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What (Not) To Do About Obesity: A Moderate Aristotelian Answer

RICHARD A. EPSTEIN*

For much of recorded history, the central challenge facing ordinary people was getting enough food into their own bellies and those of their families. Like all living things, human beings are machines that need to burn fuel to survive. Yet their precarious sources of supply made starvation and famine major threats; every calorie counted. To compensate, people evolved emotional and physiological strategies to store food as fat today in order to ward off starvation tomorrow. Notwithstanding this adaptive strategy, hunger unfortunately remains a daily occurrence for millions of people across the globe. But it is a sign of the prosperity of the United States and much of the developed world that talk of starvation has been displaced by an intense debate over its opposite—obesity—and what ought to be done about it.

The problems here proliferate at every level. First, there is the obvious question of how to define the condition. Next there is the tangle of questions over the source of obesity. Once we know its causes, how do we decide whether, and to what extent, it counts as a problem, as opposed to simply a state of affairs? Once its dangers are exposed, what, if anything, should be done about it? That challenge potentially invites a number of private and public solutions, which could easily operate in tandem, to reduce the incidence and severity of obesity. Some approaches praise persuasion; others call for full disclosure; still others call for regulation, taxation, or new theories of liability. Some call for a full five-course meal. The issue operates in microcosm of the larger issues of health and human safety that buffet this and every other society. To what extent does society rely on the market, or some sense of individual and parental responsibility, and to what extent does society rely on a mix of government programs, some of which are coercive and others are not?

Any effort to examine these problems should recognize the importance of

* James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution; Body Mass Index between 24 and 25. ©2005, Richard A. Epstein. I wish to thank Jacob Sollum for his help in avoiding error and leading me to recent sources on this never-ending subject. I should also like to thank Alix Weisfeld, University of Chicago Law School, class of 2006, and budding triathlete for her excellent and acerbic research assistance, and Justin Hurwitz, class of 2007, for stepping up in a timely fashion to finish the work. I also benefited greatly from reading Gregg Bloche’s contribution to this debate.

1. For one such account of the evolutionary pressures, see, GLENN GAESSER, BIG FAT LIES: THE TRUTH ABOUT YOUR WEIGHT AND YOUR HEALTH 32–34 (updated ed. 2002).
individual priors—background presumptions on the role of state intervention—to the overall debate. Obesity tends to mark a sharp, almost visceral, division between sides. Opponents of government intervention see the obesity controversy as a giant government land grab based on shoddy science or worse. Not content to treat obesity as a low-level question, they invoke the language of liberty and freedom on their own behalf. Defenders of government intervention see obesity as a major health crisis brought on by a wide range of sinister social forces. The two sides agree only on their ability to find the appropriate villain in cases of this sort: big business. Thus the people who believe that scare tactics have manufactured a false crisis accuse not only the low-fat food companies of stoking the fire, but also the entire cottage industry that has grown around low-fat food: the diet books; the weight loss programs; the health clubs; the sellers of exercise equipment; and the suppliers of dietary supplements, some of which have proved dangerous in particular cases. The people who see obesity as a crisis of epic proportions point the finger at the fast-food industry that plies a defenseless public with excessive fat.

The lines are sharply drawn. It is much more likely that supporters of national health care will find good reasons for state intervention to counteract obesity than those who by and large favor private health care solutions. It is for that reason that Jacob Sullum’s article, The War on Fat, is delicately subtitled, Is the Size of Your Butt the Government’s Business? The article is in large measure a debunking of Kelly Brownell’s book, Food Fight, whose subtitle is the more restrained, The Inside Story of the Food Industry, America’s Obesity Crisis, and What We Can Do About It. The advocates of centralized solutions stress the difficulty ordinary individuals face on matters of cognition and self-control.

Amidst the din, the science that surrounds the evaluation of obesity is difficult to master. The effects of various products on human health are tricky to discern even with warning labels, and almost impossible to figure out without them. The ability of individuals to stick to diets or to exercise any other measure of self-control is notoriously weak, and in the minds of many counterproductive, so that perhaps a regime of taxation or regulation that moderates supply could operate as a useful backstop to, or a substitute for, the frailty of individual

5. Sullum, supra note 4, at 20 (beginning with an attack on Kelly Brownell’s own weight problem).
6. BROWNELL & HORGEN, supra note 3.
8. GAESSER, supra note 1, at 145–147. Gaesser attributes enormous wear and tear on the body to the yo-yo effect of diets. Those who diet today gain back even more weight tomorrow, as the body becomes more retentive of calories because of evolved mechanisms for preventing future starvation. Id.
will, especially the will that cannot accurately discount future cravings to their present value.

From the other side come the familiar rejoinders of those who are suspicious of government programs. They claim that governments have neither the incentives nor the knowledge to work any intelligent system of regulation, taxation, or liability. Ordinary individuals bear the consequences of ill-health first and foremost, and thus should be willing to take steps to advance their health by easing the strain of obesity. In addition, no system of upstream control, public or private, can fully take into account the tremendous variation in individual cases. Controlling obesity, this view urges, depends on person-specific knowledge of everything from body-type, age, and allergies, to food likes and dislikes, travel schedules, occupation, and so on. Any effort to develop centralized solutions will fail because the high level of variation across individual cases will defeat even a conscientious government that is consistently virtuous in the discharge of its public duties. That last condition is, the argument continues, routinely unattainable because of the usual concerns about the misuse of public power which is the central insight of the public choice literature.

Neither side claims its solutions are necessarily better than the other’s. Neither thinks that a pure private or public solution is desirable. And they are right. But the center of gravity does depend on choosing between these dueling sets of prior beliefs. On this matter Gregg Bloche and I start from different priors about the propriety of government regulation, yet in one sense I am both pleased and surprised about the similarity of our concrete positions on the proper social approach toward obesity. In dealing with the underlying factual issues, we share much the same orientation and I welcome and endorse his view that exotic cognitive findings such as "hyperbolic discounting" do much to explain our current concern with obesity.9 Notwithstanding his strong initial presumptions on these matters, Bloche is keenly aware that any effort to use state force to control the obesity problem is not likely to work. Thus, he writes that "public policy and law should reject prohibitions or sanctions on the purchase or sale of problematic foods. Not only do such approaches constitute paternalism in the private sphere, at odds with mainstream conceptions of liberty in democratic societies; they are at high risk of backfiring."10 To be sure, at points he backtracks from this sensible position, by thinking that some good might come from the regulation of advertisements or from the use of public information campaigns that alert consumers to the costs and benefits of different sorts of foods. But on balance, his pragmatic instincts do a good job in constraining his reformist impulse. My own background presumption is more skeptical about government intervention than his, largely because of the differ-

9. M. Gregg Bloche, Obesity and the Struggle within Ourselves, 93 GEO. L.J. 1335, 1345–46 (2005). Hyperbolic discounting refers to the tendency of individuals to have very steep discount rates for immediate gratification, which leads them to underestimate the importance of their long-term well being.

10. Id. at 1353.
ences between our background presumptions about the need for government action generally. As a firm believer in the decentralized view, I will argue here that the sound background presumption against government intervention has not been overcome. But rather than leave discussion of these issues at a high level of abstraction, let us descend to the particulars. Accordingly, in Part I, I present a short but suggestive case study. In Part II, I grapple with some small fraction of the science literature that addresses the relationship between diet, obesity, and health. In Part III, I turn to the possible legal issues this relationship raises.

