

# Professor Sugarman’s Contribution to Public Health Scholarship

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I first met Steve Sugarman at an annual meeting of the Association for Public Policy Analysis and Management (APPAM), probably in the early 1990s. As a teacher of torts, among other things, I had of course read some of his often seminal, always bracing torts scholarship—especially his iconoclastic, pathbreaking book *Doing Away with Personal Injury Law* (1989).<sup>1</sup> There, he went far beyond existing no-fault thinking and other incremental tort system reform proposals to urge a far greater reliance on regulatory and entitlement programs, which he would expand and refine. This theme—greater reliance on government entitlements—has been a constant in the immense Sugarman oeuvre. Sure enough, at the APPAM session where we met as joint panelists, Sugarman was at it again—with a paper explaining how workers could be better protected through a plan for regulatory entitlements, some contributory, which would maximize workers’ benefits, flexibility, and protection against workplace interruptions. Attention to justice in the workplace has been another significant motif in Sugarman’s work,<sup>2</sup> albeit not one that I explore here.

Like all of Sugarman’s policy proposals, the worker-benefit scheme cleverly exploited the resources, interstices, and limitations of government and market arrangements to improve social welfare and fairness to individuals. Interestingly, for all his policy boldness, he has never been a pie-in-the-sky, start-from-scratch reformer. Instead, Sugarman begins with existing

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1. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* (1989).

2. See *Employment Benefits and Employment Law*, BERKELEY LAW, <https://www.law.berkeley.edu/our-faculty/faculty-sites/steve-sugarman/my-publications/employee-benefits-and-employment-law/> [<https://perma.cc/A2KV-9VY6>] (listing Sugarman’s publications in employee benefits and employment law).

arrangements and institutions. He then assesses their strengths and weaknesses and proposes policy changes that seem only incremental but might move the ball way down the field (to use a tired sports cliché that even the indefatigable Sugarman surely deployed when he taught sports law).

The organizers of this Festschrift asked me to discuss Sugarman's work in the area of public health. It is a pleasure to do so. It is also a valuable re-learning experience, given his major contributions to this literally life-and-death field, a field that the COVID-19 pandemic has elevated to its proper place in the policy universe. Before getting into Sugarman-on-public-health proper, I note that almost all of his work, even when not denominated as focused on public health, bears closely on it. One example, to which I've already referred, is workers' rights. Another policy area that bears closely on public health—the education of children who grow up in and around poverty—had been of special concern to Sugarman from the beginning of his academic career a half century ago. As his and others' work has shown, the quality of poor children's educational experience (in terms of teaching, textbooks, other resources, and classroom discipline) and the quantity of their education (affected by dropout rates, illness, truancy, suspension, and expulsion) affect their health, with the causality going in both directions.

More recently, Sugarman's scholarship has focused on public health *per se*, especially his extensive work on how to combat the public health scourges of obesity, tobacco, alcohol, and unhealthy foods. This work—a deeply felt preoccupation, really—began well over a decade ago. The remainder of my contribution will focus on it.

## I.

### PERFORMANCE-BASED REGULATION OF PUBLIC HEALTH THREATS

Private market transactions generate effects, both positive and negative, on third parties. Because the members of our large, economically and socially integrated society interact constantly and in myriad ways, such externalities are inevitable and complex. The history of public regulation in the United States—that part of public law intended to force those who create externalities to internalize them in the creators' design, pricing, and marketing decisions—is a long one, going back at least to exploding steamboat engines.<sup>3</sup>

The two most recent spasms of federal regulation occurred in the New Deal era and in the 1965-75 periods, but their subject matters and regulatory methods were, generally speaking, significantly different. New Deal regulation focused on particular industries or industrial activities affecting interstate commerce: securities, agriculture, natural gas and electricity production and transmission, labor relations, wages and prices, banking, thrift institutions,

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3. For a history of public regulation in the United States, see generally JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2012).

airlines, railroads (which were first federally regulated a half century earlier), and others. This regime primarily relied on so-called “economic” regulation of prices, market entry and exit, controlled competition, corporate governance, and terms of service. Occasionally, it used outright subsidies to particular industries (e.g., airlines).

