

TARGETED MARKETING OF JUNK FOOD TO ETHNIC MINORITY YOUTH: FIGHTING BACK WITH LEGAL ADVOCACY AND COMMUNITY ENGAGEMENT

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Introduction

The youth obesity epidemic is well known and documented. Far less attention, however, has been given to the “tragic realit[y]” that childhood obesity is “most severe and rising fastest in low-income populations and communities of color, which have the fewest resources to intervene or cope with the consequences.”¹ Since many ethnic minority youth are also low-income, these youth are the hardest hit by the epidemic. For example, 27.5% of Mexican-American, and 18.6% of African-American², boys ages 6-11 are obese compared to 15.5% of Non-Hispanic White boys of the same age. Among 6-11 year-old girls, the statistics are 19.7% for Mexican Americans, 24% for African Americans and 14.4 % for Non-Hispanic Whites. Similar discrepancies exist among children ages 2-5 and 12-19.³

Given that ethnic minority youth are “ground zero” of the obesity epidemic, the issue of targeted marketing⁴ of junk food to this subpopulation takes on particular importance. Yet while the marketing of junk food to youth in general is the subject of much research and exploration, little has been done with respect to the targeted marketing of junk food to ethnic minority youth in particular. Efforts to study and limit junk food advertising to youth in general will of course benefit ethnic minority youth as well; it is appropriate, however, to consider whether there are ways in which legal and community engagement strategies can be harnessed on behalf of ethnic minority youth in particular.

This chapter first summarizes the existing data on the targeted marketing of junk food to ethnic minority youth, and the reasons such advertising may have a particularly potent effect on this group. Second, it examines whether federal civil rights or state consumer rights laws provide a potential basis for challenging the targeted marketing of junk food to ethnic minority youth. Third, it discusses the importance and efficacy of using community engagement

to address the targeted marketing of unhealthy food and beverages to ethnic minority youth, whether as a complement to legal action or as a stand-alone approach.

Existing Data on the Targeted Marketing of Junk Food to Ethnic Minority Youth

Existing data regarding the targeted marketing of junk food to minority youth is scarce. Sonya Grier, one of the few academics who have written about the issue, recently observed that “with all this concern about food marketing to children, there should be a heavy emphasis on looking more carefully at food marketing to ethnic minority youth and you don’t see that.”⁵

When Jerome Williams wrote an article on targeted food marketing to minority youth in 1993, he “could not identify any studies that dealt specifically with the effects of food advertising on obesity in ethnic minority children.”⁶ As of 2010, there are still no published studies that specifically link marketing efforts to obesity outcomes with a sample of African-American or Hispanic youth. Researchers, however, are beginning to explore this issue.⁷ The Federal Trade Commission is also starting to collect, for the first time, data on food and beverage marketing directed toward ethnic youth, which should be released in early 2012. In contrast to the dearth of academic research and government data, there is a “burgeoning commercial market research industry that studies ethnic minority youth” but the results are of course proprietary.⁸ Existing available data does indicate, however, that ethnic minorities, as a group, are subject to a disproportionately large amount of junk food advertising on television, billboards and other traditional media, relative to the general public,⁹ as a result of both targeted marketing to ethnic minorities and higher exposure

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to television.¹⁰ Indeed, studies consistently show that the “most frequently promoted and most accessible products to African Americans, relative to White Americans, [are] high-calorie and low-nutrition foods and beverages.”¹¹ The same holds true for Hispanics.¹² The data also shows that African-American children, in particular, have 60% more exposure to food-related TV advertising (particularly fast food advertising) than White children because of targeted marketing (far more junk food commercials appear on prime time shows with large African-American audiences than those with more general audiences),¹³ and higher television viewing rates.¹⁴ And since 2003, “advertising to African-American children of items such as cookies and fast food has risen substantially in comparison to White children.”¹⁵

These trends will likely carry over to new forms of digital and interactive advertising, particularly given that African-American and Hispanic children have higher cell phone use rates than non-Hispanic White children.¹⁶ As an example, marketers can now send (via cell phone) a digital coupon for a fast food restaurant when the cell phone user is identified as being in the vicinity of that restaurant. Ethnic minority teens are likely to receive a disproportionate number of such coupons not only because of higher cell phone usage but also because fast food restaurants are more highly concentrated in minority neighborhoods.¹⁷ Another example is the Coca Cola Company’s “Sprite Yard” advertising campaign (a cell phone application that allows users to share pictures and chat with friends), which was specifically designed to “interact with [Sprite’s] ‘mostly African-American youth target audience.’”¹⁸ Indeed, “[m]arketers are recognizing both that ethnic minority youth are leaders in the use of a lot of digital media and also that they are fast becoming the majority of the U.S. population, so marketers are putting a lot of money and effort into marketing [through digital media] to ethnic minority youth.”¹⁹

Not only are ethnic minority youth more exposed to both traditional and newer forms of junk food²⁰ marketing than their non-Hispanic White counterparts, but researchers also indicate that such advertising may have a more potent impact on this particular segment of the population.²¹ First, African-American and Hispanic youth may be particularly responsive to targeted marketing. Surveys show that “minority youth are more interested in, and positive towards, media and marketing than non-Hispanic Whites.”²² Ethnic minority youth also “respond more favorably to ethnically targeted marketing than majority youth.”²³ This may be because an ad that features ethnic cues (such as African-American or Hispanic celebrities or cultural symbols) may resonate particularly strongly with ethnic minority children – who are drawn to an ad that feels designed for them and suggests a sensitivity to their ethnic group. In contrast, a marketing campaign aimed at non-Hispanic White

children, who have not experienced racial discrimination and routinely see ads featuring White cultural symbols and role models, would probably not strike as powerful a chord.²⁴ Indeed, “minority youth may use consumption to combat social stigma and economic marginalization.”²⁵

