

# SAVING US FROM OURSELVES: THE GOVERNMENT’S ROLE IN OBESITY AND PERSONAL RESPONSIBILITY

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## I. INTRODUCTION

“The issue of determining the breadth of personal responsibility underlies much of the law: where should the line be drawn between an individual’s own responsibility to take care of herself and society’s responsibility to ensure others shield her?”<sup>1</sup>

The solutions to the obesity epidemic are as varied as the places where blame can be cast. So far, no satisfying solution has been found to this ever-growing problem. The obesity epidemic reaches into far corners of society, affecting the American budget, healthcare, and the judicial system. As such, politicians have attempted to remedy the obesity epidemic through various legislative measures. So far, however, proposed legislation has not presented a satisfactory solution and scholars are coming out in favor of broad societal changes as a new avenue to pursue.

This Note will outline the progression of some of the most notable obesity legislation, including the highly publicized fast-food lawsuits that motivated them. In addition, this Note will analyze the public perception of the obesity issue and how that affects proposed solutions to the problem.

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1. *Pelman v. McDonald’s Corp.*, 237 F.Supp. 2d 512, 516 (S.D.N.Y. 2003).

## II. REGULATION THROUGH LITIGATION

The obesity epidemic gained nationwide attention in 2002, when a series of lawsuits were filed against fast food companies in an attempt to impose liability for the adverse effects their products allegedly caused their customers.<sup>2</sup> The lawsuits came on the heels of successful tobacco liability lawsuits,<sup>3</sup> and conjured up similar language of addiction and accusations of big industries promoting ignorance of the dangerous side effects of their products.<sup>4</sup> One such lawsuit was filed against McDonald's, Burger King, Wendy's, and KFC.<sup>5</sup> The complaint accused the food industry of being purposely misleading about the potential health risks of consuming their products.<sup>6</sup>

In various interviews with news sources, attorney Samuel Hirsch and lead plaintiff Caesar Barber described the case.<sup>7</sup> Attorney Hirsch alleged that these companies had created "a de facto addiction in their consumers, particularly the poor and children."<sup>8</sup> Barber described his eating habits: "[T]here was no fast food I didn't eat, and I ate it more often than not because I was single, it was quick and I'm not a very good cook."<sup>9</sup> He went on to say, "It was a necessity, and I think it was killing me, my doctor said it was killing me, and I don't want to die."<sup>10</sup> Barber placed the blame for his fast food "necessity" squarely on the fast food companies, saying he had "trace[d] it all back to high fat, grease and salt, all back to McDonald's, Wendy's, Burger King."<sup>11</sup> He accused the fast food companies of being "irresponsible and deceptive in posting of their nutritional

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2. Verified Complaint, *Barber v. McDonald's Corp.* No. 23145/2002 (N.Y. Sup. Ct. 2001); *Pelman*, 237 F.Supp. 2d, at 512.

3. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 208 (E.D.N.Y. 2001), *reversed in part* by *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211 (2d Cir. 2004), *reversed and remanded* by *Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004), *certified questions answered* by *Blue Cross and Blue Shield of N.J., Inc.*, 3 N.Y. 3d 200 (N.Y. Ct. App. 2004); Master Settlement Agreement (November 1998), <http://publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> (settlement between forty six states and the four largest U.S. Tobacco companies).

4. *Pelman*, 237 F. Supp. 2d at 516; Verified Complaint, *supra* note 2, at 9–14.

5. Verified Complaint, *supra* note 2, at 1.

6. *Id.* at 13.

7. *Ailing Man Sues Fast-Food Firms*, FOXNEWS.COM, July 24, 2002, <http://www.foxnews.com/story/0,2933,58652,00.html> [hereinafter *Ailing Man Sues*]; Sue Chan, 'Food Court' Takes on New Meaning, CBSNEWS.COM, July 6, 2001, <http://www.cbsnews.com/stories/2002/08/28/health/main520007.shtml?tag=mncol;lst;1>.

8. *Ailing Man Sues*, *supra* note 7.

9. *Id.*

10. *Id.*

11. *Id.*

information.”<sup>12</sup> Barber explained, “They said ‘100 percent beef.’ I thought that meant it was good for you . . . I thought the food was OK. Those people in the advertisements don’t really tell you what’s in the food. . . . It’s all fat, fat and more fat. Now I’m obese.”<sup>13</sup> Additionally, he argued that these companies should be required to offer other options in their meals, including “non-meat vegetarian, less grams of fat, and a reduction in meal size,” and be required to include a tobacco-style warning label on their food.<sup>14</sup>

Attorney Samuel Hirsch brought another obesity lawsuit in 2002, this time focusing on child obesity, with the ultimate goal of creating a massive class-action lawsuit consisting of McDonald’s customers under the age of eighteen.<sup>15</sup> Hirsch represented parents in a suit against McDonald’s on behalf of their obese children, alleging that McDonald’s failed to fully disclose the ingredients and nutrition information of their food and the effects the food would have.<sup>16</sup> One father claimed that he had been deceived, “I always believed McDonald’s was healthy for my children.”<sup>17</sup> McDonald’s lawyers urged the judge to dismiss the lawsuit and warned that if this litigation was allowed to proceed that it may lead to an onslaught of “McLawsuits.”<sup>18</sup> The lawyers further objected to the lawsuit, arguing that a variety of factors can lead to obesity, including genetics, a sedentary lifestyle, and other foods, and thus it was impossible to conclusively say that McDonald’s was the sole cause of the plaintiff’s obesity.<sup>19</sup>

Judge Robert Sweet agreed that the complaint failed to provide a proper causal link between the plaintiff’s obesity and McDonald’s.<sup>20</sup> With no data in the record explaining how many times the plaintiffs had eaten at McDonald’s, Judge Sweet expressed concern that the class “could consist entirely of persons who ate at McDonalds on one occasion. As a result, any number of other factors then potentially could have affected the plaintiffs’ weight and health.”<sup>21</sup> Another crucial element that was absent in the plaintiff’s complaint was evidence that McDonald’s contained a danger that was not within the common knowledge of

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12. *Id.*

13. Sue Chan, *supra* note 7.

14. *Ailing Man Sues*, *supra* note 7.

15. *Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 512 (S.D.N.Y. 2003); Marc Santora, *Teenagers’ Suit Says McDonald’s Made Them Obese*, N.Y. TIMES, Nov. 21, 2002, <http://www.nytimes.com/2002/11/21/nyregion/teenagers-suit-says-mcdonald-s-made-them-obese.html>.

16. *Pelman*, 237 F. Supp. 2d at 520.

17. Santora, *supra* note 15.

18. *Pelman*, 237 F. Supp. 2d at 518.

19. *Id.* at 537 n.27.

20. *Id.* at 539–40.

21. *Id.* at 538.

its customers.<sup>22</sup> Judge Sweet responded by dismissing the suit, saying, “the Complaint fails to allege the McDonald’s products consumed by the plaintiffs were dangerous in any way other than that which was open and obvious to a reasonable consumer.”<sup>23</sup>

Although it seemed that McDonald’s had scored a victory, the dismissal did little to quell the food industry’s fear of an oncoming wave of litigation. Many observers speculated that the food industry could be the next business subjected to liability in multi-million dollar class-action lawsuits in the same way that the tobacco industry had been.<sup>24</sup> Rather than dismissing the claim outright as to effectively preclude further claims, the food industry feared that Judge Sweet was inviting future suits by giving the plaintiffs leave to amend and by explicitly spelling out the elements that the plaintiffs would need to be successful.<sup>25</sup>

Judge Sweet explained that a successful complaint might be possible if the plaintiffs provided a stronger argument that the way in which McDonald’s processed its food made it more dangerous than consumers would realize.<sup>26</sup> One such product that was offered up as an example was the Chicken McNugget, which was described as a “McFrankenstein creation of various elements not utilized by the home cook” containing twice the amount of fat as a hamburger.<sup>27</sup> If the plaintiffs could show that McDonald’s had created a “McFrankenstein” amalgam of highly processed foods that were much healthier than they appeared to a reasonable consumer, then they would be very close to overcoming the deficiencies in their complaint.<sup>28</sup>

In addition, Judge Sweet indicated that he would be more open to further development of the argument that McDonald’s liability stemmed from advertisements that advocated eating McDonald’s every day.<sup>29</sup> The plaintiffs, however, would have to meet a very high standard. It was not enough for McDonald’s to advocate eating its products every day; the plaintiffs had to show that McDonald’s intended for its products to be eaten for every meal of every day, and that “McDonald’s is or should be aware that eating McDonalds’ products for

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22. *Id.* at 518.