Sugarman, however, has been mostly preoccupied with the techniques that federal policymakers began to deploy extensively during the 1965-75 period of regulation, spanning the Great Society and Nixon years. These techniques, known as “social” regulation, differ in several important ways from New Deal economic regulation.<sup>4</sup> First, the regulation usually applies to a vast, highly diverse range of industries and actors. Rather than covering a single industry like energy production or banking, social regulation applies virtually across the board to all entities in the country. Second, the types of externalities that the regulations target are essentially social, ideological, or egalitarian rather than economic (although they inevitably affect the regulated activities economically, often significantly). Third—and most pertinent to Sugarman’s public health work—the new social regulations deployed some distinct types of control techniques. They were almost always imposed through notice-and-comment (“informal”) rulemaking under the Administrative Procedure Act of 1946 (APA) rather than through the New Deal approach of agency rule issuance followed by case-by-case adjudications to flesh out the rules’ meanings.<sup>5</sup> The number and diversity of industries, firms, and individuals covered by, and potentially liable for violating, these rules are vast—even universal unless exempted in the particular statute or rule.

In principle, as Sugarman and other students of social regulation have explained, social regulation rules could target three different aspects of the target entities’ activities and decisions: inputs, processes, and outcomes or performance (which Sugarman terms “performance-based regulation” or PBR).<sup>6</sup> Like many other analysts of regulation, Sugarman uses a portmanteau category—“command-and-control regulation” (I’ll refer to this as CAC)—to

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4. See generally *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980) (collecting essays on individual regulatory and enforcement programs). I reviewed this book in Peter H. Schuck, *The Politics of Regulation*, 90 *YALE L.J.* 702 (1981).

5. I do not mean to exaggerate the difference. APA informal rulemaking is often followed by adjudications over the meanings and applications of important rules.

6. See, e.g., Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 *DUKE L.J.* 1403, 1410 (2007) [hereinafter Sugarman & Sandman, *Fighting Childhood Obesity*]; Stephen D. Sugarman, *Performance-Based Regulation: Enterprise Responsibility for Reducing Death, Injury and Disease Caused by Consumer Products*, 34 *J. HEALTH POL. POL’Y & L.* 1035, 1067 (2009) [hereinafter Sugarman, *Performance-Based Regulation*]; Stephen D. Sugarman, *Salt, High Blood Pressure, and Performance-Based Regulation*, 3 *REGUL. & GOVERNANCE* 84, 91 (2009) [hereinafter Sugarman, *Salt*]; Stephen D. Sugarman, *Enticing Business to Create a Healthier American Diet: Performance-Based Regulation of Food and Beverage Retailers*, 36 *LAW & POL’Y* 91 *passim* (2014) [hereinafter Sugarman, *Enticing Business*].

encompass and criticize the first two of these regulatory foci.<sup>7</sup> Here, he is in good company among the analysts of regulatory failure, but I do have a small bone (maybe just a nit!) to pick about this, which is that the performance regulation that he prefers is in fact a form of CAC. The significant point is not that PBR is not CAC, but that PBR is indeed a form of CAC that is more likely to be the *kind* of CAC that will succeed in achieving the regulator's objective.<sup>8</sup> My pointing to the breadth of CAC regulation, including PBR, is no mere cavil. Agencies often—probably *most* often—reject any type of CAC. They decide not to issue rules at all but self-consciously rely instead on some combination of domestic and foreign competition—that is, markets—to achieve the desired social outcome.

