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Lawrence O. Gostin
Georgetown University Law Center, gostin@law.georgetown.edu

Jennifer L. Pomeranz
Yale University

Peter D. Jacobson
University of Michigan School of Public Health, pdj@umich.edu

Richard N. Gottfried
New York State Assembly

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Assessing Laws and Legal Authorities for Obesity Prevention and Control

Lawrence O. Gostin, Jennifer L. Pomeranz, Peter D. Jacobson, and Richard N. Gottfried

Law is an essential tool for public health practice, and the use of a systematic legal framework can assist with preventing chronic diseases and addressing the growing epidemic of obesity.[1] The action options available to government at the federal, state, local, and tribal levels and its partners can help make the population healthier by preventing obesity and decreasing the growing burden of associated chronic diseases such as cardiovascular disease and Type 2 diabetes. The Centers for Disease Control and Prevention (CDC) uses the four-part systematic legal framework commonly referred to as "public health legal preparedness" to demonstrate the essential role law can play for any public health issue.[2] This paper uses the "laws and legal authorities" component of the framework and should be considered in combination with the competencies, coordination, and information-best practices components of the framework.[3] Throughout this paper we provide examples of how current laws and legal authorities affect the public health goal of preventing obesity in both a positive and negative way.

Public health department authority to regulate is a constitutionally established police power.[4] With the legal power and ethical duty to regulate in order to protect and promote the public's health,[5] public health law can be effective in creating conditions that allow individuals to lead healthier lives. For example, in 2005, 17 states passed statutes relating to school-based nutrition, and 21 passed statutes related to physical education programs.[6] Other legislation include restricting access to vending machines,[7] and introducing fresh, locally grown produce into school nutrition programs.[8]

The concerted use of legal-based strategies as an integral component of obesity prevention and control efforts is nascent. Legal-based efforts to directly impact risk factors for overweight or obesity at the population level are just beginning to complement proven programmatic strategies. Unfortunately, there are existing statutes, regulations, and local ordinances

Lawrence O. Gostin, J.D., LL.D., (Hon.) *is Associate Dean of Research and Academic Programs and the Linda D. and Timothy J. O'Neill Professor of Global Health Law at the Georgetown University Law Center, where he directs the O'Neill Institute for National and Global Health Law. Dean Gostin is also Professor of Public Health at the Johns Hopkins University and Director of the Center for Law & the Public's Health at Johns Hopkins and Georgetown Universities—a Collaborating Center of the World Health Organization and the Centers for Disease Control and Prevention. Dean Gostin is Visiting Professor of Public Health (Faculty of Medical Sciences) and Research Fellow (Centre for Socio-Legal Studies) at Oxford University, as well as a Fellow of the Royal Institute of Public Health.* **Jennifer L. Pomeranz, J.D., M.P.H., i***s the Director of Legal Initiatives at the Rudd Center for Food Policy & Obesity at Yale University. She received her Juris Doctorate from Cornell Law School and practiced law in New York City before obtaining her Masters of Public Health from the Harvard School of Public Health. Jennifer's work is dedicated to finding innovative legal solutions to address such issues as obesity, weight bias and discrimination, food policy, and marketing to children;* **Peter D. Jacobson, J.D., M.P.H.,** *is a Professor of Health Law and Policy, and Director, Center for Law, Ethics, and Health, at the University of Michigan, School of Public Health. He is also serving as the current Principal Investigator (PI) on a CDC study examining the impact of state and federal law on public health preparedness.* **Richard N. Gottfried, J.D.,** *represents the 75th Assembly District of New York City. He is chair of the Assembly Health Committee and is a member of the Assembly Majority Steering Committee and the committees on Rules and Higher Education. He is head of the Manhattan Assembly Delegation. He is a leading state health policymaker acclaimed for his influence not only in New York but also nationally.*

that inadvertently contribute to the growing obesity epidemic by creating incentives for individuals to engage in unhealthy behaviors.