I. AN INTERESTING CASE

The major task in the scientific literature is to identify the nature of the relationships among diet (including fat intake), obesity, health, and mortality. To give some idea of the difficulty of pinpointing the relationship, consider the position of a fifty-eight-year-old white male who has a history of heart disease in his family, which prompts him to take treadmill tests from his early thirties. His former day job was somewhat strenuous, because of its incessant demands and his personal misadventures. For many years, he did not regularly exercise. As a confirmed policy wonk, our hero was known to eat fair amounts of junk food during late-night bull sessions devoted to the great issues of western civilization. Not surprisingly, his LDL (low-density-cholesterol—the bad kind) rose during his tenure in the job, going from 137 to 177 in his last year alone. But since leaving his high-pressure position, he has lost about twenty pounds by going on the so-called South Beach Diet, which stresses low carbohydrates and whole grain breads and cereals. He appeared to be in excellent shape in his last public appearance, but shortly thereafter suffered chest pains that led him to check himself into Boston-area hospital, where his clogged arteries needed quadruple bypass surgery, which he had at his home base in New York City. Happily, our patient seems to have sailed through his ordeal with flying colors.

The key question here is whether ex-President Bill Clinton’s condition should be attributed to his past overweight condition, to the sharp loss of weight that took place once he went on the diet, to the genetic predisposition of his family, or to some unidentified factor, or combination thereof. Clearly it is easy to be of two minds about the case. It is possible, as Dr. Robert Robbins of the Stanford Cardiovascular Institute of Palo Alto said, that “his past ways caught up with him,” or, alternatively, that his genetic predisposition was so strong that he would have run this risk no matter what precautions he had taken, no matter what lifestyle he had led. It’s always difficult to identify and weigh the possible causal factors that operate in any individual case. Every lawyer knows how difficult it is to develop theories of apportionment to cover cases of joint

12. Id.
causation, and the obesity issue is filled with just those issues. One common figure is that about 25 to 40 percent of the variation in weight among individuals is due to genetic factors, which leaves the remaining 60 to 75 percent to environmental factors, which cover everything from family stress to the consumption of fast foods. The numbers make it hard to be confident that any proposition that holds for aggregates applies with equal force to individual cases. Unless we know both the sign and the weight of the coefficients for the key terms, we cannot develop a coherent strategy, collectively or individually, to deal with the threats that fat and obesity do (or do not) pose to ordinary health.

The Clinton episode is, unsurprisingly, subject to two different interpretations, both of which are consistent with the statistical claims. One is that he was just fine until he went on the diet, and the rapid change in weight triggered an unfortunate response. The other is that his last-gasp diet was both too little and too late to stop the serious damage attributable in part to his earlier behavior. These explanations are not mutually exclusive; both could be true, leaving it to the unhappy analyst to decide which of many straws broke the camel’s back. The interpretive problem here does not stop with the evaluation of this single case. Clearly, any reputable statistical study has to be able to navigate a factual thicket with two questions: First, what is the connection between fat intake and obesity? Next, what is the connection between obesity and specific medical conditions and general health?

On these questions, the level of observable disagreement inside the literature appears to be complete. It is striking how strident are the titles of the various books, all of which are exposés of at least some portion of big business (excluding for the moment big oil). Thus the reader can indulge in Marion Nestle’s Food Politics, Greg Critser’s Fat Land, and Kelly Brownell and Katherine Horgen’s Food Fight, all of which indicate the ways in which the relentless advertising campaigns of Big Food overwhelm the natural defenses that ordinary individuals might have against the overconsumption of calories, using fat as an imperfect proxy. But of course Big Food is on both sides of the market and is responsible for creating the false illusion that low-fat diets will work in order to promote its own huge array of products that occupy this enviable market niche, which is the thesis of Paul Campos’s The Obesity

13. BROWNELL & HORGEN, supra note 3, at 23. The scientific references include Gregory S. Barsh et al., Genetics of Body Weight Regulation, 404 NATURE 644–651 (2000); C. Bouchard, Genetic Influences on Body Weight, in EATING DISORDERS AND OBESITY: A COMPREHENSIVE HANDBOOK (KELLY D. BROWNELL & CHRISTOPHER G. FAIRBURN, eds. 2D ed. 1995).


Myth.\textsuperscript{17} Glenn Gaesser's \textit{Big Fat Lies: The Truth About Your Weight and Your Health},\textsuperscript{18} takes a complementary view that up and down diets are bad, but does not spend its time condemning the businesses that promote them.

Take your pick. Reading as an outsider, I think that the entire debate is overwrought. The words “epidemic” and “crisis” are debased in this discussion. Ideally, we should all be willing to follow a simplified version of Aristotelian ethical theory which holds that moderation in all things probably works for the good. Steadiness and constancy in personal life reduces the risks from all quarters, of which obesity is only one. As one might expect, the causes and consequences of obesity are not a matter of settled and undisputed truth. In light of that uncertainty, we should be very skeptical of any effort to solve this matter by government intervention, whether in the form of regulation, taxes, or liability rules. A little gentle suasion might help, as long as we remember that the government is not a particularly gentle or effective persuader. Here is how it all breaks down.

\section*{II. The Basic Case Against Obesity}

The contemporary attack against obesity begins in many ways right at the top. Thus the single most quoted statistic on the subject is one by the Surgeon General that makes a self-conscious effort to link obesity to cigarette smoking. In its 2001 report on overweight and obesity, the Surgeon General takes the position that fat counts as an “epidemic” that results in the death of around 300,000 Americans per year, such that if “[l]eft unabated, overweight and obesity may soon cause as much preventable disease and death as cigarette smoking.”\textsuperscript{19} Others have put the figure at 400,000, though that number has recently been challenged.\textsuperscript{20} More recently, the Secretary of the Department of Health and Human Services announced HHS would consider treating obesity as a medical condition:

\begin{quote}
Obesity is a critical public health problem in our country that causes millions of Americans to suffer unnecessary health problems and to die prematurely. Treating obesity-related illnesses and complications adds billions of dollars to the nation’s health care costs. With this new policy, Medicare will be able to review scientific evidence in order to determine which interventions improve
\end{quote}

\begin{tabular}{l}
17. \textsc{Paul Campos}, \textit{The Obesity Myth: Why America's Obsession with Weight is Hazardous to Your Health} (2004); see also \textsc{Paul Campos}, \textit{Weighting Game: What the Diet Industry Won't Tell You}, \textsc{New Republic}, Jan. 13, 2003, at 17. \\
18. \textsc{Gaesser}, \textit{supra} note 1. \\
19. \textsc{Office of the Surgeon General, U.S. Dep't of Health and Human Servs.}, \textit{The Surgeon General's Call to Action To Prevent and Decrease Overweight and Obesity}, at XIII (2001). \\
20. For the 400,000 figure see, e.g., \textsc{Ali H. Mokdad et al.}, \textit{Actual Causes of Death in the United States}, 2000, 291 \textsc{JAMA} 1238, at 1240 (2004); for recent challenges see, e.g., \textsc{Katherine M. Flegal, et al.}, \textit{Excess Deaths Associated With Underweight, Overweight, and Obesity}, 293 \textsc{JAMA} 1861 (2005) (finding approximately 111,000 excess deaths associated with obesity). 
\end{tabular}
As with any Medicare pronouncement, it is hard to separate the science from the politics, and the brief announcement makes no effort to justify its position. But before we dismiss this position, it is still critical to evaluate the standard attack on obesity to which this statement refers. Here a large share of HHS’s case rests on charges that a majority of Americans are overweight or obese. Critical to this account are the underlying definitions. Overweight persons are defined as individuals whose BMI (or body mass index) is over twenty-five. For obese persons, the BMI is over thirty. For those who want a frame of reference, a male with a height of six feet and a weight of 185 has a BMI of just under twenty-five, which means that he is not quite overweight, but close. The test makes no distinction between men and women, which seems surely wrong, and it does not account for differences in age. Since most people gain weight as they get older, the aging of the population will accentuate the ostensible obesity. For what it is worth, the test makes no reference to levels of body fat. The muscular athlete and the couch potato of the same weight and size get the same BMI. Nonetheless, even when these cautionary notes are injected, the underlying trends are ominous. The steady upward trend in the BMI index is probably not evidence that more Americans than ever are putting on muscle mass doing weight-training in the gym. Rather, the percentage of overweight and obese people, by any definition, seems to be on the rise. Becoming overweight may be asking for trouble, for the condition is commonly associated with increases in type 2 diabetes, coronary heart disease, and hypertension.