Terminology aside, Sugarman is surely correct in preferring PBR to CAC as a general matter. In his seminal, co-authored<sup>9</sup> 2007 article in the *Duke Law Journal* on regulatory approaches to child obesity and related conditions, he presents illuminating examples of actual or imagined CAC approaches to these specific regulatory targets: (1) eliminating certain food items from school vending machines; (2) requiring schools and workplaces to include healthier menu items; (3) sharply restricting the inclusion of trans fats in foods prepared by food service establishments; (4) limiting the density of fast-food restaurants near facilities where children gather; (5) forbidding the retail sale of certain junk food to children; (6) eliminating the advertising of sweet or high fat foods in connection with children's television programs; (7) upgrading school lunches so that they are healthier; (8) requiring cities to subsidize grocery stores that sell fresh fruits and vegetables in low-income areas; (9) assuring all children safe access to parks and bicycle paths; and (10) requiring schools to

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7. See, e.g., Sugarman & Sandman, *Fighting Childhood Obesity*, *supra* note 6, at 1411–13; Stephen D. Sugarman, *No More Business as Usual: Enticing Companies to Sharply Lower the Public Health Costs of the Products They Sell*, 123 PUB. HEALTH 275, 276 (2009) [hereinafter Sugarman, *No More Business as Usual*]; Sugarman, *Performance-Based Regulation*, *supra* note 6, *passim*; Sugarman, *Salt*, *supra* note 6, at 91; Jennifer L. Pomeranz, Stephen P. Teret, Stephen D. Sugarman, Lainie Rutkow & Kelly D. Brownell, *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185, 200–01 (2009); Sugarman, *Enticing Business*, *supra* note 6, at 94–95.

8. I believe, further, that this tripartite classification of regulations—input, process, and performance—provides a bit more focus on and critical leverage to the analysis of specific regulatory technique. Each of the three foci has distinctive advantages and disadvantages. For example, a process rule is generally clear about how the regulated entity must go about meeting the agency's requirements: it must use the more or less specific process that the agency has mandated, and if it does so, it knows that it is in full compliance. The characteristic disadvantages of a process rule, however, are considerable: the agency may mandate a wrong or excessively costly process; its specification of the required process may be too vague, too specific, or out of date. Moreover, the process's relationship to the agency's ultimate substantive, regulatory goal may be tenuous or even perverse. An input rule has most, perhaps all, of the disadvantages of a process rule but may bring the process rule a bit closer to the desired outcome or performance. The gap, however, is still very wide and risks regulatory failure. The outcome or performance rule is what Sugarman prefers and analyzes most extensively.

9. His co-author is Nirit Sandman, a mathematically trained lawyer. Purely for simplicity's sake, I shall refer to the author as Sugarman.

increase the duration and intensity of physical education.<sup>10</sup> Sugarman points to the conviction that underlies such CAC-form requirements: “Proposals like these rest on the belief that professional public health experts know how the regulated parties should behave, and so the point of regulation is both to spell out that behavior and enforce effectively the specified obligations.”<sup>11</sup>

The problems with CAC regulation, Sugarman shows, are many. Perhaps the most important problem is the agency’s ignorance of how best to achieve its regulatory objectives.<sup>12</sup> This ignorance is virtually impossible to dispel in a timely manner, given the cost of trying to centralize the almost infinitely dispersed information, the rapidity with which that information changes under dynamic market conditions, and the decentralization and indeed secrecy of many technological advances.<sup>13</sup>

Sugarman rightly explains that PBR cannot solve this problem of regulatory ignorance and inability to grapple quickly with change.<sup>14</sup> But what PBR can do, he argues, is identify which outside actors can best come up with the answers to these questions and then impose on those actors a legal responsibility to address the challenges.<sup>15</sup> He concedes, of course, that PBR is not a panacea. It rests on the plausible but unproven assumption “that the regulated party can either use its repository of information and experience, or draw on that of others, to develop the cheapest, most efficient, and most effective way to accomplish the regulator’s goal.”<sup>16</sup> But PBR does not wait for the market to bring about that change:

Instead, PBR selects the party it thinks is responsible for the problem and well situated to solve it, and then imposes on that party the obligation to do so. PBR is not simple. It requires deciding who the appropriate subject of regulation is and what level of performance is necessary. On top of that, it is also necessary to figure out how to measure compliance and what penalties to impose for noncompliance.<sup>17</sup>

I would add that even the most careful PBR does not solve certain informational problems that still face the most scrupulous PB regulator: how to

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10. Sugarman & Sandman, *Fighting Childhood Obesity*, *supra* note 6, at 1409–10.