Laws and regulations directly and indirectly affect risk factors for overweight and obesity at the population level. While an exhaustive consideration of all the legal authorities that government could use to promote health and reduce obesity is beyond the scope of this paper, we highlight the progressive use of laws at every level of government and the interaction of these laws as they relate to obesity prevention and control. The discussion considers the status of legal interventions in three domains — Healthy Lifestyles, Healthy Places, and Healthy Societies. General gaps in the use of law for obesity prevention and control are identified in this paper and more specifically in Table I. The table serves as the basis for our companion action paper, which delineates options for consideration by policymakers, practitioners, and other key stakeholders (see action paper). The three domains around which this paper is organized are meant to complement the CDC setting-specific framework that includes workplaces, schools, communities, and medical care. The CDC framework offers a programmatic approach to addressing overweight and obesity among Americans, even though the legal issues frequently repeat in multiple settings. Before turning to the legal framework, it will be helpful to describe the constitutional system of federalism, which influences which level of government has the power to act.

Federalism: The Role of National, State, Tribal, and Local Governments

In the United States, federalism is the system in which the power to govern is shared between the national, state, and tribal governments. Federalism is a system of power distribution between the federal government and the states as set forth in the Constitution. The Constitution enumerates a number of powers that may be exercised by the federal government, which the Supreme Court has interpreted expansively. The most important of these enumerated powers is the power to regulate commerce among the states (the Commerce Clause), the power to tax and spend, and the power to implement and enforce the Civil Rights Amendments. Powers that are not enumerated are thereby reserved to the states under the Tenth Amendment. Congress has used its authority under the commerce clause to enact several statutes that regulate farming, food importation, and labeling. It has used its spending and taxation powers to create subsidies for certain foods and tax on others, which create significant incentives or disincentives to businesses and consumers.

When the federal government has the constitutional authority to act, its valid legislation supersedes conflicting state regulation under the Supremacy Clause of the Constitution. Thus, the federal government can explicitly or impliedly preempt state law. Thus, when state legislatures and public health departments consider using regulatory strategies to address the obesity epidemic, they must consider whether Congress has already preempted state or local law.

In deciding legal challenges to state or local law using a preemption argument, the federal courts consider the question and determine whether state law conflicts with federal law and whether Congress intended to preempt the state law in question. If preemption is explicitly or implicitly determined, the court will not allow a state or local regulation that is inconsistent with a federal statute. For example, the New York City Board of Health's first attempt to require menu labeling was contested by the New York State Restaurant Association using a preemption argument. The United States District Court for the Southern District of New York struck down the Board of Health regulation, concluding the regulation was inconsistent with federal food labeling statutes. However, using guidance from the court opinion, the Board of Health adopted a new regulation that applies to restaurants in New York City that are part of restaurant chains with a threshold number of restaurants nationally.[9]

Assessment of Laws and Legal Authorities within the Three Domains

Healthy Lifestyles

To maintain a healthy weight, individuals need to engage in recommended levels of physical activity and follow a healthful, balanced diet.[10] Governments' use of law can substantially influence whether the population can succeed in maintaining a healthful diet. State and local governments can encourage healthy diets by implementing policies that reduce the availability of unhealthy foods containing excess calories, sodium, and harmful fats such as trans fat and highly saturated fat; and improve easy access to ample amounts of fresh fruits and vegetables. The primary authorities governments use to impact nutrition at the population level, aside from those pertaining to micronutrient fortification of foods, include the following: (1) programs that subsidize, tax, and ban unhealthy foods that are grown and purchased; (2) strategies governments use to allow food marketing; and (3) requirements placed on food labeling.

