Americans have gained weight over the course of the last century. This increase stems from a variety of factors, primarily more consumption of calories and less vigorous activity. From a historical perspective, a rising caloric intake was a positive event for the first half of the twentieth century. Though the fast-food industry has proliferated since the 1960s, there is little conclusive evidence that it is a primary cause of obesity. Further, this study finds that fast food has worked as a force to lower the cost of protein for consumers at all income levels. Lawsuits against fast-food companies miss the mark from a nutritional, economic, and legal perspective; they ignore the fundamental issue of personal choice and responsibility.

THE SCENE

The overweight baseball fan jumps to his feet in the bleachers of Wrigley Field, screaming for the Chicago Cubs to hold onto their 3-2 lead in the bottom of the ninth inning. He squeezes a Cubs pennant in his left hand while shoving a mustard-smeared hot dog into his mouth with the right. The Dodgers have a runner on first who is sneaking a big lead off the base. The Cubs’ pitcher has thrown three balls and two strikes to the batter, a notorious power hitter. The obese fan holds his breath, while the pitcher winds up and fires a blazing fastball. “Crack!” The ball flies over the fan’s head into the bleachers for a game-winning home run. The fan slumps to his bleacher seat and has a heart attack.

Who should the fan sue?

(a) The Cubs for breaking his heart?
(b) The hot dog company for making a fatty food?
(c) The hot dog vendor for selling him a fatty food?
(d) All of the above?

A few years ago these questions might have seemed preposterous. But now scenes better suited for the absurd stories of Kafka snake their way into serious courtroom encounters. While no federal court has yet heard a case on behalf of sulking baseball fans, just a few months ago, the US District Court for the Southern District of New York responded to a complaint filed against McDonald’s by a class of obese customers, alleging among other things that

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the company acted negligently in selling foods that were high in cholesterol, fat, salt, and sugar. In the past ten years, we have seen an outburst of class action lawsuits that alleged harm to buyers.

With classes numbering in the thousands, these suits may bring great riches to tort lawyers, even if they provide little relief to the plaintiffs. The sheer size of the claims and the number of claimants often intimidate defending firms, which fear that their reputations will be tarnished in the media and their stock prices will be punished—not because of the merits of the case but from the ensuing publicity. In his opinion in the McDonald’s case, Judge Robert W. Sweet suggested that the McDonald’s suit could “spawn thousands of similar ‘McLaw suits’ against restaurants.” Sure enough, a few days ago, hungry lawyers gathered in Boston to plot their strategy for future obesity litigation, convening panels with titles such as “Food Marketing and Supersized Americans.” Recent books with titles such as Fat Land and Fast Food Nation promote the view that fast-food firms are harming our health and turning us into a people who are forced to shop in the “big and tall” section of the clothing stores. The Wall Street Journal recently reported that “big and tall” has become a $6 billion business in menswear, “representing more than a 10 percent share of the total men’s market.”

While it may be easy for critics to accuse fast-food restaurants of serving fattening foods, this study analyzes the issues on several levels. First, this study examines why fast-food companies suddenly find themselves under legal attack. Second, this study finds that fast-food restaurants are not a chief explanation for rising obesity levels in the United States. Third, this study suggests that the spread of fast-food restaurants has actually helped to push down the cost of protein, a key building block to good physical health. Fast-food restaurants provide a very economical source of protein and calories (even though they may also be providing cheap sources of fat as well.) Fourth, this study explains how changing and contradictory nutritional recommendations make the courtroom a particularly poor place to determine what and where people should eat.

The study does not conclude that you should stuff yourself with french fries or that you should get your children hooked on a daily “Happy Meal.” But it does argue for more facts, more careful consideration—and less litigation.

WHY HAVE FAST-FOOD FIRMS BEEN UNDER ATTACK?

Fast-food restaurants have exploded in popularity since World War II. More cars, more suburbs, and more roads have made roadside eating more convenient. During the 1950s, drive-through and drive-in burger, ice cream, and pizza joints catered to a mobile population. McDonald’s, which specialized in roadside restaurants, eclipsed White Castle hamburger stands in the 1960s because the latter had focused more on urban, walk-up customers. The McDonald’s road signs in the early 1960s boasted of serving a million hamburgers; now McDonald’s claims to have sold over 99 billion burgers. The “zeros” in 100 billion will not fit on the firm’s tote-board signs when the 100 billionth burger is sold.

And yet despite the popularity of such fast-food firms as McDonald’s, Wendy’s, Burger King, Pizza Hut, Taco Bell, Subway, etc.—at which American consumers voluntarily spend over $100 billion annually—it has become quite fashionable to denounce these restaurants for a variety of reasons. “They make people fat.” “They hypnotize the kids.” “They bribe the kids with toys.” “They destroy our taste for more sophisticated foods.” These condemnations often come from highbrow sources claiming that customers of fast food are too ignorant or too blinded to understand what they are putting in their own mouths. But the onslaught of criticism is not even limited to the food.

