

ARTICLE

Cornucopia and the Grapes of Wrath: A Social-Philosophical Perspective on the Regulation of Risks and Side-Effects of Food and Drink

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Based on a taxonomy of inherent risks and side effects of foodstuffs and beverage, this article analyses, from a social and philosophical perspective the limits of regulation of and responsibility for these risks and side-effects. To what extent does (legal) responsibility apply to consumers, producers, government and other actors? The harm principle of John Stuart Mill, and its meaning in the 21st Century as an organisational principle for the justification of freedom limiting measures, forms the modern frame of reference in our consumption society in the age of liquid modernity. The preliminary conclusion is that law, considering its foundations, is not yet equipped to take justified action against lawful products and services that have potentially adverse consequences. The foundations referred to offer insufficient points of reference if and when we seek to hold on to the lawfulness of these products and services, food and drink stuffs in particular. A way out of this dilemma in the risk society is to think differently about law and its function in liquid modernity in a structural way. It starts with a reflexive attitude towards law as a whole and its foundations of contemporary society. Such an attitude may enable us to come to a readjustment of our mutual expectations for the sake of a new normative framework. The notion of 'libertarian paternalism', hailed as a possible solution, proves to be problematic from a legal point of view.

Keywords: risk; liability; libertarian paternalism; risk society; reflexivity

1. Introduction

The point of departure we usually take in life is that we are reasonable acting people, who have the privilege to shape our biographies on the basis of informed choices and accept the goods and side-effects that come with the choices we make. This is also the point of departure in law. In many different ways we give shape to legal relations for mutual benefit and take responsibility for it. It is the basis of the freedom of contract and autonomy of choice. At the same time, law limits our freedom to act, visible in criminal law and tort law (as part of the law of obligations). A person who suffers damage or a loss as a result of the action of another can seek redress if and when certain, legally enshrined, criteria are met. The action, for example can be qualified as a tort of negligence and, as a result, the action is deemed to have been unlawful *ex post facto*. A rich body of precedent exists in this regard. The essence of this body of precedents is that the *action* is the predominant focus of attention and not the loss or damage that is caused (although damage is a necessary criterium). This is so, because if the action is upon judicial consideration deemed to have been *lawful*, the ensued damage is not up for redress, at least not in terms of a tort of negligence. The same applies, to a large extent, in respect of criminal law.

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This article is an elaborated version of an earlier Dutch article. In the current article, the discussion goes further. The social-theoretical framework is worked out in a little more detail as well as the critique on the concept of nudging and libertarian paternalism. For the Dutch version, see: B. de Vries, 'Le Grand Bœuf – Over de grondslagen van regulering van inherente risico's en neveneffecten van eten en drinken – Een sociaal-filosofisch perspectief', in: A.L.M. Keirse et al., *Ongezond en (on)geoorloofd? Publiek- en privaatrecht & legale maar gezondheidsbedreigende producten en diensten* (2018).

However, we do live in the knowledge that evident lawful action also leads to damage to ourselves. Consuming food and drink are good examples. Most of us have suffered a hang-over once or twice and suffered heart burn after a rich Christmas lunch but the adage *volenti non fit iniuria* applies here. To what extent does this adage apply when we generalise the consumption of food and drink and apply it in respect of the problem of, for example, obesity and diabetes? The most recent statistics, for the Netherlands, show that in 2015 half of the adult population was over-weight, of which 13% can be characterised as being obese, while in 1980 these percentages were 33% and 5% respectively.¹ Being obese implies a medical condition,² considering the related diseases such as heart disease and type-2 diabetes.

The production, sale and consumption of food and beverages is so self-evident (like breathing) that it comes across as a bit absurd to speak of 'lawful action' or lawful behaviour. We stumble upon a paradox, or so it seems: we want to employ law to prevent or mitigate the harmful side effects (obesity and diabetes) of lawful behaviour (the lawful production, sale and consumption of food and beverages). Insofar this lawful behaviour is bound by rules, such as rules in respect of product information, food safety and marketing, it is not problematic. These rules exist for good reason and leave our freedom to produce and consume intact. Indeed, these rules strengthen our informed freedom of action as consumers and generates trust with producers. Law, or so it seems, cannot do more than this. It would be quite absurd to prohibit the production and/or consumption of food and beverages that are potentially harmful. I do not think this is what is meant with the legal battle against lawful but potentially harmful products and services (the main theme of this special issue).

In the end, we take for granted, at the individual level, the harmful side effects of (certain) food and beverages or are in many cases not aware of their existence. But in addition to consequences for individuals, in terms of health and well-being, the problem of obesity and diabetes carries with it also consequences at societal level. Obesity and diabetes can lead to an increase of unhealthy years of living that would in its turn lead to an increase in social and economic costs, for example in respect of sick leave, limited labour participation and subsequent medical costs. Furthermore, it often leads to psychological problems, connected with stigmatisation and discrimination.³ It begs the question (rightly so) whether such lawful action that contributes to obesity and diabetes and their social, psychological, physical and economic consequences, should and could be addressed in a way that goes further than regulating food safety, product information and marketing. Does it involve a redistribution of responsibility? This question is two-fold: is it efficacious and appropriate to use private law to redistribute responsibility for the consequences of lawful but potentially harmful food products and beverages and, if so, what is the normative foundation of such action? These questions are normative by nature as they concern the bigger question as to how we want to live together and how we seek to distribute the responsibilities in our (global) society.