What makes the issue so intractable is that the critics of government intervention are not necessarily defenders of obesity as a desirable state for any given person. Rather, their view is that individual means of control are likely to prove preferable. Taken in this light, the standard critique must raise at least one eyebrow for reasons that don’t fight the data. The first source of uneasiness is the overwrought comparison of food with cigarettes. While cigarettes can be shunned altogether, people have to eat to live. Accordingly, the responses to overweight and obesity must be more modulated than for tobacco, where it is possible to follow the lead of the millions who have never smoked and the millions who have smoked and quit. Even if we accept the figures on death and illness at face value, figuring out the right individual or social response is necessarily a good deal more difficult to achieve. There is quite simply no


22. See Inas Rashad & Michael Grossman, The Economics of Obesity, 156 Pub. Int. 104, 105 (2004). For the uninitiated, BMI is defined as Kg/M², which is one’s weight in kilograms (about 2.21 pounds) divided by one’s height in meters squared (a meter is about 39.27 inches). Id.

23. OFFICE OF THE SURGEON GENERAL, supra note 19, at 8.
agreement today on what counts as “best practices” for physicians counseling their patients about obesity, even among doctors who specialize in the condition. 24 Deciding whether to reduce food intake or increase exercise, and in what proportions, is not an easy choice even for the conscientious. The matter is still more complicated because fat location matters as much, or more, than fat amount. “Pear-shaped” individuals with fat in the thighs and legs, for example, are less likely to develop diabetes than “apple-shaped” individuals whose fat is concentrated about the waist. 25

The sheer complexity of the issue seems, however, to cool off some of the overheated rhetoric on the subject. The constant use of the term “epidemic” does more to inflame than inform. Whatever the problems with obesity, it is not a communicable disease, with the fears and pandemonium that real epidemics let loose in their wake. 26 The attempts to describe it as a public health problem therefore expand the definition of public health to cover a wide range of decisions and actions that have none of the functions of public goods. 27 There are no collective action problems, for I can go on a diet while you decide to binge, or the reverse. There is, accordingly, a vast difference in desirable social responses to pollution or plague on the one hand, where coercive collective action is indispensable, and to obesity, where different individuals can pursue different choices. Thus, Bill Clinton can try the South Beach Diet, which is a low carbohydrate diet, or could graduate to the virtually no-carbohydrate Atkins Diet. 28 (Passover 365 days a year is too horrible to contemplate!) I am free to ignore both, which I happily do. The lack of a single common peril to which we all must collectively respond is a clear blessing because it allows experimentation at the individual level with the appropriate response to obesity or malnutrition by people who, quite literally, internalize the successes and failures of their decisions.

Sensing this difficulty, it is sometimes said that obesity is a public issue because the collective provision of medical care in the United States means that


26. For a good introduction to epidemics and public responses, see HOWARD MARKEL, WHEN GERMS TRAVEL: SIX MAJOR EPIDemics THAT HAVE INVADED AMERICA SINCE 1900 AND THE FEARS THEY HAVE UNLEASHED (2004).


individual decisions on health and fitness have a profound effect on the public fisc to which all are forced to contribute. But here it is the social response, not the underlying set of choices, that introduces a public goods dimension into the mix. The problem could be reduced or eliminated by reversing the antecedent decision to socialize the expenses of health care through programs like Medicare and Medicaid. If we let insurers and employers have the right to draw distinctions on the grounds of weight, muscle mass or anything else, then the cross-subsidy problem will be largely eliminated because each person’s rate will depend more on individual performance and not on the performance of others. The prices will not only change the distribution of burdens, but should create incentives to reduce the total size of the problem, which is an important consequence of prices that the champions of state intervention tend to overlook. It is only when universal access is the cardinal principle of health care that markets are sure to fail. But here doing nothing in the face of rising costs is not attractive, so it becomes fair game to support increased government regulation on anything that influences health care costs—for which obesity qualifies, as HHS duly notes. Yet there are limits to the process. Determined supporters of state action are usually unhappy with the thought of regulating such individual matters as exercise levels and portion size. So their attention turns to taxation and regulation of the goods sold, not on the consumers to whom they are sold. Their broad definition of public health provides them with a point of reference that shrinks the domain of “pure” private health issues to the vanishing point: private health is a domain that the state cannot successfully regulate.

Even if we were to pass this definitional point by and treat obesity as a full-scale public health problem, some element of caution is needed in working out the optimal collective response. “Epidemic” is not the only overheated rhetoric that public officials use to describe obesity. Their further claim of the 300,000 preventable deaths looks like a potent figure, paralleled in significance and magnitude by death from tobacco-related diseases. But it also suffers from an ambiguity that tends to inflate the statistic’s impact. It is not as though 300,000 individuals a year are simply laid waste, as by typhoid or diphtheria. In order to see why the figure overstates the matter, ask this question: if everyone who died in a given year had never smoked, how much longer would they have lived? That particular question is not as easy to answer as might first appear. The first implicit assumption of the 300,000 deaths claim is that obesity is the sole cause of these complications, but the actual studies at best attribute the shortening of life to generalized “diet/activity” patterns of which obesity is only

29. I had stressed this point in an unpublished speech at an obesity conference held at the American Enterprise Institute this past May. It was picked up again by Sullum, supra note 4, at 31 ("[A] hostile audience member asked him, what are you doing to prevent obesity? Epstein’s answer: ‘I play basketball.’" Happily, still true.). And last year, Swiss Re, a major reinsurer, proposed that insurers raise premiums for the obese as well as for those prone to obesity. Charles Fleming, Costlier Insurance May Lie Ahead for the Overweight, WALL ST. J., Apr. 6, 2004, at D5.
a small part.\textsuperscript{31} Worse still, it is often unclear whether obesity is the cause of the health deficit or just a second manifestation of some other dangerous underlying condition.\textsuperscript{32} Furthermore, the statement as made makes no reference to the age of either the smokers or obese individuals involved. Nor does it refer to other changes in behavior that the reluctant nonsmokers might have adopted to satisfy their cravings. It is therefore perfectly consistent with the possibility that all of the 300,000 preventable deaths this year would have turned into unpreventable deaths next year. It is worth exploring this last point in a little more detail.