Animal rights activists condemn fast food for animal cruelty. Environmentalists allege that fast food produces too much “McLitter.” Orthodox organic food fans accuse fast-food firms of using genetically modified ingredients, which they call “frankenfoods.” In Europe, anti-globalization protestors allege that fast food homogenizes culture.
and spreads capitalism far and wide. French kids are eating fries instead of foie gras. Sacre bleu!

With the fury directed at fast-food firms, it is no surprise that tort lawyers have jumped into the fray. Tort lawyers around the country settled the $246 billion tobacco case in 1998. Those who have not retired on their stake from that settlement are wondering whether fast food could be the "next tobacco," along with HMOs and lead paint. After all, the Surgeon General estimates that obesity creates about $117 billion in annual healthcare costs.7

There are differences, of course. No one, so far, has shown that cheeseburgers are chemically addictive. Furthermore, most fast-food restaurants freely distribute their nutritional content and offer a variety of meals, some high in fat, some not. Nor is it clear that the average fast-food meal is significantly less nutritious than the average restaurant meal, or even the average home meal. The iconic 1943 Norman Rockwell Thanksgiving painting ("Freedom from Want") highlights a plump turkey, which is high in protein. But surely the proud hostess has also prepared gravy, stuffing, and a rich pie for dessert, which though undoubtedly tasty, would not win a round of applause from nutritionists.

The key similarity, though, between the tobacco lawsuits and claims against the fast-food industry is this: both industries have deep pockets and millions of customers who could join as potential plaintiffs. Therefore, lawyers have enormous incentives to squeeze food complaints into the nation's courtrooms. They will not disappoint in their eagerness to pursue this.

HOW HAVE DIETS AND FOOD SOURCES CHANGED?

If you believe the old saying, "you are what you eat," human beings are not what they used to be. Before jumping into today’s fashionable condemnation of calories, let us spend a moment on a historical perspective and at least admit that for mankind’s first couple of hundred thousand years of existence, the basic human problem was how to get enough calories and micronutrients. Forget the cave-man era, just one hundred years ago most people were not getting adequate nutrition. Malnutrition was rampant, stunting growth, hindering central nervous systems, and making people more susceptible to diseases. Often, poor people begged on the streets because they did not have the sheer physical energy to work at a job, even if work was available to them. By modern standards even affluent people a century ago were too small, too thin, and too feeble.8 A century ago, an American with some spare time and spare change was more likely to sign up for a weight-gaining class than a weight-loss program.

Just as life expectancy in the United States rose almost steadily from about 47 years in 1900 to 80 years today, so too has the “Body Mass Index” or BMI, a ratio of height to weight. (The BMI is calculated by dividing weight in kilograms by height in meters squared. A person five feet five inches tall, weighing 150 pounds, would have a BMI of 25. A taller person, for example, six feet tall could weigh 184 and have a BMI of 25, too.) In the late nineteenth century most people died too soon and were, simply put, too skinny. The two are related, of course. For most of human history only the wealthy were plump; paintings of patrons by Peter Paul Rubens illustrated that relationship. In ancient times figurines of Venus (carved thousands of years ago) display chunky thighs, fulsome bellies and BMIs far above today's obesity levels. Likewise, skinny people looked suspicious to the ancients. Remember, that the backstabbing Cassius had a “lean and hungry look.” The rise in the BMI from the nineteenth century to about 1960 should be counted as one of the great social and medical victories of modern times. In a sense, it created a more equal social status, as well as a more equal physical stature.

WHAT WENT WRONG? SHOULD WE BLAME FAST FOOD FOR BIGGER BMIs?

So what went wrong more recently? It is not the case that the average BMI has suddenly accelerated. In fact, BMI has been rising fairly steadily for the last 120 years. Nonetheless, since the 1960s, the higher BMI scores have surpassed the optimal zone of about 20-25.9 No doubt, a more sedentary lifestyle adds to this concern. (In contrast, the healthy rise in BMIs during the early 1900s might be attributed to gaining more muscle, which weighs more than fat.) The post-1960s rise in BMI scores is similar to a tree that grows 12 inches per year, but in its tenth year starts casting an unwanted shadow on your patio. In the case of people, more mass from fat has diminishing returns, cutting down their life spans and raising the risk for diabetes, heart disease, gallbladder disease, and even cancer. Over half of American adults are overweight, and nearly one quarter actually qualify as obese, according to the National Institutes of Health.