This article starts with sketching a social-theoretical framework, inspired by the theory of reflexive modernisation and the risk society, following the work of Ulrich Beck and Zygmunt Bauman (paragraph 2). The essence of this framework is that we, as the English-Polish social philosopher Bauman coined it, live in a liquid society based upon consumption where solid patterns have eroded, mutual social expectations have become blurred because a solid normative framework is absent, where we are forced to make decisions autonomously, without guidance. Our liquid society confronts us with all kinds of risks that are self-produced and are the side-effects of our wealth production and ways of distribution. The German social theorist Beck poses the question how to deal with these risks or, rather, how to deal with the question who is or should be responsible, and to what extent, for the production and distribution of these risks?

Against the background of this social-theoretical sketch, the article presents a rough taxonomy of categories of potential harmful consumer goods (food and beverage, tobacco, pharmaceuticals and Nano-products), how these categories are regulated and by whom. The aim of the taxonomy is in providing some degree of overview of existing legal and extra-legal regulatory instruments and to allow for focus, in the sense that the article is primarily aimed at lawful but potential harmful food products and beverages (in terms of their fat and sugar contents) (paragraph 3). The taxonomy is then used, as a point of reference, to address how private law can (or cannot) be used as an instrument to address the harmful side effects of this

¹ Data are retrieved from the Dutch Government, Department of Health; see <<https://www.volksgezondheidenzorg.info/onderwerp/overgewicht/cijfers-context/trends#node-trend-overgewicht-volwassenen>> (last visited 4 October 2018).

² The American Medical Association (AMA), for example, recognised obesity as a medical condition in 2013 at its Annual Meeting on 13 August, in Chicago. See AMA, *Reports of reference committees of the American Medical Association House of Delegates 2013 Annual Meeting* (2013), p. 587.

³ Data are retrieved from the Dutch Government, Department of Health; see <<https://www.volksgezondheidenzorg.info/onderwerp/overgewicht/cijfers-context/gevolgen>> (last visited 4 October 2018).

specific category. It does so by reference to the philosophical (rather than legal) harm principle (paragraph 4). Subsequently, the article, in concluding that private law is ill-equipped to deal with the problem, explores an alternative – the non-legal concept of nudging as a means of actions, justified by Thaler and Sunstein as a modus of 'libertarian paternalism'. Unfortunately, the article argues how problematic the concept is from a legal (*Rechtsstaatliches*) and governmental (Foucault) point of view (paragraph 5).

2. The world risk society and its liquid state

Modern society is an evolving society in which different stages can be differentiated. These stages are all 'modern', in the sense that they share common foundations or values.

2.1. Our previous modern solid society

Bauman argues that contemporary society can be characterised as a 'liquid society' and no longer a solid one.⁴ Solid society (or in terms of the stage in the process of modernisation, solid modernity) was characterised by solid structures, patterns and institutions. These were not only physically present, such as factories, stone, concrete, coals and steel, trains, planes and automobiles, etc. These patterns, structures and institutions were also visible in the existing normative framework that directed people as to how to behave and act. It gave shape to the notion of responsibility in a society that was as of yet not characterised by the fragmentation of political power, ongoing globalisation of economies and, what Beck refers to as, 'forced' individualisation.⁵ Our responsibility was shaped by a heteronomous system of rules, including legal rules, framed within the borders of the nation state. These rules help in 'transforming' uncertainty by pointing out to people what their mutual expectations, normatively, were under the existing circumstances – legal rules do so by distributing responsibility in terms of civil and criminal liability.⁶

2.2. New uncertainties

Bauman describes liquid modernity as a process of erosion of solid structures, patterns and institutions of the previous modernity – they become liquid, diffuse and uncertain. Developments such as globalisation, individualisation and political fragmentation contribute to this process. Law is confronted with all kinds of new uncertainties, such as complex causal relations or the impossibility to establish causality in the first place. It is currently ill-equipped, or so it seems, to formulate solutions to these new societal problems and uncertainties. These uncertainties can be elegantly captured in terms of *modern risks* and society in liquid modernity can be described as a (world) risk society – the social-theoretical framework, formulated by the late German social theorist Beck.⁷

Essentially, the world risk society confronts us with a new problem of distribution, this time of risks. Contemporary society is characterised by the relationship between the "logic" of wealth production and the "logic" of risk production'.⁸ This relationship is asymmetrical, in the sense that contemporary society is and has been very well able to give shape to the production and distribution of wealth through law and the distribution of legal rights and duties. But society and law are much less able to capture the production and distribution of the attendant risks into legal responsibilities. It is the new distribution problem. Beck says:

In systematic terms, sooner or later in the continuity of modernisation the social positions and conflicts of a 'wealth-distributing' society begin to be joined by those of a 'risk-distributing' society.⁹

2.3. Modern risks and their distribution problem

Potential harmful products and services (in terms of health and well-being) can be considered in terms of the production and distribution of modern risks. Consumption of wealth (in the literal sense) implies the consumption of risks (in the literal sense). Consuming fatty foods and sugary drinks carries the risk of obesity, diabetes and other diseases. Before I work out the taxonomy of potential harmful products and services, it is good to analyse Beck's concept of modern risks in a little more detail, as it makes clear how difficult

⁴ Z. Bauman, *Liquide Modernity* (2000).

⁵ U. Beck & E. Grande, *Das kosmopolitische Europa* (2004), p. 50.

⁶ L. den Hertog et al., *Rechtsfilosofische Oefeningen – Zygmunt Bauman: Onzekere Verantwoordelijkheid* (2008), p. 4.

⁷ U. Beck, *Risk Society: Towards a New Modernity* (1992).

⁸ Beck, *ibid.*, p. 12.

