of Nudges”, *New York Times*, 8 December 2013, p BU1.

⁶ Katherine Pratt, “A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes” (2012) 87 *Tulane Law Review* 73 at 107.

State seeks to “coax and *cajole* ... autonomous adults into healthier decision making”⁷ and “to *steer* citizens towards making positive decisions as individuals and *for society*” (emphasis added).⁸ While an educational programme is directed at the conscious mind, a nudge is a covert psychological influence.⁹

The Nudge philosophy even made its presence felt in the formal structure of government.¹⁰ The British coalition government has established a Behavioural Insights Team, popularly known as the “Nudge Unit”. This unit attempts to apply insights from behavioural psychology to the formation of governmental policy, seeking to influence individual behaviour in line with government policy objectives. The state thus employs people who are actively charged with dreaming up new ways to interfere in the lives of ordinary people. The unit’s Internet blog ranges over the staggeringly wide field in which they offer their valuable insights: from obesity, tax compliance, literacy, numeracy and organ donation, down to household appliances, loft insulation, mobile phone theft, Christmas presents, plastic shopping bags, staircases, and penalty shoot-outs.¹¹

The interventions made by the ‘Nudge State’ are not always irreversible. From time to time, we come across an example of government action that involves an apparent reversal of the ‘Nudge State’ paternalistic philosophy. For example, the recent decision of the government of Hong Kong to abolish tax on wine does not fit into any model of State interventionism which is considered in this paper. At best it may support the view that Hong Kong is a free market economy and the government wants to promote Hong Kong as a tourist destination. The Financial Secretary expected that “by developing various businesses in Hong Kong relating to quality table wine, our total business volume in trading, storage and auction of table wine may increase by as much as HK\$4 billion”.¹² Thus, this example indicates that the ‘Nudge State’ philosophy may be arrested for the purpose of achieving trade-related objectives. Although the focus may be on an improvement of trade figures, indirectly government is promoting consumption of alcohol, which is what has happened in Hong Kong. Indeed the consumption of alcohol has increased in Hong Kong since 2009. The percentage of people aged 18 to 24 engaged in binge drinking has risen each year from 7.4% to 9.8% in 2010 and 2012 respectively.¹³ Thus, although Hong Kong has become a wine city after abolishing tax on wine, this abolition has come with a heavy price in terms of increased alcoholism, binge drinking and illness related to drinking.¹⁴

But in general, there is little difference in substance between the ‘Nanny State’ and the ‘Nudge State’. The Nudge State is simply an attempt to rebrand the way in which governments seek to influence the choices made by their citizens. As the Nanny State has been rejected by the citizenry because of its paternalistic characteristics, a Nudge state government seeks to influence governments’ preferred choices by manipulating the choice. In doing so, Nudge State governments often adversely impact on the rights and interests of the suppliers of these choices. Thus, the ‘Nanny State’ and the ‘Nudge State’ legislative programmes are both based on, and inspired by, the same ‘nanny knows best’ philosophy. In essence, it is a distinction without a difference.

2.2 A Libertarian Philosophy on the Proper Role of the State

In contrast, a libertarian philosophy provides a socially healthy alternative to the implantation of the principle of paternalism. According to libertarian philosophy it is not the role of the state to hold the hands of adults of full capacity as they make their way through commercial life. This libertarian philosophy emphasises both personal choice and acceptance of individual responsibility for the consequences of those choices: “people should be free to choose

⁷ Jonathan Cummings, “Obesity and Unhealthy Consumption: The Public-Policy Case for Placing a Federal Sin Tax on Sugary Beverages” (2010) 34 *Seattle University Law Review* 273 at 294.

⁸ Alberto Alemanno, “Nudging Smokers: The Behavioural Turn of Tobacco Risk Regulation” [2012]-1 *European Journal of Risk Regulation* 32 at 32.

⁹ Alemanno, *supra* n 8, 37.