23. *Id.* at 541.

24. *E.g.*, Julie Vallese, *After Tobacco Suits, Lawyers Target Fast Food*, CNN.COM, Aug. 19, 2002, <http://archives.cnn.com/2002/LAW/08/19/fast.food.lawsuit/index.html>.

25. *Pelman*, 237 F. Supp. 2d at 536; *cf.* Jeremy Grant, *Food Groups Get Taste of Fear*, FT.COM, Feb. 23, 2005, <http://www.ft.com/intl/cms/s/1/fa2754e2-85c8-11d9-9011-00000e2511c8.html#axzz1uCjvAcqS> (explaining that after *Pelman*, food companies modified their policies to promote and offer healthier foods and, indeed, *Pelman* was partially reopened for more discovery by an appeals court).

26. *Pelman*, 237 F. Supp. 2d at 536.

27. *Id.* at 535.

28. *Id.* at 534.

29. *Id.* at 528.

every meal of every day is unreasonably dangerous.”<sup>30</sup> This would prove to be a tall order as the original brief had contained only anecdotal evidence from the plaintiffs saying that they had frequently eaten at McDonald’s multiple times a week for breakfast and lunch, along with just two advertisements from McDonald’s.<sup>31</sup> The advertisements, “Big N’ Tasty Everyday” and “McChicken Everyday!” fell short of qualifying as a deceptive act or a promise from McDonald’s that eating their products everyday would not be unhealthy.<sup>32</sup>

In response to these lawsuits, and in fear of an oncoming avalanche of litigation, Representative Ric Keller—along with eighty-five co-sponsors—introduced the Personal Responsibility in Food Consumption Act of 2005, popularly known as the “Cheeseburger Bill.”<sup>33</sup> The purpose of this bill was “[t]o prevent legislative and regulatory functions from being usurped by civil liability actions . . . against . . . food manufacturers [and others] for claims of injury relating to a person’s weight gain, obesity, or any health condition associated with weight gain or obesity.”<sup>34</sup> The bill passed in the House by a vote of 306 to 120 on October 19, 2005.<sup>35</sup>

The Cheeseburger Bill’s Senate counterpart was the Commonsense Consumption Act of 2005, introduced by Senator Mitch McConnell and thirty-one co-sponsors.<sup>36</sup> The Commonsense Consumption Act’s purpose was to take the fast-food controversy away from the courts and instead “allow Congress, State legislatures, and regulatory agencies to determine appropriate laws, rules, and regulations to address the problems of weight gain, obesity, and health conditions associated with weight gain or obesity.”<sup>37</sup> In 2003, McConnell described similar legislation<sup>38</sup> as a response to two “disturbing” trends: class action lawsuits against the fast food industry that “promote a culture of victimhood and jettison the principle of personal responsibility,” and the subversion of the democratic process by placing legislative decisions in the hands of the unelected judiciary.<sup>39</sup> McConnell accused this type of litigation of being an abuse of the purpose of

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30. *Id.* at 537.

31. *Id.* at 539 n.28.

32. *Id.* at 527–28.

33. Personal Responsibility in Food Consumption Act of 2005, H.R. 554, 109th Cong. (2005).

34. *Id.*

35. 151 CONG. REC. H8940 (daily ed. Oct. 19, 2005) (recording the vote on the Cheeseburger Bill).

36. 151 CONG. REC. S6065 (daily ed. June 19, 2005); Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005).

37. Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005).

38. Class Action Fairness Act of 2003, H.R. 1115, 108th Cong. (2003).

39. 149 CONG. REC. S12,998 (daily ed. Oct. 22, 2003) (statement of Sen. Mitch McConnell).

class action lawsuits.<sup>40</sup> Rather than being used for their proper goal to “efficiently provide remedies to large numbers of plaintiffs,” McConnell said class action lawsuits were being used inappropriately to “circumvent the decisions that belong to other branches of Government and to other States.”<sup>41</sup> Senator McConnell argued, “No branch of Government should mandate that Burger King and McDonald’s carry veggie burgers for portly patrons,” especially not a state court emboldened to make decisions with a national impact.<sup>42</sup>

Just days before Senator McConnell spoke on the floor, the Senate also heard testimony from small-business owner and member of the Board of Directors of the National Restaurant Association, Wayne Reeves.<sup>43</sup> As part of his testimony, Reeves made sure to acknowledge the problem of obesity while distancing the food industry from responsibility.<sup>44</sup> Reeves also reiterated the argument made by the McDonald’s legal team: obesity results from a variety of causes and factors.<sup>45</sup> He made sure to stress that obesity is a complex and multi-faceted issue, and that frivolous lawsuits against the food industry are merely a distraction from finding a real solution.<sup>46</sup> In an effort to shift blame away from the food industry and to focus instead on personal responsibility, Reeves emphasized that “all foods can be part of a balanced diet. Therefore, it doesn’t mean that one must give up certain foods, it means setting limits on how much and how often.”<sup>47</sup>

Reeves’ argument that all foods have the potential to be part of a balanced diet is typical of how the food industry views obesity. They do not want customers to stop buying their foods, so instead, they place the emphasis on eating unhealthy products in moderation. Indeed, Reeves listed the key ingredients of a healthy lifestyle as “personal responsibility, moderation, and physical activity.”<sup>48</sup>

Reeves used the idea of personal responsibility to place the blame for bad eating habits on the customers themselves. He quoted the old service motto, “the customer is always right,” and emphasized that patrons have free will to choose

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40. *Id.*

41. *Id.*

42. *Id.*

43. *Fast Food Supersizing and Common Sense Consumption: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Wayne Reeves, Owner, Manna Enters., Inc.).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

what they order.<sup>49</sup> In an effort to further show that the obesity epidemic cannot be pinned solely on fast food restaurants, Reeves pointed to poll numbers showing that seventy-six percent of meals are eaten inside the home.<sup>50</sup> After accusing special interest groups and trial attorneys of using the food industry as a scapegoat for society's obesity epidemic, Reeves went on to warn that the threat of pending litigation would hurt small restaurant owners like himself and the people who worked for him.<sup>51</sup> In addition, he mentioned that the food industry was worth protecting because, with 11.7 million employees, it is the largest employer outside of the government.<sup>52</sup> To bolster the food industry's defense, he pointed to a July 2003 Gallup poll, stating that eighty-nine percent of Americans felt that America's obesity epidemic was not caused by the food industry.<sup>53</sup> A National Restaurant Association poll shows that ninety-five percent of Americans felt that they are qualified to make their own decisions on what to eat when they are eating out.<sup>54</sup>

Earlier in 2003, Victor Schwartz—a well-known expert in tort law—also provided testimony on the subject of the potential dangers of allowing fast-food liability lawsuits to go unchecked.<sup>55</sup> Schwartz explained that “regulation through litigation,” a term coined by former Secretary of Labor Robert Reich, is a phenomenon wherein the purpose of tort litigation is shifted from compensating an injured party to attempting to change the behavior of a defendant through the threat of massive litigation.<sup>56</sup> Regulation through litigation was most successfully and famously used in tobacco and gun litigation.<sup>57</sup> Schwartz testified that he believed regulation should only occur through the confines of the checks and balances of government.<sup>58</sup> This way, if people do not agree with the regulation they at least can use democratic means, such as elections, to implement a change they find to be more agreeable.<sup>59</sup> Schwartz then contrasted the more democratic process with the regulation through litigation process that features a judge who has decided to make up the law and change it.<sup>60</sup>

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Barring Frivolous Lawsuits Against the Food Indus.: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Victor E. Schwartz, Partner, Shook, Hardy and Bacon LLP) [hereinafter *Barring Lawsuits*].

