10-1-2004

Broken Scales: Obesity and Justice in America

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BROKEN SCALES: OBESITY AND JUSTICE IN AMERICA

Adam Benforado, * Jon Hanson, ** & David Yosifon ***

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We are grateful to Chloe Cockburn, Tracy Conn, Sam Halabi, Aaron Houck, Natasha Kim, Mariko Miki, Thomas Tso, Russell Valdez, and Andrew Woods, for excellent research assistance, and to Carol Igoe for outstanding secretarial assistance. For financial support, we owe thanks to the Harvard Law School Summer Research Fund. We also want to thank Ben Falit, Katherine Pratt, and the participants at the Northeastern University Public Health Institute's First Annual Conference on Legal Responses to the Obesity Crisis, June 22–23, 2003. All remaining errors are the sole responsibility of McDonald's. Finally, we want to express our gratitude and love to Kelly Hogan; Jay, Elizabeth, and Nate Benforado; Kathleen, Emily, Erin, and Ian Hanson; and Paula Noyes.
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BROKEN SCALES: OBESITY AND JUSTICE IN AMERICA

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.

—Todd Buchholz

I am testifying . . . because I am concerned about the direction in which today's obesity discourse is headed. We cannot continue to blame any one industry or any one restaurant for the nation's obesity epidemic. Instead . . . the first step is to put the responsibility back into the hands of individuals.

—Dr. Gerard J. Musante

INTRODUCTION

America is fat. For some, the evidence is readily apparent: a cavernous dent in the once-sturdy couch, the belt which grows like kudzu, the cruel reminders in the eyes of strangers. For others, though, the obesity epidemic is something troubling but external, alien even, like the neighbors two streets over who leave old car parts in their yard—best kept away from, or at the very least, complained about in the safety of similarly tasteful friends; a sign of personal collapse and failure best glowered over as a Washington Post editorial or chuckled at as a New Yorker cartoon. When in our Sunday morning ritual of Chi Tea, nectarine, and newspaper, we discover that 64.5% of Americans are overweight, perhaps we read it as we read the line, “Body Piercings Linked to Infectious Liver Disease.” Not our problem. Not our America. Secure in our


3 Scientists categorize a person as "overweight" if they have a Body Mass Index ("BMI") greater than 25 kg/m², and as "obese" if they have a BMI greater than or equal to 30 kg/m². Recent data suggests that 30.5% of American adults are "obese" under this measure. Katherine M. Flegal et al., Prevalence and Trends in Obesity Among US Adults, 1999–2000, 288 JAMA 1723, 1723–27 (2002). Although increases occurred in both men and women and across age groups and racial/ethnic groups, certain populations currently harbor disproportionately high levels of overweight and obesity. For example, among black women who are over forty, more than 80% are overweight and more than 50% are obese. Id. at 1725–26.
coastal enclaves, we buy our Organo-Flakes at Whole Foods, melt away extra calories at evening Pilates sessions, and only step into a McDonald’s if to use the facilities on the long drive out to the summerhouse. It is with self-satisfied eyes we watch as the Surgeon General calls obesity a “catastrophe” and a more “pressing issue in health” than terrorism or weapons of mass destruction.4 Not us. You will not count us among the hundreds of thousands of Americans said to die this year from weight related conditions.5 You will not count us among the behemoths, whose every decision, from clothing style to diet, is so clearly mistaken. Pitiable, yes, but not forgivable. We all had the choices before us—be healthy or unhealthy, live in the moment or live long—and we chose wisely. Rejoice, fellow beanpoles, for we are safe. We are immune.

A. Hidden Costs

But then again, maybe we are not. Maybe, there are costs to us. Large costs. For many, looking in the mirror may not show them. Yet, slender and portly alike, we are all being weighed down by this epidemic. It turns out that while some of us squeezed in a jog around the lake between our 10:30 with marketing and our 12:20 with accounts, our local school was squeezing in a Coke machine between the lunch line and the cafeteria doors, and signing an exclusive deal with Burger King. In just the last thirty years, obesity in children has tripled, with over 15% of youngsters currently obese.6 Major

4 United States Surgeon General Richard H. Carmona, Prepared Remarks at Public Safety Wellness Week, Orlando, Florida (Jan. 22, 2003), at http://www.surgeongeneral.gov/news/speeches/publicsafe well.htm. Rather than focusing our energy on more nebulous future dangers to America, Carmona argues that we should confront “a threat that is very real, and already here: obesity. Obesity is an epidemic now, and it’s growing. If we don’t do anything about it, we will have a morbidly obese dysfunctional population that we cannot afford to care for.” Id. (emphasis in original).

5 Although the figure is controversial, some public health experts place the number at close to 400,000 deaths per year related to excessive weight. See Ali H. Mokdad et al., Actual Causes of Death in the United States, 2000, 291 JAMA 1238, 1242 (2004). And the trajectory of that death toll appears to be upward. Id. at 1240. Current estimates typically name tobacco as the largest killer, accounting for 435,000 deaths in 2000 (18.1% of the total), and poor diet and physical inactivity as a close second (16.6% of the total). Id. at 1239. This is a dramatic increase from 1990 when tobacco accounted for 400,000 deaths (19%) and poor diet and physical inactivity accounted for 300,000 deaths (14%). Id. at 1240. Moreover, obesity is not just killing people; it is killing them sooner. See id. at 1241-42. See generally Kevin R. Fontaine et al., Years of Life Lost Due to Obesity, 289 JAMA 187 (2003) (providing evidence that being overweight lessens life expectancy); Anna Peeters et al., Obesity in Adulthood and Its Consequences for Life Expectancy: A Life-Table Analysis, 138 ANN. INTERNAL MED. 24 (2003) (same).

6 For consistency, we use the term “obese” here to correspond to a BMI for age at the 95th percentile or higher. The Centers for Disease Control and Prevention (“CDC”) avoids the term “obesity” and refers to such children as “overweight.” See Cynthia L. Ogden et al., Prevalence and Trends in Overweight Among US Children and Adolescents, 1999–2000, 288 JAMA 1728, 1729 (2002). Those at or above the 85th percentile but less than the 95th percentile of BMI for age are defined as “at risk for overweight.” Id. In the early 1970s
health problems—including cardiovascular, endocrine, pulmonary, hepatic, renal, neurological, and psychosocial conditions—once rare among the young, are showing up in increasing numbers and, unlike with cigarettes, ceasing the activity may not reverse the damage—a disease like type 2 diabetes can be with a person for the balance of their abbreviated life. While we synergize our staffs and aerobicize our thighs, our children eat. And eat. And eat.

We might take comfort in the fact that not everything is getting bigger, if it were not our pocketbooks taking the hit. Burgeoning health problems in a large sector of the population mean increased health care and insurance costs borne by the public as a whole. A recent study funded by the U.S. Centers for (National Health and Nutrition Examination Survey ("NHANES") I: 1971–1974), 4.0% of children aged six to eleven were obese, and today (NHANES 1999–2000), 15.3% are. Similarly, in the late 1970s (NHANES II: 1976–1980), 5.0% of adolescents aged twelve to nineteen were obese, and today, 15.5% are. Id. at 1731. Today, approximately 30.3% of children aged six to eleven and approximately 30.4% of adolescents aged twelve to nineteen are overweight (BMI for age at the 85th percentile of higher). American Obesity Association, AOA Fact Sheets: Obesity in Youth, at http://www.obesity.org/subs/fastfacts/obesity_youth.shtml (last updated Oct. 13, 2004); see also Richard P. Troiano & Katherine M. Flegal, Overweight Children and Adolescents: Description, Epidemiology, and Demographics, 101 PEDIATRICS 497, 499–501 (1998) (tracking longitudinal trends in overweight children and adolescents among various demographic groups).

7 See Richard J. Deckelbaum & Christine L. Williams, Childhood Obesity: The Health Issue, 9 OBESITY RES. 239S, 340S–41S (2001) (maintaining that approximately twenty-two million children under five years of age are currently overweight in the world). Given the increase in obesity among young people, the American Academy of Pediatrics is now suggesting that doctors screen children as young as three for high blood pressure. Eric Nagourney, Confronting Hypertension Early, N.Y. TIMES, Aug. 3, 2004, at F6. The dangers of failing to deal with weight problems in the first years of a child’s life are evident; dietary patterns established during childhood tend to continue into adulthood and affect later health. Steven H. Kelder et al., Longitudinal Tracking of Adolescent Smoking, Physical Activity, and Food Choice Behaviors, 84 AM. J. PUB. HEALTH 1121, 1123–25 (1994); see also Richard S. Strauss, Childhood Obesity, 49 PEDIATRIC CLINICS N. AM. 175, 184–86 (2002) (pointing out the immediate and long-term consequences of obesity).

Type 2 diabetes mellitus has become a serious global threat and is a major cause of kidney and heart disease, blindness, and death. See Paul Zimmet et al., Global and Societal Implications of the Diabetes Epidemic, 414 NATURE 782, 782–84 (2001). By 2025, the number of people in the world with diabetes is expected to increase to 300 million. Hilary King et al., Global Burden of Diabetes, 1995–2025, 21 DIABETES CARE 1414, 1416 (1998). If one gains eleven to eighteen pounds, the risk of developing type 2 diabetes doubles, and gaining forty-four pounds means that one is four times as likely to develop the disease. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 2001 at 8 (2001), available at http://www.surgeongeneral.gov/topics/obesity/calltoaction/CalltoAction.pdf.

Even if an obese child is lucky enough to escape obesity-related physical health problems during youth, psychological problems are still likely. See Michael I. Goran & Eric T. Poehlman, The Role of Physical Activity in the Development of Childhood Obesity, in EXERCISE & DISEASE 1, 2 (Ronald R. Watson & Marianne Eisinger eds., 1992) (noting that obese children are at increased risk for psychosocial medical conditions). These psychosocial problems may, in turn, lead to still other health risks. As John Langone points out, “Ridiculed by their peers for their body size and plagued by low self-esteem, [overweight young people] may be more vulnerable to the lure of cigarettes and alcohol than their ‘normal’ classmates and friends.” John Langone, The Riddle of Obesity, N.Y. TIMES, May 11, 2004, at F8.
Disease Control and Prevention estimated the direct annual medical costs of overweight and obesity at almost $93 billion (9.1% of total national medical costs), with about half of that being paid for by the government through Medicaid and Medicare. Private first-party health insurance similarly spreads the costs of care from those who are overweight to those who are not. But medical expenditures are only part of the larger drain on the American economy. Our collective weight problem also means lost capacity for companies, since physical ailments, like hypertension, coronary heart disease, and osteoarthritis, result in more sick time and decreased productivity. In
addition, certain jobs requiring dexterity, physical agility, and general fitness become much harder to do when you are carrying around an extra fifty or hundred pounds.\textsuperscript{11} And on top of it all, the cruel stereotyping of, and prejudice against, the obese is rampant—a great cost to our conception of the United States as a land of fairness and respect. In short, the Supersizing of America hurts us all.

\textit{B. Getting Behind Causation}

Facing up to the fact that obesity in America is \textit{our} problem, whether we are six-pack crunchers or six-pack guzzlers, gets us only so far. The issues of causation remain. Only recently have scientists begun to sort through the genetic, behavioral, and environmental factors that have a direct impact on body weight. Although the evidence remains hotly contested, especially by fast food companies facing potential tort liability, the emerging consensus among public health experts is that obesity is largely a product of a “toxic environment.”\textsuperscript{12} As our diet has been taken over by high-calorie, low-nutrition foods and mega servings, we have also become increasingly sedentary with greater reliance on the car, less time for exercise, and more of our day in front of televisions and computers. At the same time, the important work of documenting the environmental roots of obesity, and the broader debate over its significance, seems to miss something central about why we are fat and why it is so appealing and so commonsensical to blame the “lard asses” for their condition.

This Article is not so much about the scales we use to measure weight, but the scales we use to infer causation and assign responsibility—including the scales of justice. Ultimately, the problem we face is not obesity itself. Obesity aid workers in losing weight. See Eve Tahmicioglu, \textit{Paths to Better Health (On the Boss's Nickel)}, \textit{N.Y. TIMES}, May 23, 2004, at C7. Xerox, for example, offers its employees classes on how to cook healthy food at home and big discounts on their health insurance if they agree to take a health assessment survey. \textit{Id.}

\textsuperscript{11} The Attorney General has suggested the great cost of obesity in light of the threat of terrorism: “Of course, being overweight or obese directly impacts job performance when you're in a public safety position. Remember: when you are called upon will you be ready to back up your partner or save a citizen?” Carmona, \textit{supra} note 4. In the same speech he pointed to National Fire Protection Association data that shows that “heart attacks caused by overexertion or stress caused 40 percent of all firefighter deaths in 2001 . . . [and continue to be] the number 1 cause of line of duty deaths.” \textit{Id.}

is only a symptom of the problem. When scientists and public health experts point to various environmental agents—whether larger portion sizes, corn subsidies, video games, or urban sprawl—they, too, overlook the deeper source of our troubles. Our real problem is that we have an extremely difficult time seeing and understanding the role of unseen features in our environment and within us and too readily attribute responsibility and causation to the more obvious "personal choices" of the obese.  