¹⁰ The Unit has recently left the Cabinet Office and is now a “social purpose company”: <http://www.behaviouralinsights.co.uk/blogpost/behavioural-insights-team---social-purpose-company>.

¹¹ <http://www.behaviouralinsights.co.uk/blog>.

¹² <http://www.china-briefing.com/news/2008/02/27/hong-kong-eliminates-duties-on-alcohol.html>

¹³ <http://www.scmp.com/news/hong-kong/article/1512953/officials-look-taxes-and-ads-curb-binge-drinking?page=all>

¹⁴ <http://www.scmp.com/news/hong-kong/article/1512953/officials-look-taxes-and-ads-curb-binge-drinking?page=all>

whether to live in ways that are healthy or unhealthy and take personal responsibility for their own health.”¹⁵ Every time that the government seeks to mould individual economic and social choices, personal freedom is diminished, so very strong justifications should be demonstrated for such interventions. Interference should be a last resort, not a reflex instinct.

2.3 Common Law Libertarianism versus Legislative Paternalism

Most Nanny State or Nudge State interventions take place by way of legislation rather than judge-made law. Many rules of the common law and equity have libertarian characteristics, generally holding parties to their bargains and resisting the temptation to abolish or revise obligations freely undertaken merely because their outcomes subsequently prove disadvantageous to a party. Several recent decisions by Australian courts are illustrative of the libertarian tendencies of the common law.

In a recent Australian High Court decision, over a 14 month period the appellant had lost over \$20 million while gambling at a Victorian casino.¹⁶ He had a compulsion to gamble, though he was able to control that compulsion. In a unanimous judgment the Court rejected the gambler’s unconscionability claim against the casino. Gambling was a rare commercial activity in which each party inherently sought to cause financial damage to the other party.¹⁷

The appellant was a wealthy “high roller”. He did not suffer from a constant compulsion that would have prevented him from staying away from the casino.¹⁸ He was able to stay away when he so wished.¹⁹ He had also gone to considerable lengths to convince the casino that his previous gambling problems were now past.²⁰

Two passages from the judgment reflect the Court’s reluctance to set aside commercial transactions. First, the Court observed that, “equitable intervention does not relieve a plaintiff from the consequences of improvident transactions conducted in the ordinary and undistinguished course of a lawful business. A plaintiff who voluntarily engages in risky business has never been able to call upon equitable principles to be redeemed from the coming home of risks inherent in the business.”²¹ Thus, equity did not characterise as victimisation the ordinary operation of a lawful commercial activity.²² It would be a different matter if a casino encouraged a pensioner to cash their pension cheque to fund gambling or if a gambler who was drunk or under an incapacity, had been encouraged to continue to gamble.²³

Second, the Court also emphasised that indifference to the welfare of the other party to an arm’s length commercial transaction would not justify equitable intervention: “Equitable intervention to deprive a party of the benefit of its bargain on the basis that it was procured by unfair exploitation of the weakness of the other party requires proof of a predatory state of mind. Heedlessness of, or indifference to, the best interests of the other party is not sufficient for this purpose. The principle is not engaged by mere inadvertence, or even indifference, to the circumstances of the other party to an arm’s length commercial transaction.”²⁴

In stark contrast, the legislative and executive branches (as opposed to the judicial branch of government) of many Western governments appear to be faithfully devoted to Nudge State interventions. All of the numerous health-based interventions discussed below have arisen from legislative or executive action.

3. Nudge State Interventions in the Name of Health

¹⁵ Pratt, *supra* n 6, 110, 129.

¹⁶ *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at [1]; [2013] HCA 25.

¹⁷ *Kakavas, supra* n 16, [25].

¹⁸ *Kakavas, supra* n 16, [23].

¹⁹ *Kakavas, supra* n 16, [33].

²⁰ *Kakavas, supra* n 16, [36].

²¹ *Kakavas, supra* n 16, [20].

²² *Kakavas, supra* n 16, [26].

²³ *Kakavas, supra* n 16, [30].