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.*

As Schwartz described it, the issue was:

[W]hether Congress should take proactive measures to prevent individual state courts from engaging in “regulation through litigation” in the area of food, and holding a seller and a manufacturer or a distributor of a food product that complies with all health and safety regulations, and is not defective, liable for obesity or other health hazards.<sup>61</sup>

Although Schwartz’s expertise on the area of tort law was seemingly helpful to his goal of trying to convince Congress to enact legislation to prevent regulation through litigation, his expertise also may have unwittingly provided ammunition for opponents who argued that this kind of legislation was unnecessary and premature. Opponents argued that the judicial system was already taking care of this potential problem and pointed to the fact that no fast-food lawsuit had made it to court; all had been dismissed by judges.<sup>62</sup> Schwartz himself admitted that the judicial system already had safeguards in place that were preventing an influx of litigation.<sup>63</sup> A few things would need to occur for a plaintiff to have a successful suit against a food manufacturer.

First, the plaintiff would have to show that “it is more probable than not” that their obesity was caused by food, not by lifestyle choices or genetics.<sup>64</sup> Next, the plaintiff would have to place the blame for their obesity on one specific food manufacturer or restaurant.<sup>65</sup> Lastly, for this kind of litigation to succeed, there would need to be a change in the traditional definition of “defect” that would effectively sweep away the existing Restatement (Third) of Torts rules.<sup>66</sup> In the end, to be effective, legislation would need to “solidify existing law and draw a line where experience and practical wisdom have suggested it should be drawn.”<sup>67</sup> After being referred to the Senate Committee on the Judiciary on April 26, 2005,<sup>68</sup> the Commonsense Consumption Act never received any additional action and died in committee when the session ended.<sup>69</sup>

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61. *Id.*

62. *Id.*; Ted Barrett, *House Band Fast-Food Lawsuit*, CNN (March 10, 2004), [http://articles.cnn.com/2004-03-10/justice/fat.lawsuits\\_1\\_frivolous-lawsuits-fast-food-industry-personal-responsibility?\\_s=PM:LAW](http://articles.cnn.com/2004-03-10/justice/fat.lawsuits_1_frivolous-lawsuits-fast-food-industry-personal-responsibility?_s=PM:LAW).

63. *Barring Lawsuits*, *supra* note 55.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. 151 CONG. REC. S4261 (daily ed. Apr. 26, 2005) (bill introduced by Senator Mitch McConnell).

69. Commonsense Consumption Act of 2005, S 908, 109th Cong. (2005) (no further action taken).

In the following session, the Commonsense Consumption Act of 2007 was introduced into both the House and Senate.<sup>70</sup> The Senate version was referred to the Committee on the Judiciary<sup>71</sup> but never made it out of the Subcommittee on Commercial and Administrative Law for debate or vote and subsequently died at the end of the session.<sup>72</sup> The House version only managed to be referred to the Committee on the Judiciary<sup>73</sup> before it too died.<sup>74</sup>

In the following session, the story was similar. The Commonsense Consumption Act of 2009 was introduced into the House by Representative Dan Boren—this time with only seven co-sponsors.<sup>75</sup> The bill again was referred to the Committee on the Judiciary<sup>76</sup> and then the Subcommittee on Commercial and Administrative Law in July of 2009, where it languished without being voted on.<sup>77</sup> Without controversial cases against major food companies like McDonalds in the forefront of the news, and without the lobbying groups of these powerful industries pressuring Congress to pass legislation, interest in this type of bill has significantly waned.

Nonetheless, obesity continues to be a major problem in the United States, and alternative legislative options have been presented, which are more focused on obesity prevention and treatment.<sup>78</sup> Bills like the Stop Obesity in Schools Act of 2009; the Obesity Prevention, Treatment, and Research Act of 2009; the Improved Nutrition and Physical Activity of 2009; and the Improving Nutrition for America's Children Act have all met the same fate of being trapped in Committee like the Commonsense Consumption Acts before them.<sup>79</sup>

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70. Commonsense Consumption Act of 2007, S. 1323, 110th Cong. (2007); Commonsense Consumption Act of 2007, H.R. 2183, 110th Cong. (2007).

71. 153 CONG. REC. S5655 (daily ed. May 7, 2007) (statement of Senator Mitch McConnell).

72. Commonsense Consumption Act of 2007, S. 1323, 110th Cong. (2007) (no further action taken).

73. 153 CONG. REC. H4552 (daily ed. May 7, 2007) (statement of Representative Dan Boren).

74. Commonsense Consumption Act of 2007, H.R. 2183, 110th Cong. (2007) (no further action was taken).

75. Commonsense Consumption Act of 2009, H.R. 812, 111th Cong. (2009).

76. 155 CONG. REC. H920 (daily ed. Feb. 3, 2009) (statement of Representative Dan Boren).

77. Commonsense Consumption Act of 2009, H.R. 812, 111th Cong. (2009) (no further action taken).

78. Stop Obesity in Schools Act of 2009, H.R. 2044, 111th Cong. (2009); Obesity Prevention, Treatment, and Research Act of 2009, S. 1060, 111th Cong. (2009); Improved Nutrition and Physical Activity Act, H.R. 2276, 111th Cong. (2009); Improving Nutrition for America's Children Act, H.R. 5504, 111th Cong. (2010).

79. See sources cited *supra*, notes 70, 75, and 77.

The allegations raised in the fast-food lawsuits point to the critical difficulties arising out of how to solve the obesity epidemic. Barber's demand of requiring healthier alternatives assumes that people will make a healthy choice if it is provided to them.<sup>80</sup> His accusation of deception assumes that people will choose to abstain from fast food if they are simply told what is in the food and how many calories they are consuming.<sup>81</sup> But neither one of these points of view gets at the troubling problem of the widely-held belief that fast food is a necessity or that making fast food a staple of one's diet is an acceptable lifestyle choice. Part of this frustration is evident in the statement made by Senator McConnell in the debate on the Class Action Fairness Act of 2003 and other statements urging moderation and commonsense.<sup>82</sup>

Representative Rosa DeLauro spoke out in opposition to the Common-sense Consumption Act of 2005, saying, "we should do something about obesity in this country by empowering people to make informed decisions for themselves. But this bill is not the way to go about it."<sup>83</sup> DeLauro instead urged passage of her bill, the Menu Education and Labeling Act (or MEAL Act).<sup>84</sup> The purpose of the MEAL Act was "[T]o enable customers to make informed choices about the nutritional content of standard menu items in large chain restaurants."<sup>85</sup> DeLauro rejected the idea of shielding companies from litigation, and instead made informed choices and personal responsibility the hallmark of her proposed obesity solution.<sup>86</sup> In order to combat a startling statistic that only twelve percent of Americans eat a healthy diet, DeLauro urged a creative solution to the obesity epidemic, beginning with the passage of the MEAL Act.<sup>87</sup> DeLauro imagined that this bill would empower people to make informed decisions about their food choices, which would in turn help to foster personal responsibility.<sup>88</sup> "That is the kind of balanced, innovative approach this body should be considering today to address obesity—that would be a real step toward helping encourage personal

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80. See *Ailing Man Sues*, *supra* note 7.