1. Food Subsidies/Taxation/Bans. Federal subsidies authorized in the Farm Bill[11] are not based solely on the principle of encouraging the cultivation of healthy crops. Farm subsidies cover a broad spectrum of foods

Laws/Regulations/ Policies	Public Health Issue	Setting	Behavior Area	Gap/Challenges
Americans with Disabilities Act (ADA)	Civil rights protections to individuals with disabilities in the areas of public accomodation, public services, transportation, education, employment, and telecommunication	Community, Healthcare, Schools, Worksites	Social justice: health access, health disparities, disability	Morbid obesity not recognized as disabling even when it is; ADA definitions require physiological cause
Breastfeeding Promotion Program	Encourages breastfeeding under the child nutrition program	Worksites, Hospitals	Nutrition	Does not make any specific recommendations or requirements to develop environments in which women can safely and privately BF; Formula distributed to mothers in hospitals after childbirth
Child Nutrition and WIC Reauthorization	Encompasses several food programs relating to food insecurity, child and maternal health, and access to healthy food. School wellness policies also developed under Act.	Community; School	Nutrition	Coordination with healthcare sectors, diverging demographics and needs of participants, and access to healthful food choices. Unhealthy foods allowed under EBT program.
Deficit Reduction Act (DRA)	Provides states with flexibility to reform their Medicaid programs	Healthcare	Healthcare	Providers not adequately reimbursed under Medicaid for obesity-related visits so disease goes untreated and preventative measures not explored
Employment Retirement Income Security Act (ERISA)	Ensures health plan coverage for retirees and qualified beneficiaries	Worksites	Social justice: health access, health disparities, disability	Costly COBRA benefits mean many are without healthcare coverage if laid off or upon retirement
Federal Trade Commission Act (FTC Act)	Regulates food advertising	Community	Nutrition, Child protection	Congress withdrew the FTC's ability to regulate "unfair" marketing/advertising to children so children inundated with ads for nutritionally poor foods and fast food establishments
Food Conservation, and Energy Act (Farm Bill)	Access to and supply of healthful foods	Community	Nutrition	Subsidizes foods of poor or minimal nutritional quality
National School Breakfast Program (SBP)	Cash assistance to states to operate nonprofit breakfast program to schools and residential childcare facilitites	Schools	Nutrition	Heavily favors packaged foods which are normally produced with excessive amounts of sugar, high fructose corn syrup, and/or salt
National School Lunch Program (NSLP)	Nutritionally balanced meals at schools and residential childcare facilitites	Schools	Nutrition	Heavily favors packaged foods which are normally produced with excessive amounts of sugar, high fructose corn syrup, and/or salt; Minimal restrictions on sales of competitive foods
No Child Left Behind (NCLB)	Addresses risk factor for disease: low educational attainment and thus, higher likelihood of low SES in adulthood	Schools	Physical Activity, Education	Does not require PA, PE or health education as part of the curricula requirements
Nutrition Labeling Education Act (NLEA)	Labeling of content, nutritional value and place of manufacture for food items regulated by the FDA	Community	Nutrition	Nutrition Facts Panel requirements do not apply to food service establishments. Food companies place diverse and uninformative symbols on the front of packaging, some touting low nutritional standards. No daily recommended value for sugar established.
Pregnancy Discrimination Act	Modifies the Civil Rights Act to protect breastfeeding by new mothers; provide tax incentives to employers to encourage breastfeeding by employees; and provide a performance standard for breastpumps	Community; Healthcare; Worksites	Nutrition	Does not require the provision of lactation rooms for breastfeeding mothers
Safe Accountable Flexible Efficient Transportation Equity Act (SAFETEA or Transportation Bill)	Safe and accessible opportunities to commute, travel and engage in PA	Community	Physical Activity	Focus on vehicular modes of transportation and limited if any consideration to safe routes, sidewalks, pedestrian and bicycle ways
School Bullying Policies	Discrimination against overweight children	Schools	Child protection	Schools lack anti-bullying policies or enforcement mechanisms for existing policies
Social Security Act	Provides disability insurance	Healthcare	Healthcare	In October of 1999 deleted obesity from the recognized list of disabling conditions
Zoning	Determines whether land use favors physical activity and access to healthy foods	Community	Nutrition, Physical Activity	Most often created without public health considerations.

with varying nutritional quality, such as dairy (milk as well as butter), sugar beets, grains (manufactured into whole meal or sweetened white bread), and feed grains for beef (lean as well as fatty).[12] Until recently, government programs have not encouraged consumers to buy healthy foods by subsidizing fresh fruits and vegetables at the level of the farm or retailer.