²⁴ *Kakavas, supra* n 16, [25]. See also at [161].

3.1 Australia's Plain Packaging Law

One of the most controversial Nudge State interventions is the Australian federal law which provides that tobacco products may be sold only in generic packaging. The exterior of Australian cigarette packs must be “dark drab brown” in colour and have a matt finish.²⁵ The executively mandated specific colour is reputed to be the “world’s ugliest colour”.²⁶ The interior of packs must be white.²⁷

The legislation effectively guts valuable tobacco trademarks of any economic significance. Trademarks may not appear on cigarette packaging, other than a single use of the brand name.²⁸ Even the size, typeface and colour of the brand name are closely regulated.²⁹ Trademarks may not appear on the cigarettes themselves³⁰ or the packet wrappers.³¹ Ugly graphic health warnings must take up 75% of the front of packets and 90 % of their reverse side.³²

3.2 New York's 'Sugary Drinks Portion Cap' Rule

The New York City Board of Health famously adopted a “Sugary Drinks Portion Cap Rule”, which limited the size of the cups in which sugary drinks could be served by food service establishments. Such cups could be no larger than 16 fluid ounces.³³ The New York Court of Appeals ultimately held that the rule was unconstitutional as its adoption by an administrative body violated the separation of legislative and executive power under the New York City Charter.³⁴ However, while the ban on giant sodas was widely ridiculed, such paternalistic strictures are likely to re-emerge elsewhere, perhaps in different guises but with the same intentions.

3.3 Denmark's Fat Tax

Samuel Johnson long ago described taxes on goods as “hateful” while Blackstone called them “odious”.³⁵ Legislators now drape themselves in justifications of health objectives while imposing such taxes. Taxes upon unhealthy foods are an extension of the old legislative practice of piously levying “sin taxes” upon disfavoured goods such as tobacco or alcohol.³⁶ Thus far, the most extraordinary food tax has been Denmark’s wide-ranging “fat tax”.

A 2011 Danish statute imposed a special tax upon foods that were high in saturated fat.³⁷ A tax of approximately €2.15 per kilogram of saturated fat was imposed upon a range of domestic and imported foods. These foods included meat, margarine, animal fats, cooking oils and some dairy products. The tax was payable only if a specified percentage of saturated fat content was exceeded. Most milk fell below this threshold and was not taxable.³⁸ This imposition of fat tax was extremely unpopular and the Danish Parliament repealed the tax after just a single year in operation.³⁹ Anticipating a similarly adverse reaction, the Government also abandoned its plans for a sugar tax.

²⁵ s 19(1)-(2), *Tobacco Plain Packaging Act* 2011 (Cth).

²⁶ Rachel Wells, “Does this colour turn you off?”, *The Age*, 17 August 2012. The specific colour is set by the regulations (Pantone 448C). See r 2.2.1(2), *Tobacco Plain Packaging Regulations* 2011 (Cth).

²⁷ r 2.2.1(3), *Tobacco Plain Packaging Regulations* 2011 (Cth).

²⁸ ss 20(1), (3), 21(2)(b), *Tobacco Plain Packaging Act* 2011 (Cth).

²⁹ r 2.4.1, *Tobacco Plain Packaging Regulations* 2011 (Cth).

³⁰ s 26(1), *Tobacco Plain Packaging Act* 2011 (Cth).

³¹ s 22(2)(b), *Tobacco Plain Packaging Act* 2011 (Cth).

³² ss 9.13(1), 9.19(1), *Competition and Consumer (Tobacco) Information Standard* 2011 (Cth) (Federal Register of Legislative Instruments F2013C00598).

³³ *New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Department of Health and Mental Hygiene*, 23 NY 3d 681 at 690-691 (2014).

³⁴ *New York Statewide Coalition*, *supra* n 33, 690, 693. See *New York City Charter* s 21.

³⁵ Sir Harry Gibbs, “‘A Hateful Tax’? Section 90 of the Constitution” (1995) 5 *Upholding the Australian Constitution* 121 at 123.