Should we chiefly blame fast-food firms for BMIs over 25? According to the caricature described by lawyers suing fast-food companies, poor, ill-educated people are duped by duplicitous fast-food franchises into biting into greasy hamburgers and french fries. The data tell us that this theory is wrong. If the “blame fast food” hypothesis were right, we would see a faster pace of BMI growth among poorly educated people, who might not be able to read or understand nutritional labels. In fact, college educated, not poorly educated people accounted for the most rapid growth in BMI scores between the 1970s and the 1990s—though poorly educated people still have a higher overall incidence of obesity. The percentage of obese college-educated women nearly tripled between the early 1970s and the early 1990s. In comparison, the proportion of obese women without high school degrees rose by 58 percent. Among men, the results were similar. Obesity among those
Without high school degrees climbed by about 53 percent. But obesity among college graduates jumped by 163 percent.10 If the “blame fast food” hypothesis made sense, these data would be flipped upside down.

Of course, we cannot deny that people are eating more and getting bigger. But that does not prove that fast-food franchises are the culprit. On average, Americans are eating about 200 calories more each day than they did in the 1970s. An additional 200 calories can be guzzled in a glass of milk, a soda, or gobbled in a bowl of cereal, for example. Fast-food critics eagerly pounce and argue that the additional calories come from super-sized meals of pizza, burgers, or burritos. It is true that between the 1970s and the 1990s, daily fast-food intake grew from an average of 60 calories to 200 calories. But simply quoting that data misleads. Though Americans have been consuming somewhat more fast food at mealtime, they have reduced their home consumption at mealtime. Americans have cut back their home meals by about 228 calories for men and 177 for women, offsetting the rise in fast food calories.11

In total, mealtime calories have not budged much, and mealtimes are when consumers generally visit fast-food restaurants. So where are the 200 additional calories coming from? The US Department of Agriculture has compiled the “Continuing Survey of Food Intakes by Individuals,” which collects information on where a food was purchased, how it was prepared, and where it was eaten, in addition to demographic information, such as race, income, age, and sex. The Survey shows us that Americans are not eating bigger breakfasts, lunches, or dinners. But they are noshing and nibbling like never before.

Between the 1970s and the 1990s, men and women essentially doubled the calories consumed between meals (by between 160 and 240 calories). In 1987–1988, Americans typically snacked less than once a day; by 1994 they were snacking 1.6 times per day. But surely, the fast-food critics would argue, those fast-food cookies and pre-wrapped apple pies must account for calories. Again the data fails to make their case. Women ate only about six more snack calories at fast-food restaurants, while men ate eight more snack calories over the past two decades. That is roughly equal to one cracker or a few raisins.

Where do Americans eat their between-meal calories? Mostly at home. Kitchen cabinets can be deadly to diets. And in a fairly recent development, supermarket shoppers are pulling goodies off of store shelves and ripping into them at the stores before they can even drive home. Consumers eat two to three times more goodies inside stores than at fast-food restaurants.12

Why are people eating more and growing larger? For one thing, food is cheaper. From a historical point of view that is a very good thing. A smaller portion of today’s family budget goes to food than at anytime during the twentieth century. In 1929, families spent 23.5 percent of their incomes on food. In 1961, they spent 17 percent. By 2001, American families spent just 10 percent of their incomes on food.13 The lower relative cost of food made it easier, of course, for people to consume more.

Since the mid-1980s we have seen an interesting change in restaurant pricing, which has made restaurants more attractive to consumers. Compared to supermarket prices, restaurant prices have actually fallen since 1986. Whereas a restaurant meal was 1.82 times the cost of a store-bought meal in 1986, by 2001 a restaurant meal cost just 1.73 times as much.14 Higher incomes and lower relative restaurant prices have induced people to eat more and to eat more away from home.

Despite the attraction of restaurant eating and the proliferation of sit-down chain restaurants such as the Olive Garden, TGI Friday’s, P.F. Chang’s, etc, Americans still consume about two thirds of their calories at home. Critics of fast food spend little time comparing fast-food meals to meals eaten at home, at schools, or at sit-down restaurants.

The nature of the American workplace may also be contributing to higher caloric intake. Whether people dine while sitting down at a table or while standing at a fast-food counter, at the workplace they are literally sitting down on the job more than they did during prior eras. More sedentary desk jobs probably contribute to wider bottoms. Consider two middle-income jobs, one in 1953 and one in 2003. In 1953, a dockworker lifts 50 boxes off of a mini-crane and places it on a hand truck, which the dockworker pulls to a warehouse. In 2003, a person earning a similar income would be sitting in front of a computer, inputting data, and matching orders with deliveries.