The most troublesome shortfall of this claim about preventable deaths is that it lacks any direct translation into the loss of expected years attributable to smoking or obesity. In addition, the figures in question do not state how long we must wait before the loss of those expected years. The great tragedy of typhoid and diphtheria, for example, was that they were childhood diseases. In a more modern vein, the tragedy of AIDS is that it may (and in Africa and Asia, and the earlier years of the epidemic here, surely did) cut off the life of its victims within a short time of infection. People could be infected at thirty and die at thirty-three, with a loss of several decades of expected life. Cigarettes and obesity do not follow that profile. Here the distribution could be that people begin smoking at age twenty and suffer a two-year loss in life expectancy at age seventy-five or eighty. Now the lost years of life come far in the future, where the high discount figure lends respectability to the claim that some individuals might prefer the front-end enjoyment even at the cost of some small increase in back-end risk. Food consumption opens up the same set of possibilities. Such choices could be handled by mixed strategies. Individuals could smoke while young, quit by thirty while their lungs are still relatively able to rejuvenate; then turn to sugars, which they start to cut down on at age forty, when the weight increase proves more dangerous. It is an open question of whether such strategies are effective, and, if so, for what fraction of the population. But all this only reinforces the basic point. It is difficult if not impossible to cash out the present value of the future losses, as measured by quality of life years lost, contained in the phrase "300,000 preventable deaths," and thus the statistic, by itself, has little if any useful meaning.

Next, there is the question of adaptive responses. Here the problem is larger than might generally be supposed. Start with the alleged equation of smoking and obesity. These are linked problems. But it is not as though those who can control smoking are necessarily in an ideal position to control weight. Instead the relationship may run in the opposite direction, if some people smoke in order to control their appetite.\textsuperscript{33} Hence any calculation of the mortality risk associated with smoking has to include the increased mortality risk associated

\begin{footnotesize}
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\item See Gaesser, supra note 1, at 75–80 (discussing the limitations of J. Michael McGinnis & William H. Foege, Actual Causes of Death in the United States, 270 JAMA 2207 (1993)).
\item Id. at 78–79.
\item For discussion of this hypothesis, see C.S. Pomerleau et al., The Female Weight-Control Smoker: A Profile, 5 J. Substance Abuse 391–400 (1993).
\end{enumerate}
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with the weight gain that often follows quitting. Inas Rashad and Michael Grossman claim that this rebound effect is not trivial. Their research shows that “each 10 percent increase in the real price of cigarettes produces a 2 percent increase in the number of obese people, other things being equal.” The tax increases on cigarettes have been quite steep, and these can be built into the price of cigarettes. The upshot if Rashad and Grossman are correct is that perhaps 20 percent of the increase in obesity is attributable to increases in the real price of cigarettes.

The complex patterns of influence do not stop with the connection between smoking and obesity. While most of the critics on both sides of the debate are happy to denounce Big Food for getting Americans to do the wrong thing all of the time, the economists who analyze this problem tend to stress various structural issues for which it is hard to point an obvious finger of blame. Rashad and Grossman, for example, do not think that the decline in smoking is the larger driver of increased obesity. They hold that pride of place lies elsewhere: “as much as two-thirds of the increase in adult obesity since 1980 can be explained by the rapid growth in the per capita number of fast-food restaurants and full-service restaurants, especially the former.” The clear point here is that when it is easier to eat out than to cook, and calorie counts are higher in restaurants than at home, levels of consumption move smartly upward. The trend seems to have been exacerbated by the large amount of snack foods individuals consume, which has also pushed up the overall level of caloric intake.

But what causes this shift? Well, here there are trends at work that touch every area of American life, not just food. One key factor is surely the increased participation of women in the labor force, which drives down the amount of home cooking, and makes it likely that mothers will do less to monitor the diets of their children. This could account in part for the increasing levels of childhood obesity that have been reported in the past few decades.

Once we start down this path, it becomes child’s play to identify other sources of obesity. Tomas Philipson, another economist, has noted that the real cost of food has gone down, so that even if people continued to cook their own meals, the weight levels would continue to rise. In addition, he notes that the nature of work itself has changed, so that fewer people do manual labor and more are engaged in office work (which is surely safer than manual labor, and saves lives and limbs even as it contributes to workers’ weight). At one time

36. Id. at 108.
37. See David M. Cutler et al., Why Have Americans Become More Obese?, 17 J. ECON. PERSP. 93 (2003). Their work is discussed in detail in Eric Oliver, Big, Fat Politics: Uncovering the Real Sources of America’s Obesity Epidemic ch. 5 (unpublished manuscript, on file with author).
most jobs included physical exertion. Now, rather than being paid to exercise on the job, many people pay to join clubs or hire personal trainers. Nor do the costs end there, for every hour in the gymnasium is an hour away from the job and the family. It takes no wizard to draw the inescapable inference: as the costs of keeping trim increase, fewer people will be thin. Obesity will rise because of structural changes in the American economy, which it will prove hard to isolate or reverse. On this view the ad campaigns do not create the preferences that Americans have for fast food; fast food chains give Americans exactly what they want—whether they should want it or not. We should expect a lot of diffuse resistance to any initiative that seeks to alter fundamental behavioral patterns. It will not prove so easy to reduce obesity in this way, even if we try.

Yet should we try? The most common recommendation is a shift in diet away from fatty foods. But that innocent recommendation has proved just as controversial as all of the other scientific positions on obesity. The science that seeks to find the biological origins of obesity is filled with unexpected pitfalls. The initial impulse on this issue was to link the rise of obesity to an increase in the consumption of fat. After all, people become fat because they store fat. The simple solution therefore is to eliminate fats from the diet in order to drive down the weight. But the scientific inferences that have to be made to support this conclusion turn out to be much more tenuous than this “commonsense” response. Perhaps the most relentless campaigner on this issue is Gary Taubes, an outspoken champion of the high-fat Atkins Diet. Taubes’s central message is that no one has proved to date that eating a low-fat diet helps people live longer. Taubes has as his central target an industry-government alliance, which includes the food industry that churns out huge numbers of low-fat and non-fat products and the advertisement and promotional campaigns to sell them, and the United States Department of Agriculture that developed and constantly preaches the “Food Guide Pyramid” that urges sparing use of fats and oils and heavy reliance on carbohydrates.

The link between consumption of low-fat items and improved health outcomes seems doubtful, for while the dietary level of fat intake has dropped from 40 percent to 34 percent over the past three decades, the incidence of heart disease has not declined, even if the successful treatment of these heart conditions has reduced the risks of mortality. The Taubes argument recognizes obesity as a problem, but claims that fat consumption is not its cause. One

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39. See, e.g., GAESSER, supra note 1, passim.
40. See Gary Taubes, What If It’s All Been a Big Fat Lie?, N.Y. TIMES, July 7, 2002, § 6 (Magazine), at 22.
42. Id. at 2537. The USDA has recently changed its “Food Guide Pyramid” to reflect the need to match dietary recommendations to individuals. See http://www.mypyramid.gov. It is not clear that these changes address Taubes’s concerns.
43. Taubes, supra note 41, at 2537.
44. Id. at 2541.
powerful argument in favor of this conclusion is that the body has evolved its own responses to counteract the effects of diet. If individuals start to eat less, then the body will slow down its rate of metabolism, undercutting the effects of lower consumption, and triggering the weight gain that follows when the discipline of dieting proves intolerable.

Similarly, if the intake of carbohydrates is too high, then the body will convert some of the carbohydrates to fats, for storage and later consumption. The body needs fat, and no one argues that fat should just be excluded from diets entirely, given the important role that fat plays in critical bodily functions, including the insulation that it supplies to neurons in the brain and elsewhere. The body in effect acts as its own maximizer, which negates much, if not all or more, of the push-pull connection between what comes in and what goes out.