81. *Id.*

82. 149 CONG. REC. S21,998 (daily ed. Oct. 22, 2003) (statement of Senator Mitch McConnell); see also *Ailing Man Sues*, *supra* note 7 (quoting Walter Olson of the Manhattan Institute saying, "Most people are aware if eating double cheeseburgers, it's not the same as [eating] celery," and National Restaurant Association spokeswoman Katherine Kim stating, "It's senseless, baseless, and ridiculous. . . . There are choices in restaurants and people can make these choices, and there's a little personal responsibility as well.").

83. 151 CONG. REC. E2138 (daily ed. Oct. 20, 2005) (statement of Rep. Rosa DeLauro).

84. *Id.*

85. MEAL Act, H.R. 5563, 109th Cong. (2005).

86. 151 CONG. REC. E2138 (daily ed. Oct. 20, 2005) (statement of Rep. Rosa DeLauro).

87. *Id.*

88. *Id.*

responsibility in food consumption while protecting industry and our Mom n' Pop restaurants."<sup>89</sup>

DeLauro's first attempt at passage of the MEAL Act in June 2006 resulted in a referral to the Subcommittee on Health, but no further action.<sup>90</sup> At the same time, Senator Tom Harkin introduced the MEAL Act into the Senate.<sup>91</sup> The bill was referred to the Committee on Health, Education, Labor, and Pensions, where it subsequently died.<sup>92</sup> The bills met a similar fate in the following session.<sup>93</sup> In the 111th session, DeLauro and Harkin once more introduced the MEAL Act into the House and Senate, but no vote was forthcoming and the bills again died in committee.<sup>94</sup>

As an alternative to legislative measures that have seen various levels of effectiveness, many groups are suggesting that single-minded legislative reform will not be enough to combat the widespread problem of obesity. In his testimony before the Committee on Senate Health, Education, Labor, and Pensions Subcommittee on Children and Families, Jeff Levi, the executive director of Trust for America's Health, advocated a policy of government intervention to enact widespread social change.<sup>95</sup> Levi's proposed policy would be a "comprehensive, realistic plan that involves every department and agency of the federal government, state and local governments, businesses, communities, schools, families, and individuals."<sup>96</sup>

In support of his proposition for government intervention, Levi painted a stark picture of America's future: obesity rates had tripled since 1980, children's fast-food consumption had increased five-fold since the 1970s, and obesity-related hospital costs for children increased from \$35 million in 1979 to \$127 million in 1999.<sup>97</sup> Furthermore, Levi rejected proposed solutions that would focus only on treatment and place the burden on the healthcare system, opting instead for nothing short of a complete societal change: "As a nation, we tend to over-medicalize health problems. In fact, given the state of today's science—medicine can only address the consequences of overweight and obesity, not pre-

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89. *Id.*

90. MEAL Act, H.R. 5563, 109th Cong. (2006).

91. MEAL Act, S. 3484, 109th Cong. (2006).

92. *Id.* (referred to committee and no further action taken).

93. MEAL Act, S. 2784, 110th Cong. (2008); MEAL Act, H.R. 3895, 110th Cong. (2007).

94. Howard M. Metzenbaum MEAL Act, S. 1048, 111th Cong. (2009); MEAL Act, H.R. 2426, 111th Cong. (2009).

95. *Childhood Obesity: Hearing Before the Subcomm. on Children and Families of the Comm. on Health, Education, Labor and Pensions*, 110th Cong. (2008) (statement of Jeff Levi, Executive Director of Trust for America's Health).

96. *Id.*

97. *Id.*

vent it . . . . We need a cultural shift, one in which healthy environments, physical activity and healthy eating become the norm.”<sup>98</sup> Rather than a solution based in medicine, Levi couches the problem—and its solution—in more basic terms. According to Levi, the issue is simple: children are eating more unhealthy foods and being physically active less, which results in them being overweight or obese.<sup>99</sup> The root causes of this social phenomenon are widespread; children spend more physically inactive time in front of computers and television, the levels of physical activity in schools are woefully inadequate, and physical activity is further decreased because many children do not have safe paths where they can walk and be free from fear of abduction or the dangers of traffic.<sup>100</sup>

This call for widespread social change is not new. In July 2003, former Surgeon General Richard H. Carmona made a similar call for social change as the solution to obesity in his testimony before the House Subcommittee on Education Reform.<sup>101</sup> Carmona provided the same obesity equation that would later be echoed by Levi: the fundamental reason for the obesity epidemic is that people are eating too much and moving around too little.<sup>102</sup> Like Levi, Carmona stressed the importance of social changes—“We need physical activity and healthy food choices in every school in America. We need better food choices at affordable prices in every neighborhood in America. And we need community planning that includes neighborhood playgrounds and safe walking paths.”<sup>103</sup> Carmona also managed to point a finger at a popular target (McDonald’s) by making an allusion to the restaurant’s value meals and its role in the obesity epidemic: “While extra value meals may save us some change at the counter, they’re costing us billions of dollars in health care and lost productivity. Physical inactivity and super-sized meals are leading to a nation of oversized people.”<sup>104</sup> Later in his testimony, however, Carmona’s tone towards McDonald’s changed, and he shifted the burden of obesity onto personal responsibility:

Some people want to blame the food industry for our growing waistlines. The reality is that restaurants, including many fast food restaurants, now offer low-fat, healthy choices. For the meals we eat at home, and the meals we eat out, it’s still our deci-

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98. *Id.*

99. *Id.*

100. *Id.*

101. *The Obesity Crisis in America: Hearing Before the Subcomm. of Educ. Reform of the H. Comm. of Educ. and the Workforce*, 108th Cong. (2003) (statement of Richard H. Carmona, Surgeon General).

102. *Id.*

103. *Id.*

104. *Id.*

sion what we eat, where we eat, and how much we eat. That concept is part of what I'm talking about with Americans of all ages: increasing our health literacy.<sup>105</sup>

Carmona seemed to hold the belief, apparently shared by fast food litigants, that part of the obesity problem would be solved if restaurants offered healthier options.<sup>106</sup> His statement seemed to indicate that the people who had eaten to excess for so long were capable of making healthy choices if only the options were available to them. Part of Carmona's bid to increase health literacy meant more focus on tools like the Food Pyramid, which he complimented as, "a great example" and "probably the most-recognized nutrition guideline tool in America."<sup>107</sup> Carmona went on to say—"HHS [Health and Human Services] is looking forward to working with the Department of Agriculture to evaluate and update the food pyramid based on the latest scientific evidence."<sup>108</sup>

### III. THE FOOD PYRAMID: A WORK IN PROGRESS

This faith in the Food Pyramid raises many questions. Because a common thread throughout the discussion of obesity is a call for personal responsibility and education, it is important to take a critical look at the nutrition education that is widely available in society. Among those who advocate for personal responsibility and believe that people will choose healthier options if they are provided, the Food Pyramid seems to stand as a beacon for personal responsibility and health literacy. Taking into consideration, however, that the Food Pyramid—introduced in 1992—has roots dating back far before the obesity epidemic, it seems that this widely recognized nutrition guideline has failed to educate Americans on how they should eat.<sup>109</sup> One reason for this may be that—despite what one may first assume—the Food Pyramid is not based solely on scientific evidence, but is shaped by political forces and lobbying efforts.<sup>110</sup> From its very inception, the Food Pyramid has been shaped by powerful food industry lobbyists who loathe to see their industry pushed to the top of the pyramid in the "eat less" category.<sup>111</sup>

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 67–68 (2002).