What’s the key difference? Until recently, employers paid employees to exert energy and burn calories. In contrast, employers pay workers to stay in their seats. For many, the most vigorous exercise comes from tearing off a sheet of paper from a printer or walking to the refrigerator. Furthermore, I would suggest that the decline in factory work—with its fixed lunch and coffee break schedule—enables people to eat more often. Less factory work means less foremen supervision. According to Bureau of Labor Statistics data, manufacturing employment fell from about 24.4 percent of civilian employment in 1970 to merely 13 percent in 2000. A woman who spends her career sitting at a desk may “end up with as much as 3.3 units of BMI more than someone with a highly active job.”15

A person telecommuting from home may be sitting even closer to the refrigerator or cupboard. In 1970, the term “telecommuting” did not even exist. By 2000, however, with advances in computers and remote access technology, approximately 12 percent of the workforce worked from
FAST-FOOD EATING VS. ALTERNATIVES

Very few defenders of fast food would tell moms and dads to throw out the home-cooked meal and instead eat 21 meals a week at a fast-food restaurant. But it is a mistake to stereotype fast food as simply a cheeseburger and large fries. Fast-food restaurants have vastly expanded their menus for a variety of reasons, including health concerns and demographic shifts. The increasing role of Hispanic Americans in determining national food tastes has inspired many fast-food franchises to offer tacos, burritos, and salsa salads.

Wendy’s, traditionally known for its square-shaped hamburgers, offers a low-fat chili dish that the Minnesota Attorney General’s office recommended as a “healthier choice” in its fast-food guide. McDonald’s has continuously revamped its menu in recent years. On March 10, 2003, the company unveiled a new line of Premium Salads that feature Paul Newman’s Own All-Natural dressings. In its publicity blitz, McDonald’s facetiously asked, “What’s Next? Wine Tasting?” Meanwhile, Burger King features a Broiled Chicken Teriyaki in addition to its traditional fare. Judge Sweet notes that the Subway sandwich chain, which boasts of healthy choices, hired a spokesman who apparently lost 230 pounds of weight while eating the “Subway Diet.”

In fact, fast-food meals today derive fewer calories from fat than they did in the 1970s. Consumers can customize their fast-food meals, too. Simply by asking for “no mayo,” they may cut down fat calories by an enormous proportion. It is worth pointing out that fast-food firms introduced these alternative meals in response to changing consumer tastes, not in reply to dubious lawsuits. During the 1990s, McDonald’s and Taco Bell invested millions of dollars trying to develop low-fat, commercially viable selections such as the McLean Deluxe hamburger and Taco Bell’s Border Lights. Burger King adopted its “Have It Your Way” slogan several decades ago.

While plaintiffs’ lawyers vigorously denounce the nutritional content of fast food, they tend to ignore the nutritional content of alternatives. Home cooking, of course, has a nice ring to it, and it is hard to criticize the idea of a traditional meal cooked by mom or dad. But if we put nostalgia aside for a moment, we can see that the typical American meal of 25 years ago might win taste contests but few prizes from today’s nutritionists. Meat loaf, fried chicken, butter-whipped potatoes, and a tall glass of whole milk may have kept us warm on a cold winter evening. But such a diet would surely fail a modern test for healthy living. And let’s not even discuss a crusty apple pie or bread pudding for dessert. Yesterday’s “comfort” food gives today’s dieters indigestion. No surprise then that today’s fast food derives a smaller percentage of calories from fat than a typical home meal from 1977–1978. In fact, even in the 1970s, fast-food meals had almost the same fat/calorie ratio as home cooking at that time. By this measure of fat/calories, fast food in the 1970s looked healthier than restaurant cooking.

Therefore, the caricature of fast food as a devilish place for nutrition makes little historical sense.

Now it is true that home cooking has changed since the 1970s and that it has made even more progress than fast food at reducing fat calories. Very few families these days feast on pork rinds and pecan pie, a development that flattens our current nutritional tables. How do fast-food meals compare to schools? Despite the legions of concerned dieticians and PTA leaders, school meals do not look considerably better on the test of fat. While schools provide slightly fewer fat calories, they deliver more saturated fat than fast food, the more dangerous subset of fats. The comparison to sit-down restaurants is similar, with no clear advantage to either fast-food or sit-down restaurants. Of course, fast-food firms have made it easier for patrons to learn about nutritional content than fancier kinds of food outlets. Few patrons of the fabled 21 Club in New York would know that its $26 hamburger is made with rendered duck fat. Should super-chef Daniel Boulud worry about lawsuits for daring to sell a $50 hamburger at db Bistro Moderne that is crafted from ground sirloin and braised short ribs, stuffed with foie gras, and topped with shaved black truffles?

In sum, the facts show that obese plaintiffs might just as well walk up to a fast-food counter rather than tuck a napkin under their chins and dine at a chic restaurant or at a school.