If we are calibrating our prescription devices based on incorrect measurements, we have little hope of solving the obesity epidemic. As individuals, we will fail to alter the behaviors that make us fat.  

By putting our energy and money into the wrong diets and lifestyle changes, we will neglect what the environment does to accentuate our errors in measurement and miss how our environment is itself the product of manipulation. State and national policies will similarly fail to eliminate our collective spare tire because they, too, will be aimed disproportionately at the individual. When our policy prescriptions founder, we will, as we have done in the past, blame the implementers of the prescriptions or the subjects of the policies themselves, never considering that we have misdiagnosed the disease. This same basic dynamic contaminates not only our efforts to deal with national girth, but also virtually all issues in which we seek to alter behavior or assign causation, responsibility, or blame. Yet, with Dr. Phil's promise of *The Ultimate Weight Solution* topping the New York Times Best Sellers' List, and with that

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13 In a previous article, two of us referred to this phenomenon generally as the problem of "dispositionism." See Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 149–77 (2003) [hereinafter Hanson & Yosifon, *The Situation*]. In Part I, infra, we describe this fundamental aspect of human thinking about human behavior in some detail.

14 This Article is also intended to alter our conceptions of what it means to be fat. Although, throughout much of what follows, we implicitly accept the conventional presumption that obesity is itself the problem that needs fixing, we believe that view harmfully oversimplifies the matter. To be sure, obesity is a public health problem that often harms the health and lives of those who suffer directly and indirectly from it. But that is not always the case. There are extremely healthy individuals who qualify as "overweight" or "obese" just as there are very unhealthy individuals who are "thin" or "underweight." Moreover, much of the suffering that does occur from obesity is connected to larger, situational forces that have little to do with the obesity itself. Ours is an extremely "lookist" society, and, as we explore below, there are institutions, groups, and individuals with a stake in promoting "lookism." They do so in part by promoting or accepting a dispositionist view of a person's appearance. The freedom with which explicit stereotyping and prejudice are displayed in this culture is evidence of that dispositionism and is certainly part of the problem this Article hopes to underscore and, perhaps, help ameliorate. In short, we are interested in providing a situationist account of obesity, not simply to reduce its incidence, but also to reduce its stigmatizing effect.
“solution” opening with the phrase “You have a decision to make,” obesity may present the most pertinent avenue to investigate our broken scales.

Before we can progress in the war against flab, we will have to dig deeper to try to understand what makes us cringe when we hear about a four-hundred-pound man suing McDonald’s. Another frame is needed. Instead of distilling our collective corpulence down to “a decision,” we need to examine why we so often attribute behavior to personal choice. Instead of looking at how we eat, we need to look at how we think.

I. THE LESSONS OF SOCIAL SCIENCE

A. A Shocking Discovery

1. The Man with the Gun

Imagine that you are rushing along an urban sidewalk, late for a meeting, when a man comes up to you, sticks a gun in your side, and snaps: “Into that building!” You obey and find yourself led to a small room, wherein the gunman explains that he will shoot you unless you flip a switch (labeled “DANGER! XXX–450 volts”) attached by wires to an electric chair device in which a middle-aged gentleman is strapped. According to your captor, the man in the chair is a “stoolie” who needs to be given a “taste of the pain he gave us—a jolt to refresh his memory and make him squeal a little.”


16 This Part summarizes, and this entire Article is a specific application of, other work recently out, forthcoming, or in progress. See, e.g., Adam Benforado & Jon Hanson, The Costs of Dispositionism: The Premature Demise of Situationist Law and Economics, 64 MD. L. REV. (forthcoming Spring 2005) [hereinafter Benforado & Hanson, The Costs]; Ronald Chen & Jon Hanson, Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory, 77 S. CAL. L. REV. 1103 (2004) [hereinafter Chen & Hanson, Categorically Biased]; Ronald Chen & Jon Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103 MICH. L. REV. 1 (2004) [hereinafter Chen & Hanson, The Illusion of Law]; Hanson & Yosifon, The Situation, supra note 13; Jon Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 GEO. L.J. (forthcoming Fall 2004) [hereinafter Hanson & Yosifon, The Situational Character]; Adam Benforado & Jon Hanson, Naive Cynicism: Some Mechanisms of Dispositionism and other Persistent Attributional Errors (in progress) (unpublished manuscript, on file with authors) [hereinafter Benforado & Hanson, Naive Cynicism]; Ronald Chen & Jon Hanson, Theorizing Illusion: The Laws Behind Our Laws (in progress) (unpublished manuscript, on file with authors) [hereinafter Chen & Hanson, Theorizing Illusion].

17 This section borrows from and summarizes a more thorough presentation in Hanson & Yosifon, The Situation, supra note 13, at 150–54. We even encourage readers who are familiar with that piece to read this section, in order to prime the mind for the arguments that follow.
Meanwhile, the “stoolie” is squirming, sweating, and imploring you not to flip the lever. He seems almost as scared as you are, and is saying something about heart trouble and pleading to be released. Ignoring his pleas, the gunman puts the gun to your head and says, “You have no other choice. You must go on.”

We suspect that many of you would probably give in to the gunman’s gruff command, as would we. The situational pressure is simply too great to withstand. The power of the gun is unmistakable. The “choice” to enter the building and the “choice” to administer the shock are hardly choices at all. Even those of you who believe that, faced with the dire situation, you would spare the other victim would probably sympathize with, and hold relatively blameless, anyone who did flip the switch.

2. The University Experiment

Now, suppose you are casually walking across your favorite university campus, enjoying the last sips of your Chi Tea, when you are approached by a lab-coated graduate student who is recruiting participants for an ongoing psychological experiment testing learning techniques. Since you are in no rush, you agree to take part and are handed over to a professor who explains that he will read a list of pairs of associated words to another volunteer, the “learner,” after which he will read one of each of the pairs as a prompt for the “learner” to supply the correct associated word. If the “learner” fails to provide the correct word, you, the “teacher,” are to flip a switch that will shock the “learner,” who has been strapped into a chair in the adjacent room. With each incorrect answer, the strength of the shock will increase by 15 volts. The experiment begins, and after only a few questions, the subject gets an association wrong. Do you flip the switch?

Suppose you do. But now the answers continue to come, and many of them are wrong. With each mistake you increase the voltage, and you begin to hear the “learner” moaning in pain and then demanding to be released. At 300 volts the person is kicking the wall and screaming in agony. After 330 volts, there is silence in the “learner’s” room. The professor continues to ask questions and announces that silence will be interpreted as a wrong answer, bringing another shock. You look at the control panel and see that the next level reads “DANGER: SEVERE SHOCK—450 volts.” You hesitate, and the professor demands, “You have no other choice, you must go on.”

Do you carry out that final directive? Would others in your place?
If you are like most people, you have answered with a very certain "No!" to these questions—only a depraved individual would do otherwise.

3. Stanley Milgram's Findings

The second scenario was the basis of a series of actual experiments conducted at Yale University beginning in 1963 by Stanley Milgram, a pioneer in the field of social psychology. The only difference was that the "learner," unbeknownst to the "teacher," was not actually shocked by the flipped switches. College students asked to evaluate this experiment beforehand estimated that, on average, most people would reach only 135 volts before refusing to go on, and that only 1 in 100 would continue all the way to the end of the scale—450 volts. Professional psychiatrists surveyed about the same proposal predicted that only 1 in 1000—"the sadists"—would go all the way. 18

We humans do not understand ourselves well.

Out of the first forty "teacher" subjects Milgram tested, twenty-five of them—63% 19—went all the way to 450 volts. 20 Countless replications and variations of the original experiment only reinforced the disturbing findings. As he would later summarize, with astounding "regularity good people...[m]en who [were] in everyday life responsible and decent were seduced by the trappings of authority, by the control of their perceptions, and by the uncritical acceptance of the experimenter’s definition of the situation, into performing harsh acts." 21 Situation, like an invisible hand, moved people. Indeed, by further manipulating the situation, Milgram found he could increase or decrease conformity on the part of "teacher" subjects. For example, when it was not the teacher himself administering the shock but rather a peer at the teacher’s instruction, more than 90% of subjects administered the maximum shock. 22 When it was an ordinary person, rather than a scientist, demanding that the shocking continue, almost nobody went to 450 volts. 23 The 63%
compliance that was observed repeatedly at Yale shrunk to a still sizeable 48% when the study was moved off campus and appeared to be run by "Research Associates of Bridgeport."\textsuperscript{24}

4. Forgetting Milgram

Although Milgram's experiments are standard fare in undergraduate Psych 101 classes—for most people who are not social psychologists—the experiments seem to represent an exceptional and temporary phenomenon—an historical oddity to be stored in the back of the head between Hooke's Law and the Battle of the Bulge, but not something with implications for our modern workaday lives. White coats, it stands to reason, were much more influential back in the 1960s. But since then we have become a more sophisticated, informed, even cynical, population. We have lived through everything from Watergate to Monicagate. These days we do not blindly defer to authority.\textsuperscript{25}

The notion of the "maturing of America" may have a comforting ring to it, but it is, unfortunately, far from the truth. The phenomenon that Milgram identified influences virtually every social judgment we make. The vast discrepancy between ex ante predictions about the likely behavior of subjects in these experiments and their actual behavior reveals a central lesson of social psychology: We tend to underestimate the influence of the situation on behavior and overestimate the influence of personal dispositions and choice. That tendency is so central that social psychologists commonly refer to it as the \textit{fundamental attribution error}.\textsuperscript{26} As Milgram's experiments help demonstrate, unobserved (though observable) situation can be as potent as observed situation—indeed, as powerful as a loaded gun—yet, when it is unobserved situation that moves us, we tend to experience it as dispositional choice.

While the rest of us—policymakers, scholars, voters, and consumers—have been ignoring Milgram and his findings, social psychologists have for the past half-century been studying the extent of our \textit{dispositionism}—the tendency to exaggerate the role of disposition, personality, or choice and to underestimate the role of situation, environment, and context in accounting for

\textsuperscript{24} \textit{Id} at 71–72.
\textsuperscript{25} Milgram's studies on obedience were in part motivated by a desire to understand the atrocities committed by so many seemingly ordinary citizens during the Holocaust, and it seems likely that the public today views them in a similar light—an aberration that pertains only to the past. \textit{Milgram, supra} note 18, at 1–12.
\textsuperscript{26} See Hanson & Yosifon, \textit{The Situation}, \textit{supra} note 13, at 136 (describing the "fundamental attribution error"); \textit{id}. at 136 n.20 (collecting citations from social psychological literature regarding it).
human behavior. Social psychologists have found that the tendency to see the
actors and miss the stage is, like many other interpretive biases, partially the
result of our limited cognitive capacity and the mind’s propensity to conserve
its own scarce resources. It is easy to see a person’s role in bringing about a
particular event, but it takes a good deal of thought to understand how
background factors, social context, and situational pressures may have wielded
influence, so we tend to focus, often misleadingly, on individual action. In
addition to cognitive miserliness, social psychologists have also discovered
that we human beings share a number of persistent motives that operate in
unseen ways to amplify our tendency to dispositionalize. We tend to hold
beliefs and reach conclusions that we desire, and we vastly under-appreciate
that tendency, particularly with respect to motivated reasoning about ourselves,
our identity groups, and the systems of which we are a part.

B. Human Motivations

1. Self-Affirming Motive

An extensive social-psychological literature has made clear that as
individuals, we want to see ourselves in self-affirming ways. We want to
believe that we are smart, reasoning actors who exercise control over our lives
and destinies. We want to believe that we are the preference-driven choosers
that we imagine ourselves to be. Thus, we tend to presume that our actions

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27 See id. at 174–76 (summarizing some of the reasons that social psychologists have provided to explain
the fundamental attribution error).
28 SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 67–86 (1991) (summarizing the
“fundamental attribution error”).
(“[M]otivation may affect reasoning through reliance on a biased set of cognitive processes—that is, strategies
for accessing, constructing, and evaluating beliefs . . . . [M]otivation can be construed as affecting the process
of reasoning: forming impressions, determining one’s beliefs and attitudes, evaluating evidence, and making
decisions.”).
30 This section only briefly summarizes a more complete argument made elsewhere that choice, as
understood or defined in most policy analysis, is in many ways an illusion. Social psychologists studying the
fundamental attribution error have demonstrated the role of exterior situational forces on people’s behavior,
while social cognition theorists have demonstrated the role of interior situational forces (that is, influences
within us about which we are not conscious) on our “choices.” Both types of evidence indicate that the widely
held faith that human behavior reflects choices driven by stable, conscious preferences is misplaced. See
Hanson & Yosifon, The Situational Character, supra note 16, passim.
31 See Hanson & Chen, Categorically Biased, supra note 16, at 1182–1211 (discussing the role of
motivation on the activation and application of schemas); Hanson & Yosifon, The Situational Character, supra
note 16, at Part III.C.2 (reviewing key studies and summarizing evidence on the role of motivation); see also
ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 220–23 (1999) (providing useful summary of
motivation and “hot cognitions”).
reflect our own choices, and that our actions and choices correspond to our own stable inner dispositions. Indeed, in part to maintain that impression, people often react very negatively to any person, group, institution, or rule that would seem to reduce their control or perceived freedom. To maintain a conception of ourselves as well intentioned, in control, and good, we often engage in fairly dramatic cognitive adjustments to keep our individual preferences, attitudes, and tastes aligned with our actual behavior. In other words, because our behavior is very often not a reflection of individual disposition, but rather the situational influences to which we are subject, we cannot simply conform our behavior to our perceived inner dispositional preferences—to maintain our self-affirming views of ourselves, we must often conform our attitudes to our behaviors, rather than the other way around.