³⁶ Robert Creighton, “Fat Taxes” (2010) 31 *Journal of Legal Medicine* 123 at 124, 126, 132.

³⁷ Act No 247 of 20 March 2011, available at <https://www.retsinformation.dk>. The Act is summarised in Susie Stærk Ekstrand and Kristine Lillholt Nilsson, “Danish Parliament Approves Fat Tax” [2011]-2 *European Food and Feed Law Review* 126.

³⁸ Alemanno and Carreño, “‘Fat Taxes’ in Europe – A Legal and Policy Analysis under EU and WTO Law” 2013-2 *European Food and Feed Law Review* 97 at 102.

³⁹ Art 1, Act No 1395 of 23 December 2012, available at <https://www.retsinformation.dk>.

3.4 Soda Taxes and Other Tax Strategies

Sugar has also been in the fiscal sights of legislators. Numerous American States impose “soda taxes” upon sugary beverages.⁴⁰ Legislators have also charged differential tax rates depending upon the nutritional content of the food. Under the Canadian goods and services tax, basic foodstuffs are not taxed, whereas “junk foods” are subject to the full rate of the GST.⁴¹ Legislators have also experimented with tax incentives. The Canadian federal government and some provinces have also offered tax credits for various activities that may promote physical fitness.⁴² Under the Australian GST processed foods are taxed but unprocessed foods are not subject to the tax.⁴³

3.5 Hong Kong: payments for plastic shopping bags and a requirement to switch off car engines while waiting

The government of Hong Kong, acting as a Nudge State legislator, has relied on environmental arguments to change the behaviour of individuals. As a geographically small place, disposal of solid waste has been a serious concern for the government of Hong Kong. According to a report, published in 2008, the average disposal of solid wastes per day stood at 13,503 tonnes. It was estimated that, on average, one person uses and discards three plastic shopping bags in one day which translates into over eight billion plastic shopping bags every year.⁴⁴ To curb the indiscriminate use of plastic shopping bags which was causing a major and visible environmental problem, the Hong Kong government introduced a levy of 50 cents on each plastic shopping bag. The objective of the scheme is to provide an economic disincentive to users of plastic shopping bags and, instead, to encourage them to use their own shopping bags.⁴⁵ This levy, presumably, also helps retailers because they do not have to pay for environmental damage caused by their customers. If retailers collude with customers or do not charge the levy, then retailers commit an offence and they would be subject to a maximum fine of HK\$100,000 for the first offence and HK\$200,000 for a subsequent offence.⁴⁶ The ultimate aim of the government is to bring about behavioural changes by reducing the excessive use of plastic shopping bags and to encourage people to embrace BYOB (“Bring Your Own Bag”).⁴⁷

3.6 No Free Toys Ordinances

The Nudge State philosophy has even extended as far as seeking to veto parental choices regarding childrens’ diets, with several American cities prohibiting restaurants from offering free toys with their meals unless those meals meet certain nutritional standards.⁴⁸ This is state paternalism seeking to undercut parental decision making regarding the diets of their children. One television programme satirised this ordinance as giving kids the menu choice of the “Crappy Meal”, “equipped with the Periodic Table of Elements, CPR instructions, and a toy figurine of Kathleen Sebelius, Secretary of the US Department of Health and Human Services.”⁴⁹

3.7 Health Star Ratings

⁴⁰ J Angelo DeSantis, “Formulating A Soda Tax Fit For Consumption: A Pragmatic Approach to Implementing the Failed New York Soda Tax” (2012) 16 *Michigan State University Journal of Medicine and Law* 363 at 397-398. In 2010 such a proposal failed in the State of New York: *id.*, 367-370. For historical lists of State soda taxes, see Michael F Jacobson and Kelly D Brownell, “Small Taxes on Soft Drinks and Snack Foods to Promote Health” (2000) 90 *American Journal of Public Health* 854 at 855-856.