⁹ Beck, *ibid.*, p. 20 (emphasis in the original). For a more elaborate description of risk society theory, see U. de Vries, 'Introducing the World Risk Society', in U. de Vries & J. Fanning, *Law in the Risk Society* (2017), pp. 11–25.

it is to find legal answers in the fight against lawful but potential harmful goods and services. In abstract terms, risks, as understood by Beck, can be seen as 'a systematic way of dealing with hazards and insecurities induced and introduced by modernity itself [that] have their basis in industrial overproduction'.¹⁰

At least six, more concrete, characteristics can be distinguished.¹¹ Risks are the side-effects of decisions about wealth production. These risks are structural and produced because of these decisions. As we make these decisions (as society so to speak), these risks are intrinsic rather than extrinsic. We cause these risks upon ourselves. Modern risks are thus structural and manmade. The production of wealth implies the production of risks but they differ in terms of impact: wealth is produced with an aim of direct distribution and consumption, while the production of attended risks is future-oriented: the manifestation of the risk lies in the future (diabetes as a result of obesity) but the risk (the threat of manifestation) is permanently present.

The second trait is that risks are global. They are produced locally but their distributive reach is global without certainty as to where (and when) risks might materialise in actual loss or damage, as a disease, an epidemic or a disaster. The third trait that follows from this global reach is that risks have a discriminatory effect. Who is subjected to risks seems to mirror the class distinction in respect of wealth distribution, but the difference is that it plays out at the global level. Beck states 'poverty attracts an unfortunate abundance of risks'.¹² The class positions of the national wealth society are strengthened by the social risk positions in the world risk society. Indeed, research shows a correlation, if not a causal connection, between poverty and obesity.¹³

The fourth trait is that risks are knowledge-dependent and, as a result, are for the most part sensory invisible. Risks exist by virtue of mathematical calculations or chemical formula. This knowledge dependency of risks, makes them, according to Beck, 'politically explosive'.¹⁴ Scientific debate about risks, fully captured by logical reasoning, tends to ignore for a large part the social and cultural costs of risks as well as the fact that risks carry with them a normative component. This component becomes visible when a risk manifests itself in terms of a disaster. This normativity also exists in the (political) decision to label a side-effect as an acceptable or unacceptable risk, insofar its existence is fully known. Furthermore, it is visible in so-called known unknown risks and the debate on the application and extent of the well-known precautionary principle.¹⁵

The last two traits follow from the knowledge-dependency of risks. Risks bind the present and the future without us being able to determine cause and effect. Risks carry with them, as a result, a causality problem: it becomes increasingly difficult to determine what action of which actors cause the production of risks and their subsequent manifestation, and for whom. As a consequence, it becomes increasingly difficult to determine who is responsible and why, at least in legal terms. What this means, according to Beck, is that risks and their consequences if and when they materialise no longer can be explained in terms 'isolable single causes and responsibilities'.¹⁶ It is clear that this causes a problem for law such as tort law that distributes responsibility (liability) on the basis of the facts of a case ('isolable single causes') So, can products such as tobacco, unhealthy foods and beverages be understood as modern risks? Perhaps not at the individual level but they could at the social level. The taxonomy below seeks to illustrate this.

3. A taxonomy of harmful products and services

The aim of this paragraph is to provide some overview by way of presenting a rough (and incomplete) taxonomy of lawful but (potential) harmful products and services as being social risks.

The taxonomy is based on two assumptions. The first assumption is that the taxonomy concerns lawful goods and services that do not have the *intention* to cause harm (are not produced with intention to do harm) but can be either inherently harmful or potentially harmful. The latter concerns for example particular consumer goods such as sugary sodas, alcoholic drinks and fatty snacks. Tobacco is considered to be a

¹⁰ Beck, *supra* note 7, p. 21.

¹¹ See also De Vries, *supra* note 9, p. 21 ff.

¹² Beck, *supra* note 7, p. 35. He argues that risk, in the end, will level off and have an equalising effect. For a counter-argument, see: L. Francot & U. de Vries, 'No Way Out. Contracting about Modern Risks', (2008) 95 *ARSP*, 2, pp. 199–215, at p. 207. See also De Vries, *supra* note 9, pp. 22–23.

¹³ See, for example, the research provided by the Dutch Cultural Plan Bureau: <<http://statline.cbs.nl/StatWeb/publication/?DM=SLNL&PA=81177ned&D1=39-43&D2=0-13,33-37&D3=0&D4=1&HDR=T&STB=G1,G2,G3&VW=T>> (last visited 5 October 2018).

¹⁴ De Vries, *supra* note 9, p. 24.

¹⁵ See also L.M.A. Francot, & U.R.M.T. de Vries, 'Eyes Wide Shut: On Risk, Rule of Law and Pre-caution', (2013) 26 *Ratio Juris*, 2, pp. 282–301 and criticised by C.R. Sunstein, *Laws of Fear – Beyond the Precautionary Principle* (2005).

¹⁶ Beck, *supra* note 7, p. 32.

consumer good that is inherently harmful and, normatively, to be considered to cause intentional harm, due to the overwhelming scientific evidence and the ensuing legal battle against tobacco and tobacco manufacturers.¹⁷ Tobacco is not an ingredient like alcohol or sugar but the product itself that is consumed (smoked). The second assumption concerns the state of the art and scientific development, in the sense that we know, scientifically, that many food products and beverages contain ingredients that are potentially harmful, like sugars and saturated fats.¹⁸ We also know that we are not yet on top of what the side effects will be or can be of food stuffs and beverages, and their ingredients, produced through new technology such as genetically modified products and products produced on the basis of nanotechnology.¹⁹

3.1. Five categories

The taxonomy (see **Table 1** below) distinguishes five categories of lawful but potential harmful products and services. Of each category, some examples are given as well as the manner in which law seeks to regulate these products and services and what the (normative) foundation is of these legal interventions. As said, the taxonomy is far from complete and scientifically insufficiently grounded. The sole purpose is to create a little more focus for the remainder of this contribution.