Second, while all children must establish a personal identity, targeted advertising may be particularly effective with minority youth because they are also in the process of developing a racial or ethnic identity. Advertisers typically seek to have their product associated with certain images. Minority youth confronting racial or ethnic identity issues may be particularly responsive to product images that are specifically targeted to their ethnic group. “[A]dolescent self-consciousness makes them more accepting of image advertising and frequently promoted brands, [thus] we might expect ethnically targeted marketing to play an enhancing role in ethnic identity development and minority youth response.”²⁶

Finally, there is a substantial amount of research regarding advertising to children generally, including marketing of food and beverages. The available evidence indicates that junk food advertising targeted toward youth generally is ubiquitous, effective, and leads to increased consumption of unhealthy foods and higher levels of obesity.²⁷

In sum, more research on targeted marketing of junk food to ethnic minority youth is clearly needed. It can be inferred, however, from existing research regarding targeted junk food advertising to (1) ethnic minorities, and (2) youth, that ethnic minority youth are likely the most heavily targeted segment of the population. Further, while food marketing to children generally is known to be effective, it is likely to be even more potent with respect to ethnic minority children. Ethnic minority children also suffer, by far, the highest rates of obesity. While the causes of this disparity are complex, the targeted marketing of junk food to ethnic minority youth likely plays some contributing role.²⁸

Fighting Back with Legal Advocacy

Targeted marketing to specific demographic groups is accepted as a fundamental principle of sound marketing strategy and is routinely employed. Thus, there is nothing unlawful about targeted marketing *per se*. No one would question the marketing of arthritis remedies to seniors, for example. Assume, however, a campaign to intensively target youth of a particular ethnic minority for the sale of an unhealthy food strongly linked to obesity and its adverse health effects, despite ample documentation that the targeted children are already suffering disproportionately high obesity relative to non-Hispanic White youth, who are not racially targeted for sales. Such activity raises issues of racial discrimination, ethics, and fundamental fairness.

As our laws currently stand, however, such activity does not fit neatly into any recognized legal claim. First, anti-discrimination laws in this country largely focus on government conduct. In the private sector, there are specific remedies aimed at a few sub-sectors, such as employment and housing (including remedies against employment or housing advertisements that discriminate on the basis of race or gender).²⁹ Currently, however, there is no anti-discrimination law that covers advertising in general or food marketing in the particular. Further, much of consumer protection law focuses on activities that are false or misleading – rather than fundamentally unfair or offensive to public policy. As discussed below, however, there are federal civil rights and state consumer laws that could potentially be drawn upon to press these issues on the legal front. The viability of such challenges, however, would turn on the willingness of courts to plow new ground.

The Civil Rights Act of 1866

In the 1990s, the cigarette maker, Phillip Morris, racially targeted the sale of mentholated tobacco products to African Americans, despite knowing that such products were significantly more harmful than other tobacco products and were causing higher cancer rates among African Americans.³⁰ In an effort to challenge this conduct on legal grounds, a class of African-American smokers filed suit against Phillip Morris in the case of *Brown v. Phillip Morris, Inc.* The plaintiffs argued, among other things, that Phillip Morris had violated Sections 1981 and 1982 of the Civil Rights Act of 1866,³¹ which prohibits intentional racial discrimination in private contracts and the purchase and selling of personal and real property.^{32 33} The Civil Rights Act of 1866 embodied “Congress’s intent to enact sweeping legislation implementing the thirteenth amendment to abolish all the remaining badges and vestiges of the slavery system.”³⁴

While it is well established that a defendant cannot, under Sections 1981 and 1982, refuse to sell a home or product to African Americans based on race (or sell it to them at different prices or terms),³⁵ the *Brown* case essentially involves the flip side of such scenarios – the “over offering” of a product to African Americans that is known to have adverse impacts. The appellate court refused to embrace such a claim, finding that it failed to readily fit within established precedent. As it explained, the prior cases were distinguishable “because they involved either a naked racially-motivated restriction on dealing or a race-based variation of the terms of the contract at issue.”³⁶ It specifically distinguished a case in which African Americans were targeted for sales of defective burial vaults (while Whites were sold a non-defective version) on the ground that the burial vaults being marketed to African Americans and Whites were not identical, whereas in *Brown*, the exact

same menthol products were available and sold to both racial groups at the same prices.³⁷ Clams of “discriminatory advertising,” the court concluded, are simply not cognizable under Sections 1981 and 1982.³⁸

Importantly, however, *Brown* represents only one decision, and it was decided by a split 2-1 panel of three judges. The third judge, Judge Shadur, issued a forceful dissenting opinion which could lay a foundation for another challenge in a court willing to look beyond the four corners of existing precedent. Judge Shadur argued that the decision improperly focused on the too narrow question of whether there were *unequal products* rather than whether there was intentional *unequal treatment* of different racial groups involved in the commercial transactions at issue.³⁹ Finding the majority opinion’s attempts to distinguish prior cases “hollow,” he observed:

[W]hat I believe is . . . prohibited by [Sections 1981 and 1982] is using [racially targeted] advertising to deny Blacks the same treatment as Whites—the rights to contract and to purchase under the *same conditions*—by deliberately subjecting Blacks to the far greater impact of the seriously (often fatally) deleterious effects of the advertised product—effects well known to but undisclosed by the tobacco companies.⁴⁰

Indeed if the touchstone of Sections 1981 and 1982 is rooting out intentional discrimination in the market place, then the focus should properly be on the existence of intentional unequal (and in this case, harmful) treatment on the basis of race – regardless of whether this intent is manifested through the refusal to offer a benign product or the “over offering” of a detrimental product. The *Brown* case, of course, presented particularly compelling facts; the targeted product not only caused fatal cancers but this information was concealed. And proving intent to discriminate is often a difficult challenge, absent an admission. In a case with compelling plaintiffs and facts, however, the *Brown* dissent could provide a framework for renewing a challenge to racially discriminatory advertising.