Fast-food critics also like to criticize portion sizes. True, fast-food restaurants have been offering super-sized sandwiches, drinks, and French fries. But have these critics been to a movie theater lately, where popcorn containers look like bushel baskets? Or to fancy restaurants featuring all-you-can-eat Sunday buffets? A study in the Journal of the American Medical Association cited the “most surprising result [as] the large portion-size increases for food consumed at home—a shift that indicates marked changes in eating behavior in general.” People eat bigger portions of hamburgers, fries, and Mexican food on their own kitchen
tables than when they are sitting on a fast-food stool. The study found that “the average home-cooked hamburger now weighs in at about eight ounces, versus perhaps 5.5 ounces in full-service restaurants and a little over seven ounces at fast-food outlets.”

When the USDA surveyed portion sizes and compared them to official US government portions, it did find that fast food hamburgers exceeded official estimates by 112 percent. But it also found that Americans were eating pasta portions that surpass official measures by 333 percent and muffins that rise to 480 percent of the official sizes.21 If we are turning into a jumbo people, we are a jumbo people everywhere we eat, not just where the tort lawyers target defendants.

FAST FOOD AND PROTEIN PER DOLLAR

As discussed earlier in this study, obtaining enough protein and calories to fuel the human body has been a constant struggle throughout history. A time traveler from almost any other era would be befuddled by our current obsession with losing weight, which has spurred America’s $50 billion diet industry, $12 billion in annual health club revenues, and the 100,000 radical gastric bypass surgeries last year.22 Nowadays in the United States food comes pretty cheap, and fast food has played a role in giving people access to inexpensive foods.

There are many measures of nutritional value. In an earlier time, we might simply measure calories per dollar. Because, however, critics accuse fast food of selling “empty” calories (that is, calories comprised of fats and sugars), I have developed a more specific benchmark, namely “cost per gram of protein.” Protein is the building block for muscles, and animal protein foods, including meat, poultry, fish, dairy products and eggs, contain the [nine] essential amino acids that cannot be synthesized in the body. Using the ratio of dollar/protein gram seems reasonable and, because it does not include fats and sugars, creates a tougher test for fast food than, for example, dollar/calorie.

Comparing the cost of protein obtained at fast-food restaurants to protein obtained at supermarkets, this study finds that fast-food restaurants provide reasonable value to the consumer, considering the cost of raw materials and the cost of time in preparing meals. In a survey of fast food chains and supermarkets in five southern California communities (where the fast-food chains and the supermarkets were located within the same towns), I compared the cost of purchasing a “marquee” hamburger, a grilled chicken sandwich, a fish sandwich, a sliced turkey sandwich, and a green salad. The results suggest that in some cases consumers can actually purchase a high protein meal at a fast food chain for less than the cost of buying the separate groceries at a supermarket and preparing the sandwich themselves. The comparisons understate the cost of supermarket purchases for two principal reasons:

1. Supermarket prices generally reflect a cost savings for purchasing a larger quantity. You can order one fish fillet from Burger King; it is nearly impossible to buy a single frozen fish fillet in your supermarket.

2. Supermarket prices do not reflect the time and cost to the shopper of preparing the meal at home. Nor have I included the extra ingredients such as pickles, relish, onion, mustard, etc. There is little doubt that for a worker earning the average hourly rate (which is $15, according to the Bureau of Labor Statistics) preparing a cooked sandwich would cost far more in materials and time than simply purchasing it from a fast-food restaurant. Even for a minimum wage worker earning $5.15 per hour, a fast-food sandwich is probably much cheaper than spending 30 minutes preparing and grilling a hamburger, fish fillet, or chicken breast.

On average, a gram of hamburger protein found in a Burger King Whopper or McDonald’s Big N’ Tasty costs about 7 cents. Each sandwich provides 25 grams of protein. During a recent national campaign, both of these restaurant chains slashed their prices, bringing the dollar/protein ratio down to just 3.8 cents. The supermarket survey shows that a gram of protein from a ground beef patty and bun costs about eight cents (leaner beef would cost somewhat more, standard ground beef somewhat less). The cost of supermarket beef does not include the cost of a tomato, lettuce, pickle, and other accompaniments, nor does it include any time or labor costs for preparing a sandwich oneself.

For fish fillets, the results were similar. A Burger King fish fillet provides protein at 7.8 cents per gram. Van de Kamp’s and Gorton’s frozen fish fillets cost 15 cents per gram. The results for grilled chicken sandwiches display an advantage for supermarket buyers. A Burger King grilled chicken sandwich provides 35 grams of protein at 10.5 cents per gram. McDonald’s grilled chicken costs 13.9 cents per gram. Purchasing chicken breast fillets at a supermarket averages just 4.6 cents per gram of protein.