110. See *id.* at 53–54 (detailing the political motivations behind the Food Pyramid's dietary guidelines).

111. See *id.* at 51–52.

The state of lobbying in the political process has always been controversial. It seems, however, that most Americans are unaware to what great extent the political process has touched their daily lives, including what they eat.

“In the very short span of about fifty years, we’ve allowed our politicians to do something remarkably stupid: turn America’s food-policy decisions over to corporate lobbyists, lawyers and economists. These are people who could not run a watermelon stand if we gave them the melons and had the Highway Patrol flag down the customers for them—yet, they have taken charge of the decisions that direct everything from how and where food is grown to what our children eat in school.”<sup>112</sup>

In fact, the USDA’s role in the issuance of dietary guidelines has often been recognized as problematic, considering that the USDA is “in the position of being responsive to the agriculture business. That is their job. Nutrition isn’t their job.”<sup>113</sup> Therefore, any type of dietary guidelines, which tell consumers to restrict their intake of meat or dairy—two major agricultural commodities—are going to be met with hostility by producers of those products.<sup>114</sup>

The idea that the USDA would have a role in nutrition was something that was assumed from its inception in 1862.<sup>115</sup> Besides ensuring a reliable food supply, the USDA was also charged with providing “useful information”<sup>116</sup> on subjects related to agriculture, which was interpreted to include nutritional advice.<sup>117</sup> From the 1890s—when the USDA began to become seriously involved in nutritional studies—through the 1960s, nutritional advice centered on the goal of consuming more food in order to obtain all necessary nutrients.<sup>118</sup> In 1923, the USDA released a pamphlet indicating an acceptance of all available foods, saying, “There is no one of all of these many foods that cannot be introduced into the diet in such a way as to contribute to its wholesomeness or its attractiveness.”<sup>119</sup>

It was not until the 1970s that a shift towards an “eat less” mentality began to occur, as the government began to study the effects of chronic diseases and the overconsumption of calories that were the hallmark of an “affluent soci-

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112. Eric Schlosser et al., *One Thing to Do About Food: A Forum*, THE NATION, Sept. 11, 2006, <http://www.thenation.com/article/one-thing-do-about-food-forum?page=0,5>.

113. NESTLE, *supra* note 109, at 51 (citing Carole Sugarman & Malcolm Gladwell, *U.S. Drops New Food Chart*, WASH. POST, Apr. 27, 1991, at A1).

114. *See id.*

115. NESTLE, *supra* note 109 at 33.

116. Department of Agriculture Act, ch. 72, 12 Stat. 317 (codified as amended at 7 U.S.C. § 2201 (2006)).

117. NESTLE, *supra* note 109, at 33.

118. *Id.* at 32–34.

119. *Id.* at 34 (quoting C.L. HUNT & H.W. ATWATER, USDA, *FARMER’S BULLETIN: GOOD PROPORTIONS IN THE DIET*, No. 1313 (1923)).

ety” where food was plentiful and meeting nutritional needs was no longer an issue.<sup>120</sup> This process of linking chronic disease with overconsumption of calories marked the beginning of the public perception that some foods were simply “bad” or “unwise.”<sup>121</sup>

In 1977, the government introduced official “Dietary Goals for the United States” that aimed at reducing fat, saturated fat, and cholesterol in the American diet.<sup>122</sup> The first edition was met with widespread criticism for being “premature; inadequately researched; politically motivated; promising too much; unreliable; puritanical; ‘big-brother’-ist; and engendering a ‘nutritional debacle.’”<sup>123</sup> The report’s recommendation to eat less meat, eggs, sugar, salt, and to drink nonfat milk rather than whole milk<sup>124</sup> caused major protests from producers of those goods.<sup>125</sup> Members of the Congressional Committee that wrote the Dietary Goals were confronted in hearings by representatives of these industries.<sup>126</sup> In particular, the president of the National Cattlemen’s Association objected to the recommendation to “decrease consumption of meat,” which caused some members to try and reach a compromise by offering a more generously worded recommendation to “increase consumption of lean meat.”<sup>127</sup>

The major conflict between Congress and the food industries caused one of the committee members, Senator McGovern, to say that, “he did not want to disrupt the economic situation of the meat industry and engage in a battle with that industry that we could not win.”<sup>128</sup> In the face of pressure, a second edition of the Dietary Goals was released later that same year that contained a disclaimer: “The value of dietary change remains controversial, and science cannot at this time insure that an altered diet will provide improved protection from certain killer diseases such as heart disease and cancer.”<sup>129</sup> The Dietary Goals contained new recommendations referencing the “nutritional benefits of eggs” and

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120. *Id.* at 38–39.

121. *Id.*

122. U.S. SENATE SELECT COMMITTEE ON NUTRITION AND HUMAN NEEDS, STOCK NO. 052-070-03913-2, *DIETARY GOALS FOR THE UNITED STATES (1977)*; see also A. Stewart Truswell, *Evolution of Dietary Recommendations, Goals, and Guidelines*, 45 *AM. J. OF CLINICAL NUTRITION* 1060, 1060 (1987); TIM LANG & MICHAEL HEASMAN, *FOOD WARS: THE GLOBAL BATTLE FOR MOUTHS, MINDS, AND MARKETS* 113 (2004).

123. LANG & HEASMAN, *supra* note 122, at 113.

124. *DIETARY GOALS FOR THE UNITED STATES (1977)*, *supra* note 122.

125. NESTLE, *supra* note 109, at 40.

126. *Id.*

127. *Id.* at 41.

128. *Id.*

129. LANG & HEASMAN, *supra* note 122, at 113 (citations omitted).

replaced the offensive “reduce consumption of meat” statement with, “choose meats, poultry, and fish which will reduce saturated fat intake.”<sup>130</sup>

The USDA’s issuance of dietary guidelines seems to be hindered by good intentions based on incomplete data that has led to unintended harmful results.<sup>131</sup> For instance, in response to data indicating that fat consumption may lead to an increase in serum cholesterol—a risk factor for heart disease—the USDA issued dietary guidelines calling for a reduction in fat consumption.<sup>132</sup> In accordance with Congressional mandate, the USDA and Department of Health and Human Services issues a revised edition of the dietary guidelines every five years.<sup>133</sup> The recommendation for a decrease in fat was renewed in each revised edition in 1980, 1985, 1990, and 1995.<sup>134</sup> The blanket limitation on fats was issued over the protests of nutritionists and other health experts who complained that fats—a biologically necessary part of diet and a means for increasing satiety—were being unduly limited.<sup>135</sup> Frustration mounted and serious flaws became evident when data was released showing that, while the relative fat consumption decreased over the population during these years, the number of obese and overweight people increased.<sup>136</sup>

In 1995, as obesity rates continued to climb, the USDA began to publicly address the effectiveness of the low-fat recommendation in the dietary guidelines.<sup>137</sup> In 2000, the USDA reversed its opinion and even recognized previous recommendations may have had an overall harmful effect.<sup>138</sup> The USDA conceded that the source of the problem may have been the blanket recommendation

130. NESTLE, *supra* note 109, at 42.

131. See Paul R. Marantz, *Rethinking Dietary Guidelines*, 50 CRITICAL REV. FOOD SCI. & NUTRITION 17 (2010).

132. *E.g.*, USDA & U.S. DEP’T OF HEALTH AND HUMAN SERV., DIETARY GUIDELINES ADVISORY COMMITTEE, DIETARY GUIDELINES FOR AMERICANS 27 (6th ed. 2000); USDA & U.S. DEP’T OF HEALTH AND HUMAN SERV., DIETARY GUIDELINES ADVISORY COMMITTEE, REPORT OF THE DIETARY GUIDELINES ADVISORY COMMITTEE ON THE DIETARY GUIDELINES FOR AMERICANS, 2000 34 (2000) [hereinafter 2000 DIETARY GUIDELINES REPORT]; Marantz, *supra* note 131, at 18.