⁴¹ Nola M Ries, “Legal and Policy Measures to Promote Healthy Behaviour: Using Incentives and Discincentives to Control Obesity” (2012) 6 *McGill Journal of Law and Health* 1 at 19.

⁴² Ries, *supra* n 41, 15-16.

⁴³ ss 38.2-38.4 and Sch 1, *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

⁴⁴ <http://www.epd.gov.hk/epd/psb/en/intro.html>.

⁴⁵ http://www.epd.gov.hk/epd/psb/en/faq_public01.html.

⁴⁶ http://www.epd.gov.hk/epd/psb/en/faq_trade01.html.

⁴⁷ <http://www.legco.gov.hk/yr11-12/english/panels/ea/papers/ea1128cb1-424-5-e.pdf>.

⁴⁸ Alexis M Etow, “No Toy for You! The Healthy Food Incentives Ordinance: Paternalism or Consumer Protection?” (2012) 61 *American University Law Review* 1503 at 1512-1513.

⁴⁹ Etow, *supra* n 48, 1531.

Australian health ministers intend to introduce a voluntary “health star rating system” for food manufacturers.⁵⁰ The proposed rating system gives each product a numerical value out of 5, based on the energy, saturated fat, sugar and salt content of the foodstuff.⁵¹ The numerical ratings are determined by entering nutritional values into a spreadsheet calculator.⁵²

When the scheme was first proposed, it was intended that a voluntary system would be trialed for two years. If an insufficient proportion of food manufacturers were to adopt the system, a mandatory standard would be adopted by Food Standards Australia New Zealand,⁵³ an executive body. Such mandatory standards would not be subject to parliamentary disallowance.⁵⁴

3.8 Menu Labelling Requirements

The United States federal ‘Obamacare’ legislation requires that restaurants with more than 20 stores include on their menus nutritional information about their food offerings, along with a statement of the recommended daily calorie intake.⁵⁵

4. Policy Considerations: The Futility of Nudge State Measures

There are numerous policy objections to such paternalistic interventions. This section outlines some of these objections: the ready alternative of promoting and accepting individual responsibility, the substitution effect, the probable circumvention of such laws, the likelihood of unintended consequences, the availability of voluntary alternatives, the lack of public support for such measures and the likelihood of endless litigation challenging Nudge State impositions.

4.1 The Alternative of Individual Responsibility

It is often argued that Nudge State measures against obesity are warranted because obesity results in higher health costs which are absorbed by private or public health insurance systems. However, these costs could arguable be minimised if the health insurance system prices insurance premiums in line with individual risk, so that those who are obese would pay higher premiums since their treatment costs are likely to be higher than those of non-obese persons.⁵⁶

Such a measure would certainly be controversial and sensitive because those who have to pay the higher premiums would claim to be the victim of unjustifiable discrimination. Nevertheless, this approach would send a strong price signal against obesity and is consistent with individual responsibility for health since it cannot be denied that a large proportion of cases of obesity are the result of individual lifestyle choices. With such a financial penalty, individuals would have a constant economic disincentive against an unhealthy lifestyle. Such an approach is supported by research suggesting that most people are more likely to modify their behaviour in response to a financial loss than to achieve an economic gain.⁵⁷

4.2 The Substitution Effect

When a tax is imposed upon a good, people tend to substitute an alternative that has similar qualities or effects. For example, raising the price of alcohol has often been followed by an increase in the consumption of marijuana as one

⁵⁰<http://www.health.gov.au/internet/main/publishing.nsf/Content/foodsecretariat-front-of-pack-labelling-1>.

⁵¹http://www.ahmac.gov.au/cms_documents/Health_Star_Rating_Style_Guide_30_June_2014.pdf.

⁵² http://www.ahmac.gov.au/cms_documents/Health_Star_Rating_Calculator.xlsm.

⁵³ s 54, *Food Standards Australia New Zealand Act 1991* (Cth).

⁵⁴ s 94, *Food Standards Australia New Zealand Act 1991* (Cth).