A few states provide incentives for recipients of food benefits (e.g., food stamps and WIC) to purchase healthy foods by increasing the value of the benefits when used to buy, for example, lean dairy or produce.[13] The United States Department of Agriculture (USDA) has also taken initiative in this area, offering participating women and infants WIC vouchers for fruits and vegetables, and establishing a Farmers' Market program to address the nutritional needs of beneficiaries.[14]

Governments can create powerful incentives for healthy eating and exercise. The World Health Organization identifies taxation as an evidence-based policy option to reduce the intake of foods high in fat, sugar, and/or salt[15] that can be considered by governments as effective tools to influence consumer choices.[16] In the U.S., 40 states impose a sales tax on soft drinks and/or snack products.[17] Colloquially known as a "fat tax," the intention is to discourage purchasing calorie-dense, nutrient-poor foods and provide revenues for nutrition education.[18]

Beyond incentives and disincentives, governments can influence healthy eating through its power to prohibit particularly unhealthy ingredients. New York City led the country in banning trans fat in restaurant foods,[19] and other states, cities, and counties have introduced or enacted similar measures.[20] The American Medical Association has asked the FDA to regulate salt as a food additive, imposing limits for added sodium in processed and fast foods.[21]

2. Food Marketing Strategies. In a recent study of the marketing practices of 44 food and beverage companies,[22] the Federal Trade Commission (FTC) found that in 2006, approximately $870 million was spent on child-directed marketing, and a little more than $1 billion on marketing to adolescents, with about $300 million overlapping between the two age groups.[23] The food industry spends more than $11 billion to market its products annually, the vast majority of which is spent on promoting unhealthy foods, such as sweetened beverages, sugary cereals, candy, and highly processed foods with added sugar, fats, and sodium to children.[24] Advertising is ubiquitous spanning television, radio, and the print media to the Internet and "advergames," where food is used as a lure in fun video games.[25]

Much of this marketing is targeted toward children and adolescents encouraging them to buy less healthy food options. America's youth is exposed to some 40,000 advertisements annually.[26] Young children, aged 2 to 11, are estimated to view 5,538 food advertisements annually; these advertisements mostly promote highly sugared cereals (15 percent), desserts and sweets (16 percent), and restaurants and fast food establishments (25 percent).[27] The Institute of Medicine has concluded that marketing influences the "preferences and purchase requests of children (aged 2 to 11) and consumption at least in the short term."[28]

Currently, the federal government does not systematically regulate or oversee marketing to children, although it does monitor misleading advertisements through the Federal Trade Commission.[29] Similarly, neither the FTC nor any other government agency promotes counter advertising focusing on healthy eating.

3. Nutritional Labeling and Education. The USDA publishes a food pyramid and, along with other agencies (e.g., Department of Health and Human Services), offers food advice.[30] The FDA requires labeling of packaged foods with ingredients and nutritional values such as calories, fats (saturated, unsaturated, and trans fat), sugar, and sodium.[31]

Unlike for sodium and fat, the FDA does not require that a maximum daily value of added sugars be included on the Nutrition Facts Panel. This leads to inadequate attention paid to the adverse health effects of highly sugared processed food products. The FDA labeling system also does not extend to restaurants, including fast food restaurants where a single "supersized" meal can contain more than half the daily recommended intake for calories, fat, and salt. Some cities and states require or are considering requiring fast food companies to prominently display the nutritional value of their foods.[32] New York City has led the way in this area, requiring restaurants to include calorie information on their menus. Once the regulation survived an initial legal challenge,[33] city health inspectors began enforcement efforts, issuing violation notices to area restaurants.[34]