The difficulties do not stop here, for even if it is conceded that the intake of saturated fats increases cholesterol levels and obesity, it is hard to draw any inference about the relationship between these markers and overall health, in light of other factors that confound that relationship. Thus Paul Campos, whose target is the diet industry, disputes that connection, by pointing to two such confounding factors. First, those individuals who engage in moderate exercise do better on matters of mortality and morbidity than those individuals who lead a sedentary life. The connection between moderate exercise and health seems to hold regardless of weight; thus, being “fat and active” is in general a better place to be than “thin and inactive,” even if “thin and active” is in general best of all. Second, it turns out, so Campos claims, that stability in weight is a positive factor for health, so that those individuals who take pills or go on strict diets to lose weight increase their risks of ill-health simply by introducing the fluctuation. The point is a restatement of the yo-yo effect deplored by Gaesser. The argument here is that what matters on the intake side is the total level of calories consumed, not their source, given that the body can adapt to a wide variety of diets, depending on its needs.

The insistence that any extreme diet (including in my view Atkins) may pose serious risks here makes intuitive sense, because any form of variation necessarily consumes resources in the conscious or unconscious efforts to return to some kind of equilibrium position. People who follow stable routines will in general do better than those who constantly flit back and forth between different routines. At this point we have a genuine question of causal attribution. The Clinton tale is more universal than first appears. If weight loss regimes are risky, do they count as the cause of harm, or do we go back one step further in the chain of influence to the weight condition that induces the decision to diet in the first place?

Matters only get worse when one tries to figure out who is overweight by any objective standard. The BMI measure may be a useful guide in evaluating populations that face wholesale starvation or obesity, but it is less successful
when pressed into service as a guide to individual conduct. The standard “normal” BMI range for adults is approximately 20 to 25. But for many purposes, reliance on a BMI number in and of itself is obviously fallacious. As the National Institutes of Health recognizes, body types differ, and people tend to put on weight as they age; weights that were attainable at 16 to 20 years of age simply are out of the question 40 years later. Given such caveats, it is reasonable to insist that policy recommendations based on BMI data be systematically revised to take into account the influence of age, sex, smoking, or body-build. For example, reclassifying people over 65 with BMIs between 25 and 27 as “normal” rather than “overweight” may make a big difference in our statistical picture of the “epidemic.”

III. FROM SCIENCE TO POLICY AND LAW

The confused scientific picture should sound a cautionary note to those working on policy responses. There seems to be some agreement that obesity is harmful for some people, but little agreement on its source, and still less agreement on the question of the proper response. At one end of the spectrum lie those who insist that individuals have primary responsibility for their own health. The argument here rests as much on the idea of simple necessity as it does on some noble and immutable concept of individual responsibility. The question of body health in general and body weight in particular depends on so many circumstances that any individual who thinks that he can trust a government to make the right decisions is just kidding himself. Even if all foods were subject to just the right sin tax, for example, the quantities consumed, and the other behavior of the consumer, could negate all the purported benefits from the rules of public regulation. The upshot is that people have to invest in both information and self-discipline no matter what legal regime is in place. To say otherwise is to cultivate the grand illusion that public protection will pick up the slack when individuals fail to take care of their own lives.

That said, the question then is what forms of state involvement we might ask

47. The NIH website states:
BMI is not always an accurate way to determine whether you need to lose weight.
Here are some exceptions:
* Body builders: Because muscle weighs more than fat, people who are unusually muscular may have a high BMI.
* Elderly: In the elderly it is often better to have a BMI between 25 and 27, rather than under 25. If you are older than 65, for example, a slightly higher BMI may help protect you from osteoporosis.
* Children: While an alarming number of children are obese, do not use this BMI calculator for evaluating a child. Talk to your child’s doctor about what an appropriate weight is for his or her age.
to deal with these issues. There are only four methods that could be tried. The state could initiate a taxation scheme; it could engage in programs of regulation; it could create systems of liability against the suppliers of food or other products; or it could mount some form of education program. Of these, any limited use is in all likelihood exhausted by the programs now in place, so that further interventions are likely to be both costly and counterproductive. The following is a brief summary of the ups and downs of the four options.

*Fat Taxes.* In principle, if obesity is the target, then the preferred form of tax should be one that hits obese people. That could be accomplished, at least in theory, by using a "weight tax" for people who exceed the appropriate norms. The idea will prove to be a nonstarter politically, for it will force politicians to face up to the explicit gap between weight and fat, in light of exercise on the one hand and differences in body build on the other. In addition, it is a moral certainty that no political figure wants to run weight checks on millions of individuals, all of whom will bridle at the imposition and plead special conditions (e.g., glandular disorders) if they end up on the high end of the scale.

If taxation of weight is a dead loser, then what about the taxation of inputs that on average tend to make people fat? Perhaps the most common proposal for intervention is one that seeks to implement some kind of fat tax. The chief advantage of this system of taxation is that it promises some degree of administrative ease, and a system-wide improvement in dealing with health. The tax structure would ideally mirror the increased costs that certain forms of eating impose on other, more virtuous, individuals within the current institutional framework. The hope here is that individuals will move away from those foods which are heavily taxed into other non-taxed alternatives—such as carrots—a shift which will carry with it more desirable social consequences, especially if the revenues raised are plowed back into various activities intended to control obesity.

This system has its fair measure of supporters and critics. It would be foolish to contend that in principle an ideal tax on fat could never produce some improvement over the status quo. Yet, by the same token, social choices should not be made on the grounds that the best possible tax beats the status quo. What kind of a tax are we likely to end up with *in fact*, and how will that system perform compared to the status quo? Here the case for the fat tax is unhappy.

First, start with the question of what should be taxed. One possibility is to simply put a tax on calories, but that approach runs into the objection that calories that come with foods that have genuine nutritional value should be

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50. See, e.g., Sullum, *supra* note 4, at 23–24.
taxed differently from the empty calories in various forms of junk food. But
don’t hold your breath waiting for a multi-part index that could capture all these
variations, given the enormous challenge of administration that even the sim-
plest of fat taxes imposes. There are thousands of different food products that
are sold in the United States in all sorts of forms and through all sorts of
different distribution channels. Someone has to decide which of these foods is
subject to a tax, and at what level. The job cannot be done by broad product
category, because the variations in category are likely to prove too great. Rather,
classifications must be done product by product, and then redone as products are
reformulated, to take into account changing prices, new technologies, regulatory
demands for the removal of different ingredients and the like. Make no mistake
about it, this is an enormous task, and one which could easily be botched by the
Department of Agriculture or any other agency put in charge of so daunting an
undertaking.

Here is one example of the pitfalls that may lurk ahead. Some years ago, I
worked on litigation about which drinks were subject to a simple bottle tax on
various kinds of soft drinks, and the question of inclusion and exclusion was
hard to handle, given the full range of bottled drinks, with and without carbon-
atation. The products almost always align along a continuum, so that questions of
coverage and amount dogged the entire inquiry. These uncertainties produced
dead weight losses at best, and invited a new cottage industry of producers
seeking to reformulate their products so as to minimize their tax liability—and
to lobby for heavier taxes on their rivals. Before starting down this road, you
have to see your way through to billions of dollars in administrative overhead
alone. The exact amount, of course, is impossible to determine without detailed
knowledge of the tax. But these are not trivial figures. The bottle tax turned out
to be much more complicated than a simple sales tax because it was triggered
by weight and not by price. Just getting the cash registers to calculate it
correctly required massive engineering. Small businesses could not afford the
retrofit at all. If we could implement a fat tax at 1 percent of the total food bill,
consider it a bargain.