Consumer Rights Remedies

Virtually every state has, in one form or another, consumer protection laws that prohibit “deceptive” trade practices, which includes misleading advertisements.⁴¹ There are also business practices, however, that are not false or deceptive but which “state legislatures feel should be prohibited because they unfairly take advantage of consumers.”⁴² Thus, over half the states’ consumer rights laws also prohibit “unfair” acts or practices. As of yet, however, no court has addressed whether racially targeted advertising of harmful products can ever be actionable under “unfair” state consumer rights laws.

Unlike “deception” claims which focus on the attributes of the product itself, “unfair practice” claims often focus

on how the consumer is being treated. In roughly half of the states with unfairness laws, courts will find a business practice “unfair” if it (1) offends public policy under statutes, the common law or otherwise, (2) is immoral, unethical, oppressive, or unscrupulous, and/or (3) the practice causes substantial injury to consumers.⁴³

Most consumer cases assert deception claims so the law regarding “unfair practices” is much less developed and more unpredictable. Given, however, that unfair practice cases focus on the treatment of the consumer, they do provide an opening to make arguments regarding business practices that are particularly harmful to ethnic minority youth.

As noted above, targeted marketing is a well-accepted practice and thus there is nothing inherently “offensive” or “unethical” about targeted marketing *per se*. This general proposition, however, does not preclude the possibility that a specific, harmful marketing campaign that exploits a uniquely vulnerable population could constitute an unfair trade practice.

Further, an argument could be made, particularly as the research develops, that ethnic minority youth are a uniquely vulnerable population. First, it is well documented that children in general, and particularly children under 12, are especially vulnerable to marketing campaigns and less able to distinguish advertisements from other types of information. Second, as discussed above, ethnic minority youth may be especially susceptible to marketing, not because of the cognitive limitations that affect all children, but because advertisers can exploit issues relating to historic discrimination against minority groups and the development of ethnic and racial identity among minority children. Third, ethnic minority children are probably the segment of the population with the least political or economic resources to address the consequences of targeted advertising of unsafe products.

The question then arises whether it is unethical or offensive to public policy to deliberately target ethnic minority children for the sale of a product known to increase their risk of obesity, given that ethnic minority children are a uniquely vulnerable population that already suffers disproportionately from obesity. If so, an unfair trade practice could be established under various state laws.

To date, there have not been any attempts to challenge targeted marketing as “unfair” under state consumer protection laws; thus, this type of claim is wholly untested.⁴⁴ Notably, however, the absence of precedent is less important in this area of the law than in some others. “Even more than in defining deceptive trade practices, state courts wish to retain their flexibility when it comes to determining the meaning of ‘unfair’ . . . The Massachusetts Supreme Court has stated that this process of case by case development

permits the court to ‘discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop.’⁴⁵

The First Amendment could also present a hurdle for such a claim. While courts have long held that false or misleading advertising falls outside the constitutional protection afforded commercial speech, it is less clear how restrictions on advertising found to violate state consumer protection “unfairness” laws will fare.⁴⁶

Some state attorney general’s offices with strong consumer rights units have begun looking to state consumer protection laws to address food marketing abuses. Both “deceptive” and “unfair” consumer laws can be enforced by state attorney general offices, which generally have substantial authority and discretion in this area.⁴⁷ So far, such efforts have generally focused on deceptive practices. A resourceful attorney general, however, could, if so desired, attempt to break new ground in this area by invoking the unfair practice laws to challenge a racially targeted marketing campaign of unhealthy food or beverage to ethnic minority youth.⁴⁸

Fighting Back with Community Engagement

Overview of Community Engagement Approach

A community engagement approach is based on the premise that efforts to achieve public health changes in a community are more likely to be effective and sustainable if the community⁴⁹ is directly involved in the effort. This involvement is usually initiated through use of community organizing strategies to raise awareness and understanding of the issue, and ultimately develop support for policy change. A community engagement approach then builds on this support by developing in residents the capacity to act as advocates⁵⁰ for change, for example by participating in the political process, relevant administrative procedures, or other lobbying efforts or media campaigns. Importantly, a community engagement approach can be either a stand-alone strategy or employed as a precursor or complement to legal advocacy.

While there is substantial precedent for the community engagement model in the area of environmental justice,⁵¹ recent experience also demonstrates that it is an effective tool in the public health arena as well. A case in point is Healthy Eating Active Communities (HEAC) and the Central California Regional Obesity Prevention Program (CCROPP), which, together, pioneered multi-sector initiatives focused on obesity prevention in low-income, ethnically diverse communities. Community and youth engagement were instrumental to achieving a variety of recent policy and environmental change successes such as removal of soda from school campuses, acceptance of WIC and EBT benefits at farmers markets, parks renovation to ensure access to physical activity opportunities, and the incorporation of health language in general plans.