A frequently cited study helps illustrate this finding. In the experiment, subjects were made to perform a simple and boring task—moving pegs on a board. After marching the pegs around for a while, all subjects were asked to inform other potential volunteers that the peg study was quite interesting and fun. One group of subjects was paid $1 to do this; another group was paid $20 (a considerable sum in 1959, the year of the experiment). After the subjects gave the favorable opinion to potential volunteers, they were then asked about their true feelings regarding the task.

Surprisingly, those who were paid $1 reported finding the experiment to be far more interesting than did those who were paid $20. Intuitively, we would expect that the more a subject was paid, the more likely she would be to change her beliefs, but this ignores the motivational significance of self-justification. Subjects who were paid $20 to promote the study were provided a financial justification that could easily reconcile the dissonance between their words and their actual beliefs about the study. Subjects receiving just $1, however, faced a more acute dissonance that threatened their motivation to see themselves as coherent, positive individuals making good choices. Given the small payment that they received for endorsing the study, some other method of reconciliation was needed, and a subconscious alteration of beliefs and attitudes provided the necessary consonance. To bring their feelings about the experiment into line with their actions, subjects changed their attitudes. This

32 For a summary of the theory explaining that tendency, reactance theory, see SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 93, 96, 115-16 (1981).
basic finding has been replicated in hundreds of experiments. While most of us seek to avoid deceit, and will refrain from lying without good reason, an extremely common way to elude contradiction is not to alter our attitudes, but our beliefs.

In nonexperimental settings this kind of induced compliance—and induced belief formation—can be far more serious and exploitive than in the benign setting of a social psychologist’s lab. The key lesson, for our purposes, is that to maintain an affirming self-image as a person who acts according to existing preferences, an individual will make sense of her situationally induced behavior by attributing it to disposition. Hence, while we like to believe that we do as we please, it is often the case that we are simply pleased with what we do.

This desire to see ourselves in a positive light is an important motive behind what Lee Ross and his co-authors have dubbed “naïve realism”—the name given to “three related convictions about the relation between [one’s] subjective experience and the nature of the phenomena that give rise to that subjective experience.” First, we naïvely believe that we see the world as it really is through objective, unfiltered lenses. That self-perception is another manifestation of our motive to self-affirm. Second, we assume that anyone else who is similarly neutral and intelligent will see the world as we do—that is, accurately. The experience of being confronted with views that conflict with our own, therefore, creates a kind of dissonance, which leads to the third tenet of naïve realism: We relieve such dissonance by attributing the viewpoint gap to a lack of objectivity on the part of the person or entity whose views do not square with our own. Since we see things as they truly are, something


35 Lee Ross & Andrew Ward, Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding, in Values and Knowledge 103, 110 (Edward S. Reed et al. eds., 1996); see also Emily Pronin et al., Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others, 111 Psychol. Rev. 781, 781–88 (2004) (examining asymmetries between individuals’ perceptions of themselves and others in the context of naïve realism). For a more precise summary of naïve realism, see Benforado & Hanson, Naïve Cynicism, supra note 16.

36 The tendency to see bias there, but not here, may also be attributable to the privileged access that we each have to our own thoughts and private actions. See Emily Pronin et al., You Don’t Know Me, But I Know You: The Illusion of Asymmetric Insight, 81 J. Personality & Soc. Psychol. 639, 639–40 (2001). Indeed, some experiments have shown that people will rank themselves “as guilty as, if not guiltier than” others “with respect to a number of negative traits such as competitiveness or frequent inspection of one’s appearance by looking in the mirror.” Id. at 652.
must be distorting the perceptions of those who see things otherwise, and we commonly assume that the source of that bias is a dispositional one—be it laziness, corruption, or lack of intelligence. Even if we, in some sense, perceive that we may be subject to biases, we tend to believe that our biases are themselves the means to truth. Our particular background was the path to authentic insight, while others fell upon the road to distortion. And so it is that we are quick to see ideological bias, gullibility, or vanity on the part of foes, friends, and family members who do not share our worldview.37

That asymmetry of attributions is what leads virtually all of us to believe that we are, ourselves, immune to the manipulative influences of marketing and advertising even as we acknowledge that advertising does work and that many people are easily manipulated.38 This is the source of the power of our biases: We don’t believe that we are subject to them (allowing us to trust our own clear vision) and we are extremely quick to see them in others (allowing us to distrust others’ obscured vision). So, naive realism helpfully reduces the dissonance that we might otherwise feel and protects our existing perceptions, including our positive self-image. Unfortunately, it also is precisely what renders us biased and vulnerable to manipulation—the very qualities that we like to believe we do not have.

It bears noting that a particularly effective means of counteracting dissonance is to attribute other people’s "distorted" vision to their self-interest, often a financial interest.39 Experiments directly testing this phenomenon have shown that even people whose attitudes toward a social policy are out of sync with their own self-interest will assume that the attitudes of others will correspond to self-interest.40

38 See JEAN KILBOURNE, CAN'T BUY MY LOVE: HOW ADVERTISING CHANGES THE WAY WE THINK AND FEEL 27 (1999) (noting that we are all influenced by advertising, although almost everyone holds the misguided belief that advertising does not affect them); Pronin et al., supra note 37, at 369.
40 See Heath, supra note 39, at 56 (subjects based job satisfaction decisions on intrinsic values such as skill building or doing something worthwhile over extrinsic factors including job security and benefits, but
In sum, we see bias there, but not here—and in either case, we see dispositional behavior. We strut out into the world confident in the acuity of our vision, rarely stopping to question the synapses' ability to deliver unfiltered "reality." It is truly a blind faith.

2. **Group-Affirming Motive**

The motive to see ourselves in a positive light, individually, shapes the opinions we have about the groups with which we do or do not identify. Humans tend to divide the world into categories of "us" and "them," and then proceed on the simple assumption that those in the in-group are, generally speaking, dispositionally superior and more deserving than those in the out-group. Social psychology is overflowing with examples of how "us" categories are seen as far more appealing than "them" categories.

In a classic set of experiments beginning in the 1950s, Muzafer Sherif investigated some of the ways in which group schemas are created and some of the ways they influence behavior. Sherif and his collaborators ran a summer camp in which boys were arbitrarily assigned to one of two groups—the Rattlers and the Eagles. Throughout the summer, the boys were subtly asked to rank friendships and make other sociometric designations about each other.

In the first part of the experiment, the two groups were kept separate but were not pitted against each other in any kind of competition. During this stage, the subjects demonstrated mild in-group favoritism but little animosity towards the other group. In the second stage of the experiment, the boys were made to compete against each other for various prizes. At this stage, the subjects developed extreme in-group solidarity and out-group animosity. Significantly, rather than seeing the other group as an artificially created

predicting incorrectly that their peers would be motivated by extrinsic factors); Miller & Ratner, *The Power*, *supra* note 39, at 29–30 (subjects demonstrated higher volunteerism when reward included payment to charity than when reward included payment to the volunteer, but predicted that their peers would choose the latter option).

41 ROSS & NISBET, *supra* note 34, at 40.
45 ROGER BROWN, *SOCIAL PSYCHOLOGY* 611 (2d ed. 1986).
47 *Id.* at 96–115.
adversary—one dictated by the directors of the camp—the boys’ animosity toward their competitors took markedly dispositional tones. They explained their dislike for the other group with reference to individual traits—among other complaints, it seemed all too clear that the opposite bunkhouse was filled with “sneaky, smart-aleck stinkers.” With situational pressures giving rise to dispositional attributions, appeals to dispositional change fell on deaf ears. A call for “brotherly love, forgiveness of enemies, and cooperation” at Sunday religious services did nothing to overcome the divisive dynamics at work in the camp: Within minutes of leaving the chapel, the boys were busy thinking up new ways to defeat and torment the hated outsiders. Moreover, simply removing the competitive elements and allowing the groups to commingle during meals and activities was similarly ineffective in reducing out-group animosity, as subsequent food fights demonstrated.

It was only when the situation significantly changed that the boys were able to overcome the dispositional attributions. In a “sneaky, smart-aleck” third phase of the experiment, Sherif began to introduce challenges in which the boys had important shared interests in cooperating together. During one such controlled situation, a bus transporting the two groups to dinner “broke down,” forcing the hungry campers to work as a team. With a rope that had been used earlier in the tug-of-war competition, the two groups worked to jointly push and pull the bus to restart it. Operating under such cooperative—“common enemy”—conditions over time, the campers changed their group-based views of one another, and inter-group friendships emerged. Again in this third stage of the study, the boys’ now positive assessments of each other took dispositional terms—when asked how they had now become friends with those whom they had so recently considered “stinkers,” the boys attributed the development to dispositional changes in the character or attitudes of their erstwhile enemies.

As Sherif’s experiments demonstrated, just assigning individuals to a group leads to an array of associated motivations. Not only do grouped individuals see in-group members as more attractive, kinder, and more worthy of reward

48 BROWN, supra note 45, at 613.
49 ROSS & NISBETT, supra note 34, at 39-40.
50 Id. at 158.
51 Id. at 170-71.
52 ROSS & NISBETT, supra note 34, at 39.
53 Since the 1960s, much has been learned to confirm and expand Sherif’s findings about the operation of group motives and dynamics. For reviews of the more recent work, see BROWN, supra note 45, at 543–51; FISKE & TAYLOR, supra note 28, at 133–34.
than out-group members, but they also see them as less responsible for negative outcomes.\textsuperscript{54} Dispositionist explanations are thus triggered by good behavior for in-groups and bad behavior for out-groups,\textsuperscript{55} mirroring the self-serving attribution seen in the individual.\textsuperscript{56} And just as naïve realism mediates the conflicting viewpoints of individuals, it does the same for groups.\textsuperscript{57} Every reliance on this cursory us-them cognitive structure operates to excuse us from the burden of exploring the much more complex situational influences behind our own group's successes and the other group's failures. From this dispositionist vantage point, what is generally ought to be—which leads to the third general motive.

3. System-Affirming Motive

Our motives sweep beyond self- and group-affirmation. Social scientists have further found that we humans are motivated, again in powerful and unseen ways, to believe that the social systems in which we live are good and just. Melvin Lerner, a pioneer in this area of social psychology, summarized this propensity in his classic work, \textit{The Belief in a Just World: A Fundamental Illusion}: “We do not believe that things just happen in our world; there is a pattern to events which conveys not only a sense of orderliness or predictability, but also the compelling experience of appropriateness expressed in the typically implicit judgment, ‘Yes, that is the way it should be.’\textsuperscript{58} And, yes, “people generally get what they deserve”\textsuperscript{59}—an assumption that seems particularly relevant to legal theoretic inquiry and the topic at hand.

A number of studies demonstrate the scope and potentially pernicious effect of this basic human motivation. Building on Milgram's famous design, in one classic experiment demonstrating the “just world” hypothesis, female subjects were shown a video of a Milgram-like experiment in which a female

\textsuperscript{54} Fiske & Taylor, supra note 28, at 134.
\textsuperscript{56} See supra text accompanying notes 36–40.
\textsuperscript{57} See Emily Pronin et al., \textit{Understanding Misunderstanding: Social Psychological Perspectives}, in \textit{HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT} 636, 656 (Thomas Gilovich et al. eds., 2002) (“People perceive their group’s knowledge of other groups to be more accurate and complete than other groups’ knowledge of their group.”), \textit{id.} at 659 (summarizing evidence).
\textsuperscript{58} Melvin J. Lerner, \textit{The Belief in a Just World: A Fundamental Delusion}, at vii (1980).
subject was shocked for giving wrong answers in a learning experiment.60 A first group of subjects watching the video was told that if they so desired, they could reassign the woman to a new study in which she would earn money rewards for correct answers, instead of receiving electric shocks for wrong ones. Most subjects in the group took advantage of this opportunity and reassigned the woman. A second group of subjects was given no such option and was made to understand that the shocking would continue.61

All of the subjects were then asked to evaluate the victim they had seen in the video. In a very revealing result, subjects who did not have the opportunity to reassign the woman to a less miserable fate tended to view the victim very negatively in comparison to those who were able to reassign her to a more just end. According to Lerner and Miller, our motive to see the world as just explains this surprising outcome: "[T]he sight of an innocent person suffering without the possibility of reward or compensation motivated people to devalue the attractiveness of the victim in order to bring about a more appropriate fit between her fate and her character."62 If we are unable to restore justice, we alter our perception that an injustice has in fact occurred. Again, external situation acts in unseen ways to cause us to change our dispositional attributions of others, in particular when people are suffering.