Again, the comparison does not include the extra costs or time involved in creating a grilled chicken sandwich served with lettuce, tomato, and seasoning. Sliced turkey also shows an advantage for supermarket shoppers. While a Subway turkey sandwich costs almost 24 cents per gram of protein, sliced Sara Lee turkey averages just over 10 cents per gram of protein. Once again, the Subway sandwich also includes lettuce, tomatoes, green peppers, onion, olives, pickles and a choice of breads, as well as the convenience of someone else putting together the meal.

Salad greens are roughly similar in price at fast-food restaurants and supermarkets. Because greens are not notable for their protein content, I have instead calculated the cost per ounce. A Burger King side salad costs just under 20 cents per ounce, compared with over 27 cents for a Fresh Express bag of pre-washed “American Salad.”
In sum, fast food provides in a number of cases competitively priced foods per gram of protein. For people who lack the time, kitchen space, or ability to purchase from grocery stores and cook at home, fast food can provide significant benefits. Furthermore, if consumers choose with some level of prudence from the fast-food menus, they can eat fairly nutritious meals.

IS NUTRITION A MOVING TARGET?

I remember my mother forcing us to eat beef liver every two months because it was iron-rich. I hated it and often sneaked bite-sized pieces under the table to our appreciation sheepdog. Nowadays, few people press cholesterol-laden liver on their family. For liver-hating kids everywhere, that represents a big step forward, almost as important as the Salk vaccine.

What has been more fickle than diet recommendations over the years, which continuously spark new fads? In the 1980s and early 1990s, “carbo-loading” was hot, and steaming bowls of pasta shoved roast beef off the dinner table. Today a plate of pasta scares those on the popular, low-carbohydrate Atkins diet, who are instructed to load up their breakfast plates with fried eggs, ham, and bacon while leaving toast off to the side. According to the Atkins Approach, it is fine to bite into a greasy hamburger, but don’t dare chew on the bun.

Desserts, too, have changed. During the 1960s and 1970s, parents maneuvered to keep chocolate away from children, fearing the high fat and sugar content, as well as a connection to acne. More recently, we read that cocoa powder and dark chocolate may help delay the progression of cardiovascular disease. Chocolate contains a healthful nutrient known as a flavonoid that may slow the oxidation of “bad cholesterol” (LDL). So maybe we should not worry so much about a few pimples.

Surely, you might say, there are obvious national standards such as the official US Department of Agriculture’s food pyramid. Why not force fast-food firms to serve meals that fit into the pyramid’s architecture? The pyramid tells us to eat at least six servings of grain (breads, pasta, etc.) each day, two servings of fruit, and only a little bit of fat or sweets. Sounds reasonable, no? Here is what the controversial head of the Harvard School of Public Health says about the pyramid: “Some people are likely to die from following the USDA pyramid because they will be eliminating healthy fats, such as liquid vegetable oils, that actually reduce the risk of heart disease.” Who should Wendy’s listen to? The US government or Harvard? Is this a fair choice for a restaurant?

During the 1980s, nutrition advocates lobbied McDonald’s to switch its frying oil from partially beef-derived to vegetable-based. Then, after McDonald’s switched, many of the same advocates assailed McDonald’s for using trans-fatty acids—a result of using the vegetable oils! Now, McDonald’s is introducing new vegetable oils that reduce the trans-fatty acids.

Here again, fast food presents a very different case than tobacco, even though plaintiffs’ counsels are eager to deploy the same lucrative, cookie-cutter approach to litigation. Fast-food meals, though tasty to many patrons, are not chemically addictive. One seldom hears of Subway or Wendy’s customers shaking with withdrawal symptoms when they give up a turkey sandwich or a frozen fish fillet. Second, no one has claimed yet that he or she became sick, cancerous, or even choked or coughed from “second-hand” eating. Swallowing food is very much an individual act.

Third, cigarette research has been rather consistent for decades in pointing to the physical effects of smoking. In contrast, diet advice and research has been inconsistent and often contradictory. As a result, fast-food firms have been reacting to the changing tastes and nutritional expectations of customers. As stated above, in the 1970s, there was very little difference between the fat content of home-cooked meals or fast-food meals.

Fast-food chains did not start out by conspiring to sell diabolical menus. Over the past 20 years, homes and fast-food restaurants have pursued lower-fat menus (though homes have admittedly moved more quickly). This would be expected because commercial restaurants would tend to follow the tastes of patrons. Today, nearly every fast-food restaurant offers non-fried poultry and low-fat salads. Further, within 20 seconds of inquiring, each of the fast-food chains mentioned in this study produced nutritional content charts.