Similarly, community engagement was influential in a successful campaign to improve physical education in the Los Angeles Unified School District (LAUSD), the second largest school district in the nation, serving more than 675,000 students, 90% of whom are students of color and three-quarters of whom qualify for free/reduced price meals.⁵² A 2007 community organizing campaign provided fliers, online videos, news articles, speakers and other messaging that mobilized the community to become involved in improving physical education for LAUSD students. Advocates relied heavily on evidence-based social science research documenting the value of physical education to educate the community, and they were able to present the information in clear and accessible formats. (This research was also used to educate school board members). All of these efforts were critical to bringing the community on board and forging a diverse and effective alliance between parents, teachers, health advocates, community activists, and lawyers. As a result of this community engagement, complemented by the legal strategy of filing an administrative complaint (and the threat of litigation), the school board adopted an implementation plan to ensure that LAUSD students received a physical education consistent with governing education and civil rights laws.⁵³

In short, experience demonstrates that community engagement can be a very effective strategy in health promotion^{54, 55} and achieving policy changes that improve access to healthy foods and physical activity in communities for obesity prevention.^{56, 57}

Applying Community Engagement Approach to the Targeted Marketing of Junk Food to Ethnic Minority Youth

Using a community engagement approach to address the targeted marketing of junk food to ethnic minority youth will help ensure that the community “owns” the response to the problem and may also provide a hedge against challenges on this controversial issue. The public may be concerned that taking action against the junk food industry could jeopardize donations to the community, employment opportunities in low-income communities or positive portrayals of minorities in junk food advertising. As was also the case in the areas of tobacco and obesity prevention, restrictions on targeted marketing may be viewed as paternalistic interferences with individual choice. Thus, while community engagement is an important element of public health work generally, in the case of targeted marketing of unhealthy products to ethnic minority youth, it is particularly critical to ensuring that the public is aware of the negative aspects of the issue and supports the healthy choice for communities.⁵⁸

An example of successfully engaging the community around improving the food environment is found in South Los Angeles, where most of the residents are low-income, ethnic minorities, and 72% of the restaurants are fast-food

spots, in contrast to the primarily White neighborhood of West L.A., where only 41% of eating establishments serve fast-food.⁵⁹ In 2009, the Los Angeles City Council agreed to a moratorium on new stand-alone, fast food restaurants in South Los Angeles.⁶⁰ The moratorium was aimed at halting new fast-food development in the area and creating an incentive package to attract healthy food retail offered by the Redevelopment Agency.⁶¹

The fast food moratorium was controversial for some of the same reasons that challenging the targeted advertising of junk food to minority ethnic youth would likely be controversial (i.e., jeopardizing donations and employment opportunities in the community, and imposing paternalistic interferences on individual choice). Thus, developing community support was crucial. Those leading the movement around the moratorium were able to involve community residents and youth in the advocacy process through skills-based training, creating community engagement opportunities, and identifying engagement opportunities for local advocates.

For example, using Photovoice, community residents documented the pervasiveness of fast food in their environment, and illustrated their day-to-day experiences, struggles, and successes. These images were then shared with key stakeholders. Some community members and youth also participated in training on public speaking and advocacy and were able to testify publicly in front of their local representatives to share their perspectives and support for the fast food moratorium. Hearing the voices of and seeing the images taken by actual community residents in a concerted, organized effort was a powerful tool to persuade decision-makers that the fast food moratorium was supported by the larger community and the right path to take.

Many of the strategies utilized in South Los Angeles (as well as in the other examples of community engagement described above involving HEAC, CCROPP and the LAUSD), could be applied to address the targeted marketing of unhealthy food to ethnic minority youth in a particular community. For example, social science research could be utilized to document for the community the racial disparities in targeted advertising of junk food to ethnic minority youth and the worse health outcomes suffered by ethnic minority youth as result of disproportionately high obesity rates. Such documentation may lead residents to see the issue as a matter of food justice, or “racial profiling” in advertising, rather than just an issue of personal choice. Ethnic minority youth could utilize Photovoice or other digital media, such as creation of YouTube videos, to capture images of the ubiquitous junk food marketing in their communities, or images of a junk food campaign particularly targeted at them. They could also be involved in data collection to document how pervasive junk food marketing is in their day-to-day lives, and how it affects their food purchases.

Once the public is more aware of and supportive of the issue, community resident leaders could participate in public speaking and training to advocate to their city government or school board for responsive action, such as removal of targeted junk food advertising to ethnic minority youth on city-owned billboards or at schools or school sporting events. Such advocacy could also contribute to other public health policy changes, media attention, “spotlighting” of unfair advertising practices, product boycotts, and development of a groundswell of public support for legal challenges.⁶² On a broader scale, community residents could lend their voices to boycotts organized by national advocacy organizations focused on marketing of unhealthy foods to youth. Over time, organized efforts such as these could create strong public awareness among ethnic populations of the negative health impacts of targeted junk food marketing. Ultimately, the ubiquitous targeted marketing of junk food to ethnic minority youth could become much less acceptable.

Addressing the targeted marketing of junk food to youth may seem daunting, but the same was said of tobacco usage and marketing, and concerted efforts around this issue eventually achieved a larger awareness in the population of the dangers of consuming tobacco that resulted in a dramatic shift in social norms around tobacco in the United States.⁶³ Indeed, in 1997, R.J. Reynolds Tobacco Company stopped using the cartoon image of Joe Camel to market its cigarettes to youth after facing legal action and pressure from anti-tobacco advocates.⁶⁴ Similarly, the ability to threaten legal action, combined with strong community support, could also result in a reduction of the targeted marketing of unhealthy food and drinks to ethnic minority youth.

Conclusion

The targeted marketing of junk food to ethnic minority youth, already prevalent, is only likely to increase in future years. African-American and Hispanic youth are the fastest growing population segments, and ethnic minorities are predicted to comprise almost half of all American youth by 2050.⁶⁵ Thus, junk food marketers are likely to focus increasingly on this population. Indeed, ethnic minority youth are “an attractive market segment within the overall child-focused market,” not only because of their increasing size but because of their spending power (African-American and Hispanic teens spend more than the average teen),⁶⁶ media use patterns, and influence on the broader youth culture. Moreover, as public awareness decreases demand for junk food in the general market, the targeted marketing of junk food to ethnic minorities, including ethnic minority youth, may increase – in the same manner the tobacco industry shifted its marketing efforts to minority communities (and developing countries) once attitudes in the general population toward smoking began to shift.⁶⁷

The confluence of all of these factors is likely to not only intensify the obesity epidemic overall but also exacerbate the disparities between ethnic minority youth and their White counterparts. Thus, the issue of targeted marketing of junk food to ethnic minority youth will only take on greater importance in coming years.