Finally, there is the nasty question of whether the tax will do any good. One
problem is that this tax will not operate the same way for restaurants and
providers of prepared food as it does for individuals who consume at home. Though I know nothing about dietary science, it seems plausible to suppose that
how food is prepared makes a huge difference in the caloric or fat content that is
delivered. The number of calories (sometimes from fat consumption) that work
themselves into the system from a given meal could be heavily dependent on
what time of day the food is eaten, the speed with which it is consumed, or
other foods with which it is served. If any of these assumptions are true, then
the measurement system will be flawed in its relationship to the overall objec-
tive of reducing caloric intake.

In addition, a fat tax is likely to prove either futile or counterproductive. Any
such tax must be uniform in the way in which it deals with foods at their source.
But the downstream variations are enormous. There are individuals, for example, who consume enormous quantities of fast food but show no ill effects in part because they exercise at a high rate. The imposition of this tax will only increase their consumption costs without providing them with any kind of protection against obesity or its dreaded side effects. Recall that the level of weight depends both on what is consumed and what is expended. There is little sense in controlling what goes in if there is no effort to account for what goes out. Yet there is clearly no way to key the level of tax to the amount of exercise that any individual does. In addition, there is really no way to impose a food tax on those who eat too much without also raising food costs for the poor. Any uniform tax therefore has a disparate impact, such that some individuals are left worse off by its imposition. There is no way that a general tax can vary to take into account these critical downstream differences.

Regulation. Now we shift to various forms of regulation, and ask what they could do to respond to the challenge of obesity. One form here is disclosure, that might require a firm to list the contents of various ingredients in its products. This approach has already been adopted in some contexts, and it might serve as a sensible ground for protection against various forms of fraud. But there seems to be little that could be done to provide disclosures that say “eating too much of this product causes ill health.” Either it will be a truism, in which case the outcome will be generally known, or it will contain so much clutter that people will ignore it in favor of the familiar proposition that asks people to eat “smart,” which does not run the risk of information overload, with or without labels. But a skull and crossbones would be out of place in this environment—the products in question are not poisons—and the danger is that the warnings that would be required could prove so detailed and overwrought that they would be incomprehensible or unpersuasive, or both.

On this score, for example, it seems almost comical to try to “require,” as Kelly Brownell suggests “food labeling at restaurants.”51 Left as an aspiration, this proposal does not demand that we figure out which of the millions of places that serve some food count as restaurants; nor does it require us to figure out what information should be disclosed and why. But given the transformations in food that take place with cooking and menu changes, this proposal is a dead loser; anyone who has looked at the ornate disclosure regimes that govern securities law, prescription drugs, and product liability, will not start down this path with equanimity. The institutional features are paramount. Does one require different disclosures for different preparations? Are they to be updated every time a restaurant hires a new chef or purchases from a different supplier? Is there any reason to think that labels would tell us more than our senses already convey: greasy food may be yummy but it is also harmful. Disclosure here is ordinarily more difficult with prepared meals than with prepackaged food, at least for most restaurants. There is some question as to whether the

51. BROWNELL, supra note 3, at 312.
rigid standards that are used by large restaurant chains to ensure product uniformity might obviate this difference, at which point the disclosures could well make sense, even if the information that they contain is already known in some general sense by their customers. But even here, the rate at which the food is consumed, and the size of the individual portions, could introduce differences in impact in individual cases. The most that we can ask for are routine health inspections that deal with dangerous substances and impurities. But these have largely been addressed already, which accounts in large measure for the added confidence that people have in both prepared and restaurant foods.

The difficulties with the task of regulation become more apparent as we move further afield from the preparation and consumption of food. Kelly Brownell’s book contains unstinting criticism of those who downplay the obesity crisis, but his recommendations for action frequently skirt the hard question of regulation. Thus, he urges that people generally should “appreciate” the changes in the environment, or “recognize” that individuals are unable to cope with the advertising menace; or “support” further research into the problem, or “learn” from what other nations do overseas. Although popular awareness programs, thankfully, do not involve regulation, they run into the real risk that others with different points of view will push their own preferred positions by championing the Atkins or Weight-Watchers diet. Unless we are prepared to begin suppressing such speech, there will never be a uniform message projected to the public given the enormous divisions of opinion on dietary questions both inside and outside government and the academy.

Some of Brownell’s other recommendations take on a more coercive or interventionist tone, but these share one overriding defect which emerges when concerns with obesity bump up against a bewildering array of other considerations. Thus, we could “[m]ake schools commercial-free zones and use zoning laws to prohibit establishments with unhealthy foods from operating near schools.” The first half is relatively unproblematic in that it asks schools to operate in certain defined ways. This requires no more regulation than the ordinary proprietor brings to the operation of his or her business. If private schools can seek to direct their students and employees respectively down certain dietary paths, then in principle the government could do the same while operating in that managerial capacity. Yet again, hidden pitfalls lurk in the path of implementation. To be sure, school controls have a solid chance of working with younger students. But as they reach middle school, children may chuck or trade away (as my own children from time to time did) their nutritious lunches supplied from home in favor of junk food that they buy at school. Shut down

52. Proposed legislation in the House, 2003 HR 3444, the “Menu Education and Labeling Act,” would remove the current exemption for restaurants (found at 21 U.S.C. § 343(q)(5)(A)(1)) for chain restaurants with more than twenty outlets. Query whether the same level of uniformity runs system-wide, or is subject to regional and local variations?
53. BROWNELL, supra note 3, at 309–12.
54. Id. at 312.
the junk food vendors at school, and children may make a quick detour to purchase those same foods before class. It may turn out that cutting out the exclusive contracts with junk food companies will do little to temper the flow of unhealthy food in classrooms, while denying the school system the revenues needed to run its own interscholastic athletic or gym programs. The gaps of course can, and in many cases should, be made up with additional tax revenues. But if these were easily available, then these food concessions would have never taken off at all: political opposition to higher taxes may well have spurred the revenue deals in the first instance. Therefore, even when the state runs the school (and thus is not seeking to regulate private activities) the choices are harder than Brownell supposes.

They get even harder when the state puts on its regulatory cap, which raises interminable administrative problems, for now someone has to develop coherent rules to indicate which foods may be sold and served and which ones may not within, say, a thousand feet of a school. At a guess, local awareness is likely to do better than external regulation. Brownell’s plausible objective cannot survive the battering it would be sure to receive if adopted. Regulators would have to grapple with questions such as whether a school commercial-free zone should allow students to buy whole milk, or high-fat granola bars.

His zoning proposal is more naïve because it implicates other interests as well. Many schools are located in populated urban areas where nearby establishments cater to many constituencies. Zoning laws will impact not only what happens in schools, but also what happens elsewhere in the community. If there are a number of schools in close proximity with each other, then we could have to shut down numerous supermarkets and convenience stores in heavily populated areas. The problem gets more delicate if we try to zone out existing businesses, where courts might smell a takings or administrative law violation. Brownell’s single-minded focus ignores the fact that people will make behavioral adjustments to deflect the regulations. The counter-response is to demand wider regulation, but in this context it will founder because the new scope will bring into the land use battle new constituencies whose interests will be adversely affected. On food matters, the fight against obesity has a chance. On the broad-scale land use and environmental issues, it will be outgunned.