Should we expect or demand that fast food lead the march to better menus? How could they? What would they base it on? The US government’s nutrition pyramid? The Harvard pyramid? The Atkins diet? Weight Watchers? Oprah’s personal plan? Clearly the best avenue is for fast-food firms to provide choices and provide information so that customers can be informed, prudent, and as up-to-date as they would like.

In April 2003, The Wall Street Journal carried the following headline: “Wendy’s Sees Green in Salad Offering: More Sophistication, Ethnic Flavors Appeal to Women . . .” Salads had leapt to more than 10 percent of Wendy’s total sales, from 3 percent a year earlier. In October 2002, Bloomberg News announced that “Wendy’s 3rd Qtr Net Rises 16 percent as Salads Boost Sales.” The story explained how Wendy’s new “Garden Sensations” salad strategy was drawing customers from sit-down restaurants, while also posing new challenges to McDonald’s and Burger King, “as consumers seek healthier choices.” The story then described how Wendy’s “more healthful strategy spurred on rival Burger King [which] is trying to gain market share by introducing new items that compete directly with Wendy’s, including a baked potato and chili . . .” Is this a broken system that desperately cries for judicial action?
No, it is a super-competitive market where stores jockey for position, trying to please customers and their changing tastes for a more healthful lunch.

Faced with the conundrum of changing tastes and nutritional recommendations, Judge Sweet shrewdly took up the distinction between an inherently dangerous meal and a meal that may pose some legitimate risk, if only from over-consumption. The Restatement (Second) of Torts states that “[o]rdinary sugar is a deadly poison to some diabetics” and that “Good whiskey is not reasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous.”27 These risks are not good reasons to outlaw good sugar or good whiskey. Fried fish may be oily but that does not mean it is contaminated. Absent a truly compelling and sweeping health reason, we should not let lawsuits rob consumers of choices.

Judge Sweet recognized that the dangers of over-consumption of … high-in-fat foods, such as butter, are well-known. Thus any liability based on over-consumption is doomed if the consequences of such over-consumption are common knowledge. . . . Thus, in order to state a claim, the Complaint must allege either that the attributes of McDonald’s products are so extraordinarily unhealthy that they are outside the reasonable contemplation of the consuming public or that the products are so extraordinarily unhealthy as to be dangerous in their intended use. The Complaint—which merely alleges that the foods contain high levels of cholesterol, fat, salt and sugar, and that the foods are therefore unhealthy—fails to reach this bar.28

Judge Sweet also found, as I did in my survey, that McDonald’s willingly provides information on the nutritional content of its products.

What would the plaintiffs’ counsel want McDonald’s to do—other than pay out settlement sums? Should Judge Sweet have stopped McDonald’s from flipping burgers? What about diners at the 21 Club? Should they too be protected, or are the fast-food lawsuits a patronizing tool to protect the poor and the allegedly poorly educated from their own mouths? If the fear is over-consumption, should McDonald’s discriminate against plump people? Should a cheeseburger require a doctor’s prescription? Should fast food firms be required to punch holes in a meal ticket and refuse to serve those who have already filled their card? Surely some intermeddlers could devise a national BMI card, certified by a government nutritionist who determines how many fat grams Burger King may sell to you. Of course, that number would have to be revised with each new issue of the Journal of the American Medical Association and after every meeting of the American Society for Clinical Nutrition.

CONCLUSION

The Food and Drug Administration, with its battalion of researchers, aided by thousands of university and private-sector scientists throughout the world, are constantly exploring, testing, and digging for scientific insight. A class action lawsuit would not be digging for scientific inferences. Instead, plaintiffs’ lawyers would be digging into the pockets of franchise owners, employees, and shareholders in order to pull out gold. Moreover, the threat of such lawsuits can do no good to the employees, shareholders, or customers of fast-food firms. When tort lawyers strut in front of cameras waiving weighty complaints that are flimsy in facts, the media quickly follow the story.

Nearly every major publication in the country carried stories about the McDonald’s obesity suit. If “McLawsuits” spread, we will see at least one, if not all, of the following three results:

1. Lower wages for fast-food employees;
2. Lower stock prices for shareholders; and/or
3. Higher prices for consumers.

Fast-food restaurants hire and train hundreds of thousands of workers; attract investments from millions of middle-class citizens; and quench the hunger and thirst of millions of satisfied patrons.

This study finds that fast-food restaurants are not a chief culprit in the fattening of America. But let us be frank here. Depending on what you pile on it, a fast-food burger may not enhance your health and it may even hinder your ability to run a marathon—but it is very easy to find out how fatty that burger is. You do not need a tort lawyer by your side to pry open a brochure or to check the thousands of Web sites that will provide nutrition data. Lawsuits against fast-food firms fail to recognize the fact that people choose what and how they want to eat. While it is unlikely that nutritionists will soon announce that super-sized double-cheeseburgers will make you thin, society should not allow the latest fads or the most lucrative lawsuits to govern what we eat for lunch.