While existing legal avenues for addressing this issue are limited, state consumer protection laws do provide a potential opening in the event that state attorney generals and legal advocates are willing to forge new ground. Similarly, legal advocates willing to take on the Third Circuit’s precedent established in *Brown v. Phillip Morris* could assert a challenge under federal civil rights law based on the strong dissenting opinion by Judge Shadur. Regardless of whether such challenges ultimately prevail, they can help bring much needed attention to the disparate obesity rates for ethnic minority youth.

An equally, if not more important vehicle, however, is community engagement. As discussed above, community engagement should form the foundation of any effort to address the targeted marketing of junk food to ethnic minority youth, whether as a precursor or complement to litigation or a stand-alone strategy. Not only does community engagement ensure that the community is fully informed on the issues, but it enables them to develop ownership over the response and build the necessary support to withstand likely controversy and sustain any successes over the long term.

The experience to date with community engagement in the public health arena provides valuable lessons and suggests that community engagement could also be effectively harnessed to start addressing the oft-ignored issue of targeted marketing of junk food to ethnic minority youth. Finally, any efforts to address this issue should be coupled with efforts to reduce the actual presence of junk foods in schools, neighborhoods, and other environments, while increasing the availability of healthy foods and beverages. Indeed, given the urgency of the issue, it is important to consider all possible strategies for drawing attention to the obesity disparities suffered by ethnic minority children.