133. 7 U.S.C. § 5341 (2006); Marantz, *supra* note 131, at 17.

134. USDA & U.S. DEP’T OF HEALTH, EDUC., AND WELFARE, DIETARY GUIDELINES FOR AMERICANS 10 (1st ed.1980); USDA & U.S. DEP’T OF HEALTH AND HUMAN SERV., DIETARY GUIDELINES ADVISORY COMMITTEE, DIETARY GUIDELINES FOR AMERICANS 15 (2d ed.1985); USDA & U.S. DEP’T OF HEALTH AND HUMAN SERV., DIETARY GUIDELINES ADVISORY COMMITTEE, DIETARY GUIDELINES FOR AMERICANS 13 (3d ed. 1990); USDA & U.S. DEP’T OF HEALTH AND HUMAN SERV., DIETARY GUIDELINES ADVISORY COMMITTEE, DIETARY GUIDELINES FOR AMERICANS 26 (4th ed.1995) [hereinafter 1995 DIETARY GUIDELINES]; Marantz, *supra* note 131, at 17.

135. Marantz, *supra* note 131, at 17.

136. *Id.*

137. 1995 DIETARY GUIDELINES, *supra* note 134; Marantz, *supra* note 131, at 17.

138. 2000 DIETARY GUIDELINES REPORT, *supra* note 132, at 36–37; Marantz, *supra* note 131, at 17.

to eat less fat which may have given the public the false impression that low-fat foods, including junk foods marketed as reduced fat, could be eaten in any quantity while still allowing for the maintenance of good health.<sup>139</sup> This would explain why, although relative fat consumption decreased over this period of time, the amount of calories consumed increased.<sup>140</sup> The USDA concluded that a decrease in fat was likely met with an increase in the consumption of carbohydrates, and thus an increase in the adverse health consequences that come from over-consumption of calories and carbohydrates.<sup>141</sup>

The USDA's nutritional advice has often been marked by contradiction that has no doubt confused the public. Besides the ever-changing language on whether to eat less meat or to eat more lean meat, coupled with incomplete nutritional advice, there has been much confusion arising from how to properly characterize the different food groups. These food group characterizations are used to instruct the public on how many servings they should be eating, yet the groups have been ever-changing. In 1917, the USDA divided food into five food groups consisting of "fruits and vegetables; meats and protein rich foods, including milk; cereals and starchy foods; sweets; and fatty foods."<sup>142</sup> A subsequent guide from the 1930s included twelve food groups.<sup>143</sup> A 1942 pamphlet included eight food groups.<sup>144</sup> Four out of those eight groups arose because the pamphlet separated milk, meat, eggs, and butter into their own food groups.<sup>145</sup> In 1943, the grouping had shifted to be called the "Basic 7."<sup>146</sup> The Basic 7 consisted of one group made up of "meat, eggs, fish, and beans; milk as a separate category; and fats and sugars as separate categories."<sup>147</sup> To make things even more confusing, at the same time as the Basic 7 information was being distributed, there was still new

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139. 2000 DIETARY GUIDELINES REPORT, *supra* note 132, at 36–37; see Marantz, *supra* note 131, at 17.

140. Marantz, *supra* note 131, at 17.

141. 2000 DIETARY GUIDELINES REPORT, *supra* note 132, at 36–37; Marantz, *supra* note 131, at 17.

142. NESTLE, *supra* note 109, at 34 (citing C. L. HUNT & H. W. ATWATER, USDA, FARMERS BULLETIN: HOW TO SELECT FOODS, No. 808, 14 (1917)).

143. *Id.* at 35 (citing H. K. STIEBLING & M. M. WARD, USDA, DIETS AT FOUR LEVELS OF NUTRITIVE CONTENT AND COST (1933)).

144. *Id.* at 35 (citing OFFICE OF DEFENSE HEALTH AND WELFARE SERVICES, U.S. NEEDS US STRONG (1942); BUREAU OF HOME ECONOMICS, WHEN YOU EAT OUT: FOOD FOR FREEDOM (1942)).

145. *Id.* at 35 (citing OFFICE OF DEFENSE HEALTH AND WELFARE SERVICES, U.S. NEEDS US STRONG (1942)); BUREAU OF HOME ECONOMICS, WHEN YOU EAT OUT: FOOD FOR FREEDOM (1942)).

146. *Id.* at 35 (citing USDA, WAR FOOD ADMINISTRATION, NATIONAL WARTIME NUTRITION GUIDE (1942)).

147. NESTLE, *supra* note 109, at 35.

material coming out featuring eleven food groups.<sup>148</sup> In 1946, a four food group system was introduced that contained a breakdown of four categories: “milk; vegetables and fruits; eggs, meats, poultry, or fish; and bread, cereal, cookies, and cakes.”<sup>149</sup>

In 1992, the four food group system was discarded in exchange for a new system.<sup>150</sup> After much debate and many compromises, the USDA introduced the Food Pyramid, a visual representation of the amount of servings of each food group that should be consumed daily.<sup>151</sup> The pyramid was built on a foundation of the grain food group; followed at the next level with fruits and vegetables; then meat and dairy; and at the top, the fats, oils, and sweets group.<sup>152</sup> Just as the 1977 Dietary Goals received criticism from meat and dairy producers for recommending that people limit their intake of those products,<sup>153</sup> the Food Pyramid was accused of harming the meat and dairy industries by placing those groups at the top of the pyramid and thus implicitly telling consumers to eat less of those products.<sup>154</sup>

The Food Pyramid continues to be a source of criticism to this day. The Food Pyramid is, by its very design, inherently limited in usefulness because it can only offer broad guidelines to a large population, and not individualized standards.<sup>155</sup> The unfortunate state of the obesity epidemic and the limitations of the dietary guidelines have led to suggestions for its improvement. The problem with the USDA dietary guidelines and the Food Pyramid is that they seek to provide extremely complex nutritional information in a reader friendly way, often at the expense of subtlety and nuance, and often based off of inconclusive evidence.<sup>156</sup> Alternatives to this system are not ideal. The dietary guidelines could sacrifice being relatively straightforward and user-friendly, at the risk of creating public confusion or being ignored completely, by explaining the limitations of evidence with caveats and disclaimers.<sup>157</sup> The other alternative is for the gov-

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148. *Id.* at 35–36.

149. *Id.* at 36 (citing USDA, BUREAU OF HUMAN NUTRITION AND HOME ECONOMICS, FOOD FOR GROWTH: FOOD FOR FREEDOM (1946)).

150. USDA, CENTER FOR NUTRITION POLICY AND PROMOTION, HOME AND GARDEN BULLETIN NO. 252, THE FOOD GUIDE PYRAMID (1992) [hereinafter THE FOOD GUIDE PYRAMID]; NESTLE, *supra* note 109, at 63.

151. THE FOOD GUIDE PYRAMID, *supra* note 150; *see* NESTLE, *supra* note 109, at 63–64.

152. THE FOOD GUIDE PYRAMID, *supra* note 150; NESTLE, *supra* note 109, at 52.

153. *See* LANG & HEASMAN, *supra* note 122, at 113.

154. NESTLE, *supra* note 109, at 51.

155. *See* Marantz, *supra* note 131, at 18.

156. *See id.* at 17–18.