3.2. Inherently harmful

The first category consists of products and services that are inherently harmful and also have the conditional intention to be harmful.²² It concerns tobacco (products) and most drugs. Legal action exists in prohibition of manufacturing, sale, possession and/or use (see for example, the Dutch Opium Act, 1928) and, in respect of tobacco, strict regulation (see the Dutch Tobacco and Smoke Ware Act, 1988) and taxation. The normative foundation of legal interventions in terms of prohibition (denying the lawfulness of the action) or strict regulation lies in the interests of public health and public order, and to some extent in a moral (perfectionist) disqualification of these types of products and for a variety of reasons, for example the harm it causes others.²³ The second category concerns products that are inherently harmful, considering the main ingredient of the product. Alcoholic beverages are the prime example here. They differ from tobacco in the sense that alcohol is more of an ingredient rather than the product itself. Legal intervention exists in strict regulation, including the prohibition of sale of these products to minors (the Dutch Alcoholic Beverage and *Horeca* Act, 1964). The normative foundation of these interventions could be found in the interests of public health and public order as well as certain paternalistic considerations.²⁴

Table 1: Taxonomy of lawful but harmful goods and services.²⁰

Harmful products	Example	Action	Justification ²¹
Inherently and intentional harmful	Certain drugs, tobacco	Prohibition, regulation	Moral image, health
Inherently harmful	Alcohol	Regulation	Moral image, health
Known side effects (1)	Pharmaceuticals	Regulation	Health
Known side effects (2)	Fats and sugars	Information	Consumer choice
Unknown side effects	Nano products	Precaution	Prudence

¹⁷ See for example, the initiative of Sick of Smoking: <<https://sickofsmoking.nl/en/>> (last visited 19 October 2018).

¹⁸ See, for example, R. Michac & D. Mozaffarian, 'Trans fatty acids: Effects on cardiometabolic health and implications for policy', (2008) 79 *Prostaglandins, Leukotrienes and Essential Fatty Acids*, 3–5, pp. 147–152.

¹⁹ See, for example, Summary Report of the Joint DG JRC-DG Sante Symposium, 'Nanomaterials in Food: Reliability of measurement results', 3–4 May 2017, Ispra, Italy. <https://ec.europa.eu/food/sites/food/files/safety/docs/novel-food_nanomaterials_in_food_20170503_sum.pdf> (last visited 19 October 2018).

²⁰ The table was first presented at the 22nd Ius Commune Conference: B. de Vries, 'Le Grand Bœuf', *Liability and Insurance—The legal battle against lawful products or services that are potentially threatening to human health*, Ius Commune, Utrecht, 22 & 23 November 2017.

²¹ It goes beyond the scope of this article to give an exhaustive explanation of the (normative) justification of the given action.

²² We could assume that the criminal law notion of *mens rea* would be absent here. Rather, in the knowledge of the side effects a conscious risk is taken.

²³ See, for example, K. Butler, 'The Moral Status of Smoking', (1993) 19 *Social Theory and Practice*, 1, pp. 1–26.

²⁴ The National Prohibition Act 1919 (Volstead Act) that introduced prohibition in the USA in the 1920s is a good example of a paternalistic normative foundation. The Dutch Alcoholic Beverage and 'Horeca' Act 2007 refers to 'social-hygienic and social-economic reasons' in its consideration.

3.3. Side effects

The third and fourth category consists of products that contain potentially harmful ingredients and (also in respect of services) carry with them side effects (risks). The products and services themselves are not necessarily harmful. On the one hand, we can think of pharmaceuticals that have as their aim the improvement of (mental) health but have, by their nature, side effects that can materialise when used. Legal intervention exists in stringent protocols for development, testing and approval, product information and sale, as well as rules on the financing of medicine and health insurance (see the Dutch Pharmaceuticals Act 2007). The normative foundation lies in the interests of public health and its financing.

The other category concerns consumer products (food and beverages), containing ingredients that carry with them potential harmful side effects (risks), like sugar and saturated fats containing beverages and snacks. Legal intervention, here, exists primarily in regulation in terms of food safety (i.e. the product as such is safe to consume at that moment), information and labelling, taxation (VAT categories). The normative foundation seems to reside here in freedom of choice – allowing consumers to make an (informed) choice what to consume and how much, as well as preventing defective products to enter the market. Implicitly, there is also an interest in public health and consumer protection (defective products regulation).

The final category concerns products of which it is of yet uncertain whether and to what extent they carry with them potential harmful side effects due to the state of the art and the direction of scientific development. Examples are products that are made on the basis of nanotechnology. Legal intervention exists in regulatory instruments based on the precautionary principle.²⁵

4. Private law and the harm principle

For the remainder of the article the focus is on the fourth category (food products and beverages containing sugars and saturated fats) of lawful but potential harmful products. As set out in the introductory paragraph, these products are a threat for public health and the health of individual consumers, citizens, when we consider the epidemic nature of obesity and related illnesses, such as diabetes. They can be considered risks in the sense that the products carry with them side effects that are systematically self-produced, sensory invisible and have, at the social level, a global effect (considering the world-wide obesity problem). They are future-oriented and carry with them a causality problem (at the individual level) and, hence, responsibility is difficult to establish, at least in a legal sense. These risks are liquid as they escape (or transcend) existing structures of control and regulation.

The central question, as a consequence, is the extent to which law can be utilised that goes beyond mere regulation in respect of consumer protection, information and consumer choice. This central question is in effect, a two-part question (central to this whole special issue):

1. Is it legally efficacious to use private law instruments to 'fight' a legal battle against lawful but potential harmful products?
2. If so, what is the normative foundation: the (philosophical) harm principle, moral, paternalistic or utilitarian considerations such as the (financial) interests in public health?