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- ¹ Sallis, J.F., Story, M., & Orleans, C.T. (2007). A research perspective on findings from Bridging the Gap. *American Journal of Preventative Medicine*, 33(4S):169-171, at 169.
- ² The terms African American and Black are used interchangeably in this chapter to refer to descendants of Africa and the African Diaspora.
- ³ Grier, S. (2009). *African American & Hispanic youth vulnerability to target marketing: Implications for understanding the effects of digital marketing*. Berkeley, CA: Berkeley Media Studies Group, at 12, Appendix, Table 1. Available at: http://www.nplanonline.org/system/files/Targeted_marketing_to_Hisp_and_AA_youth.pdf. See also Berkeley Media Studies Group (“BMSG”). (2006). *Fighting junk food marketing to kids: A toolkit for advocates*. Berkeley, CA: BMSG, at 10 (noting that while only 28.2% of White children ages 6-19 are overweight or at risk for overweight, statistics grow to 35.4% for Black children and 39.9% for Mexican-American children); Williams, J.D., Achterberg, C., & Sylvester, G.P. (1993). Target marketing of food products to ethnic minority youth. *Annals of the New York Academy of Sciences*, 699: 107-114, at 107-08. To date, the research relating to ethnic minority youth, obesity, and junk food advertising concerns African-American and Hispanic youth; no data on Asian or Native American youth has been uncovered. For the sake of simplicity, however, this memo will use the term “ethnic minority youth” to refer to African-American and Hispanic youth. The term Hispanic refers to region, not race, and describes any person whose origins are Mexican, Puerto Rican, Cuban, Central or South American, or of some other Hispanic origin.
- ⁴ Targeted marketing “refers to a general strategy through which a firm identifies consumers sharing similar characteristics (e.g. social economics status, gender, age ethnicity, sexual orientation, or a combination) and strives to reach them using those characteristics.” Johnson, G. & Grier, S. (2011). Targeting without alienating: Multicultural advertising and the subtleties of targeted advertising. *International Journal of Advertising*, 30(2): 233-258, at 235.
- ⁵ Grier, S. “The health impact of targeted marketing: An interview with Sonya Grier.” *Corporations and Health Watch*. (June 1, 2010). Available at: www.corporationsandhealth.org/news/117/59/The-Health-Impact-of-Targeted-Marketing-An-Interview-with-Sonya-Grier (last visited Jan. 13, 2012).
- ⁶ Williams, J. et al., *supra* note 3, at 110.
- ⁷ The African American Collaborative Obesity Research Network (AACORN) has a five year RWJ-funded project underway which will include this issue. More information is available at: www.aacorn.org/AbouTest-1394.html (last visited Jan. 17, 2012).
- ⁸ Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 5. In fact, given that ethnic minority youth are the fastest growing segments of the child/adolescent population, food marketers are focusing on this market. See Food Marketing to Children Workgroup. “Comment to FTC re: Food marketing to children and adolescents study; Project No. P094511.” (2009), at 4. Available at: www.ftc.gov/os/comments/foodmktgkids-2/543668-00007.pdf (last visited Jan. 13, 2012).
- ⁹ Grier, S. & Kumanyika, S. (2008). The context for choice: Health implications of targeted food and beverage marketing to African Americans. *American Journal of Public Health*, 98(9): 1616-1629. (systematic review of studies indicated that African Americans are consistently exposed to food promotion and distribution patterns with relatively greater potential adverse health effects than are Whites). In one study, ads with Black characters were “more likely to promote convenience and fast foods, to depict snacking vs. meals, and were less likely to include adults, overweight characters or food in line with dietary recommendations.” Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 2. Studies also show that TV shows aimed at African-American audiences tend to feature more junk food commercials than general audience shows. *Id.*
- ¹⁰ Harris, J.L., Schwartz, M.B., Brownell, K.D., et al. (2010). *Fast food F.A.C.T.S.: Evaluating fast food nutrition and marketing to youth*. New Haven, CT: Yale Rudd Center for Food Policy and Obesity. Available at: www.fastfoodmarketing.org/media/FastFoodFACTS_Report.pdf; Grier, S. & Lassiter, V. (2012). Understanding community perspectives and motivating a shift in consumer demand to address inequities in food marketing. In [Name of Editor] (Ed.), [Name of this collection] [(pp. ##-##)]. [City of Publication: Name of Publisher], [at pin cite]. **(this is a citation to another chapter published within this collection)**.
- ¹¹ Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 2; Berkeley Media Studies Group. (2011). *Food and beverage marketing to children and adolescents: An environment at odds with good health*. Berkeley, CA: BMSG. Available at: www.bmsg.org/pdfs/BMSG_HER_Food_Marketing_11_Mar_31.pdf.
- ¹² Agency Information Collection Activities, 75 Fed. Reg. 29,344 (May 25, 2010) (pointing to research indicating that “African-American and Hispanic youth are exposed to more food marketing for less nutritious foods than youth in the general population”).
- ¹³ Berkeley Media Studies Group. *Fighting junk food marketing to kids*, *supra* note 3, at 12.
- ¹⁴ Yancey, A.K. & Kumanyika, S.K. (2007). Bridging the gap: Understanding the structure of social inequities in childhood obesity. *American Journal of Preventative Medicine*, 33(4S): 172-174, at 172. Both African-American and Hispanic children spend more hours watching television than White children. M. Story, M. & French, S. (2004). Food advertising and marketing directed at children and adolescents in the U.S. *The International Journal of Behavioral Nutrition and Physical Activity*, 1:3.
- ¹⁵ Berkeley Media Studies Group. *Food and beverage marketing to children and adolescents*, *supra* note 11, at 5-6.
- ¹⁶ Grier, S. & Kumanyika, S. (2010). Targeted marketing and public health. *Annual Review of Public Health*, 31: 11.1-11.21, at 11.6.
- ¹⁷ Regina Austin, *Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 Loy. L.A. L. Rev. 687, 704, n. 66 (2007) (citing Block, J.P., Scribner, R.A., & DeSalvo, K.B. (2004). Fast food, race/ethnicity, and income: A geographic analysis. *American Journal of Preventive Medicine*, 27(3): 211-217, at 214 (“finding that predominately black neighborhoods had 2.4 fast-food restaurants per square mile as compared with 1.5 in white neighborhoods, which meant that ‘for an average neighborhood shopping area,’ blacks were ‘exposed to’ six more fast food restaurants than Whites)); Yancey, A. & Kumanyika, S. *Bridging the gap*, *supra* note 14, at 172. Notably, African-American and Hispanic students in urban schools near fast food restaurants are three times as likely to have a higher body mass index. Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 3.
- ¹⁸ Grier, S. & Kumanyika, S. *Targeted marketing and public health*, *supra* note 16, at 11.14.
- ¹⁹ Grier, S. “An interview with Sonya Grier,” *supra* note 5; Berkeley Media Studies Group. *Food and beverage marketing to children and adolescents*, *supra* note 11, at 6.
- ²⁰ For purposes of this chapter the term “junk food” shall refer to calorie-dense, nutrient-poor food products.
- ²¹ Grier, S. & Lassiter, V. (2012). Understanding community perspectives and motivating a shift in consumer demand to address inequities in food marketing. In [Name of Editor] (Ed.), [Name of this collection] [(pp. ##-##)]. [City of Publication: Name of Publisher], [at pin cite]. **(this is a citation to another chapter published within this collection)**.
- ²² Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 3.
- ²³ *Id.* See also Ross D. Petty, Anne-Marie G. Harris, et al. *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 Mich. J. Race & L. 335, 349 (2003) (“A 1997 study shows that Black Americans who have a strong cultural identity vividly remember [advertising with ethnic cues] and evaluate it more favorably than advertising without ethnic cues.”).
- ²⁴ Research indicates that a “favourable target market effect” (i.e. a positive response to a targeted ad), has been mostly found among consumers belonging to a numeric or ethnic minority group. Johnson, G. & Grier, S. Targeting without alienating, *supra* note 4, at 235.
- ²⁵ Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 4.
- ²⁶ *Id.*
- ²⁷ See, e.g., Berkeley Media Studies Group. *Fighting junk food marketing to kids*, *supra* note 3, at 11-12,14; Grier, S. *African American & Hispanic youth vulnerability*, *supra* note 3, at 2 (noting that increased media usage is associated with increased consumption of junk foods and higher weight); Grier, S. & Kumanyika, S. *Targeted marketing and public health*, *supra* note 16, at 11.9-11.10 (discussing the Institute of Medicine report on influence of food and beverage marketing to children); Story, M. & French, S., *supra* note 14. White House Childhood Obesity Task Force. *Solving the problem of childhood obesity in a generation*. May 2010, at 28. Available at: www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf.
- ²⁸ Grier, S. & Kumanyika, S. *Targeted marketing and public health*, *supra* note 16, at 11.09-11.10 (discussing evidentiary link between junk food marketing, consumption and obesity).