157. *Id.* at 18.

ernment to attempt to avoid unintentional harm by exercising restraint and not providing any guidelines at all when data is unclear or inconclusive.<sup>158</sup>

In response to the limitations of the Food Pyramid, in 2005, the USDA introduced a revamped version of the Food Pyramid, known as MyPyramid.<sup>159</sup> One of the shortfalls of the Food Pyramid has been that it can provide only broad guidelines because it must be relevant to a broad population, which means it may not provide the best advice based on individual needs. The USDA addressed this problem by creating MyPyramid—a website that offered personalized meal plans to consumers.<sup>160</sup>

MyPyramid was an attempt to simplify the traditional Food Pyramid, with mixed results.<sup>161</sup> Balancing utility with information is always difficult. The Harvard School of Public Health described the 2005 MyPyramid as “two steps forward, one step back.”<sup>162</sup> Its design—an attempt to convey nutritional advice in an abstract way through the use of a rainbow of six colors in a pyramid and without any words—has been termed a failure.<sup>163</sup> Because MyPyramid did not contain any words and instead hinged on the user visiting a website in order to learn what each color stands for and to personalize their own pyramid to determine how many servings of each group they should consume, there were concerns that it roundly excluded those without internet access.<sup>164</sup>

Notably, MyPyramid marked the end of the controversial hierarchy of the food groups, a change that likely was met with support from the food groups that previously complained that they were being damaged by their position at the top of the Food Pyramid. In fact, MyPyramid's design was reminiscent of a suggested bowl shaped design that the food industry lobbied for during the creation of the Food Pyramid in the early 1990s.<sup>165</sup> The bowl design featured a rainbow of colors, just like MyPyramid, that was more acceptable to those in the food industry because it was not a pyramid that seemingly placed some foods above others.<sup>166</sup>

One notable change for MyPyramid was that it addressed its previous controversy by removing the recommendation to limit all fats, and instead speci-

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158. *Id.*

159. *Food Pyramids: What Should You Really Eat?*, HARVARD SCHOOL OF PUBLIC HEALTH, <http://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/pyramid-full-story/index.html#dga2005> (last visited May 9, 2012).

160. *See id.*

161. *See id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. NESTLE, *supra* note 109 at 62, Fig.10.

166. *Id.*

fied that only trans fat and saturated fats should be limited.<sup>167</sup> One addition that was complimented as a marked improvement for MyPyramid over the traditional Food Pyramid was that it moved beyond the scope of only focusing on diet to emphasize that exercise is also an important part of maintaining good health.<sup>168</sup>

On January 31, 2011, the USDA, in conjunction with the Department of Health and Human Services, released its 2010 Dietary Guidelines and promised a “new generation” Food Pyramid would be released in the coming months.<sup>169</sup> The 2010 Guidelines attempted to improve upon old versions of the Dietary Guidelines by encouraging less calorie consumption and more physical activity.<sup>170</sup> USDA Secretary Tom Vilsack praised the ‘new and improved’ Dietary Guidelines for providing the public with the information necessary to make healthy choices.<sup>171</sup> One of the recommendations made by the 2010 Guidelines is to “Enjoy your food, but eat less.”<sup>172</sup> The “eat less” recommendation seemed to be an encouraging break from the traditional “eat more” attitude that is actively encouraged by the food industry, which profits from increased consumption. Nonetheless, the 2010 Guidelines do not mark a total change in food philosophy. Just as the language of the 1977 Dietary Goals was changed from “decrease meat consumption” to “increase lean meat consumption,”<sup>173</sup> in the 2010 Dietary Guidelines there is a call to continue drinking milk, but to switch to one percent or fat-free.<sup>174</sup> This kind of language indicates a troubling continuation of the food industry’s influence on the Dietary Guidelines.

In January 2011, the public was promised a new generation Food Pyramid that would make up for the shortcomings of the past models.<sup>175</sup> On June 2, 2011, the new generation they received wasn’t a pyramid at all, but rather a

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167. HARVARD SCHOOL OF PUBLIC HEALTH, *supra* note 159.

168. *Id.*

169. USDA & U.S. DEP’T OF HEALTH & HUMAN SERV., DIETARY GUIDELINES FOR AMERICANS, 2010 (7th ed. 2010) [hereinafter 2010 DIETARY GUIDELINES]; Press Release, USDA, USDA and HHS Announce New Dietary Guidelines to Help Americans Make Healthier Food Choices and Confront Obesity Epidemic (Jan. 31, 2011), *available at* <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PressRelease.pdf>.

170. 2010 DIETARY GUIDELINES, *supra* note 169, at 13, 17; Press Release, USDA, *supra* note 169.

171. Press Release, USDA, *supra* note 169.

172. *See* 2010 DIETARY GUIDELINES, *supra* note 169, at 17; Press Release, USDA, *supra* note 169.

173. DIETARY GOALS FOR THE UNITED STATES (1977), *supra* note 122; NESTLE, *supra* note 109, at 41.

174. 2010 DIETARY GUIDELINES, *supra* note 169, at 4; Press Release, USDA, *supra* note 169.

175. *See* Press Release, USDA, *supra* note 169.

plate.<sup>176</sup> MyPlate features an overhead view of a placemat setting with a round plate divided into four roughly equivalent quarters devoted to fruits, grains, vegetables, and protein.<sup>177</sup> On the right side of the plate there is a round circle for dairy that resembles the overhead view of a glass of milk, and to the left of the plate the picture is completed with a fork.<sup>178</sup>

MyPlate is a major upheaval to the traditional Food Pyramid. Including MyPyramid, this new icon marks the second radically different design that Americans have seen in the span of six years. Not only does MyPlate look different, it also has a different scope and purpose from the traditional Food Pyramid. At the MyPlate launch press conference, Secretary Vilsack explained, "It's not designed to tell you specifically what to eat . . . . It is designed to tell you the proper proportions."<sup>179</sup> Throughout the history of government-sponsored dietary guidelines there has been a tension between clarity for the population at large and subtle nuances in the science of nutrition, and MyPlate seems to lean decidedly in the direction of clarity. First Lady Michelle Obama and Secretary Vilsack touted MyPlate's simplicity, calling it a 'quick, simple reminder,' and an 'uncomplicated symbol,' respectively.<sup>180</sup>

Critics, however, were quick to point out that the emphasis on simplicity caused this new symbol to fall short in instructing the public on more subtle differences between the benefits of whole grains over refined grains or lean meats over red meats.<sup>181</sup> They also took issue with MyPlate's complete silence on the role of fats, sweets, and processed foods in the diet, which accounts for one of the greatest sources of trouble in obesity.<sup>182</sup> In addition, MyPlate only continues the long-standing conflict surrounding the role of dairy in the dietary guidelines. MyPlate is accused of overemphasizing the role of dairy in the diet by implying that a glass of milk can be enjoyed at every meal at a time when some nutritionists are questioning the benefits and possible harms of dairy.<sup>183</sup> It is clear that no

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176. *ChooseMyPlate.gov*, USDA, [www.choosemyplate.gov](http://www.choosemyplate.gov) (last visited May 9, 2012); Press Release, USDA, First Lady, Agriculture Secretary Launch *MyPlate* Icon as a New Reminder to Help Consumers to Make Healthier Food Choices (June 2, 2011), available at <http://www.cnpp.usda.gov/publications/myplate/pressrelease.pdf> [hereinafter Press Release, *MyPlate*].

177. Press Release, *ChooseMyPlate.gov*, *supra* note 176.

178. *Id.*

179. The Nutrition Source, *Out with the Pyramid, In with the Plate*, HARVARD SCHOOL OF PUBLIC HEALTH, <http://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/plate-replaces-pyramid/index.html> (last visited May 9, 2012).

180. Press Release, *MyPlate*, *supra* note 176.

181. The Nutrition Source, *supra* note 179.

182. *Id.*

183. *Id.* (citing evidence that "high intakes of dairy products do not reduce the risk of osteoporosis and may increase the risk of some chronic diseases").

solution has yet been found that successfully couples nutritionally sound information with ease of use.

#### IV. THE FOOD INDUSTRY

Many people argue that what is needed to combat obesity is simply more information and awareness of how many calories people are eating, and yet history has shown a long progression of contradictory information that has been the hallmark of public nutrition since its beginning. Nutrition is very complex and technical, and calls to reduce intake of certain foods is met with both open hostility from those whose pocketbooks will be hurt and confusion and unintended results for the public.