Healthy Places

Access to an environment that promotes physical activity and healthy foods is an important component of public health programs designed to reduce overweight and obesity. Governments at the state and local level can use zoning laws and policy decisions to change the environment in which we live in order to promote healthy eating and encourage individuals to increase their physical activity (e.g., active modes of transportation, recreational activity, and exercise). In

this section, we consider the laws and legal authorities related to the environment that governments use, directly and indirectly, to promote healthier eating and increase activity including zoning and land use planning, and public transportation funding.

1. Zoning Related to Access to Affordable, Healthy Foods. Many places where people live, especially in urban and rural areas of low socioeconomic status, are devoid of grocery stores and markets that provide opportunities for healthy eating. These settings often lack supermarkets, farmers' markets, and places to cultivate fruits and vegetables because local zoning ordinances prevent the use of land for these purposes. For example, larger supermarkets may be "zoned out" of urban settings because zoning requires larger parking areas than possible in the space available. As a result, people in these communities have to travel longer distances for healthier foods and may find themselves surrounded by corner stores and aggressively marketed fast-food restaurants that offer calorie-dense foods as an inexpensive and convenient choice.

Zoning laws also influence where farmers may grow food and where it may be sold. Zoning ordinances can prohibit a "farmers' market" in an urban area because land used for this purpose does not generate the tax base desired by local planners. Similarly, zoning can prohibit farmers' markets in rural or suburban areas because they are considered a commercial business.

Few local and state governments augment the nutritional environment by subsidizing local farms, farmers' markets, and school or community gardens.[35] Similarly, only a few local governments are using zoning ordinances to limit the number of fast food and formula restaurants or to ban drive-through restaurants.[36]

2. Zoning Related to Physical Activity Promotion. In many municipalities and counties, green spaces, playgrounds, sidewalks, and paths are considered secondary to road development, traffic flow, and business access. As a result, even the simplest activities, such as walking, can be difficult due to traffic congestion, lack of sidewalks, and places to go such as shops, museums, banks, and cafes.

While it is becoming increasingly common for government to require developers and industry to perform an environmental impact assessment prior to erecting new, or changing existing, structures, few developers are required to conduct health impact assessments.[37] Prudent planning among local and county governments can include a health impact assessment as a necessary precondition of initiating significant building projects.[38]

3. Public Transportation. Research shows that people who use mass transit on a regular basis are more physically active than people who commute using a personal car.[39] However, federal, state, and local governments provide far greater subsidies for roads than for public transportation. For example, in one year, the Department of Transportation spends over $30 billion on the nation's highways and roads, compared with the $24 billion Amtrak received over a time span more than three decades long.[40]

Physical activity is more likely to increase in a population where public transportation is available, safe, and convenient to use, and goes to places where large percentages of the population work, shop, and go to school. Supporting mass transit systems and ensuring safe routes for people to walk to school, work, and recreational venues are an essential part of a community design committed to increasing levels of physical activity.

Healthy Societies

The complex array of causal factors impacting an individual's eating and physical activity patterns includes important sociocultural factors operating at a macroenvironment level, such as poverty, racism, and crime. Policymakers who seek tangible change related to population-level obesity will need to consider legal strategies that confront and rectify these structural and sociocultural issues. Consider, for example, the owner of a supermarket closing the business because crime has significantly increased in the community or children riding the bus to school because the walking path to the school is not safe. This section considers the laws and legal authorities that affect our ability to address obesity from a social perspective (e.g., antidiscrimination laws; health care insurance and benefit design; school and day care for children; and surveillance.)