- ²⁹ See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000(c) (2006); Fair Housing Act, 42 U.S.C. §§ 3601 et seq. (2006).
- ³⁰ See *Brown v. Phillip Morris Inc.*, 250 F.3d 789, 795 (3rd Cir. 2001).
- ³¹ 42 U.S.C. §§ 1981, 1982 (2006).
- ³² See generally Ross D. Petty, et al. *Regulating Target Marketing*, *supra* note 23, at 366-371.
- ³³ In order to state a claim under section 1981, a plaintiff “must allege facts in support of the following elements: (1) that plaintiff is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of the activities enumerated in the statute, which includes the right to make and enforce contracts.” *Brown v. Phillip Morris*, 250 F.3d at 797 (internal citation omitted). The requirements under section 1982, although “not identical” are “quite similar.” *Id.* Notably, discriminatory advertising that violates civil rights laws does not qualify as protected commercial speech under the First Amendment. *Ragin v. The New York Times Company*, 923 F.2d 995, 1002-03 (2nd Cir. 1991).
- ³⁴ *Brown v. Phillip Morris*, 250 F.3d at 797 (internal citations omitted).
- ³⁵ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968) (holding that Section 1982 protects African-Americans from private discriminatory refusals to sell them real estate); *Clark v. Universal Builders, Inc.*, 501 F.2d 324, 331 (7th Cir. 1974) (involving practice of selling houses to African-American purchasers on worse terms than offered to non-African Americans).
- ³⁶ *Brown v. Phillip Morris*, 250 F.3d at 799-800.
- ³⁷ *Id.* at 798 (citing *Roper v. Edwards*, 815 F.2d 1474 (11th Cir. 1987)).
- ³⁸ *Id.* at 800.
- ³⁹ *Id.* at 807-11 (Shadur, J., dissenting).
- ⁴⁰ *Id.* at 809, 810 n. 4.
- ⁴¹ National Policy & Legal Analysis Network (“NPLAN”). (2010). *Consumer protection: An overview of state laws and enforcement*. Oakland, CA: NPLAN, at 1. Available at: www.nplanonline.org/sites/phlpnet.org/files/Consumer_Protection_-_An_Overview_of_State_Laws_and_Enforcement_FINAL_20100624.pdf.
- ⁴² Pridgen, M.D. (2009). *Consumer protection and the law*. West, § 3:15.
- ⁴³ NPLAN. *Consumer protection*, *supra* note 41, at 2. How these three criteria are balanced may vary among the states. In Connecticut, for example, “[a]ll three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.” *Keller v. Beckenstein*, 979 A.2d 1055, 1065 (Conn. App. Ct. 2009) (internal citation omitted). Also, there is debate over whether the injury to the consumer must be purely economic or can include physical injury as well. Pridgen, M.D., *supra* note 42, § 4.9.
- ⁴⁴ There is one pending case, brought under New York consumer protection laws, that contends that McDonald’s misleading marketing of fast food as nutritious led to the plaintiffs’ obesity-related health problems, but it asserts a “deceptive,” not an “unfairness,” claim. See *Pelman v. McDonald’s Corp.*, 396 F.3d 508, 510 (2nd Cir. 2009). Although the named plaintiffs in that case are primarily African-American youth, that fact has not been made an issue in the case. Rather, the case is being brought on behalf of all New York residents. See Ashley B. Antler, Note, *The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of Pelman v. McDonald’s Corp.*, 15 *Cardozo J.L. & Gender* 275, 275-76 (2009).
- ⁴⁵ Pridgen, M.D., *supra* note 42, § 3:15 (quoting *Commonwealth v. DeCotis*, 316 N.E.2d 748, 754 (Mass. 1974)).
- ⁴⁶ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Court articulated a 4-part test to determine whether a ban on advertising for reasons not related to deception was valid under the First Amendment. “First, in order to merit any constitutional protection, the commercial speech in question ‘must at least concern lawful activity and not be misleading.’ Second, the government must assert a ‘substantial’ interest that is, third, ‘directly advance[d]’ by the restriction at issue, and finally, the restriction itself must not be ‘more extensive than is necessary.’” Pridgen, M.D., *supra* note 42, § 12:38 (quoting *Central Hudson*, 447 U.S. at 566). Since then, the Supreme Court has struck down two advertising bans in non-deception cases. In *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996), the Court overturned a ban on price advertising of alcoholic beverages because the evidence did not sufficiently demonstrate that the ban directly advanced the state’s interest in reducing

alcohol consumption. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001), the Court overturned a ban on outdoor advertising of tobacco products within 1000 feet of a school or playground. While the evidence that the ban directly advanced the state’s interest was adequate in that case, the state failed to prove that the ban was not “more extensive than necessary.” *Id.* at 565. To the extent that the remedy sought for an unfair business practice involves a restraint on commercial speech, defendants may raise the First Amendment as a defense. “These arguments have met with mixed success.” Pridgen, M.D., *supra* note 42, § 7:29.

- ⁴⁷ NPLAN. *Consumer protection*, *supra* note 41, at 1-2. In some states, individuals can also sue, acting as a “private” attorney general, but the available remedies may be more limited, and the evidentiary burdens higher. *Id.*
- ⁴⁸ Putting aside for a moment the viability of directly challenging the targeted marketing of junk food to ethnic minority youth in particular, it is worth noting that the available research discussed above could also be used to buttress any legal efforts to attack the targeted marketing of junk food to children generally on grounds that the marketing is either deceptive or unfair under consumer protection laws.

A junk food marketing campaign targeted at children may or may not also include sub-targeting to ethnic minority youth (e.g., include African-American or Hispanic characters or other cultural symbols). If it does, then the currently available evidence, while limited, provides a sufficient basis for arguing that the problems associated with the targeted marketing of junk food to youth generally are accentuated in every way for ethnic minority youth. Ethnic minority youth (1) are exposed to even more junk food advertising than other youth, (2) are more vulnerable to targeted marketing for the reasons explained earlier in this chapter., (3) suffer disproportionately high rates of obesity, and (4) have the least political or economic resources to address the consequences of targeted advertising of harmful products.

In short, if the targeted marketing to youth is challenged as “deceptive,” the impact of that deception will likely be felt even more acutely among ethnic minority youth. If a marketing campaign is challenged as “unfair,” the unfairness is heightened with respect to ethnic minority youth given their unique vulnerability and higher obesity rates. Even if a junk food marketing campaign does not include sub-targeting to ethnic minority youth, it can still be argued that ethnic minority children are particularly harmed by such marketing given (1) their increased exposure to advertising, (2) the substantial health disparities, and (3) their lack of political or economic resources.