Consider another famous demonstration of the "just world" motive that illustrates how we maintain the perception that our systems and process are fair by dispositionalizing bad outcomes. In this 1973 experiment, subjects participated in a simulated jury exercise involving one of three rape scenarios.63 In the first scenario, the victim of the rape was "a virgin," in the second, the victim was "a married woman," and in the third, the woman was a "divorcee." In surveys conducted before the experiment, these three categories had been arrayed along a continuum of "respectability," with the virgin considered the most respectable and the divorcee the least respectable. The subjects in the simulated jury were asked to give their assessment of the culpability of the victim in the rape scenario they were given. Surprisingly,
subjects found the victim in the virgin scenario to be more responsible for the rape that occurred than they found the married victim to be, and both the virgin and the married woman were seen to be more culpable than the divorcee. The strange results demonstrate the power of the just world motivation:

[T]he knowledge that innocent, highly respectable females can be raped was particularly threatening to the subjects' belief that the world is just, and to avoid the threat posed by this type of admission, it was necessary to find fault with the actions of the victim. Thus, the subjects appear to have tried to convince themselves that the victim was really not innocent and that she must have contributed, at least in some small but significant way, to her fate.64

Acknowledging the power of the situation is dangerous to anyone hoping to maintain a view that the world is fair and that outcomes are just.65 And it is dispositionalizing that offers the safe path, confirming our hypothesis that the righteous win and the corrupted fail.

Although this motive would seem especially strong in observers, there is evidence that victims seem to get something from it as well.66 For example, when experimental subjects were assigned an unpleasant task (e.g., to eat a worm) and were forced to wait in this state of negative expectancy for a short time, approximately 80% of them chose the unpleasant task when given the opportunity to perform a neutral task instead. One possible explanation was that the subjects determined that they "deserved" their fate.67 The most "alarming" finding of the authors was that those who engaged in self‐derogation as a consequence of a negative expectation "chose" to follow through with the negative event when it was avoidable.68

Recent path-breaking work by John Jost and several collaborators has begun to shed more light on the power of the system-affirming motive.69 In a

64 Lerner & Miller, supra note 59, at 1035.
65 Other experiments involving people of high social status demonstrate a similar tendency to exaggerate the person's behavioral responsibility. Id. at 1041.
66 In addition to the studies that follow, see John Sabini, Social Psychology 337 (2d ed. 1995) (making the point that observers and potential victims tend to get something out of derogation).
67 In one study, researchers "found that young men, immediately after learning that the random draw of the Draft Lottery placed them in imminent jeopardy of being drafted, showed signs of lowering their own self-esteem. In other words, they seemed to devalue themselves as a function of their miserable but clearly arbitrary fate." Lerner, supra note 58, at 124.
69 See John T. Jost et al., Non-Conscious Forms of System Justification: Implicit and Behavioral Preferences for Higher Status Groups, 38 J. Experimental Soc. Psychol. 586 (2002); John T. Jost &
series of articles, Jost and his colleagues found that across individuals, and across social groups, there is a powerful motive to justify systems and rationalize the status quo. Individuals not only perceive the existing social fabric as equitable, they may go as far as to see it as "natural" or even "inevitable." What makes the recent work so important and surprising is that it strongly suggests that the system-affirming motive will often trump the self-affirming and group-affirming motives and that, as a consequence, disadvantaged groups will often be the most adamant defenders of the status quo.

Where does this tendency to maintain the perception of a just world come from? According to Melvin Lerner, such a belief enables the individual to confront his physical and social environment as though they were stable and orderly. Without such a belief it would be difficult for the individual to commit himself to the pursuit of long-range goals or even to the socially regulated behavior of day-to-day life.

Jost and his colleagues similarly suggest that the system-affirming motive serves a palliative function for individuals of both high and low socioeconomic status, soothing what would otherwise be irreconcilable tensions about one's social condition. Effectively, it reduces and prevents stress by allowing a person to feel as though the social environment is stable, predictable, and just. Although a disadvantaged person may suffer discomfort by assuming responsibility for a bad outcome, he may avoid the far more distressing


Jost & Hunyady, supra note 69, at 119.

Lerner & Miller, supra note 59, at 1030. But there is likely more underlying our tendency to derogate people or their behavior than simply our desire to minimize our own perceived vulnerability to injustice. Those tendencies result as well from our other self-affirming motives, including our desire to see ourselves and our groups as good and just. See supra text accompanying notes 31–57; see also, e.g., Keith E. Davis & Edward E. Jones, Changes in Interpersonal Perception as a Means of Reducing Cognitive Dissonance, 61 J. ABNORMAL & SOC. PSYCHOL. 402 (1960) (detailing an experiment examining the differences and changes in perception between groups given a choice in their participation versus groups assigned a specific task); David C. Glass, Changes in Liking as a Means of Reducing Cognitive Discrepancies Between Self-Esteem and Aggression, 32 J. PERSONALITY 531 (1964).

Jost & Hunyady, supra note 69, at 147.
realization that others with power and position are discriminating against him or profiting from his misfortune. It is apparently more comforting to believe that despite one’s low status, the overall social system is as it should be. Thus, poor people actually report “more positive emotion, less guilt, and greater satisfaction when they feel responsible for their situation than when they make external (system-blame) attributions for their poverty.” In terms of the earlier study, once we are stuck eating worms, it feels a lot better believing that it could be no other way, that our past choices and actions have led directly to a dinner of *Lumbricus terrestris*.

C. The Power of Framing

Inside all of us there are many subtle hands tying the blindfold of the fundamental attribution error, from our hardwiring that makes dispositions stand out and situation fade away, to our basic motives that lead us to see ourselves, our groups, and our systems in a positive light. Yet, concentrating solely on the interior mechanisms behind our tendency to see disposition and miss situation overlooks the important role of our environment in shaping the way we see the world. Recent cross-cultural studies have shown that although dispositionism is a baseline across cultures, its severity varies considerably. Long-term social and economic forces seem to have had an effect on shaping different cultural practices that resulted in different worldviews in the East and the West, and ultimately, different perceptions. Westerners are not only more susceptible to the fundamental attribution error than Easterners, they also tend to polarize their beliefs when confronted with contradiction, whereas Easterners tend to allow two conflicting propositions to coexist. Over thousands of years divergent environmental factors appear to have led to two different species of dispositionism. It turns out, however, that time has less to do with it than control.

The ways in which we construe our world and make attributions of causation, responsibility, and blame depend largely upon who presents the information, narratives, and images to us and how. Social psychology has

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75 *Id.*

76 *Id.* at 145.


78 See generally *id.*

79 *Id.* at 123–27, 120–28.

80 For a more complete summary of that research in the law review literature, see Hanson & Yosifon, *The Situation*, supra note 13, at 250–59.
uncovered a strong human “tendency to accept problem formulations as they are given . . . [to] remain, so to speak, mental prisoners of the frame provided to us by the experimentalist, or by the ‘expert,’ or by a certain situation.” As Nobel Laureate Daniel Kahneman and the late Amos Tversky documented, the significance of this “framing effect” “is both pervasive and robust . . . [and] as common among sophisticated respondents as among naïve ones.”

The incredible power of framing is evident in the studies we have already recounted. Think again about Milgram’s basic experiment. Subjects were told that they were needed for an experiment to test a hypothesis about how people learn—and they were asked as “teachers” to flip a switch each time a “learner” gave an incorrect answer while being monitored, prompted, and cajoled by a white-coated lab specialist. The study purportedly tested the influence of shocks on the “learner’s” memory and had nothing to do with the teacher. Somehow, though, it escaped the attention of virtually all the subjects that there was really no need for them. The lab-coated man could just as easily

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82 Daniel Kahneman & Amos Tversky, Choices, Values, and Frames, 39 AM. PSYCHOLOGIST 341, 343 (1984). As an example of the persistent and nondiscriminatory impact of framing effects, Kahneman and Tversky give the following example, taken from a study of medical decisions:

Respondents were given statistical information about the outcomes of two treatments of lung cancer. The same statistics were presented to some respondents in terms of mortality rates and to others in terms of survival rates. The respondents then indicated their preferred treatment. The information was presented as follows.

**Problem 1 (Survival frame)**
- Surgery: Of 100 people having surgery 90 live through the post-operative period, 68 are alive at the end of the first year and 34 are alive at the end of five years.
- Radiation Therapy: Of 100 people having radiation therapy all live through the treatment, 77 are alive at the end of one year and 22 are alive at the end of five years.

**Problem 1 (Mortality frame)**
- Surgery: Of 100 people having surgery 10 die during surgery or the post-operative period, 32 die by the end of the first year and 66 die by the end of five years.
- Radiation Therapy: Of 100 people having radiation therapy, none die during treatment, 23 die by the end of one year and 78 die by the end of five years.

The inconsequential difference in formulation produced a marked effect. The overall percentage of respondents who favored radiation therapy rose from 18% in the survival frame ($N = 247$) to 44% in the mortality frame ($N = 336$). The advantage of radiation therapy over surgery evidently looms larger when stated as a reduction of the risk of immediate death from 10% to 0% rather than as an increase from 90% to 100% in the rate of survival. The framing effect was not smaller for experienced physicians or for statistically sophisticated business students than for a group of clinic patients.

have flipped the switches himself and thereby tested the professed hypothesis. The “teacher” was, in other words, totally redundant and dispensable to the “experiment,” and yet the subjects mindlessly accepted the frame as it was presented to them—the “teacher” must shock the “student.”

Similarly, the fact that the “choice” to shock the learner was presented not in a single, 450-volt, “extreme danger” jolt, but in a long series of incrementally higher shocks that eventually led to the 450-volt option had a significant effect on subjects’ willingness to flip that switch. That such frames matter has been confirmed in more recent experiments testing the effect that new options have on people’s preferences for existing choices.83 In one experiment—yet another variation on Milgram’s model—student subjects were asked to train rats with electric shocks. In one trial, subjects could only select between “mild” and “slightly painful” shocks; in other trials, a third option was present, labeled either “moderately painful” or “extremely painful.”84 Subjects were told not to use the more extreme option and none did; thus, the researchers were able to observe whether an individual’s preference between A and B would change in the presence of an irrelevant alternative C. While the “slightly painful” option was selected only 24% of the time in the first trial, it was chosen 28% of the time when “moderately painful” was also present, and 39% of the time when “extremely painful” was present.85 In another experiment designed to test this phenomenon, subjects were offered a choice of either six dollars or an attractive Cross pen, and only 36% chose the pen. However, when subjects were offered a three-way choice between the cash, the Cross pen, and an inferior pen, 46% chose the Cross pen.86

Sherif, in his famous experiment, was able to create group identities for campers simply by designating one set of boys “The Rattlers” and another set “The Eagles.” More recent studies have confirmed that random group designations, even without any inter-group competition or other distinguishing features, can elicit in-group and out-groups sentiments. “In other words, even

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85 See id. at 400.

the most arbitrary and seemingly inconsequential group classifications [or frames] can provide a basis for discriminatory behavior.87

As research since then has helped to clarify, the frame is especially important because group designations are important.88 One study exploring the effects of socioeconomic and cultural frames suggests the particular relevance of this issue to social policy analysis. In the experiment, subjects viewed a videotape of a fourth-grade girl answering questions on standardized achievement test problems. The girl's actual performance on the test was left intentionally ambiguous in the video. One group of subjects then viewed an additional videotape depicting the girl in an urban, low-income setting, outside of the testing scenario, while another group of subjects watched a tape of the girl in a suburban, middle-class setting. A third group saw only the original videotape.

All subjects were then asked to give their assessment of the girl's academic aptitude, based on what they had seen. While those who only viewed the girl taking the test rated her ability as being about average for her grade in school, subjects who viewed the tape of the girl in the middle-class setting rated her abilities as being above average and subjects who viewed the child in the low socioeconomic setting rated her abilities below her grade level.89 When we are presented with an ambiguous set of actions, we often rely on the stereotypes about the actor triggered by the frame.90 Thus, situational frames "color our reality" allowing us to come to different dispositionist assessments when faced with a set of identical behaviors.91

87 Ross & Nisbett, supra note 34, at 40; see also Brown, supra note 45, at 543–51 (reviewing some of the studies). For an interesting recent study of how Jewish and Arab subjects reacted to the acts of Jewish and Arab groups, see Raanan Lipshitz et al., The One-Of-Us Effect in Decision Evaluation, 108 ACTA PSYCHOLOGICA 53 (2001).