The preliminary answer to these questions is that law, considering its foundations, currently is not able to act satisfactory against lawful goods and services that carry with them potentially harmful side effects.

4.1. Liberty (freedom of choice) as point of departure

The production, distribution, sale and consumption of foodstuffs and beverages is governed mostly by private law, in particular the law of obligations. Consumers purchase these goods by way of a contract. They do this based on choices as to how to live their lives. These choices stem from rational considerations and (irrational) inclinations for satisfying wishes, needs and desires. The effect and impact of marketing and advertising cannot be ignored here. Nevertheless, we value our (perceived) freedom of choice when it comes to 'lifestyle' and this is legally translated into the freedom to contract and philosophically in the notions of autonomy and self-determination.

Many of the regulatory instruments, mentioned above in paragraph 3, strengthen our freedom of choice if we consider information to be a necessary criterion to come to making (consumer) choices.

²⁵ See, for example, the Government vision on nanotechnology; Kabinetsvisie Nanotechnologieën – Van Klein naar Groot, Rijksoverheid, 30 maart 2010.

These instruments contribute to product safety and regulate the information of products: which ingredients are used, the quantitative relation among these ingredients, nutrition value and date of production and use. Other instruments regulate how these products can be marketed and advertised. In addition, the industry itself uses all kinds of quality markers that inform consumers about the nature of the products: biological, healthy, sustainable, fair trade, child labour free, etc. Of course, critique on these instruments is more than warranted. One can question the effectiveness of these instruments and quality markers.²⁶ But it does not mean these instruments do not contribute to our freedom of choice and the freedom of producers to bring these products onto the market with the aim to seduce consumers to purchase and consume these goods. Law, in effect, facilitates this liberty of choice and opportunity in the free market economy – one of the foundational pillars of contemporary consumer society, liquid as it may be. It is the legal reality.

4.2. Unlawful side effects and loss

'Man acts at his own peril.'²⁷ This adage is considered to be one of the foundational principles of tort law. It applies, in any event, to anyone who causes harm to him- or herself due to, for example, an unhealthy lifestyle and the attendant choices. It is a different matter if and when harm comes into being if caused by another. The adage, hence, has a 'mirror adage', formulated by John Stuart Mill, connecting it with the freedom or liberty of action:

That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right.²⁸

This harm principle is a liberty limiting principle that justifies governmental interference and private legal action (for example in tort). The principle implies a positive obligation for individual action: I am free to act the way I seek to act so long as I do not harm another with these actions. It implies also a negative obligation on the part of the government or others: not to interfere in a person's freedom of action in the absence of harm or the threat of harm. Hence, it also enhances and ensures liberty.

Mill positioned the harm principle on the level of individuals engaged in social interaction (within the confines of the nation state). It is considered to be a moral obligation which has found its way in law, translated in legal obligations in private law, such as tort law (the duty of care in negligence for example). It means that legal intervention is justified if the harm is caused by an unlawful action based upon a rather strict understanding of causality, proximity and foreseeability. It must be established that harm is caused by an identifiable action of an identifiable person, who could foresee that his/her action has the potential to cause this harm to that individual. Thus, it is the action that is the focus of attention and which is evaluated as lawful or unlawful *ex post facto*. Insofar the harm is caused lawfully, no responsibility for redress exists, at least not in a legal way.

Law translates our moral responsibility under the harm principle and reduces it into legal responsibility in terms of liability in private law or public law (in particular criminal law).²⁹ As long as food stuffs and beverages that are potentially harmful (as side effects) are produced and sold in a lawful manner, while the consumer by consuming these products experience their side effects, legal action by means of for example the tort of negligence is less than likely. Having a lifestyle that consists of consuming too many sugary drinks and fatty foodstuffs resulting into obesity and diabetes is different than consuming a bottle of ginger ale containing a decomposed snail, resulting in a bout of food poisoning. Tort law cannot deal with

²⁶ A recent report presented to the Dutch Government seems to conform this; see: Milieu Centraal, *Bevorderen effectiviteit duurzaamheidskeurmerken [Promoting the effectiveness of sustainability quality markers]* (2015).

²⁷ Explained and critiqued as far back as 1881 by O.W. Holmes; see O.W. Holmes, 'The Common Law', Project Gutenberg (2000, last update 2013), <<https://www.gutenberg.org/files/2449/2449-h/2449-h.htm>> (last visited 23 October 2018).

²⁸ J.S. Mill, *On Liberty*, Harvard Classics, Volume 25 (1909), p. 10; see <<http://www.bartleby.com/25/2/1.html>> (last visited 18 October 2018).

²⁹ It must be noted that there are other theoretical explanations upon which one can ground responsibility (indeed Mill's utilitarian 'turn' is a case in point). See also Weinrib's theory on corrective justice of private law: E.J. Weinrib, *Corrective Justice* (2012).

modern risks or so it seems. The unlawfulness of the action is circumscribed by proximity and foreseeability, elegantly phrased by Lord Atkin in *Donoghue v Stevenson*,³⁰ in the famous ‘neighbour principle’:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.³¹

4.3. Utilitarianism as the normative foundation?

An interesting development is that the harm principle can be understood in terms of *public* law obligations. Here, it refers to the possibility and desirability of government taking legal measures that limit the production, sale and consumption of food stuffs and beverages that have harmful side effects. As it can be determined, scientifically as we have seen, that these products contribute to a large measure to the obesity epidemic, different measures could be taken in the interest of public health and the sustainability of its costs. The government could regulate the maximum amount of sugar in beverages for example or go as far as to prohibit the production or sale of certain beverages, for example those high on sugar and caffeine. This prohibition has happened in respect of certain alcoholic beverages, either the beverage itself is prohibited,³² or the sale is prohibited based on location (petrol stations) or age (minors).³³

These interventions are aimed, in large part, at producers’ and retailers’ freedom of action. Other interventions can exist in softer measures to limit the consumption of these types of beverages and food stuffs. Taxation is an example, introducing for instance a ‘sugar tax’ as proposed in England.³⁴ The result can be, research shows, that it not only leads to a decrease in the purchase of these beverages but, more importantly, leads to producers lowering the amount of sugar in these beverages to avoid the higher taxation tariff.^{35,36} But although research shows that these measures seem to be effective, the question is whether they will be in the long run.