11. *Id.* at 1410.

12. *See id.* at 1413.

13. *See id.* The classic statement of this problem is F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945):

The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.

*Id.* at 519.

14. *See* Sugarman & Sandman, *Fighting Childhood Obesity*, *supra* note 6, at 1413.

15. *Id.*

16. *Id.*

17. *Id.*

accumulate and analyze the information needed by even the most technically sophisticated regulator to decide whether and how to regulate particular health conditions in the first place. This question itself depends on the answer to highly elusive factual and normative issues—for example, how serious is the childhood obesity problem? How serious must it be to justify regulatory intervention? Should solutions be left to state and local agencies, public health organizations in the private sector, individual families, or some combination of these? Sugarman acknowledges that “PBR is not simple” and proceeds to squarely confront these threshold, pre-regulation questions.

In this area of his work, Sugarman is at pains to compare PBR not only to CAC regulation but also to two other forms of regulation: (1) tort law and (2) subsidies and taxes.<sup>18</sup> No torts scholar has attended more scrupulously to the disadvantages of tort law as a public policy mechanism than Sugarman, who, as noted earlier, has advocated “doing away” with it in favor of other, more self-consciously regulatory forms.<sup>19</sup> Even so, he recognizes certain attractive features of tort law, such as its being victim initiated rather than depending on the government to play the active, prosecuting role.<sup>20</sup>

## II.

### PUBLIC HEALTH: TOBACCO, ALCOHOL, AND UNHEALTHY FOODS

Sugarman’s analysis and comparison of various possible modes of public health regulation is merely his opening move. His preference for PBR is fairly standard among sophisticated regulatory policy analysts. The same cannot be said of regulators themselves, who continue to favor the CAC approach for reasons that Sugarman’s analysis recognizes, such as its greater determinacy and easier enforceability.<sup>21</sup> After all, checking off lists of specific, agency-mandated input and process requirements is an easier way to enforce and defend against certain political attacks.

What is most admirable about Sugarman’s policy work, however, is his dogged, workmanlike determination to advance a fully elaborated, carefully designed regulatory proposal to target the social ill (here, childhood obesity). He does this systematically: defining the important terms; anticipating and meeting likely objections; canvassing plausible alternatives to his own favored approach; laying out each element of his proposal; candidly noting the soft spots in the data relevant to his proposal; acknowledging the tradeoffs and risks entailed by his favored approach; considering the practical and political impediments to his plan; specifying formal definitions for characterizing key

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18. *Id.* at 1416–22. I do not discuss his “participatory regulation,” a more specific form of what he calls management-based regulation, *see id.* at 1413–16, which is akin to what I call “input” and “process” regulation, *see supra* note 8.

19. *See supra* note 1 and accompanying text.

20. Sugarman & Sandman, *Fighting Childhood Obesity*, *supra* note 6, at 1417.

21. *See id.* at 1411–13.

variables; and discussing reasons why it might fail or achieve only limited effectiveness, including its unanticipated effects and the types of evasions it would engender. It is only a slight exaggeration to say that he leaves no analytical stone unturned. Along the way, however, he rests on certain premises that, while plausible, are also contestable. For example, that children eat junk food not out of free will or parental permissiveness but because they and their parents are unduly influenced by food industry advertising.<sup>22</sup> His candor here is admirable, as he tries not to claim greater certainty than evidence warrants.