88 For a summary of the research revealing the power of categories and group designations, see Hanson & Chen, Categorically Biased, supra note 16, passim.


90 Id. at 27–29. This finding has special relevance to the potentially important connections between gender, race, poverty, and obesity. We only touch on a few of these revealing relationships in this paper, but we believe the topic has much potential. Consider, for example, your reactions to seeing a skinny white man in a suit buying a hamburger at McDonald’s and an obese black woman in an old dress doing the same thing. How do you feel about their respective decisions? Is it a good decision because it saves time and money or a bad decision because it is unhealthy and suggests laziness? Why have they chosen to eat at McDonald’s? We suspect that the answers to these questions are likely to be strongly tied to cues in the frame that activate powerful unconscious stereotypes.

91 Kunda, supra note 31, at 19.
In the just world experiments, subjects attributed more or less responsibility to a rape victim depending upon whether she was presented as a virgin, a married woman, or a divorcee. And subjects who are members of low-status groups tended to see themselves in positive or negative terms depending on whether the experimenter framed questions with a system threat. Indeed, the subjects’ perception of a threat was created simply by the experimenter’s manufactured claims.

In short, all of the experiments reviewed above reveal our tendency to dispositionalize—to attribute behavior to an individual’s disposition—even as we are subject to unseen situational influences. How the information or situation we encounter is framed can influence virtually any construal that we make. And once we accept a particular frame, we will interpret any new evidence through that frame in a way that tends to confirm it, without any inkling of unseen influence.\textsuperscript{92} Frames or schemas thus help shape the answers to many important questions in our lives: What behavior is typical or exceptional? What behavior is appropriate or inappropriate? What conduct is attractive or unattractive? Why do people generally behave as they do? What behavior is dispositional and what is situational? Who is objective and who is biased? What constitutes an out-group or an in-group? Who belongs to which? What is the nature of the relationship between groups, competitive or cooperative? Is there an existing threat to the system? What claims constitute such a threat?

Basic human cognition and powerful framing effects lead us to dispositionalize the suffering that we encounter, and though there are limits to this tendency, the exceptions often prove the rule. To take an example of which we are all aware, virtually no Americans saw victims of the 9/11 terror attacks on the World Trade Center as having dispositionally chosen to suffer or as having “assumed the risk” of terrorism. No one, we hope, sees those victims as responsible for their tragic fates. And, yet, that case can be made. There was, after all, plenty of warning that the Twin Towers might be the focus of a terrorist attack, not simply because of their prominence in the New York cityscape and their importance as a symbol of capitalism and Westernization, but also because they had previously been successfully targeted. Moreover, nobody forced the workers at gunpoint to keep working at the World Trade Center; they made a choice to earn money by taking a job in a vulnerable edifice. Who knows? Perhaps an economist so inclined could

\textsuperscript{92} See Chen & Hanson, \textit{Categorically Biased}, supra note 16, at 1195–1211.
demonstrate that those workers were even paid a risk premium for working within such a target. In the end, however, this argument does not convince us, or worse, it stirs outrage at the suggestion, because we know that those victims were different—they were victims of the situation in the most obvious sense.

That is exactly our point. When we see situation, it is because it is easy to see it, we are motivated to see it, and the issue is framed in situational terms. When we watched in horror as planes flew into the towers, the situational forces leading to the victims' deaths were as obvious as they get—more horrifying than a gun to the head. It mattered, too, that the attackers were members of several out-groups as part of an Islamic terrorist network long dedicated to destroying "us." And with that, the victims were framed as part of our in-group. Just as the Eagles and Rattlers came together in the face of a common enemy, so did "Americans." The new frame amplified our tendency to dispositionalize our shared adversary and situationalize our fallen heroes. Thus, the bombers were immediately dispositionalized with labels such as "evil doers" and "cowards." Anyone who challenged the labels or offered up situational factors (poverty in the Middle East, unrelenting indoctrination, etc.) was treated with scorn. The mere suggestion that even some responsibility belonged to anyone other than Al Qaeda, or that American policy, in any way, might have contributed to a climate that promoted such horrors, was itself a threat to the legitimacy of the system—and was treated accordingly. 93 Those

93 Jeremy Glick's experience is typical. Glick, whose father was killed in the World Trade Center on September 11, appeared on the FOX News program The O'Reilly Factor to discuss his antwar position, and soon found himself cast as a traitor, a bad son, and a villain. The O'Reilly Factor (FOX News television broadcast, Feb. 4, 2003), reprinted in We Decide, You Shut Up, HARPER'S, May 2003, at 17–20. Earlier, Glick had signed an advertisement that suggested that there was more to the tragedy than the popular dispositionist account let on: "We too watched with shock the horrific events of September 11...we too mourned the thousands of innocent dead and shook our heads at the terrible scenes of carnage—even as we recalled similar scenes in Baghdad, Panama City, and, a generation ago, Vietnam." Id. at 17. The interview included the following exchange:

O'REILLY: ... I was surprised, and the reason I was surprised is that this ad equates the United States with the terrorists. And I was offended by that.

GLICK: I'm actually shocked that you're surprised. Our current president inherited a political legacy from his father that's responsible for training militarily, and economically, and situating geopolitically the parties involved in the murder of my father and countless thousands of others. So I don't see why it's surprising—

. . . .

O'REILLY: ...[W]hat upsets me is I don't think your father would be approving of this.

. . . .

GLICK: ...[S]ix months before the Soviet invasion in Afghanistan, starting in the Carter Administration and continuing and escalating while Bush's father was head of the CIA, we
who might threaten American interests or stir up anti-American sentiment were, particularly early on, dispositionalized as biased, freedom-hating, and evil. That the preceding argument is difficult for us to make and perhaps difficult for our readers to take may be evidence of the power of the system-affirming motive.

recruited a hundred thousand radical mujahedeen to combat a democratic government in Afghanistan, the Turaki government.

O'REILLY: I don't want to debate world politics with you.
GLICK: Well, why not? This is about world politics.
O'REILLY: Because number one, I don't really care what you think. . . . [Y]ou have a warped view of this world and a warped view of this country.
GLICK: Okay.
O'REILLY: Here's the record. You didn't support the action against Afghanistan to remove the Taliban. You were against it. Okay?
GLICK: Why would I want to brutalize and further punish the people in Afghanistan?
O'REILLY: Who killed your father?
GLICK: The people in Afghanistan—
O'REILLY: Who killed your father.
GLICK: —didn't kill my father.
O'REILLY: Sure they did. The Al Qaeda people were trained there.
GLICK: The Al Qaeda people? What about the Afghan people?
O'REILLY: See, I'm more angry about it than you are!
GLICK: So what about George Bush—
O'REILLY: What about George Bush? He had nothing to do with it.
GLICK: —Senior, as director of the CIA.
O'REILLY: He had nothing to do with it.
GLICK: So the people that trained a hundred thousand mujahedeen who were—
O'REILLY: Man, I hope your mom isn't watching this.

Id. at 18. O'Reilly eventually halted the interview and reportedly said to Glick, "Get out of my studio before I tear you to fucking pieces." Id. at 17.

For instance, Susan Sontag described the events in her infamous New Yorker piece as an attack not on "liberty" but on "the world's self-proclaimed superpower, undertaken as a consequence of specific American alliances and actions" and added that "whatever may be said of the perpetrators of Tuesday's slaughter, they were not cowards." Susan Sontag, Talk of the Town, NEW YORKER, Sept. 24, 2001, at 28, 32. As a result of these statements, naive realism kicked in with a vengeance among her journalistic cohorts. See generally Daniel Lazare, The New Yorker Goes to War: How a Nice Magazine Talked Itself into Backing Bush's Jihad, NATION, June 2, 2003, at 25. Charles Krauthammer called Sontag "morally obtuse," and Andrew Sullivan labeled her "deranged." Id. at 25. John Podhoretz claimed that she exemplified the "hate-America crowd," that out-group of Americans who are "dripping with contempt for the nation's politics, its leaders, its economic system and for their foolish fellow citizens." John Podhoretz, America-Haters Within, N.Y. POST, Sept. 19, 2001, at 37. Rod Dreher really drove home the point saying that he wanted "to walk barefoot on broken glass across the Brooklyn Bridge, up to that despicable woman's apartment, grab her by the neck, drag her down to ground zero and force her to say that to the firefighters." Lazare, supra, at 25.

If your instinct here is to shut the Journal in disgust, you can count yourself as normal. The evidence we point to is unfamiliar and frightening. It feels better to think that we are mostly in control of our environment and not the other way around. And yet, what is truly disturbing are the implications of our fundamental natures. Since all of our attributions and biases are subject to influence, we can be encouraged to see people as members of out-groups or encouraged to believe that there is a threat to the system, just as we can be encouraged to see disposition, when situation is at work. One need not be a rising corporate whiz kid to see in the seeds of the human psyche the potential for enormous power and success.

D. The Interior Situation of the Human Eating System

So far, we have reviewed some of the ways in which human thought processes and human behaviors are far more subject to situational influence and situational manipulation than most of us appreciate. While we may think of ourselves as highly dispositional actors, we are, in fact, situational characters. In offering a critical realist assessment of the obesity crisis, we must elaborate this perspective on human agency by considering the human relationship to food and our misconceptions about how and why we eat what we do.96

1. The Evolution of the Human Eating System

Eating food is, perhaps, our most basic act of consumption. While there is room for improvisation, and even a missed number here and there, ultimately, the show must go on. From cradle to grave it is eat or die. Unfortunately, from the beginning, food has been an elusive good for our species, sometimes appearing in copious amounts but, more often than not, hard to find, hard to catch, and hard to keep. In contemporary American society, most people have food more or less constantly available to them—or, as we will emphasize

96 Scholars in many different scientific disciplines have studied the human eating system. The analysis provided in this section is only a brief treatment of some of the insights that have emerged and our emphasis is on lessons that we think are particularly relevant to a legal-theoretic assessment of the obesity crisis. Nearly every scientist who writes about human eating cautions that much remains unknown about this central feature of our lives—a point that deserves particular attention in any discussion of the role of law in this predicament, given the powerful tendency in legal and social policy discourse to mistakenly assume that eating, like most other human behaviors, is easily understood and, thus, easily dealt with by law and policy. For an accessible overview of what is known about human eating, covering many of the issues discussed in this section and others that are not, see ALEXANDRA W. LOGUE, THE PSYCHOLOGY OF EATING AND DRINKING: AN INTRODUCTION passim (3d ed. 2004).
below, have food made more or less constantly available to them, not only during the course of their day, but also throughout the course of their lives.97 However, for most of human history (and in many societies around the world today) food scarcity has been a constant—and very often deadly—situational reality.98

Evolutionary biologists have argued that because of the recurring environmental pressure of food scarcity, humans developed eating systems oriented towards consuming as much food as possible whenever food was available, regardless of the body's present energy needs. This “over-consumption” made it possible for the body to store presently unneeded energy in the body, as fat, for future use when food was unavailable.99 Since food

97 See infra text accompanying notes 154–215 (reviewing efforts by the food industry to make food ubiquitously available to consumers everywhere and at all times).
99 Peters et al., supra note 98, at 70 (“[Human] biology developed to encourage adaptive behaviours, such that people ate when food was available and ‘rested’ when physical activity was not required.”); see also A.W. Logue, Evolutionary Theory and the Psychology of Eating, at http://darwin.baruch.cuny.edu/faculty/LogueA.html (Oct. 22, 1998) (“In an environment in which there is a limited or erratic food supply, it would be adaptive for animals to take in as much food as they can, whenever it is available. Then, if possible, these same animals should retain (as opposed to use) the calories thus consumed, as insurance against future periods of food scarcity.”). Professor Logue, a leading expert on the psychology of eating and hunger, argues that evolutionary theory should serve as a unifying explanatory framework for the many disparate and often unconnected fields of inquiry within psychology. She suggests that an evolutionary framework is especially important in understanding the psychology of eating:

[Concepts of evolution and natural selection seem particularly appropriate to the psychology of eating and drinking . . . (because) every animal, including every person, must eat and drink appropriately or it will die. This means that every animal that has some genetically influenced behavior or anatomical trait that enables it to eat and drink well will be more likely to survive and will have more offspring than will other members of the species.]

LOGUE, supra note 96, at 4. The evolutionary perspective can also help us to understand our maladaptation—or as we will argue, our vulnerability—in the contemporary situation in which food is ubiquitous. See David M. Buss, Evolutionary Psychology: A New Paradigm for Psychological Science, 6 PSYCHOL INQUIRY 1, 10 (1995) (asserting that a preference for fatty foods in the current environment of abundance has led to over-consumption, which can cause health and reproductive problems); Mark N. Cohen, The Significance of Long-Term Changes in Human Diet and Food Economy, in FOOD AND EVOLUTION: TOWARD A THEORY OF HUMAN FOOD HABITS 261, 261–83 (Marvin Harris & Eric B. Ross eds., 1987) (tracing historical human dietary and health changes).