A justification of these measures can be found in utilitarian reasoning. Here, the moral worth of an action is measured by the effect it has – the utility or usefulness of the action is measured by how it contributes to ‘the greatest happiness of the greatest number’.³⁷ If and when these measures (mentioned above) contribute to prevent or even reduce diabetes and help containing public health financial management, the conclusion could be reached that everyone benefits even though individual freedom of choice is limited. If a sugar tax discourages the purchase of sugary beverages and encourages manufacturers to adjust the production of these beverages (less sugar) a world seems to have been won – everyone benefits. It might be a way to deal with redistributing responsibility in the risk society, overcoming the problem of causality.

In many ways, we take measures and make legal interventions that are based on a cost-benefit analysis. The fundamental question here is whether and to what extent our individual freedom of choice is to be traded against general welfare considerations, such as a sustainable public healthcare infrastructure. When can lifestyle choices be limited or subordinated to larger public interest considerations? Who has the authority to decide this? And how to evaluate these measures: are they shrapnel or heavy armoury and in the end

³⁰ [1932] UKHL 100.

³¹ *Ibid.*, p. 8.

³² Absinth is a good example, up until recently prohibited due to its (perceived) hallucinatory effect and other side effects. It was prohibited, in the Netherlands, by law in the so-called Absinth Act 1909. In 2005 this act was repealed, after a judgment of the Amsterdam district court that had acquitted an owner of an off licence for the sale of absinth (considering the production method and ingredients used). See: Rechtbank Amsterdam, 23 July 2004, ECLI:NL:RBAMS:2004:AQ5032.

³³ See, for example the above-mentioned Alcoholic Beverage and *Horeca* Act, 1964, in particular Arts. 22 and 20 respectively.

³⁴ See Draft Provisions of the Finance Bill 2017, sugar levy, Part Four of the Bill.

³⁵ See the recent report of the World Health Organization (WHO), *Fiscal policies for diet and the prevention of noncommunicable diseases* (2016). See <<http://www.who.int/dietphysicalactivity/publications/fiscal-policies-diet-prevention/en/>> (last visited 23 October 2018).

³⁶ To this end, it is quite unbelievable that the Dutch government seeks to increase VAT for fruit and vegetables from 6% to 9%, as reported in *De Volkskrant*, 21 October 2018; see <<https://www.volkskrant.nl/economie/protest-tegen-btw-verhoging-op-groenten-fruit-steekt-opnieuw-de-kop-op-totaal-verkeerd-signaal-voor-de-samenleving--bb95bbda/>> (last visited 23 October 2018).

³⁷ Two exponents of utilitarian thought are Jeremy Bentham and John Stuart Mill. The theory is clearly explained by M.J. Sandel, amongst others, in *Justice. What’s the Right Thing to Do?* (2010), pp. 31 ff. Peter Singer is considered one of the most eminent contemporary utilitarian thinkers.

as effective as promised? Are these types of measures not really 'band aids' that, as a side effect, hit particular social-economic groups unduly harsh, groupings that have a higher social risk position, disproportionately exposed to the side effects of our wealth society as Beck suggests (explained above in paragraph 2.2.)? Do we not ignore the underlying *structural* problem: the way we want to give shape to the question how to ensure the production and distribution of food and drink on a national, regional and global level, balancing the need of sufficient nutrition, lifestyle and cultural considerations, health considerations and economic access to food and drink?

These are pressing questions that go beyond the limited problem addressed in this special issue but are a fundamental part of it. The answers are not easy and do not merely exist in practical and pragmatic (legal) interventions. It demands important *normative* choices as to how we want to live together in a society that exists of persons, both natural and legal. Individual freedom is a great good – enabling us, as individuals, to shape our lives based on what we find important. These choices can be fundamental or principled but also practical and directed by desires and wishes. Limiting this too much shall be experienced as a straightjacket, when others decide what is good for us, either from utilitarian motives or, perhaps worse, motives of perfectionism: what it is to live 'the good life'. To what extent should the government be 'neutral' as to the good life?³⁸ Michael Sandel phrased this fundamental question as such:

Does a just society seek to promote the virtue of its citizens? Or should law be neutral toward competing conceptions of virtue, so that citizens can be free to choose for themselves the best way to live?³⁹

A preliminary conclusion is that the battle against lawful but potentially harmful goods and services, such as sugary beverages and fatty snacks, cannot be resolved merely by private law instruments and interventions that seek to limit individual freedom in a forceful way. It would boil down, in the end, in imposing a particular lifestyle considered to be 'good', i.e. 'healthy', regardless of whether you can afford it or not and avoids or even negates the central problem of risk society theory: how to deal with the just redistribution of wealth *and* risks. There are limits to what can be called 'coercive paternalism'.

5. 'Libertarian paternalism': nudging

Coercive paternalism is a strand in paternalistic thought that prohibits or prescribes certain behaviour with an aim to protect the individual against him- or herself. The prevention of harm is often a motive, but can go beyond this motive and be used to realise a particular way of life – educating the citizen how to live the good life – prescribing an ethic of virtue.⁴⁰ Paternalism here transcends into perfectionism and the important question is to what extent a government should have the discretion to dictate, by law, the good life.