Sugarman's proposal to use PBR to significantly reduce childhood obesity is a complicated one. Summarized in his own words:

[L]arge firms selling food and drink that is high in sugar or fat will be assigned the responsibility of reducing obesity rates in a specific pool of children. A firm's share of the overall responsibility will be based on its share of the "bad" food market, and the children assigned to it will be organized by geographically proximate schools where obesity rates are currently above the plan's nationwide target rate of 8 percent (the actual childhood obesity rate today is approximately 16 percent). Firms that fail to achieve their goals will be subject to serious financial penalties.<sup>23</sup>

For all the proposal's cleverness, it has enough moving parts, interdependencies, and powerful opponents that it would not be easy to legislate or enforce. Another possible objection to his plan, which he recognizes and clarifies, is that its "performance" would be gauged not by attainment of the ultimate objective (reduced obesity) but instead by a precursor causal measure (less sugar in regulated foods) that the proposal assumes to be highly correlated with that objective.<sup>24</sup> This problem is common. Measuring a scheme's success often requires using such a proxy measure; hopefully, the proxy is close enough to the desired outcome—an empirical question—to justify this tradeoff. Whether or not readers are convinced by Sugarman's proposed solution, they learn an enormous amount about the problem and its possible remedies along the way. One cannot ask more of a scholar seeking to take on a problem of this magnitude, complexity, and public health significance.

In the years following his early work on childhood obesity, Sugarman published a number of articles applying the same PBR, incentives-based approach, *mutatis mutandis*, to other urgent public health problems, including smoking, alcohol-related injuries and deaths, motor vehicle accidents causing

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22. *See id.* at 1431–32.

23. *Id.* at 1404.

24. Email from Stephen D. Sugarman to author (Aug. 11, 2020) (on file with author).

such losses, excessive salt intake, and medically caused injuries.<sup>25</sup> But he also sees a role for CAC approaches in certain situations.

Sugarman's article, *Compelling Product Sellers to Transmit Government Public Health Messages*, is an important example. Here, he considers laws requiring private businesses to display what the law considers government speech that takes judgmental positions on still-controversial issues like gun use, food nutrition, chlorinated water, and the like.<sup>26</sup> Where public health objectives are concerned, Sugarman argues that the government may use text, graphics, and other persuasive media to do so over the First Amendment objections of businesses required to display them—not only in the case of uncontested facts (e.g., a food item has X calories) but also with opinions designed to shape consumers' preferences (e.g., sugared beverages may increase obesity).<sup>27</sup> He concludes that “compelled speech” jurisprudence should allow the government to require sellers to post their message so long as the message's size relative to the product's size is not excessive and the message is clearly that of the government, not of the product seller.<sup>28</sup>

Here, I think Sugarman's public health advocacy may take him too far. In harder cases than the ones he posits, the lines between fact and opinion (so elusive in defamation tort cases) and between public health promotion and political/ideological advocacy are murky. There is also the risk that the factual assumptions underlying a policy may turn out to be erroneous or even perverse—a possibility that Sugarman spins out in a short comment on tobacco taxes.<sup>29</sup>

Suppose a state requires abortifacients or other related products to carry the following message: “The State of X, out of concern for women's health, discourages abortions in almost all circumstances.” This officious message, to which both Sugarman and I would object as a policy matter, seems to satisfy Sugarman's doctrinal criteria. Would he uphold it against a challenge by the product manufacturer or by a pro-choice group? As a limit, he favorably cites a 1977 Supreme Court case barring New Hampshire's “Live Free or Die”