Part of the reason Professor Logue urges her colleagues in psychology to embrace an evolutionary framework is that it has been taken up by many other scientific fields, and so following suit would allow psychology to contribute more completely to a comprehensive picture of human understanding. LOGUE, supra
availability tended to be, at best, cyclical, storing food in the body for use at a later time conferred a tremendous survival benefit.\footnote{100}

Beyond the year-to-year and season-to-season cyclical unavailability of food, evolutionary biologists have also emphasized the important part that famine and starvation have played in the evolution of the human eating system.\footnote{101} Throughout the course of history, human populations around the globe have been devastated time and again by extended periods of food deprivation.\footnote{102} And, as evolutionary biologists have shown, it was those who were unable to store up fat in the years preceding a famine who were least likely to survive the hard times.\footnote{103}

The reason is quite simple: Scientists estimate that, on average, a relatively lean person has enough energy available in fat reserves to sustain “basal energy requirements”—the energy needed to sustain life—for more than a month, average-sized individuals have enough energy stored within them to survive for more than two months, and obese individuals have enough energy stored in their fat reserves to sustain basal energy requirements “for more than a year.”\footnote{104} Famines and starvation have thus provided what Andrew Prentice describes as “genetic bottlenecks,” through which only the thriftiest genotypes

\footnote{See Prentice, supra note 98, at 15 ("[H]unger and famine have been an ever-present influence on genetic selection."). Also, an early and influential formulation of the evolutionary story put forth by Prentice was James V. Neel, Diabetes Mellitus: A “Thrifty” Genotype Rendered Detrimental by “Progress”, 14 AM. J. HUM. GENETICS 353 (1962).}

\footnote{Prentice, supra note 98, at 15–22 ("[H]istorical records reveal that famine has been with mankind throughout the world and from time immemorial.").}

\footnote{Id. at 13–15.}

\footnote{Pinel et al., supra note 98, at 1109–10 (emphasis added) (citing Paula J. Geiselman, Carbohydrates Do Not Always Produce Satiety: An Explanation of the Appetite- and Hunger-Stimulating Effects of Hexoses, 12 PROGRESS IN PSYCHOBIOLOGY & PHYSIOLOGICAL PSYCHOL. 1 (1987), and James A. Levine et al., Role of Nonexercise Activity Thermogenesis in Resistance to Fat Gain in Humans, 283 SCIENCE 212 (1999)).}
could pass. Natural selection, operating through cyclical food scarcity and periodic famine, has spared those humans driven to consume high-energy foods without reference to present needs (and those able to effectively store away the calories). It is the genes from these hearty individuals that we have inherited.

This eating system has served humanity ingeniously for millennia. However, to appreciate the present significance of this eating system, one must recognize that the genius has resided in our interior situation—that part of us which is largely hidden from our conscious awareness. Present over-consumption in anticipation of future scarcity has not been a “best practice” rooted in instrumental reasoning and consciously deployed as a clever self-preservation strategy. It runs much deeper, into our unseen selves. It drives us from within, in ways that we do not see or appreciate. And from within, even in our contemporary world where food is almost never scarce, it continues to drive us.

2. The Mechanics of Eating

Just as social psychologists have been able to bring some hidden features of our interior mental situation to light through experimental inquiry, biological scientists have also used experimentation to reveal some previously veiled secrets about what drives us to eat. While evolutionary theory demonstrates the broad contours of our eating system’s development, it does not explain how that eating system actually motivates individual humans to over-consume.

Scientists have long assumed that the experience of hunger plays a central part in the why and how of human eating. Humans eat when they feel hungry. For many years, and, not incidentally, before the evolutionary theory of the human eating system was developed, scientists believed that we experienced hunger when our bodies had an acute need for energy. Indeed, it was thought that the symptoms of hunger were caused by the body’s need for food, and that feelings of hunger subsided when such needs were satisfied. In the scientific literature, this was known as “set-point” theory: “[D]eclines in energy resources below their set points produce compensatory increases in hunger—and in eating, if food is available.” Thus, as so often happens, scientists’

105 Prentice, supra note 98, at 23.
106 See Logue, supra note 99 (“With regard to calorie consumption, humans are adapted to a different environment than the one in which we live. It is this mismatch that results in our behaving in seemingly unadaptive ways.”).
107 See Pinel et al., supra note 98, at 1105.
early and initial beliefs about hunger largely paralleled lay conceptions of the experience—it was intuitive that we would feel hungry when our body was in need of immediate sustenance, and that we would eat in order to satisfy that need. Hunger, it stood to reason, was a flashing "low fuel" light; ignore the sign and you would literally run out of gas.

However, as also so often happens, by subjecting their initial theories to experimental scrutiny, scientists have in the last thirty years repudiated “set-point” theory. Spurred to inquiry by a desire to understand anorexia nervosa on the one hand, and obesity on the other, scientists now realize that our intuitive conceptions and the “set-point” theory are, in important ways, wrong. In one basic but very influential study, Peter Rogers and John Blundell designed an experiment in which they first maintained a population of rats on a healthy diet, wherein their weights remained constant. The scientists then introduced large amounts of bread and chocolate into the rats’ diet, making high-energy food available to the rats in much greater quantities than had been available under the initial setting. Rogers and Blundell found that after this change to the food environment, the rats ate substantially more (their intake of calories increased by 84%), gained weight (their body weights increased by an average of 49%), and continued to eat, irrespective of their little bodies’ present or imminent need for food. Put differently, placed in a situation where bread and chocolate were in constant supply, the rats began to suffer an obesity crisis.

108 See infra text accompanying notes 122–29 (discussing a social psychological study finding that lay conceptions of the relationship between hunger and eating parallel the “set-point” theory); see also Pinel et al., supra note 98, at 1105 (“[S]et-point theory continues to dominate the thinking about hunger and eating of most laypersons, psychologists, and other health professionals.”).

109 See Pinel et al., supra note 98; see also George Collier, The Economics of Hunger, Thirst, Satiety, and Regulation, 575 ANNALS N.Y. ACAD. SCI. 136, 136 (1989) (noting that a long-time focus on feeding mechanisms has hampered the study of questions related to meal initiation and termination); Mark I. Friedman & Edward M. Stricker, The Physiological Psychology of Hunger: A Physiological Perspective, 83 PSYCHOL. REV. 409, 409 (1976) (proposing that the stimulus for hunger comes from information provided by the liver to the brain, thus challenging the traditional concept of a body weight set point); Peter J. Rogers & John E. Blundell, Investigation of Food Selection and Meal Parameters During the Development of Dietary Induced Obesity, 1 APPETITE 85, 85 (1980) (finding that variety and palatability affects feeding by rats); M. Russek, Current Status of the Hepatostatic Theory of Food Intake Control, 2 APPETITE 137, 141 (1981) (concluding that hepatic receptors are important in determining hunger and satiety).

110 Rogers & Blundell, supra note 109, at 85.

111 See id. Scientists have learned a great deal about human eating by studying rats. Alexandra W. Logue explains why:

[Rats are] without question . . . the favorite subject for experiments on the psychology of eating and drinking. There are many reasons for this. The rat’s diet is diverse and very similar to that of people, which accounts for its ability to flourish for so many centuries in close association
This experiment, though simple in design, did not produce an obvious result. Before Rogers and Blundell's study, and others studies like it, most scientists believed that many nonhuman animals, rats among them, had an instinctual drive toward proper nutrition. This theory of "nutritional intelligence" paralleled and supplemented the "set-point" theory of eating. The evidence for it seemed convincing: where animals were provided equal amounts of carbohydrates, proteins, and other foods, they usually ate from each food group in a healthy proportion.\(^\text{112}\) It was only after scientists thought to place lab animals in an experimental situation in which certain kinds of foods—like fats and sweets—were available in disproportion to other foods that they saw that what their subjects ate was not so much determined by internal discrimination as it was by situational manipulation.\(^\text{113}\) As one recent demonstration of this phenomenon concluded, "the rat eats simply because the food is there and not in response to nutritional needs."\(^\text{114}\) And, unfortunately, for all of us hoping to distance ourselves from our rodent cousins, the conventional wisdom among scientists is that the pattern of consumption is "generally accepted to be the case for humans" as well.\(^\text{115}\)

Studies such as those, involving both human and nonhuman subjects, have gone a long way toward falsifying the "set-point" explanation of hunger and eating. Eating is not driven by the body's need to maintain acute energy requirements at a homeostatic level. So what does drive it? In place of the now suspect "set-point" theory, the most prominent alternative explanation to emerge is the "positive incentive" theory.\(^\text{116}\) As we have seen, from an

with us. Rats, for example, absolutely love chocolate. In addition, except that they can't vomit, the individual and social behaviors that rats use in avoiding poisons and identifying beneficial ways are in many ways similar to those of people. Further, laboratory rats, bred for docility, are easy to handle. They're also relatively inexpensive to buy and maintain, and they reach sexual maturity only about 2 months after birth. Finally, the extensive amount of information that scientists have already collected concerning rats provides a rich framework into which to place the results of any new investigations.

LOGUE, supra note 96, at 9.


\(^\text{113}\) See, e.g., Tordoff, supra note 112 (summarizing the results of such a study, as well as providing an overview of scientific findings that debunked the once popular theory of "nutritional wisdom").

\(^\text{114}\) Id. at R1538.

\(^\text{115}\) Id.

\(^\text{116}\) See Pinel et al., supra note 98, at 1114 (describing "positive incentive theory"); see also Robert C. Bolles, *A Functionalistic Approach to Feeding*, in TASTE, EXPERIENCE, & FEEDING 3 (Elizabeth D. Capaldi &
evolutionary perspective, under situations of food scarcity the positive incentive is survival. But on the level of individual experience, scientists now posit that the driving force is the pleasurable feelings eating provides:

[P]eople are not driven to eat by declines of their energy resources below set points. Rather, people are drawn to eat by the anticipated pleasure of eating (i.e., by food’s positive-incentive value); under most natural conditions, people will consume highly palatable foods when such foods are available because they have evolved to find pleasure in this behavior.117

Obviously, eating provides much immediate positive incentive—food tastes good and often produces a satisfying feeling within us. At the very least, eating alleviates the discomfort of the experience of hunger itself, which is often incentive enough, even when the food is not particularly tasty. While the “positive incentive” theory does not explain everything about the human eating system, it certainly seems to better comport with the experimental evidence and evolutionary theory than does the idea that our eating is driven primarily by an experience of hunger that is itself caused by the body’s pressing need for food.

3. The Experience of Hunger and Misconceptions of Its Meaning

But what of the experience of hunger? Part of the reason that “set-point” theory enjoyed such substantial support was that people do subjectively experience potent feelings of hunger when they miss a meal, and blood sugar levels within the body are in fact lower when people report being hungry than they are when people are not hungry. Although this was seen as evidence that people experience hunger, and eat, when the body’s available energy falls below the set point, scientists now believe that a much more plausible explanation for the experience of hunger, and the concomitant drop in blood sugar, is that the body releases insulin into the bloodstream, lowering the amount of blood sugar and causing the experience of hunger in anticipation of an impending meal.118 The meal itself, scientists now emphasize, actually

117 Pinel et al., supra note 98, at 1109.
118 Id. at 1111; see also Stephen C. Woods, The Eating Paradox: How We Tolerate Food, 98 PSYCHOL. REV. 488 (1991) (suggesting that the human body has created defenses to minimize the impact of meals); Stephen C. Woods & Jan H. Strubbe, The Psychobiology of Meals, 1 PSYCHONOMIC BULL. & REV. 141 (1994).
“disrupts homeostasis, rather than reinstating it: Blood glucose level, body metabolic rate, and liver temperature all increase during a meal—sometimes to near pathological levels.”

The body lowers its blood sugar level in order to prepare itself for, and protect itself from, the ensuing influx of food. According to one set of scientists, “[T]hese anticipatory meal-compensatory changes, rather than energy deficits, are the basis of the powerful feelings of hunger that many people—including extremely obese people, who clearly have no overall energy deficit—experience when they miss a regularly scheduled meal.”

In fact, it is not just the anticipation of a regularly scheduled meal that cues the body’s hunger system. Recall that the basic evolutionary design of the eating system is to pursue and consume food when it is available. If this is true, then in the presence of food, the body should begin to anticipate the consumption of food and produce feelings of hunger. This is exactly what happens. The mere presence of food can initiate the body’s hunger system: “[e]ven if you haven’t yet touched the food, your pancreas may secrete insulin . . . . lower[ing] your blood sugar level, which makes you feel hungry.”