- ⁴⁹ “Community” is broadly defined to include community members and youth, community-based organizations, advocacy organizations, public institutions, and businesses.
- ⁵⁰ Samuels, S, Schwarte, L., Clayson, Z., & Casey, M. (2009). *Engaging communities in changing nutrition and physical activity environments*. Oakland, CA: Samuels & Associates. Available at: http://samuelsandassociates.com/samuels/upload/ourlatest/HEAC_CCROPP_EngagingCommunities_Updated5.pdf.
- ⁵¹ See, e.g., Richard Drury, R.T. (2007). Moving a mountain: The struggle for environmental justice in southeast Los Angeles. In Rechtschaffen, C. & Antolini, D. (Eds.), *Creative common law strategies for protecting the environment* (pp. 173-196). Washington DC: Environmental Law Institute, at 195 (case study suggesting that “hybrid legal-political strategies are often most effective for achieving environmental justice. It is possible to achieve results by combining sound legal strategies with direct community organizing that might not be possible through either approach alone.”).
- ⁵² Dauter, L. & Fuller, B. (2011). *How diverse schools affect student mobility: Charter, magnet, and newly built institutions in Los Angeles*. Berkeley, CA: Policy Analysis of California Education, at 16, Table 2. Available at: <http://www.scribd.com/doc/60445122/PACE-LAUSD-STUDY-How-diverse-schools-affect-student-mobility>.
- ⁵³ Garcia, R. & Fenwick, C. (2009). Social science, equal justice, and public health policy: Lessons from Los Angeles. *Journal of Public Health Policy*, 30: S26-S32.
- ⁵⁴ Yoo, S., Weed, N.E., Lempa, M.L., et al. (2004). Collaborative community empowerment: An illustration of a six-step process. *Health Promotion Practice*, 5(3): 256-265.
- ⁵⁵ Fawcett, S.B., Paine-Andrews, A., Francisco, A., et al. (1995). Using empowerment theory in collaborative partnerships for community health and development. *American Journal of Community Psychology*, 23(5): 677-697.

- ⁵⁶ Samuels, S.E., Craypo, L., Boyle, M., et al. (2010). The California Endowment's Healthy Eating Active Communities (HEAC) program: A midpoint review. *American Journal of Public Health*, 100(11): 2114-2123.
- ⁵⁷ Schwarte, L., Samuels, S.E., Capitman, J., et al. (2010). The Central California Regional Obesity Prevention Program: Changing nutrition and physical activity environments in California's heartland. *American Journal of Public Health*, 100(11): 2124-2128.
- ⁵⁸ Grier, S. & Lassiter, V. (2012). Understanding community perspectives and motivating a shift in consumer demand to address inequities in food marketing. In [Name of Editor] (Ed.), [Name of this collection] [(pp. #-#)]. [City of Publication: Name of Publisher], [at pin cite]. **(this is a citation to another chapter published within this collection).**
- ⁵⁹ MacVean, M. *Planning Commission OKs rules for fast-food eateries in South L.A.: Plan to limit stand-alone fast-food restaurants in the area still must be approved by the full City Council*. Los Angeles Times. October 15, 2010.
- ⁶⁰ Id.
- ⁶¹ Aboelata, M.J. & Navarro, A.M. (2010). Emerging issues in improving food and physical activity environments: Strategies for addressing land use, transportation, and safety in 3 California-wide initiatives. *American Journal of Public Health*, 100(11): 2146-2148.
- ⁶² Notably, some researchers have observed that “the politically sensitive aspects of targeting ethnic minority populations [for sale of unhealthy products] may include accusations of racial bias, exploitation or lack of social responsibility, which may cause problems for marketers with respect to image and may trigger boycotts or other countering strategies.” Grier S. & Kumanyika, S. *Targeted marketing and public health*, *supra* note 16, at 11.15.
- ⁶³ For a list of regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents, see the following U.S. Food and Drug Administration website: www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/RegsRestrictingSale/ucm204589.htm.
- ⁶⁴ Coughlin, P.J. & Janecek, Jr., F. (1997). *A Review of R. J. Reynolds' Internal Documents Produced in Mangini vs. R. J. Reynolds Tobacco Company, Civil Number 939359: The Case that Rid California and the American Landscape of "Joe Camel"*. Available at: <http://legacy.library.ucsf.edu/tid/ioq76b00/pdf>.
- ⁶⁵ See U.S. Census Bureau, *Press Release: An Older and More Diverse Nation by Midcentury*, Aug. 14, 2008. Available at: www.census.gov/newsroom/releases/archives/population/cb08-123.html.
- ⁶⁶ According to surveys, African-American teens spend 6% more than the average teen and Hispanic teens spend 4% more than non-Hispanic teens. Mediamark Research. (2004). *Teen market profile*. New York, NY: Magazine Publishers of America, at 12. “With a current spending power of \$20 billion and a projected growth rate six times higher than the rest of the teen market, Hispanic teens are a force in and of themselves.” Davis, T., *The teen spending game: The complex marketing strategy*, Examiner.com, Aug. 31, 2001 (citing Mediamark Research. (2007). *Drawing on diversity for successful marketing: Hispanic/Latino market profile*. New York, NY: Magazine Publishers of America, at 11). Available at: www.examiner.com/small-business-in-philadelphia/the-teen-spending-game-the-complex-marketing-strategy.
- ⁶⁷ Yancey, A. & Kumanyika, S. *Bridging the gap*, *supra* note 14, at 173.