**Liability.** The third form of coercive activity involves the imposition of liability against those who are responsible for the propagation of the foods that cause obesity. Here it is easy to be indignant about the purveyors of dangerous foods. But where does it lead? One may argue that the conduct of the fast food companies is unlawful, and patrons should not—in light of the blizzard of advertising campaigns—be expected to exercise self-restraint against it. But while it is easy to see the emotional impact of doing something against the bad guys, it is most likely that these suits will not take off to become the successor to tobacco litigation. The simplest explanation for this result is that in the past few years, more than twenty states have passed what have been termed “common-sense consumption” laws whose chief function is to block all obesity suits at the
summary judgment stage, that is, before costly discovery or trial kicks in. Similar legislation is pending in ten other states. The majorities on behalf of these bills have been reported to be huge, with Colorado adopting the legislation by a 60 to 3 vote in the House and a 33 to 2 vote in the Senate. Professors John Banzhaf and Richard Daynard, who were so instrumental in the tobacco litigation, think that the strong majorities in these cases will disappear as more adverse information comes out, as happened with tobacco. But the paths of food and tobacco have already diverged because the tobacco companies at no time were able to gain any level of legislative immunity from suit, while in many major jurisdictions—Florida, Illinois, Michigan, Ohio and Texas—suits based on obesity are blocked.

In some key states—California, Pennsylvania, and New York, for instance—plaintiffs remain free to press tort litigation. But here too the going is likely to be rocky in light of the parallel difficulties that that had to be overcome in the tobacco litigation. There is little historical doubt that the comments to Section 402A of the Restatement (Second) of Torts were intended to exempt ordinary tobacco from the class of defective products. Thus, comment i sorts out the relationship between danger and defect as follows:

\[\text{i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by “unreasonably dangerous” in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowl-}\]

56. Id.
57. Id.
58. See, e.g., Mich. Comp. Laws § 600.2974 (“CIVIL LIABILITY FOR PERSONAL INJURY OR DEATH ARISING OUT OF WEIGHT GAIN, OBESITY, OR ASSOCIATED HEALTH CONDITIONS”):

Sec. 2974. (1) Subject to subsection (2), a manufacturer, packer, distributor, carrier, holder, seller, marketer, promoter, or advertiser of a food or an association that includes 1 or more manufacturers, packers, distributors, carriers, holders, sellers, marketers, promoters, or advertisers of a food is not subject to civil liability for personal injury or death arising out of weight gain, obesity, or a health condition associated with weight gain or obesity.

(2) Subsection (1) does not preclude civil liability for personal injury or death based on either of the following:

(a) A material violation of an adulteration or misbranding requirement prescribed by a statute or regulation of this state or the United States that proximately caused the injury or death.

(b) A knowing and willful material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food that proximately caused the injury or death.

The causes of action preserved in Subsection 2 are subject to stringent conditions set forth in the remainder of the statute.
edge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Taken as drafted, the provision is the model of good sense. The key question of whether a product is defective comes from any deviation between the product as promised and the product as delivered. “Good tobacco,” like “good whiskey,” and for our purposes, “good butter,” is determined by whether these are infected with contaminants. If they are, then the next stage of the inquiry is whether these defects are apparent to the user, in which case an assumption of risk defense might be available. If not apparent, then they count as latent defects for which some remedy is made available for any harms they cause. But in Comment i contamination is the name of the game. Thus, under the old Restatement regime, with products sold as advertised, it is up to a consumer to decide whether—and if so in what amounts—to consume them. Here, no specific warning is required for these common substances because it is assumed, rightly in my view, that ordinary consumers share the common knowledge of the harmful features of these products, or could easily be informed by any third party. Knowledge gives the information. Will power is—or at least was—your own business.

The success of the tobacco litigation lay in its ability to overcome the simple paradigm of the Second Restatement. Part of that attack comes from the view that the industry was guilty of massive fraud in the way in which it marketed cigarettes, especially, but not exclusively, to minors. Once the fraud argument is accepted, then the assumption of risk defense disappears, leaving only the question of causation in the line of defense, which for many tobacco-related illnesses is relatively easy to overcome. There is a single product from a single source that looks as though it will explain many of the cases. To be sure, there is the additional difficulty that baseline rates of death by lung cancer and other conditions caused by smoking are not zero for nonsmokers. But prevailing causation doctrine, which allows the plaintiff to recover for an increased risk or hazard to which he is exposed, if double the background risk, cuts down on the effectiveness of that defense. All this said, a jury trial is still very difficult for plaintiffs to win. The defendant’s strategy is not only to talk about the public knowledge of the generic risk but to hammer home the constant numbing reminders that smokers hear, from spouses, parents, children, physicians, friends and religious leaders, from dawn to dusk, about the hazards of tobacco. But once the suits are brought by third-party payers, such as Medicaid, the assumption of risk issue drops out of the picture. The plaintiff has an “independent”
cause of action, which paves the way for large institutional settlements, such as those dealing with Medicaid patients seen over the last several years.

I think that there is much wrong with the tobacco litigation. But for purposes of this Essay, the key question is whether the obesity cases are distinguishable from the tobacco cases. A detailed analysis of the obesity claims is found in the exhaustive opinion in Pelman v. McDonald's Corp. What follows here is a distillation and extension of the court's argument, which, though vacated by the Second Circuit, has merit, in my view. The initial point is that fatty foods are quite different from tobacco. Tobacco is a discrete product that produces a characteristic set of illnesses. Fat comes from all sorts of food, many of which are unexceptionable even in the eyes of the most vociferous critic of the tobacco industry. To isolate a single firm as "the" source of the plaintiff's fat in any individual case is to ignore the contribution that comes from many other sources, from bacon and egg breakfasts at home to those incessant prepackaged snacks at all hours of day or night. It is also to ignore the obvious point that one does not have to smoke to live, but one does need to eat. Hence the zero tolerance policy for tobacco does not translate into a similar policy for fatty foods.

In addition, as noted earlier, intake is only one part of the equation. Exercise and activity levels matter as well, and these are well beyond the control of any defendant who has supplied fatty foods. Some individuals who consume large amounts of fatty foods do fine. Others do not. And for those who do not do well, there is always the question of which of a myriad of other factors in life could be responsible for the occurrence of both obesity and diabetes or heart disease. Sorting through any real case is sure to create difficulties, and aggregating them in the form of class actions may be impossible, owing to the different patterns of consumption and absorption for different individuals.

Last, there is still the question of assumption of risk. Here as a matter of present doctrine, the plaintiffs' obesity cases have stronger legs than they deserve because most jurisdictions today refuse to give conclusive weight to the open and obvious defense. In my view that defense should apply to obesity hazards. But in light of the pervasive consumer knowledge on these points, it seems unlikely that most plaintiffs will be able to persuade juries to treat these cases as though they involved some hidden defect. To be sure, there is always


60. See, e.g., Restatement (Third) of Torts: Products Liability, §2, comment d: "The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a defendant from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented injury to the plaintiff." Note that the food cases are not design cases in the traditional sense, but the claims for safer reformulation track this line of argument precisely. The difficulty with the dominant position is that it does not explain why a consumer with full knowledge of the relevant situation should not be allowed to make choices as he or she sees fit, and be bound by them. Any other position reduces the available set of downstream options. For a more complete statement of this principle, see Richard A. Epstein, Torts §16.11.2.
something particular about this or that food that escapes the attention of the people who consume it. But as a matter of principle, it is unwise to require a detailed account of each of the particular risks when better decisions are likely to be made by individuals who have a global sense of the overall risk associated with fatty foods. It does not help a patient going into surgery to have precise knowledge of every individual risk: it is quite enough to be aware of the general risks of infections and complications. So too a consumer can be fully aware of the risks of obesity, without knowing the increases in probability of a dozen different medical conditions. Whether decisions are made on the strength of first impressions or detailed information, the same basic pattern holds true. Those who rely on the two or three key factors will do better than those who try to intuit or digest gobs of information, of unquestioned relevance but dubious utility.61 In dealing with information, less is truly more.62

This theme of “less is more” has profound implications for the entire edifice of modern disclosure law as it applies in securities regulation, product liability or medical malpractice cases. The dominant theme in each of these areas is that the exhaustive presentation of information is taken as the norm, so that the omission of second-order information may be sufficient to trigger some appropriate standard of materiality.63 But in effect these decisions all proceed from a false view of how decisions are made, precisely because they do not recognize that the quick and dirty determinations based on a few factors often supply more reliable guides to conduct than an exhaustive appreciation of the unique subtleties of a particular situation. I would venture to say that the weight of an automobile has more to do with its overall safety than any of the thousands of specific defects—the location of gas tanks, the thickness of doors—that become the focal point of modern litigation.