Making all of these issues more complicated is the trouble that comes from the food industry itself. “Farm subsidies, tariffs and trade agreements support a food supply that provides 3,900 calories per day per capita, roughly twice the average need, and 700 calories a day higher than in 1980, at the dawn of the obesity epidemic.”<sup>184</sup> This overabundance of food and food options causes food companies to compete fiercely with one another for a limited market share.<sup>185</sup> This in turn, creates a great incentive for food companies to market in such a way to consumers so as to create a destructive “eat more” mentality, which leads to overconsumption and obesity.<sup>186</sup> This “eat more” mentality is characterized by efforts to “promote larger portions, frequent snacking, and the normalization of sweets, soft drinks, snacks, and fast food as daily fare.”<sup>187</sup> It is important to remember that the food industry is, first and foremost, a business. Anything short of this “eat more” mentality would undermine the business model and cut into profits.<sup>188</sup>

This conflict between public health and business profits is further compounded by the fact that highly-processed foods that contribute more to obesity deliver higher profits than lower-processed, but less profitable foods.<sup>189</sup> Highly processed foods, like fast food, snacks, and beverages, are more profitable because they are made from inexpensive products that have the strong support of agricultural subsidies.<sup>190</sup> This creates a dilemma for food companies that publicly

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184. Schlosser et al., *supra* note 112.

185. *Id.*

186. David S. Ludwig & Marion Nestle, *Can the Food Industry Play a Constructive Role in the Obesity Epidemic?*, 300 JAMA 1808, 1809 (2008).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

say that they want to be part of the obesity fight, and the stockholders that they must be held accountable to for successful business results.<sup>191</sup>

One important tool in the fight for better health is the promotion of more awareness of the fact that the food industry represents a powerful lobbying and corporate interest. Until now, the food industry has largely been allowed to police itself, with the government inviting the food industry into a partnership to combat obesity, but also allowing it to voluntarily improve its standards.<sup>192</sup> "With respect to obesity, the food industry has acted at times constructively, at times outrageously."<sup>193</sup> Food companies often create an appearance that they are acting for the health of their consumers, but these efforts often fall short. For instance, PepsiCo pledged money to the YMCA to promote physical activity for children in order to improve its public image, but its concern for children's health stopped short of providing promotion of a healthy diet, because any recommendation to eat less junk food could harm PepsiCo's profits.<sup>194</sup> At the very least, tactics like these that are commonly used by PepsiCo and other food companies appear "disingenuous," especially when, "[a] child can easily consume more calories from a soft drink than she would expend at a sports event sponsored by a beverage company."<sup>195</sup>

The National Football League prominently advertises its NFL Play 60 program, a program that encourages children to be active for at least sixty minutes per day.<sup>196</sup> Interestingly, there is also a joint program that is linked to the NFL Play 60 website called the Fuel Up to Play 60 Movement, which is sponsored by the National Dairy Council along with the USDA.<sup>197</sup> The Fuel Up to Play 60 Movement mission is to encourage youth to "consume nutrient-rich foods and achieve at least 60 minutes of physical activity every day."<sup>198</sup> Although the Fuel Up to Play 60 program does encourage physical activity, these partnership choices further illustrate the complicated relationship between the food industry and health initiatives.<sup>199</sup>

Besides the potential conflicts that have already been noted, there is also a troubling trend of the food industry and its money having a widespread effect on scientific studies. A study of 206 scientific articles on the health effects of

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191. *Id.*

192. *Id.* at 1809–10.

193. *Id.* at 1810.

194. *Id.* at 1809.

195. *Id.*

196. NFL RUSH, <http://www.nflrush.com/play60> (last visited May 9, 2012).

197. *What is Fuel Up to Play 60?*, FUEL UP TO PLAY 60, <http://supporters.fueluptoplay60.com/about/whats-fuel-up-to-play-60/> (last visited May 9, 2012).

198. *Id.*

199. *Id.*

milk, fruit juices, and soft drinks published over a five-year time period found that in the studies that were fully funded by the beverage industry, the likelihood of a conclusion favorable to the industry was four-fold to eight-fold higher.<sup>200</sup> These kinds of figures are disturbing, and they undercut the idea that mere knowledge of the facts of calorie counts and health effects of foods will be enough to fight the obesity epidemic. It seems as though the quality of information that is being disseminated depends on whether or not the food industry has used its considerable wealth and influence to potentially bias the results.

One conclusion that has been reached is the stark conclusion that the food industry cannot be trusted.<sup>201</sup> Among other accusations, the food industry has been said to: “1) Lobby vociferously against policies to improve children’s health; 2) Make misleading statements and misrepresent their policies at government meetings and in other public venues; and 3) Make public promises of corporate responsibility that sound good, but in reality amount to no more than a public relations campaign.”<sup>202</sup> Though these are some of the accusations leveled at the food industry, the nature of the food industry as a corporation means that it does not have a primary concern for protecting its customer’s health, but a primary obligation to make returns for its shareholders.<sup>203</sup> It is the government’s role, however, to provide protection for its citizens.<sup>204</sup> That is why the intrusion of the food industry’s money and lobbying power into the political arena has been so damaging.

Beyond the problems associated with the business side of the food industry, the goal of combating the obesity epidemic is made even more difficult because it involves changing deeply held habits and behaviors. “From more than a half-century of social science research, we know that changing people’s habitual behavior—from smoking to alcohol consumption, from drugs to junk food—is a mighty task. Individuals rarely listen to health messages and then change their ways.”<sup>205</sup> There is the possibility, however, that public awareness could be empowering and successful in the fight against obesity.

“What single thing could change the US food system, practically overnight? Widespread public awareness—of how this system operates and whom it benefits, how it harms consumers, how it mistreats animals and pollutes the land, how it corrupts

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200. Ludwig & Nestle, *supra* note 186, at 1809.

201. Michele Simon, *Can Food Companies Be Trusted to Self-Regulate? An Analysis of Corporate Lobbying and Deception to Undermine Children’s Health*, 39 LOY. L.A. L. REV. 169, 233 (2006).

202. *Id.*

203. *Id.*

204. *Id.*

205. Schlosser et al., *supra* note 112.

public officials and intimidates the press, and most of all, how its power ultimately depends on a series of cheerful and ingenious lies."<sup>206</sup>

## V. CONCLUSION

As legislation continues to stall out year after year in Congress, and the Dietary Guidelines continue to be held hostage by inconclusive factual evidence and powerful lobbying, it is clear that the government's role in protecting consumers from the food that they eat is very complicated. Whether the solution involves litigation, legislation, public initiatives, or more education, obesity is a complex and prevalent issue that resists a one-pronged approach. While fast food litigation creates much skepticism, it is clear that there has been a widespread, multi-generational, issuance of misinformation regarding what and how much people should eat.

The food industry wants to make as much money as possible, like any business naturally does, and so they cannot be expected to act in ways that are not self-serving. Unfortunately, this means that they have lots of money and power to lobby and affect the government's issuance of nutritional information. This is problematic and regrettable, because it betrays the trust of the public that assumes that this information is unbiased and in their best interest. Instead, the public receives contradictory information and mixed messages from the government on what they should eat. This is all complicated by the fact that the food industry is constantly trying to sell more product in a saturated market to people who already have all of the food that they biologically require.

A better solution is one that actually works for the welfare of the public, not for the welfare of the food industry. Obesity is creating an outrageous expense to America's health, economy, national security, and well-being. Americans need to know much more than how many calories are in their cheeseburger; they need to know that every aspect of the food that they eat has become engulfed in a political, profit-driven system that places health and well-being below profits.

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206. Schlossor et al., *supra* note 112.