Why We Can’t Outlaw Obesity*

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Through both litigation and legislation, the law reflects and seeks to address society’s concerns. It has been clear for some time that obesity presents public health concerns as great as those resulting from tobacco use. Lawmakers naturally seek to cure society’s ills through legislation, but a significant time lag usually exists between the time a problem is identified and effective action is taken. The lawmaking process requires either consensus or effective lobbying, so the law is in effect reactionary. Often the problem is already solved before legislators act.1 Although the courts are also a mechanism for change, the time frame is even longer given the slow pace of litigation.

The parallels between the risks posed by obesity and tobacco are profound, although there are differences. Both pose significant public health risks. However, food is not addictive2, and although a smoker can and should cease all tobacco use, an eater cannot refrain from all food. Second-hand smoke was once considered merely a nuisance but is now recognized as a significant health risk.3 Unlike smoking, obesity rarely affects the health of bystanders.4 However, a morbidly obese person in an adjoining airline seat may cause some discomfort to his seatmates, and may even pose a safety risk if immediate evacuation of the aircraft is required. Airlines are sometimes demanding that obese passengers purchase two seats,5 and the obese passengers are arguing that the airlines are illegally discriminating against them.6 Both obesity and tobacco use may increase an individual’s healthcare costs, a clear concern for health insurance companies and employers. Both obesity and tobacco addiction are increasingly considered to be “medical” problems, where they were once considered lifestyle choices, and physicians are now expected to help patients suffering from either condition.7 Unfortunately, medical science has failed to find a “magic bullet” that is highly effective for either condition.

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1 For example, as legislators are considering proposals to restrict or ban trans fats, Kentucky Fried Chicken responded to public pressure and voluntarily switched to a cooking oil with no trans fats in all its U.S. restaurants. See Andrew Martin, The Colonel Is Phasing Out Trans Fat From the Menu, N.Y. TIMES, Oct. 30, 2006, at C3.


4 Obesity may adversely affect the health of a woman’s fetus.


How have legislators responded to the threat of obesity? At the federal level, lax regulation of “nutritional supplements” has resulted in billions of dollars wasted on clearly ineffective treatments. This not only allows obese patients to be victimized financially, but they may also forego more effective approaches to treatment.

Plaintiff’s lawyers have filed or threatened lawsuits against fast food companies. In 2005, McDonald's paid $8.5 million to settle a lawsuit resulting from McDonald's failure to honor a promise to quickly reduce trans fats in its cooking oils and failing to inform consumers of the delay. Beginning January 1, 2006, the Food and Drug Administration (FDA) requires food manufacturers to list trans fats (in addition to saturated fat and dietary cholesterol) on the “nutrition facts” food label required on many products. The suit McDonald’s settled was a deceptive trade practices case, not the typical “your food made me fat” lawsuit. McDonalds has been successful in defending suits alleging obesity resulted from eating their food, but legislators in several states have already passed laws limiting such suits. Note the parallels between tobacco and obesity, i.e., the suits filed against tobacco companies and federal warning label requirements for cigarettes.

Another legislative approach targets childhood obesity by regulating the foods and beverages that schools may serve. For example, Texas limits the quantity and frequency of fried foods allowed to be served in school lunch programs, restricts portion sizes for some foods, and reduces availability of sugar-laden sodas. Perhaps to limit or preempt further legislative action, industry groups have moved to voluntarily limit access to sodas in schools, particularly elementary schools. One tactic in the war against smoking was to ban smoking on public school campuses—even by teachers or parents. However, our views on food are more complex and more conflicted. At the same time that Texas school districts were seeking to comply with strict federal and state nutritional guidelines in their school lunch programs, some parents were irritated that school districts did not allow them to bring cakes or candy to school for their children’s birthday celebrations. Texas lawmakers responded with legislation that at best sends a mixed message. They passed legislation requiring school health classes to emphasize the importance of proper nutrition and exercise and require daily physical activity in schools. However, the law

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also contained a “cupcake amendment” providing that parents and grandparents can bring any food product to school for a student’s birthday celebration.\textsuperscript{16}

The law has long been recognized as a powerful tool in public health, beginning with early judicial support for mandatory vaccination. However, there may be limits on how effectively we can “outlaw” obesity. It the future, the law will likely emphasize greater disclosure of nutritional information by restaurants, but it seems unthinkable that legislators would mandate serving sizes in restaurants, even though public health advocates strongly condemn portion creep or “super sizing” everything from sodas to French fries. There is little political will to rein in “nutritional supplement” purveyors. Unlike tobacco, where governments filed the most successful legal actions against the industry, lawmakers seem more likely to protect the fast food industry from lawsuits than to file suit against them. Although law can act as a change agent, a number of factors indicate that law is unlikely to be an effective tool in fighting obesity. Our conflicted views on food and nutrition, notions of “personal responsibility” and general distrust for public health law combine to make legal efforts to combat obesity less successful.

Healthcare professionals may enjoy more success in dealing with obesity. Most patients still trust their physicians and value their advice. With the “medicalization” of obesity, physicians may be more likely to intervene before patients become morbidly obese. Physicians and other health care providers may be able to explain the health consequences of obesity in ways that patients not only understand but act on. Physicians may be able convince patients that simple approaches such as caloric reduction combined with an increase in physical activity will yield better results than the latest “diet pill” promoted by an infomercial. The war on obesity may be better fought by physicians than lawyers.

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\textsuperscript{16} \textit{Id.}