5.1. Paternalism and its bad name

Paternalism, in particular coercive paternalism, has a bad name, certainly from the perspective of traditional liberalism. Thaler and Sunstein though point to the fact that the resistance against paternalism is based on one false assumption and two misconceptions.⁴¹ The false assumption is that we take as a point of departure the idea that people always make those choices that serve their best interests. Indeed, from the economic perspective of the rational actor and the legal notion of individual autonomy and freedom, the idea of the rational acting individual is a self-evident assumption. It is one of the foundational principles of both the economic and the legal system. At the same time, there is an increasing body of research that shows that this assumption is ill-conceived.⁴² It is rather the reverse, or so it seems, we tend to act irrationally.

The first misconception refers to the idea that there are alternatives to paternalistic ways of regulating life. These alternatives exist indeed, but it still ignores the fact that in many ways we make decisions based on choices already made by others, influencing how we come to decide to buy food or beverages

³⁸ See, for a good introduction to the idea of autonomy and perfectionism, J. Waldron, 'Autonomy and Perfectionism', in Raz's *Morality of Freedom*, (1988) 89 *S. Cal. L. Rev.* 62, p. 1097 ff.

³⁹ Sandel, *supra* note 37, p. 9.

⁴⁰ R. Claassen, "Vrijzinnig waar mogelijk, moralistisch waar nodig", (2008) 7 *Socialisme & Democratie*, pp. 70–78.

⁴¹ R.H. Thaler & C.R. Sunstein, *Nudge: improving decisions about health, wealth, and happiness* (2009). The book follows an earlier, short paper: C.R. Sunstein & R.H. Thaler, 'Libertarian Paternalism', (May 2003) 93 *AEA Papers and Proceedings*, 2, p. 175 e.v.

⁴² See, for example: S. Sutherland, *Irrationality* (2013). See also F. Parisi & V.L. Smith (eds.), *The Law and Economics of Irrational Behavior* (2005).

for example. Thaler and Sunstein refer to the notion of choice architecture and ‘choice architects’.⁴³ A choice architect is someone who is responsible to organise the context within which people make choices or decisions in such a way that people will make the desired or ‘right’ decision. Thus, choices made by choice architects, based on different motives and interests, influence choice behaviour of others, such as consumers. Thaler and Sunstein give the illustrative example of how to design the outlets of a school cafeteria, in terms of how to present the different, healthy and unhealthy, food stuffs and beverages. The redesign of a school cafeteria, based on the interest of promoting a healthier diet, research showed, led to a significant decrease and increase of the consumption of unhealthy and healthy food products and beverages. There was a pattern shift of 25%.⁴⁴ The second misconception, that follows from the first, is that paternalism is always believed to be coercive in the way it limits freedom of action. The cafeteria example shows that this is not the case: students could still buy and consume whatever was available prior to the redesign.

5.2. Nudging

The cafeteria example is choice architecture, influencing choice behaviour, and is referred to as ‘nudging’. Supermarkets employ it – in the interests of turnover and profit maximalisation – and it is neither problematic nor controversial. Indeed, together with marketing and advertising it is how the consumer mind is shaped into the consuming mode. Governments employ nudging also. A simple example is in the area of traffic control and the placing of speed restriction obstacles (such as a speed bump) rather than merely placing a speed limit sign that is (or is not) enforced forcefully by traffic controllers.

These examples lead to the question of the extent to which individual freedom of choice can and should be influenced by nudging insofar that we still seem to voluntarily make the ‘right’ decision, for example when it comes to lifestyle choices and a healthy diet? Thaler and Sunstein consider this way of nudging as an example of ‘libertarian paternalism’ – a relatively weak and uncoercive form of paternalism.⁴⁵ Choices are not enforced or limited but the landscape, so to speak, is designed as such that enables us to make the right choice in freedom (if we had the opportunity to weigh all the pros and cons, fully informed, we would have made that choice). Nudging is ‘to influence choices in a way that will make choosers better off, as judged by themselves’.⁴⁶ Thaler and Sunstein strive to contribute in developing policy based on the idea of libertarian paternalism to enhance and increase individual freedom of choice. (Nudging is a non-legal concept but in the guise of choice architecture can be found in law, prior to the concept coming to prominence by Thaler and Sunstein. One example are the default rules in contract law.)

If we apply this idea in the context of an unhealthy lifestyle and the consumption of fatty foodstuffs and sugary beverages, it would seem like an ideal solution. Professional choice architects will redesign supermarket outlets in such a way that influences consumers to buy the right stuff – healthy or at least less unhealthy foodstuffs and beverages – without compromising their freedom of choice as the full assortment remains available. Furthermore, it allows or entices producers to redevelop their products in such a way that the taste experience of their products remains the same while using other, healthier or less unhealthy ingredients. No doubt, this is already happening – there is also a large market for products that are healthier, less addictive, sustainable produced, child labour free, etc.

But there remains a question to be resolved. To what extent can we expect this from private parties – from producers, supermarkets, grocery shops, butchers, (school and sports) cafeterias and petrol stations, etc.? *Their* freedom of choice – free enterprise – is at stake here as well. The interest of these parties is predominantly shaped by turnover and profit maximalisation. If this can be achieved by healthier products they no doubt will do so, but this is for them a contingent factor. It would be, or so I would argue, a paradox to ‘impose’ upon these actors to nudge in this particular way. It would be a way of coercive paternalism. I would consider it more controversial than existing regulations that (merely) seek to create a level playing field between producers and consumers facilitating informed choices. Imposing ‘good nudging’ goes further than this.

⁴³ Thaler & Sunstein, *supra* note 42, p. 3.