This point of view helps explain why it is so risky to rely on duty to warn-type situations in dealing with food cases. It takes only one look at greasy and fatty foods to realize that they contain calories that could lead to obesity. The rest of the information is of little help in figuring out what to do, and could easily lead people to make comparisons between this and that food, based on fine differences in labeling, which have little or no consequence for overall

61. See generally MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005). The title is somewhat misleading because some of his best examples involve protocols for the diagnosis, for example, of heart conditions that are developed only after laborious effort has identified the right parameters. The success of these protocols rests on their ability to best the ordinary intuitions of even seasoned physicians, which is the opposite of what Gladwell’s title suggests. See id. at 125-136, explaining how a cardiologist, Dr. Lee Goldman, developed a simple algorithm that outperformed the intuitions of experienced physicians in identifying individuals who were, or were not, at serious risk for heart attacks. “But what does the Goldman algorithm say? Quite the opposite: that all that extra information is actually not an advantage at all; that, in fact, you need to know very little to find the underlying signature of a complex phenomenon.” Id. at 136.

62. Id. at 136.

behavior and well-being. On this issue, therefore I disagree with Gregg Bloche when he writes that the presence of rare fats in Chicken McNuggets counts as a latent defect that could trigger products liability under ordinary theories. The constant theme of full disclosure gets the overall situation fundamentally wrong. The key question is whether the marginal benefit of any additional disclosure exceeds its costs, and on that question the answer is likely to be no.

Once the disclosure claims are put to rest, what remains? I do not think that the addiction claims, which have had some appeal in tobacco cases, will provoke much sympathy here. The decision to eat with knowledge of the consequences should offer an air-tight assumption of risk defense—except for lawyers who think that tort law always supplies remedies when legislation does not cut in the direction they want. The dangers of obesity have been raised by so many people for so long, that it is hard to find some concealed plot that even begins to resemble the alleged coverup in tobacco. The pressures from advertisements come from all sources, and people are subject to too many influences to make credible the claim that consumers are uninformed fat-craving folks with clogged arteries who are buying fast food because of irresistible urges. Assumption of risk is a nice way to summarize these results. There is enough information out there: get a grip on yourself—not a lawyer.

**Education.** What professor can be against it? There is little doubt that the hue and cry from all sources has changed public perceptions on this question. Gregg Bloche in his contribution to this volume takes just that approach when he writes “I will urge efforts to encourage healthier eating and exercise choices by better informing consumers and sharpening their awareness of risks and benefits.” That statement leaves open whether the proper response is through state-sponsored campaigns (which run the risk of sounding like propaganda) or through private efforts, which will vary from highly sensible to somewhat silly. I include in this last category Morton Spurlock’s *Supersize Me,* which was painful to watch and impossible to duplicate. Anyone who has to torture himself to stuff his face for a movie cannot count as the ordinary consumer whose helplessness inspires so much of the unhappiness about the current state of affairs. Yet perhaps there is some comfort in the mini-victories of the anti-obesity crusade that have come in the form of product presentation and sales.

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64. Bloche, *supra* note 9, at 1342:

In *Pelman v. McDonalds,* for example, the plaintiffs alleged that McDonalds’ Chicken McNuggets contain risky fats and other substances virtually never found in fried chicken. A product of this sort is, in the language of the Restatement (Second) of Torts, “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” It merits liability, if causation-in-fact and other prerequisites are met, because consumers do not knowingly accept its risks.

But the effort to link causation to this particular risk seems doomed to failure in the absence of some truly extraordinary patterns of consumption.

65. *Id.* at 1339.
We have already received reports that McDonald's has downsized its menu, and that Krispy Kreme has lost market share. Perhaps we shall see more people substituting water for soft drinks, and others beginning a regular program of exercise to control their weight. And we know that Whole Foods, with its explicit emphasis on natural and organic foods, is now a four billion dollar business that has the benefit of a rapid expansion. All this movement is fine and good because one of the real virtues of education campaigns is that the government has no comparative advantage over private parties who can get out the word, or words. But once again, the key question for public policy is whether government coercion is appropriate. On this score Bloche insists that some limitations on advertisements could well promote individual autonomy by shielding people from the temptations that ruin their lives. But the program is, not surprisingly, short on particulars on a problem that will easily assume gargantuan proportions. Of the millions of advertisements for thousands of products, what should be allowed, and what not? One does not have to be a passionate defender of free speech to have serious doubts about this proposal once it goes beyond the usual concerns with false and misleading advertisements which are already illegal under current law.

CONCLUSION

In light of the enormous attention that the question of obesity has generated, how should we respond? Individually, not collectively, seems the better approach. Better a bit of self-control than a ton of state initiatives. In light of shaky science and inflated claims, a dose of individual self-control is the only viable option. It does not rest on some necessary truth about the autonomy of Kantian individuals, but simply on practical necessity. No sane person would trust his diet and lifestyle to a benevolent social planner. A social planner necessarily relies on aggregate data that has to look over the variations in individual cases. But that information is too valuable to be ignored, and an individual himself is the only person who can put all the separate pieces together to find out if he is healthy. If he is, then weight is a second-order

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68. http://www.wholefoodsmarket.com/investor/fr05_Q2restatement.pdf, for financials that suggest that annual sales now exceed four billion per year.
70. *Id.* at 1351–52, quotes selectively from this passage to argue that I fall into some fatal libertarian trap that takes all preferences as "givens," and thus fails to distinguish between deliberate choices made upon reflection and those choices made on the moment to satisfy some instant gratification. But it is instructive that he does not include in the quoted passages my observation that this conclusion "does not rest on some necessary truth about the autonomy of Kantian individuals, but simply on practical necessity." And so it does. Of course individuals should seek to educate themselves in order to refine their preferences, but that is a task that they will do better out from underneath the government thumb
consideration. If he is not, then an individually-tailored remedy, rather than a general nostrum, will offer the most sensible guidance on how to do things better. In this regard, Aristotle (in some naïve rendition) seems to have had it right in championing the cause of moderation. The best recommendation: balanced diet and moderate exercise. I learned that in elementary school, even before I had heard of Aristotle. In the midst of all this din, we would do well to remember it today. It would be nice if the state could do more than it already does to help me and everyone else resist temptation. The government can always intervene. But at this point further intervention can't help. Individual lifestyle preferences are too varied, and the science is too muddled for there to be a better answer than the one my parents gave me more years ago than I care to remember: eat a balanced diet, do some exercise, don't smoke and don't drink to excess. They didn't quite say follow Aristotle on moderation. But they could have.

than subjected to it. No one in his right mind should defend a regime of individual choice on the ground that all individuals have some unerring ability to make the right choice. No one is so fortunate. The defense based on practical necessity only means that individuals have to work through what Bloche rightly calls "the question of warring preferences" in order to navigate the shoals of obesity—and every other personal and professional problem they face in their life times.