1. Antidiscrimination Laws. Discrimination against obese persons in education, employment, housing, public services, and public accommodations is ethically unacceptable. However, most local, state, and federal antidiscrimination laws fail to mention obesity. Michigan is currently the only state that extends civil rights protections to weight-based discrimination based on weight.[41] San Francisco[42] and Santa Cruz[43] have city ordinances that have been used to improve accommodations for obese persons.[44] Most courts have interpreted the Americans with Disabilities Act[45] to exclude obesity as a disability within the meaning of the Act, but some have come to the opposite conclusion.[46] Scientists meanwhile have little doubt that morbid obesity can be highly disabling.[47] It can also have the effect of discouraging overweight and obese people from seeking the services they need for fear of discrimination.

Government can use its police powers to improve societal responses to the causes and conditions of obesity, including reducing stigma and discrimination. Using regulatory power, government officials can increase access to health care and other services for overweight and obese persons, including counseling, screening, medical examination, and treatment. Government policy may benefit the overweight and obese persons for by overcoming discrimination as a barrier to using health care and public health systems.

2. Health Care Service or Benefit Design. In reporting its most recent survey, CDC estimated that 34% of U.S. adults aged 20 and older are obese,[48] and medical expenses attributed to both overweight and obesity may have been as high as $78.5 billion in 1998.[49] Approximately half of these costs were paid through Medicare or Medicaid. As these numbers (both percentages and costs) continue to grow, the prevention and treatment of obesity has become a major public health goal. As of July 2004, the Centers for Medicare and Medicaid (CMS) officially recognized obesity as a legitimate medical condition, which led to the consideration of increased coverage for scientifically effective obesity treatments.[50] This has resulted in several states implementing treatment programs through their Medicaid programs. For example, West Virginia and Tennessee offer full and partial reimbursement for Weight Watchers programs,[51] and 42 states offer gastric bypass surgery for the morbidly obese (i.e., body mass index [BMI] of greater than 40).[52]

3. School, Day Care, and Child Care. Facilities where children learn and are cared for have a special responsibility to ensure that young minds and bodies are active and healthy.[53] However, schools have been highly criticized as contributing to the "toxic environment" associated with obesity.[54] For many years, schools have offered foods of minimal nutritional value. The two current federal programs that directly address the nutritional needs of school-aged children are the National School Lunch Program (NSLP) and the School Breakfast Program (SBP).[55] These programs rely on inexpensive commodity foods, which are high in salt, fats, sugars, and calories.[56] Financially strapped school districts have also become heavily dependent on revenue from on-site vending machines that primarily dispense sugar-laden sodas and processed snack foods (i.e., "junk food").[57]

Also of concern, schools no longer provide regular and routine physical education programs for their students. Surveys suggest that only 28% of high school students participate in daily physical education programs, and some schools have foregone physical education requirements altogether.[58] In response to these criticisms, the federal government, in 2004, mandated that every local educational agency participating in NSLP and SBP "shall establish a local school wellness policy by School Year 2006."[59] Local wellness policies must establish goals for nutrition education, physical activity, campus food provision, and other school-based activities designed to promote student wellness.[60] Schools are demonstrating improvement, including Arizona which appropriated funds for school-based programs for children's physical fitness activities.[61] Kentucky instituted minimum nutrition standards for beverages sold throughout the school day: only water, 100% juice, low-fat milk, and beverages with 10 grams or fewer of sugar per serving.[62]

4. Surveillance in the Community. Surveillance systems for adult and childhood obesity exist, but improvements are necessary. In addition, although surveillance for overweight and obesity, such as the Behavioral Risk Factor Surveillance System, provides researchers and practitioners with data, it does not lead to treatment for those surveyed.