⁴⁴ *Ibid.*, pp. 1–3.

⁴⁵ *Ibid.*, p. 5.

⁴⁶ *Ibid.*

5.3. Nudging and its problem (from a legal point of view)

From a legal point of view, if we take the harm principle as a foundational principle, nudging is problematic. Nudging, or the design of the social context in which consumers make decisions, is from the perspective of private parties a voluntary endeavour for the benefit of a particular interest 'chosen' by these private parties themselves. The moment that nudging, with an aim to redesign the social context of consumer choice, is imposed to ensure that consumers make the right choice, it would violate the principle of liberalism and freedom of choice and autonomy. Nudging, then, is nothing more than a utilitarian idea to realise a particular public interest, in this case the worth of a healthy community and a sustainable public health infrastructure. In other words, to what extent must we prevent that the consumer is influenced by 'evil nudgers' or 'bad nudgers'?⁴⁷ In the end, choice architects have their own agenda. To this end, nudging too, or the concept libertarian paternalism, cannot address the fundamental problem that the risk society exposes: how to deal with risks.

The government too can and does develop policies using nudges to allow citizens to make free choices. The speed bump is an example. In this respect, nudging (or libertarian paternalism) is similar to Foucault's idea of *governmentality*,⁴⁸ where the government in many different (non-legal) ways implement policies to entice its citizens to self-governance – to have citizens make decisions on the basis of rational considerations within a context shaped by the government (through law and otherwise) that provides the opportunities to make these choices.

Thaler and Sunstein pose the question to what extent the government should play a role in educating its citizens in order to 'teach' them to make the right decisions. Should the government be neutral or is it entitled or perhaps obliged to inform citizens about the side effects of an unhealthy lifestyle, such as smoking, eating, drinking alcoholic beverages,⁴⁹ and to develop policies to point citizens in the right direction? Governmental neutrality is a great good. It is commonly understood as that the government should not interfere with the moral and religious life of its citizens. To this end, John Locke was right.⁵⁰ Does this also cover citizens' lifestyle?

Why would the government know better how to give shape to the lifestyle of the individual citizens? In our consumer society – risky and liquid as it is – the free market is perhaps the new religion (the normative context of social life) colonising the life environment of people, as Habermas put it,⁵¹ exploiting us as consumers (while solid modernity saw the exploitation of the labourer). So, if there is a role of the government here, wherein lies the legitimacy of that role? The question is important, because we have a tacit agreement that the power of the government is based on the principle of legality as an aspect of the rule of law or *Rechtstaatlichkeit*. Thus, the government can introduce nudging, insofar it concerns consumer choice and producer choice, so long there is a legal basis for it, in accordance with constitutional rights – it cannot impose nudging.

6. Conclusion

In the end, the question remains who is responsible for the risks and side effects of lawful products, such as certain food stuffs and beverages, that are potentially harmful, threatening public health. The social-theoretical frame of reference – the risk society – informs us that we produce, generate and consume these risks ourselves. Wealth and consumption seem to be the *raison d'être* of modern society – the risks we take for granted, considered as side-effects rather than structural features – the mirror of wealth production and distribution. This logic should be reversed.

Law is but an instrument that qualifies what we find important, based on fundamental principles (moral, social, political economic, cultural and otherwise), such as freedom of choice and autonomy, legality and democracy, market economy and entrepreneurship, friendship and love, health and welfare. Considering the changing social landscape, in terms of a global market economy, consumer attitude, shifting social risk positions, the threat to public health care and attendant public interests, as well as the decline of the public sector and the changing role of the government to safeguard society, a reflexive attitude towards law could contribute, on a structural level, in the battle against lawful but potential harmful products. The alternative

⁴⁷ Ibid., p. 238.

⁴⁸ M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979* (2008).

⁴⁹ Thaler & Sunstein, supra note 42, p. 247.

⁵⁰ J. Locke, 'A Letter concerning Toleration', published in J. Locke, *Second Treatise of Government and A Letter concerning Toleration* (2016).

⁵¹ J. Habermas, *Theorie des kommunikativen Handelns* (1981).

lies in a fundamental and structural reconsideration of law and its function in our liquid risk society. A reflexive attitude towards law as a whole and the normative foundations of modern contemporary society is an important first step. The harm principle as currently understood (and explained above) does not suffice. A reflexive attitude could enable us to a reconsideration and re-evaluation of our mutual societal expectations for the benefit of a renewed normative framework. This attitude points to the heart of the matter: how do we want to produce and consume in the knowledge of the side effects that exist and threaten our health and welfare, as well as our social and natural environment. It means reconsidering the self-evident assumptions we entertain, such as the distinction between public law and private law, our notion of liability and causality, our notion of harm and liberty, contract freedom and third-party protection. This is the area of research that should be explored in more detail, using an alternative methodology.⁵²

The current legal toolkit falls short. An important reason is that the legal toolkit serves the production and consumption of wealth, taking the side effects for granted. If we consider the thesis of the risk society to be a valid way of looking at the world, we should refocus and aim our attention to the manner in which we want to re-organise the distribution of responsibility for the production and consumption of risks. This demands a new normative framework,⁵³ in which self-evident legal assumptions could be reconsidered. Libertarian paternalism falls short, precisely because it holds on to the perceived certainty of wealth society and denies the existence of the risk society.

Competing Interests

The author has no competing interests to declare.

⁵² See also U. de Vries, 'Kuhn and legal research. A reflexive paradigmatic view on legal research', (2013) 3 *Law & Method*, 1, pp. 7–25.

⁵³ See, for example, L.M.A. Francot-Timmermans & U.R.M.T. de Vries, 'Normativity in the Second Modernity', (2008) 39 *Rechtstheorie*, pp. 477–494.

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