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25. See generally Stephen D. Sugarman, *Should We Use Regulation to Demand Improved Public Health Outcomes from Industry? Yes*, 337 *BMJ* 1200 (2008) (arguing in favor of regulating smoking, drunk driving and automotive safety, child food consumption, and carbon emissions); Stephen D. Sugarman, *Outcome-Based Regulatory Strategies for Promoting Greater Patient Safety*, 15 *THEORETICAL INQUIRIES* L. 573 (2014); Sugarman, *Enticing Business*, *supra* note 6; Stephen D. Sugarman, *Using Outcome Regulation to Contend with Lifestyle Risks in Europe: Tobacco, Unhealthy Diets, and Alcohol*, in *REGULATING LIFESTYLE RISKS* 332 (Alberto Alemanno & Amandine Garde eds., 2015); Sugarman, *Performance-Based Regulation*, *supra* note 6; Sugarman, *Salt*, *supra* note 6; Pomeranz et al., *supra* note 7; Sugarman, *No More Business as Usual*, *supra* note 7.

26. Stephen D. Sugarman, *Compelling Product Sellers to Transmit Government Public Health Messages*, 29 *J.L. & POL.* 557, 557–59 (2014).

27. *Id.* at 560–62.

28. *Id.* at 567, 575.

29. See Stephen D. Sugarman, *A Balanced Tobacco Control Policy*, 93 *AM. J. PUB. HEALTH* 416, 417 (2003).



mandatory license plate message as too ideological to be protected.<sup>30</sup> But it is not so clear on which side of his line the example I give would fall.

Sugarman's deep interest in the regulation of cigarette smoking (particularly by minors, which of course precedes and causes the vast majority of adult smoking) began about twenty-five years ago with a review article in *Science*,<sup>31</sup> followed several years later by a review of three diverse accounts of the states' litigation that culminated in the landmark Master Settlement Agreement (MSA) with the four largest tobacco companies in 1998.<sup>32</sup> This last set of works reveals Sugarman's critical eye at its keenest, as each of the three books under review criticized the MSA for different reasons, including its genesis in the tort system (which Sugarman has dissected so surgically for so long) and its intersection with the federal policymaking and state/local politics (the article discusses the politics in Minnesota).<sup>33</sup> His acute analysis of the books' evidence carefully considers the relative effectiveness of these linked but disparate and competing systems (tort, legislation, and local politics) in producing both actual and potential outcomes. His sophisticated treatment and respect for all of them is obvious, even in his short review.

The same virtue—analyzing arguments with which he disagrees with the utmost seriousness and respect—is evident in his review of yet another book, an analysis of the cigarette market and its taxation, regulation, politics, and litigation by economist W. Kip Viscusi.<sup>34</sup> While noting that Viscusi's position dovetails almost perfectly with that of the tobacco industry.<sup>35</sup> Sugarman systematically addresses each and every one of Viscusi's arguments, bringing relevant data, methodology, and alternative perspectives to bear in his critique. In critiquing Viscusi's arguments, Sugarman offers his own interviews with three state and federal tobacco litigators, which usefully flesh out the history of the litigation and the MSA, especially how the state attorneys general hammered out a formula to divide up the proceeds.<sup>36</sup>

Market dynamics are never far from Sugarman's analytical vision. A fine example is his chapter in his and Robert Rabin's book on smoking policy. There, he asks whether, why, and how public and private employers and

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30. Sugarman, *supra* note 26, at 568–69 & nn.37–42 (citing *Wooley v. Maynard*, 430 U.S. 705, 707 (1977)).

31. Stephen D. Sugarman, *Smoking Guns*, 273 *SCIENCE* 744 (1996) (book review).

32. Stephen D. Sugarman, Book Review, 22 *J. POL'Y ANALYSIS & MGMT.* 712 (2003) (reviewing three books on tobacco control).

33. *See id.* at 713–14.

34. Stephen D. Sugarman, Book Review, 13 *LAW & POL. BOOK REV.* 1 (2003) <http://lawcourts.org/LPBR/reviews/viscusi-kip.htm> [<https://perma.cc/WAG2-QGBT>] (reviewing W. KIP VISCUSI, *SMOKE-FILLED ROOMS* (2002)).