While scientists have abandoned the “set point” theory of hunger and eating, most people’s conception of the relationship between hunger, eating, and the body’s need for food continues to be formed—and misled—by their intuitions on the subject. That our lay attitudes about eating stubbornly reflect the scientifically discredited “set-point” notion of eating has been demonstrated in at least one social psychological study. In 1998, Sunaina Assanand, John Pinel, and Darrin Lehman performed a study in which they surveyed a group of 206 University of British Columbia students regarding their beliefs about eating. Subjects were presented with ten questions, all of them variations on the basic inquiry: “To what degree do you believe that the hunger you normally experience before eating a meal is a feeling generated by your body’s need for energy at that time?” Subjects were asked to provide a response of between 1 and 5—with 1 being “not at all,” 2 being “to a small

(concluding that premeal bodily changes in animals, rather than depletion of energy, enable consumption of a large, predictable meal).

119 Pinel et al., supra note 98, at 1111.
120 Id.
121 LOGUE, supra note 96, at 15.
122 Sunaina Assanand et al., Personal Theories of Hunger and Eating, 28 J. APPLIED SOC. PSYCHOL. 998 (1998). Assanand, Pinel, and Lehman describe their research as the first systematic study of lay and professional beliefs about hunger and eating. Id. at 1009.
123 Id. at 1015 (emphasis in original).
degree,” 3 being “to a moderate degree,” 4 being “to a large degree,” and 5 being “completely.”\textsuperscript{124} Some questions asked about the subject’s beliefs concerning eating snacks (as opposed to meals), while others focused on the subject’s conception of what happens to the body’s energy needs when one ceases eating or snacking.\textsuperscript{125} Assanand, Pinel, and Lehman compiled all of the respondents’ answers to the surveys and found a mean response score of 3.52—“indicating that most respondents held set-point beliefs.”\textsuperscript{126} In fact, these researchers found that none of the respondents had composite set-point scores below 2.00, and more than 25% had scores between 4.0 and 5.0.\textsuperscript{127} In a second study, the researchers uncovered similarly strong “set-point” attitudes among a group of subjects comprised of health practitioners, including nutritionists, nurses, doctors, and students in these fields.\textsuperscript{128} As Assanand, Pinel, and Lehman concluded, “The findings of the present studies . . . suggest that misconceptions about hunger and eating that may have adverse implications for health are common among both laypersons and health professionals.”\textsuperscript{129}

Our tendency to cling to the mistaken notion that our hunger is a rational response to running low on nutrients is, in part, explained by what George Loewenstein calls “cold-to-hot empathy gap.”\textsuperscript{130} As Loewenstein shows, “when in a ‘cold’ state people often have difficulty imagining what they might do if they were in a ‘hot’ state—for example, angry, hungry, in pain, or sexually excited.”\textsuperscript{131} In the “hot” states, the visceral factors tend to “crowd out” virtually all goals other than that of mitigating the visceral factor. People behave in the “hot” states in ways that they would prefer not to in the “cold” states, and because of the “empathy gap” between the two states, there is little that they can do to avoid the problem. People similarly are unable to

\textsuperscript{124} Id. (emphasis in original).
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 1005.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 1007–09.
\textsuperscript{129} Id. at 1011.
\textsuperscript{130} See George Loewenstein, 
*Emotions in Economic Theory and Economic Behavior*, 90 AM. ECON. REV. 426, 428 (2000); George Loewenstein et al., 
*The Effect of Sexual Arousal on Expectations of Sexual Forcefulness*, 34 J. RES. CRIME & DELINO. 443, 445 (1997); George Loewenstein & David Schkade, 
*Wouldn’t It Be Nice? Predicting Future Feelings*, in 
*WELL-BEING: THE FOUNDATIONS OF HEDONISTIC PSYCHOLOGY* 85, 98 (Daniel Kahneman et al. eds., 1999); Leaf Van Boven & George Loewenstein, 
\textsuperscript{131} Loewenstein & Schkade, supra note 130, at 98.
empathize with others in “hot” states or understand why they themselves behaved as they did in a previous “hot” state.  

At some level most of us probably do acknowledge that a lot of our eating is driven by the pleasure of it. But this belief seems to coexist with a very strong intuition that our desire to eat is the experience of the body needing food. It is this delusion, coupled with the hedonic qualities of consumption itself, which drives us to eat more than our bodies require for their immediate energy needs. Though we live in a “positive incentive” world, through much of human history there has been a selective advantage to maintaining a “set-point” view of eating.

4. Making Specific Food Choices

The previous sections focused on our genetic predisposition to over-consume in certain environments, and we offered some evidence of how such a proclivity would be evolutionarily adaptive given food scarcity for most of human history. By concentrating on the need to meet energy requirements, however, we failed to mention a number of other powerful selective pressures. It is these pressures that help explain how, after experiencing generalized hunger, we make particular food choices.

Discovering a successful diet in an uncertain environment is about managing risks. As we have suggested, one of those risks is that there will be no food tomorrow, but there are other important considerations, such as whether this particular item of food will make me sick and whether it will provide me with more or less energy and nutrients than another item of food. To deal with these concerns, humans have developed, over thousands of years, a number of complex interior mechanisms to promote healthy consumption. In a recent article, Trenton Smith focused on three factors as having a large effect on our food choices: culture as information, chemical signals, and post-ingestion consequences. While these elements are not exhaustive of the sources we use to make eating decisions, considering each of them may be useful in painting a more complete picture of our interior situation.

With respect to the first factor, given the high costs associated with trying new foods, humans look to others for signals about the content of food. The importance of imitation in eating has been illustrated by many experiments

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132 Id.
with animals. For instance, mother cats that typically will not eat bananas can be encouraged to do so through electrical stimulation of the hypothalamus. After seeing their mothers eat bananas, kittens will also eat bananas, even though they have not been stimulated electrically. Moreover, the imitative effect in food consumption appears not to be confined to infants—older fowl can be induced to peck at visually distinctive food dishes after seeing members of their own species do so on a video screen. Humans are equally suggestible—children aged one to four are considerably more likely to eat a new food if an adult eats it in their presence than if the adult simply offers the food. While the behavior of peers appear to have an important effect on individuals’ food choices, family members seem to have the most impact, which may have a good deal to do with the extent of interactions. Thus, social influences on eating—whether they are conscious or subconscious—appear to be important.

A second important constraint on our food choices relates to chemical signals in the things we eat. Humans have a genetic predisposition for sweet and salty flavors. One- to three-day old infants have been shown to prefer

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135 *Id.* at 71. Moreover, “the behavior of eating unusual food, once acquired under the influence of the mother, was retained after weaning, in the absence of the mother.” *Id.* The importance of learning about food from parents appears to be widespread in the animal kingdom. In a similar experiment, wild rat pups were seen to be “influenced in their selection of a site for first ingestion of food by the feeding behavior of the adults of their colony.” Bennett G. Galef, Jr. & Mertice M. Clark, *Parent-Offspring Interactions Determine Time and Place of First Ingestion of Solid Food by Wild Rat Pups*, 25 Psychonomic Sci. 15, 16 (1971) (“[R]at pups in the present experiment do not actually follow an adult to food, but rather approach a feeding adult and begin to eat at the location.”).
136 See Laurel M. McQuoid & Bennett G. Galef, Jr., *Social Stimuli Influencing Feeding Behaviour of Burmese Fowl: A Video Analysis*, 46 Animal Behav. 13, 13–22 (1993). As McQuoid and Galef explain, “[b]oth auditory and visual stimuli associated with feeding fowl played a role in producing these socially enhanced feeding preferences.” *Id.* at 13.
138 See Leann L. Birch, *Effects of Peer Models' Food Choices and Eating Behaviors on Preschoolers' Food Preferences*, 51 Child Dev. 489, 492–96 (1980) (documenting that preschoolers preferences and choices in respect to food are strongly influenced by those of peers).
139 See Gerda I.J. Feunekes et al., *Food Choice and Fat Intake of Adolescents and Adults: Associations of Intakes Within Social Networks*, 27 Preventive Med. 645, 652–53 (1998) (“Food habits appear to be more associated within the nuclear family than between friends. This agrees with the finding that most meals and snacks are eaten together with members of the nuclear family.”).
140 See Leann L. Birch, *Development of Food Preferences*, 19 Ann. Rev. Nutrition 41, 41–58 (1999). We also tend to reject sour and bitter tastes. *Id.* at 46–47.
sweet fluids to nonsweet ones when both are made available. Moreover, the conventional understanding that salt is a learned taste has been revised in light of many studies suggesting that humans are born with a salt preference. The reasons for these proclivities are clear. Evolutionary biologists have demonstrated that humans evolved to pursue and "over-consume" foods with high sugar contents when they were available, even in the face of other consumption options, because such foods most readily translate into storable energy—what we know as fat—in the body. Similarly, although salt is rare in most environments, it is vital to many basic functions in the body.

A third factor relates to how postingestion feelings associated with various foods largely affect our decision to eat them. Recent studies suggest that positive postingestive consequences of certain foods—aside from their initial sweet or salty taste—may increase consumption. As Deborah Kern and her colleagues have shown, "young children can learn to prefer flavors paired with the postingestive consequences of energy from dietary fat." In addition, a number of important studies have suggested that sugar may actually have powerful addictive qualities. Further, humans will often develop aversions

141 See J.A. Desor et al., Taste in Acceptance of Sugars by Human Infants, 84 J. COMP. & PHYSIOLOGICAL PSYCHOL. 496, 497 (1973).
143 See supra note 98, at 1109.
145 Id. at 75.
146 In rats, ceasing the intake of sugar has been shown to result in behavioral, somatic, and neural evidence of withdrawal consistent with drugs of abuse. See Carlo Colantuoni et al., Evidence that Intermittent, Excessive Sugar Intake Causes Endogenous Opioid Dependence, 10 OBESITY RES. 478, 483–86 (2002). As Carlo Colantuoni and coauthors explain, this evidence suggests that the central nervous system can be altered and that the "dependence on endogenous opioids can develop during the ingestion of very palatable food on some eating schedules." Id. at 486. Moreover, they suggest that the "rat model seems to apply to some aspects of human eating disorders." Id. When given a diet consisting of intermittent access to sugar and chow, rats engaged in excessive intake with bingeing in the first hour of daily access. See Carlo Colantuoni et al., Excessive Sugar Intake Alters Binding to Dopamine and mu-Opioid Receptors in the Brain, 12 NEUROREPORT 3549, 3549–52 (2001).

As other experiments demonstrate, sugar and amphetamine appear to "be working via the same neural systems." Nicole M. Avena & Bartley G. Hoebel, A Diet Promoting Sugar Dependency Causes Behavioral Cross-Sensitization to a Low Dose of Amphetamine, 122 NEUROSCIENCE 17, 18 (2003) [hereinafter Avena & Hoebel, A Diet]. After being sensitized with amphetamine, rats show hyperactivity when given sugar. See Nicole M. Avena & Bartley G. Hoebel, Amphetamine-Sensitized Rats Show Sugar-Induced Hyperactivity (Cross-Sensitization) and Sugar Hyperphagia, 74 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 635, 637–38 (2003) [hereinafter Avena & Hoebel, Amphetamine-Sensitized Rats]. As Nicole Avena and Bartley Hoebel
to foods they associate with negative postingestion feelings—whether those feelings are directly caused by the food or not. For instance, oncologists recommend avoiding favorite foods during chemotherapy to avoid developing an aversion to them. Our food loves and hates, it seems, are largely driven by elements outside our conscious awareness or control.

Although we treat these three important influences on our food choices separately here, they often interact with each other. Indeed, it seems likely that part of what humans glean when they watch someone else eat is the postingestion consequence of eating that food. Multiple signals all urging us to consume sugary, high-fat food are thus particularly difficult to resist.

5. Conclusion

We are driven to eat whenever food is available whether we need it or not, even as we think that we are driven to eat by our body’s immediate energy requirements. A key implication of the situational character’s interior situation, therefore, is that food intake will be regulated not so much by individual disposition, as by exterior situation—that is, by the availability of food. What is true on the general level, concerning the drive to eat, is also true on the specific level, in respect to deciding what to eat. Powerful interior influences developed over thousands of years interact with our current environment to shape, if not determine, our food choices. This has always explain, “[t]he present results suggest that the neural changes caused by intermittent amphetamine occur in a system that subserves an animal’s reaction to sugar, and perhaps, any very palatable food.” Id. at 638. Cross-sensitization works in both directions and sugar-dependent rats have also been shown to have a heightened sensitivity to amphetamine. See Avena & Hoebel, A Diet, supra, at 18–19 (2003). Hence, “[t]o the extent that sugar and amphetamine act alike, one might surmise that intermittent sugar could lead to dependency.” Avena & Hoebel, Amphetamine-Sensitized Rats, supra, at 638. Thus, Avena and Hoebel suggest that “prolonged intermittent exposure to sugar... [results in] neural changes such that bursts of sugar ingestion produce intense activation in the same systems as those which cause amphetamine sensitization and amphetamine dependency.” Id.