⁵⁵ 21 USC 343(q)(5)(H), enacted by Act of 23 March 2010, Pub L 111-148, 124 Stat 119 at 573.

⁵⁶ Alexander Copp, “The Ethics and Efficacy of a ‘Fat Tax’ in the Form of an Insurance Surcharge on Obese State Employees” (2012) 15 *Quinnipiac Health Law Journal* 1 at 6, 8-10.

⁵⁷ Copp, *supra* n 56, 25.

drug is substituted for the other.⁵⁸ This effect has also been observed in the case of food. While soda taxes reduce the consumption of soda, consumers substitute other high calorie drinks, with the result that there is no reduction in the obesity rate.⁵⁹ This is exactly what economic theory predicts will occur in these cases.⁶⁰ Furthermore, alcohol taxes drastically reduce consumption by light drinkers but have little effect upon consumption by heavy drinkers.⁶¹

4.3 Circumvention of Nudge State Laws

Sometimes, consumers do not even need to substitute a different food. It is also often easy for consumers to circumvent a tax. The effect of the Danish fat tax was simply to encourage Danish consumers to buy high fat foods in neighbouring Germany and Sweden where the prices were lower.⁶² It was only Danish businesses that were hit by the tax. The American “no free toys” ordinances were quickly circumvented by fast food restaurants, which simply charged a nominal fee for the toys and thereby bypassed the nutritional strictures.⁶³

4.4 Unintended Consequences

Many Nudge State measures have unintended consequences. Stricter anti-obesity laws have been associated with an increase in the social stigma attached to obesity. Furthermore, obesity rates did not actually decline.⁶⁴ Punitive measures against obese people may also be challenged as infringements of anti-discrimination laws.⁶⁵

To provide another example, soda taxes have a far greater impact upon the incomes of poor people than the rich.⁶⁶ There is another class bias to such taxes: they target beverages generally favoured by the poor rather than those favoured by the rich, though the calorie content of each drink may be similar.⁶⁷

4.5 Availability of Voluntary Alternatives

It could be argued that there is no need to compel food manufacturers to submit to a government nutritional labeling system for their products. Private bodies can create their own educational resources concerning a healthy lifestyle. For example, an Australian medical research institute recently developed its own food star rating system.⁶⁸ Such a private initiative is preferable to a legislative imposition upon business because it is not coercive.

4.6 Lack of Public Support for Nudge State Measures

Such measures do not arise from popular demand. Where voters have been given a direct choice about Nudge State measures they have usually rejected such interventions. For example, in several U.S. States soda taxes have been repealed at statewide referenda.⁶⁹ That is not surprising in view of the fact that, usually, individuals do not want the

⁵⁸ Alemanno and Carreño, *supra* n 38, 100.

⁵⁹ Jonathan Klick and Erich A Helland, “Slim Odds” (Spring 2011) 34 *Regulation* 20; Susan Yeh, “Laws and Social Norms: Unintended Consequences of Obesity Laws” (2012) 81 *University of Cincinnati Law Review* 173 at 184; Ries, *supra* n 41, 24; Pratt, *supra* n 6, 112, 126-127.

⁶⁰ Michael L Marlow and Alden F Shiers, “Would Soda Taxes Really Yield Health Benefits?” (Fall 2010) 33 *Regulation* 34 at 37.

⁶¹ Marlow and Shiers, *supra* n 60, 37.

⁶² Stephanie Strom, “Fat Foods Tax is Repealed in Denmark”, *New York Times*, 13 November 2012, p B4; Sarah Kliff, “Denmark scraps world’s first fat tax”, *Washington Post*, 13 November 2012.

⁶³ Etow, *supra* n 48, 1536.

⁶⁴ Yeh, *supra* n 59, 176, 211; Alberto Alemanno and Amandine Garde, “The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets” (2013) 50 *Common Market Law Review* 1745 at 1759.

⁶⁵ Ries, *supra* n 41, 34-36.