35. *Id.*

36. *Id.*

insurers treat smokers and non-smokers differently.<sup>37</sup> After reviewing the possible policy and ethical rationales for such “disparate treatment,” he reviews various objections to it, noting among other insights that the motives of employers and insurers concerning disparate treatment may have little or nothing to do with smoking’s possible public health effects.<sup>38</sup> The objections he discusses are privacy, fair treatment of individual differences, collective responsibility, possible incentive effects, and symbolism—and then he discusses state “smoker’s rights” laws that view smoking as a kind of civil right that can only be restricted for narrow reasons.<sup>39</sup> Here, as elsewhere in his large public health oeuvre, Sugarman’s detailed knowledge of social insurance, regulatory practices, and market dynamics illuminates his legal, ethical, and policy analyses.

Sugarman’s public health scholarship also shows his interest in international comparisons and conventions.<sup>40</sup> An admirable example is his piece comparing tort litigation against cigarette manufacturers in the United States and in Japan.<sup>41</sup> There, he analyzes the effect of differences in the two countries concerning smoking practices (e.g., Japan’s greater use of filtered cigarettes), health warnings (much milder in Japan), evidence of addiction (less important in Japan), anti-smoking movements, and other features of the problem.<sup>42</sup> Indeed, even in his U.S.-focused contributions to the public health literature, Sugarman routinely calls his readers’ attention to relevant international comparisons.<sup>43</sup> But his interest in international comparisons of smoking practices has another payoff. It underscores the role of (1) cultural factors in smoking practices and preferences across modern societies, (2) changes in these variables within the same society over time, and (3) differences within a single society along gender, class, and other subcultural

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37. See generally Stephen D. Sugarman, *Disparate Treatment of Smokers in Employment and Insurance*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 161 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

38. *Id.* at 162–77.

39. *Id.* at 178–79.

40. See, e.g., Stephen D. Sugarman, *United States*, in *REGULATING TOBACCO, ALCOHOL AND UNHEALTHY FOODS* 193 (Tania Voon, Andrew D. Mitchell & Jonathan Liberman eds., 2014); Robert L. Rabin & Stephen D. Sugarman, *Perspectives on Policy, Introduction* to *REGULATING TOBACCO* 3 (Robert L. Rabin & Stephen D. Sugarman eds., 2001); Stephen D. Sugarman, *International Aspects of Tobacco Control and the Proposed WHO Treaty*, in *REGULATING TOBACCO*, *supra*, at 245.

41. See generally Stephen D. Sugarman, *Suing the Tobacco Companies in U.S. and Japan*, 15 *NIHON U. COMPAR. L.* 183 (1998).

42. For further discussion by Sugarman of the anti-smoking movement in the United States, see Stephen D. Sugarman, *Amerika ni Okeru Tabako Soshō to Kin'en Undō* [*Tobacco Litigation and the Anti-Smoking Movement in the United States*], 8 *DAITŌ HŌGAKU* 205 (1999) (Japan).

43. See, e.g., Rabin & Sugarman, *supra* note 40, at 6–7 (comparing U.S. tobacco-cessation programs with the European “harm reduction” model).

lines.<sup>44</sup> The United States, Sugarman shows, is Exhibit A for revealing these sorts of dynamic patterns.

#### CONCLUSION

Stephen Sugarman is not merely a scholar's scholar; he is also a policy wonk's policy wonk. His interests in how public and private law work, both together and independently, have yielded an immense body of work that illuminates much that would otherwise remain obscure and draws easily overlooked distinctions to which lawyers and policymakers should carefully attend. Ever attentive to the limits of law as well as to its possibilities, the vast sweep of his work is an invaluable but properly cautious guide to our future institutional development. We are all in his debt.

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44. See Stephen D. Sugarman, *The Smoking War and the Role of Tort Law*, in *THE LAW OF OBLIGATIONS* 343 (Peter Cane and Jane Stapleton, eds., 1999).