REFERENCES

5. For the purposes of discussion, fast food is used in its common usage, and according to the Bureau of the Census description is an establishment.
engaged in selling limited lines of refreshments and prepared food. Included in this group are establishments which prepare items such as chicken and hamburgers for consumption either on or near the premises or for “take-home” consumption. Such establishments do not have waiter/waitress service where the patron’s order is taken while the patron is seated at a table, booth, or counter.

US Census Bureau, Retail Trade: Definitions of Industries (5812).


9. Even though the BMI was not widely used until the 1990s, it is possible to construct historical BMIs based on known heights and weights. See Dora Costa and Richard Steckel, “Long Term Trends in Health, Welfare, and Economic Growth in the United States,” in Floud and Steckel (eds), Health and Welfare During Industrialization (Chicago: University of Chicago Press, 1997). These numbers are not definitive for each individual because a very muscular person, for example, may have a high BMI simply because muscle weighs more than fat. For example, Arnold Schwarzenegger and Sylvester Stallone might technically be obese if one looked only at their BMI ratings.

10. David M. Cutler and Edward L. Glaeser, “Why Have Americans Become More Obese?” NBER Monograph, January 2003, table 1. This paper presents an intriguing hypothesis—that technology has created obesity by making ready-to-eat foods more available.

11. Ibid, table 4, which is derived from the USDA’s “Continuing Survey of Food Intakes By Individuals.”

12. Ibid.


19. Pelman, n. 15.


THE FACTS ABOUT OVERWEIGHT AND OBESITY

• 61 percent of adults in the United States were overweight or obese (BMI > 25) in 1999.
• 13 percent of children age 6 to 11 and 14 percent of adolescents age 12 to 19 were overweight in 1999. This prevalence has nearly tripled for adolescents in the past 2 decades.
• The increases in overweight and obesity cut across all ages, racial and ethnic groups, and both genders.
• 300,000 deaths each year in the United States are associated with obesity.
• Overweight and obesity are associated with heart disease, certain types of cancer, type 2 diabetes, stroke, arthritis, breathing problems, and psychological disorders, such as depression.
• The economic cost of obesity in the United States was about $117 billion in 2000.

HEALTH DISPARITIES

Based on national survey data collected between 1988 and 1994:

• The prevalence of overweight and obesity increases until about age 60, after which it begins to decline.
• In women, overweight and obesity are higher among members of racial and ethnic minority populations than in non-Hispanic white women.
• In men, Mexican Americans have a higher prevalence of overweight and obesity than non-Hispanic whites or non-Hispanic blacks. The prevalence of overweight and obesity in non-Hispanic white men is greater than in non-Hispanic black men.
• 69 percent of non-Hispanic black women are overweight or obese compared to 58 percent of non-Hispanic black men.
• 62 percent of non-Hispanic white men are overweight or obese compared to 47 percent of non-Hispanic white women. However, when looking at obesity alone (BMI > 30), slightly more non-Hispanic white women are obese compared to non-Hispanic white men (23 percent; 21 percent).
• For all racial and ethnic groups combined, women of lower socioeconomic status (income < 130 percent of poverty threshold) are approximately 50 percent more likely to be obese than those of higher socioeconomic status.
• Mexican-American boys tend to have a higher prevalence of overweight than non-Hispanic black or non-Hispanic white boys.
• Non-Hispanic black girls tend to have a higher prevalence of overweight than Mexican American or non-Hispanic white girls.
• Non-Hispanic white adolescents from lower income families experience a greater prevalence of overweight than those from higher income families.

CAUSES OF OVERWEIGHT AND OBESITY

• Overweight and obesity result from an imbalance involving excessive calorie consumption and/or inadequate physical activity.
• For each individual, body weight is the result of a combination of genetic, metabolic, behavioral, environmental, cultural, and socioeconomic influences.
• Behavioral and environmental factors are large contributors to overweight and obesity and provide the greatest opportunity for actions and interventions designed for prevention and treatment.

PHYSICAL ACTIVITY AND INACTIVITY

• It is recommended that Americans accumulate at least 30 minutes (adults) or 60 minutes (children) of moderate physical activity most days of the week. More may be needed to prevent weight gain, to lose weight, or to maintain weight loss.
• Fewer than one third of adults engage in the recommended amounts of physical activity.
• Many people live sedentary lives; in fact, 40 percent of adults in the United States do not participate in any leisure time physical activity.
• 43 percent of adolescents watch more than 2 hours of television each day.
• Physical activity is important in preventing and treating overweight and obesity and is extremely helpful in maintaining weight loss, especially when combined with healthy eating.

Source: US Surgeon General