⁶⁶ Pratt, *supra* n 6, 122-123, 131; Chris L Winstanley, “A Healthy Food Tax Credit: Moving Away from the Fat Tax and Its Fault-Based Paradigm” (2007) 86 *Oregon Law Review* 1151 at 1157, 1176; Rachel E Morse, “Resisting the Path of Least Resistance: Why the Texas ‘Pole Tax’ and the New Class of Modern Sin Taxes are Bad Policy” (2009) 29 *Boston College Third World Law Journal* 189 at 208-209.

⁶⁷ Winstanley, *supra* n 66, 1175-1176; Trevor Burrus, “The Dangers of a Soda Tax”, 29 November 2013, <http://www.cato.org/blog/dangers-soda-tax>.

⁶⁸ <http://www.foodswitchstars.com.au>. See “New star ratings for food”, *Lateline*, 17 September 2014, <http://www.abc.net.au/lateline>.

⁶⁹ DeSantis, *supra* n 40, 398-399.

government telling them what to eat and charging them more if they chose something that is deemed to be unhealthy.

4.7 Endless Litigation

If business is subject to onerous regulation, it will naturally seek to challenge those rules. Extensive litigation is thus the inevitable result of Nudge State policies. For example, the scale of litigation regarding tobacco restrictions has been extensive. Nations with tobacco industries and the industry itself have challenged restrictive legislation under international trade law, European Union law, international investment protection law, European Free Trade Association law, European human rights law and national constitutional law.

The challenges brought under national law are far too numerous to outline.⁷⁰ However, the challenges brought under international rules give some indication of the scale and scope of the litigation. In 2011 Thailand's customs and taxation treatment of imported cigarettes was brought before the World Trade Organization and reached up to the level of Appellate Body for final determination.⁷¹ In 2012 the differential treatment of imported clove cigarettes and domestic menthol cigarettes by the United States was also challenged before the Appellate Body.⁷²

Challenges to various restrictive laws have been brought before the European Court of Justice. These include challenges to the Tobacco Products Directive (2002),⁷³ the Tobacco Advertising Directive (2006),⁷⁴ the British ban on tobacco for oral use (2004),⁷⁵ and the Spanish tobacco monopoly (2012).⁷⁶ A Norwegian prohibition upon the visual display of tobacco products was challenged in the European Free Trade Association Court (2011).⁷⁷ The foreseeability of the scope of French legislation regarding the labeling of cigarette packets was contested in the European Court of Human Rights (2004).⁷⁸

Numerous other international cases are pending. The Australian plain packaging legislation is currently the subject of five disputes under the World Trade Organization dispute settlement framework⁷⁹ and a Permanent Court of Arbitration investor-state proceeding brought under a bilateral investment protection treaty.⁸⁰ The knee-jerk response of the former Gillard Labor government was simply to announce that it would no longer accept investor-state arbitration mechanisms in future treaties.⁸¹

Challenges against restrictive laws are being brought on other fronts. A tobacco company has brought ICSID proceedings concerning Uruguayan requirements for pictorial health warnings.⁸² In June 2014 Philip Morris International brought an action in a British court seeking a preliminary ruling concerning the validity of the new

⁷⁰ See the list at <http://www.tobaccocontrol.org/litigation/browse/country>. For notable examples, see eg *JT International SA v Commonwealth* (2012) 250 CLR 1; [2012] HCA 43 (acquisition of property); *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610 (freedom of expression).

⁷¹ Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011: IV, 2203.

⁷² Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 4 April 2012, DSR 2012: XI, 5749; 51 ILM 755.

⁷³ *R v Secretary of State for Health; Ex parte British American Tobacco (Investments) Ltd* (C-491/01) [2002] ECR I-11453; [2003] 1 CMLR 14 (p 395).

⁷⁴ *Germany v Council* (C-380/03) [2006] ECR I-11573; [2007] 2 CMLR 1 (p 1).