Currently, no systematic, community-level surveillance programs monitor the root causes of obesity or the impact of intervention strategies targeting these causes. Surveillance of key indicators such as the BMI of children is gaining acceptance. As of June 2008, 17 state governments had passed legislation requiring BMI screening in schools or requiring weight-related assessments other than BMI.[63]

Gaps in the Use of Laws and Legal Authorities for Legal Preparedness for Obesity Prevention and Control

Laws and legal authorities that impact obesity prevention and control do so both directly and indirectly. Table I considers some of the existing laws that impact obesity more specifically and attempts to identify gaps in legal authority.

The Healthy Lifestyle domain highlights how subsidies, taxation, marketing, and labeling impact our access to and consumption of specific foods. Current law mandates labels on most foods we purchase, but it stops short of requiring prominently displayed calorie information on fast-food restaurant menu boards and sit-down restaurant menus. Such disclosures are needed to assist consumers when they purchase prepared and "fast foods" which make up the majority of the foods we eat. Similarly, current legislation allows marketing to children that appears unfettered and promotes unhealthy foods that are significantly contributing to our childhood obesity epidemic. Some states and local jurisdictions have begun requiring menus to include calorie information; tax high-fat or high-sugar foods; and encourage subsidizing nutrition programs to purchase more fruits and vegetables.

These programs are demonstrating promise, but widespread adoption is needed to see an impact over time.

The Healthy Places domain focuses on the impact of zoning and land use regulations on healthy eating and physical activity. Government law and policy controls where we can grow food, sell food, and the types of food that can be sold in a particular place. Currently, few communities consider long-range planning and impact studies for land use that include public health issues. Additionally, local governments do not appear to be taking advantage of the assets of existing communities to promote exercise and physical activity — whether by enforcing current laws or creating new laws to encourage the use of schools, parks, walking trails, sidewalks, etc., to promote more physical activity. Landmark studies are beginning to show that added reliance on public transportation can impact our physical activity levels and thus, obesity rates. Current policy, however, emphasizes personal car use that contributes to less activity.

The Healthy Societies domain considers the complex sociocultural factors that also influence childhood overweight and adult obesity rates. Laws prohibiting discrimination based on weight yet mandating health care benefit design to promote healthy nutrition and physical activity among children appear to be significant areas of opportunity. Currently, a few states include benefit-design reimbursable health care that addresses the early stages of overweight. However, most jurisdictions do not provide for care until an individual reaches morbid obesity — a condition that significantly increases our overall cost of health care. Therefore, the absence of prevention services within current benefit design contributes to the growing problem of obesity. The failure to include obesity in current local, state, and federal antidiscrimination laws represents a gap we can address. Finally, there are additional opportunities to improve the diets of children in schools, day care, and after-school programs through food procurement guidelines that dissuade the purchase and availability of high calorie, low nutritional value foods and instead encourage the consumption of fruits and vegetables and other foods of high nutritional value.

Conclusion

The three domains of Healthy Lifestyles, Places, and Societies, and the scope of legal-based alternatives available to governments for combating the obesity epidemic are quite broad. The federal, state, and local levels of government can use their authority, both directly and indirectly, to prevent and control obesity. Examination of the laws and programmatic strategies as effective strategies for reducing obesity from a public health, population perspective is relatively early in the process. It is important to evaluate and build upon the few direct legal strategies that exist and develop methods to measure the indirect legal strategies that may have an impact. Governments at all levels can assess the magnitude of the epidemic, monitor progress in control, and link people to obesity-related treatment and related conditions by *conducting* public health surveillance. It can also *compel* disclosure of consumer information, *regulate* marketing, *create* incentives or disincentives for individuals or businesses, and *prohibit* unhealthy ingredients, all of which will *create* healthier places to live.

Government action is far more effective when the state acts in concert with others. Thus, all relevant departments of government have a role to play in a coordinated response, including public health, social services, agriculture, city planning, parks and recreation, transportation, environment, education, energy, and commerce. To optimize impact, government must act in concert with partners in the private sector and civil society, including businesses, the media, academia, foundations, health systems, and the community.[64]

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