⁷⁵ *R, on the application of Swedish Match AB v Secretary of State for Health* (C-210/03) [2004] ECR I-11893; [2005] 1 CMLR 26 (p 659).

⁷⁶ *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT) v Administración del Estado* (C-456/10) ECLI:EU:C:2012:241; [2012] 2 CMLR 45 (p 1267).

⁷⁷ *Philip Morris Norway AS v Norway* (E-16/10) [2011] EFTA Ct Rep 330; [2012] 1 CMLR 24 (p 626).

⁷⁸ *Delbos v France*, 60819/00, 16 September 2004, ECHR 2004-IX p 369.

⁷⁹ DS434 (Ukraine), DS435 (Honduras), DS441 (Dominican Republic), DS458 (Cuba), DS467 (Indonesia). The progress of these disputes may be followed at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

⁸⁰ *Philip Morris Asia Ltd (Hong Kong) v Australia* (PCA Case 2012-12). Related documents may be found at http://www.pca-cpa.org/showpage.asp?pag_id=1494 and <http://www.ag.gov.au/tobaccoplainpackaging>.

⁸¹ Jürgen Kurtz, "Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication" (2012) 27 *ICSID Review* 65. By contrast, the new Australian federal government has indicated that it would consider the inclusion of such clauses on a case by case basis. See Leon E Trakman, "Investor-State Arbitration: Evaluating Australia's Evolving Position" (2014) 15 *Journal of World Investment and Trade* 152; Luke Nottage, "The 'Anti-ISDS Bill' Before the Senate: What Future for Investor-State Arbitration in Australia?" (2015) XVIII *International Trade and Business Law Review* 245-293.

⁸² *Philip Morris Brands Sarl v Uruguay* (ICSID Case ARB/10/7). Related documents may be found at <http://www.italaw.com/cases/460>.

European Union Tobacco Products Directive.⁸³

If a restrictive approach was adopted towards fast food restaurants and the snack food industry, the industry response is very likely to be the same. For example, the New York soda portion cap rule was recently successfully challenged in the state's highest court.⁸⁴

5. The Proper Role of Government as a Health Regulator

It was argued in this paper that 'Nudge State' interventionism in the field of public health diminishes the authority of individuals to make their own health decisions and is incompatible with the proper role of government. In particular, a number of policy objections to paternalistic 'Nudge State' interventions were discussed in this paper. These objections include the ready alternative of promoting and accepting individual responsibility, the substitution effect, the probable circumvention of such laws, the likelihood of unintended consequences, the availability of voluntary alternatives, the lack of public support for such measures and the likelihood of endless litigation challenging 'Nudge State' impositions.

Discussions on the proper role of government often invoke a phrase which has been attributed to Thomas Jefferson, even though it is not found in his writings: "That government is best which governs least". The phrase indicates that it is not the proper role of government to over-regulate the economy or to second-guess decisions which individuals themselves could take. It also impliedly warns against the dangers of overzealous government regulation which effectively prevents individuals from pursuing their own goals. The proper role of government is to cultivate the conditions which enable individuals to make their own health decisions and to access health services.

As indicated by the acrimonious 'Abamacare' legislation in the United States, there is a danger, often observed in parliaments around the world, that politicians will personalise debates on government intervention in individuals' health choices. This is reminiscent of the celebrated statement attributed to the Roman orator and lawyer, Cicero, who reportedly said: "When you have no basis of argument, abuse the plaintiff". Abuse is, of course, but a poor substitute for the rational assessment and consideration of legitimate arguments relating to the proper role of government as a health regulator. There is an expectation that parliamentarians will contribute, in a meaningful, but non-acrimonious manner, to debates on governance and the propriety of 'Nudge State' measures. Ensuring that these debates on improving public health through behavioural rules can take place in a rational, non-threatening environment also comes within the legitimate role of government.

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⁸³ Directive 2014/40 of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (OJ L 127, 29.4.2014, p 1).

⁸⁴ *New York Statewide Coalition*, *supra* n 33.