Although comparable experiments are not possible with people, other studies have suggested that identical mechanisms may be at work in humans. A study by Katie Kleiner and colleagues proposes that because food may compete with certain drugs of abuse for reward sites in the brain, excessive consumption may be inversely related to drug addiction. See Katie D. Kleiner et al., Body Mass Index and Alcohol Use, J. ADDICTIVE DISORDERS 105, 105–08 (2004). Indeed, higher BMI appears to be correlated to lower alcohol consumption. Id.


148 See, e.g., Ernest H. Rosenbaum et al., Mucositis: Chemotherapy Problems and Solutions, at http://www.cancersupportivecare.com/drug.html (last visited Nov. 11, 2004) (“Since taste aversions may also be associated with chemotherapy, avoid eating your favorite foods on the day you receive chemotherapy.”).
been the case. Throughout our evolutionary history, food consumption has been more situationally than dispositionally regulated. What has changed is that our access to food is no longer determined by the whims of Mother Nature, but by an equally formidable situational force, namely, a largely unregulated market. The food industry, we will argue, having discerned the realities of the human eating system, has, in pursuit of maximal profit, made foods high in fat and sugar constantly available to us and has manipulated the situational cues we rely on to make specific food choices. And yet, as we will further show, even as their market practices reveal an understanding of the situational nature of human eating, the food industry has nevertheless promoted to consumers and regulators a dispositionist view of human eating, which considers all human eating to be a matter of "personal choice." Meanwhile, so long as food is available, we continue to eat it in large amounts—our evolutionarily betrothed body desperately trying, through mechanisms that we do not see, to store energy for the winters and famines that never come.

The point of this excursion into the realities of human eating has been to enable a critical realist analysis of the obesity crisis. The experience of eating is driven in powerful ways by the unseen realities of our interior situation and because these realities are hidden, our conceptions of the obese and overweight end up being tragically distorted. When we see fat people eating, we assume that hunger has nothing to do with it because we "know" that we feel hungry and eat when our bodies need more food, and their bodies clearly do not need more food. Eating by the obese and the overweight, we therefore mistakenly conclude, must be driven not by legitimate hunger and food needs, but by something less legitimate—something like gluttony, or at the very least, something arising from personal, dispositional choice.

149 See infra text accompanying notes 154-215 (describing strategies that the food industry has used to increase consumption).
150 See infra text accompanying notes 216-27 (describing the dispositionalization of the obesity crisis).
II. BRING IN THE COMMERCIAL INTERESTS

A. Introduction[^151]

The previous section explored some of the ways in which we are far more vulnerable to situational influence over our thoughts and behavior than we appreciate. This section argues that that vulnerability, at least with respect to our conduct relating to food and our conceptions of that behavior, is presently being exploited by corporations that are themselves driven by situational factors. In the United States, norms and laws lead corporations to pursue a common single interest—profit maximization—and, in turn, the shared interests of encouraging markets, preventing profit-restricting regulation, and supporting a conception of human behavior that enhances revenues.[^152] That conception is dispositionism, and by situationally promoting it, corporations benefit greatly.

For one thing, corporations, as entities, are largely justified as socially beneficial from the dispositionist perspective. If consumers are assumed to be dispositional—that is, if they act according to a stable set of preferences that only they can assess directly—then it follows naturally that the best way to maximize welfare is to allow consumers to satisfy their preferences through free markets. It is through mutually beneficial transactions that otherwise invisible preferences are satisfied and overall social welfare is increased. Profit is the substantiation of these welfare-enhancing transactions and is therefore, by definition, good.

A dispositionist worldview is similarly valuable to the corporate interest because it helps minimize profit-reducing regulations. Markets, which allow the free exercise of dispositions, are understood to be more responsive to consumer preferences than regulators who lack good information and the appropriate incentives. The dispositionist baseline translates to a presumption against regulatory intervention even against visible harms, for the actors involved are presumed to be choosing the inevitable risks that gave rise to those harms. Since the commercial interest merely responds to individual manifestations of choice, responsibility for bad outcomes—the giant gut and

[^151]: More detailed and complete discussions of the arguments in this section can be found in Chen & Hanson, *The Illusion of Law*, supra note 16, passim; Hanson & Yosifon, *The Situation*, supra note 13, at 219–50; Jon Hanson & Adam Wright, The Commercial Stakes of Dispositionism (in progress) (unpublished manuscript, on file with authors).

[^152]: See Chen & Hanson, *The Illusion of Law*, supra note 16; Hanson & Yosifon, *The Situation*, supra note 13, at 219–50; Hanson & Wright, *supra* note 151.
the cellulite thighs—can be squarely placed on the consumer. Regulatory intervention is warranted only in circumstances in which markets demonstrably fail to respond to consumer dispositions—for instance, when consumers clearly lack information or when a transaction creates significant negative externalities. But, even in the presence of such market imperfections, calls for regulation may be rebutted on the grounds that imperfect markets are preferable to imperfect regulations.

Another benefit of dispositionism is that it helps to preserve and legitimize the status quo, in which corporations are the wealthiest and most powerful entities. Dispositionism places consumers, not corporations, in the driver’s seat. Corporations are viewed as competing to fulfill consumers’ desires in a fair competition and as having little or no role in creating or influencing consumers’ behavior. If consumers are unhappy with one or another outcome of that competitive process, they are rebuffed with the observation that the process is fair and that they have no one but themselves to blame. If consumers claim to dislike a given market outcome—say, a stroke from eating too many french fries—they can be advised to change their consumption choices, re-examine their perceived preferences, or take it up with their fellow consumers. They can be told, as they are told in so many contexts, that they “have a decision to make.”

This tendency permits corporations to attribute particularly distasteful corporate activities (think Enron) to the dispositions of the handful of prominent human actors involved (think Ken Lay) or the rather unique corporate disposition or culture of one corporation (think “don’t ask, don’t tell” accounting), and not to larger situational influences that might implicate all corporations or all of corporate law.153

Corporations have both the ability to promote dispositionism and a shared interest in doing so. In the United States, no other institutional actor controls as much wealth in so concentrated a fashion as corporations and those individuals with an important stake in promoting their power. With common sense and the motives of most Americans on their side, corporations truly have the cards stacked in their favor. No other institution or individual has the

153 See generally Ronald Chen & Jon Hanson, The Deeply Captured Schemas of Corporate Law (in progress) (unpublished manuscript on file with authors) (describing the use of the “bad apple” and “rotten roots” metaphors in the reform scripts that emerged following the prominent corporate debacles at companies like Enron and WorldCom).
incentive or voice to speak out and render salient the otherwise invisible situation.

In the end, by promoting a dispositionist worldview based on the myth of stable individual preferences and autonomous individual choices, corporations can actually curtail individual autonomy and alter perceived preferences. Much of the remainder of this Article seeks to shed light on how that happens through the case study provided by the obesity epidemic. How is it that a population that, for the most part, loathes obesity, has “chosen” obesity? It is time to enter the great “McMilgram experiment.”

B. The Great McMilgram Experiment

Although there are many variations, the basic experiment is as simple as Milgram’s not-for-profit version. The method boils down to two steps: first, exploit the existing situation and create additional situational variables encouraging consumer behavior that benefits the corporation; and second, frame the outcome as motivated by consumer disposition—that is, dispositionalize the situation—so that any doubts as to the rationality of consumer choices vanish.

1. Step 1: Controlling the Situation

It may seem obvious that corporations tweak our environment and tinker with our insides to sell more products. As mentioned earlier, the modern American views himself as a discerning and skeptical player, be it in the game of politics, interpersonal relationships, or the market. Most of us now recognize the manipulations performed by the cigarette industry, whether in the form of upping nicotine concentrations or in the guise of a smooth talking camel. The corporate control of our situation is rendered similarly salient in the cereal aisle at the supermarket where our children throw their weekly tantrums for Frosted SpongeBob Flakes. Annoying, yes, but just part of the game—fair play because we see it coming and are not easily duped.

Or so it would seem. In fact, when the exploitation is not highlighted by a child’s shrill cry or an avalanche of newspaper articles, it seems that we tend to miss it. Few of us think twice as we meander through the maze of the produce section trying to find garlic, only to end up purchasing plums, oranges, spinach, and mushrooms—things we never planned to buy in the first place. Unfortunately, it is usually not the fruits and vegetables that sneak their way into our baskets. It is the centrally placed cookies and snacks that are more
likely to surprise us. And then there is that gauntlet of candy and other impulse items located at the very place in the shopping experience where we and our children are likely to feel hungriest and have little better to do than wait and salivate over the options: the check-out line. 154

In most of our daily routines, we are shockingly naïve. And even when we acknowledge that the circumstances surrounding our choices matter—that the situation matters—we almost never take the far more important step of understanding the forces that are behind that situation or that lead us to see disposition and miss situation. After decades of blaming smokers for making a bad choice to smoke, a bevy of scientific studies, whistleblowers, court cases, and media reports finally brought many Americans around to the view that something in the situation—something besides unadulterated choice—was pushing people to light up. Unfortunately, the final message became simply that “Nicotine is addictive, which some tobacco executives knew and exploited,” so the whole issue could be attributed to a few immoral actors looking to cash in at any cost. There was no wider understanding of the human animal and the subversive structural motivations of the corporate entity, allowing the same pattern to emerge anew with each similar controversy in the future, but failing to ensure that situationism would ultimately gain ground against dispositionism generally, as it did with cigarettes in particular.

The evidence is in that obesity is linked to environment—this is where all the research has been leading, just as it once did with tobacco. In recent years scientists have expended great energy to show that, although genetics can influence an individual’s tendency to become obese, genetics cannot explain the obesity epidemic because the human genome appears not to have changed so radically in the past few decades. What has changed, according to most public health experts, is the situation—the environments in which we eat, work, and play. 155 But this evidence—while well supported—may not win the day unless individuals take the bolder step of looking at the underlying factors that keep us from seeing the environment. Thus, our point here is not to regurgitate the environmental explanations, but to highlight some of them and to dig deeper to show how commercial interests exploit the many existing pressures in our life, how their very existence may engender changes in our

154 See generally Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420 (1999) (providing more detailed discussions of this phenomena) [hereinafter Hanson & Kysar, Taking Behavioralism Seriously II].

155 See generally Brownell & Horgen, supra note 12, at 69–242 (elaborating the authors’ “toxic environment” explanation of the current obesity crisis in America).
environment, and finally, how these commercial interests manipulate additional situational variables to induce not only profitable consumer behavior, but also public conceptions of that behavior that protects profits.

a. Using Our Existing Situations

It may be a headache behind the eyes as we gaze into the flickering computer screen trying to make sense of spreadsheet gibberish, or a nagging uneasiness in the stomach as we sit in traffic, late for a parent-teacher conference—often it seems we can feel the power of situation. But that is as far as it goes: too much to do and too little time. We do not waste valuable minutes figuring out who stands to gain from our hectic lives or what really makes them hectic in the first place. We keep our feet moving. We juggle. We cancel. We struggle. Sometimes we fail, sometimes we succeed, but no matter, we keep moving. With more single-parent and dual-income families, it is harder than ever before to fit in the basic things like shopping and cooking, especially as we contend with our ever-booming chauffer service—soccer practice, preschool, and a ballet lesson are only stops one through three for the afternoon. To compound matters, even though we are working more, we have less disposable income with which to put food on the table, or, perish the thought, to buy a little rest. Into our stressful lives steps the fast food industry, which thoughtfully highlights our difficulties (in case we had not noticed), sings “you deserve a break today,” and then offers up empathetic solutions: “You don’t have time to waste, so use our drive-thru window!”; “With your crazy schedule you don’t know when you’ll be able to grab your next meal. That’s why we open early and stay open late!”; or “On a limited budget, you need a bargain—have a hamburger for just 49 cents!” Many of us gratefully accept the offer, and “dinner” gets checked off the four-page-long to-do list.

156 See generally Todd D. Rakoff, A Time for Every Purpose: Law and the Balance of Life (2002) (arguing, among other things, that the structure of our days and nights is changing under the influence of unseen but powerful influences).

157 See generally Elizabeth Warren & Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke (2003) (arguing that, contrary to widespread belief, two-income families typically spend nearly all of their income on necessities rather than luxuries, leaving most families on the brink of bankruptcy should they encounter unforeseen expenses such as illness or unemployment); Ronald Chen & Jon Hanson, Illusion of Law: Testing the Promises of Shareholder Primacy (in progress) (unpublished manuscript on file with authors) (summarizing the evidence regarding the effects of the scripts—particularly the corporate law script of shareholder primacy and the more general scripts favoring markets over regulation—on all corporate stakeholders).
The use of existing situational pressures is even more obvious on the interstate. On a long drive, we have to eat and drink, get gas, and use the bathroom. That we have some influence over when and where we stop suggests that we are in complete control of our behavior. But are we? Fast food restaurants sign exclusive deals with states to gain control of rest stops. No one ever forces us to have a hamburger or slice of pizza; we are free just to use the bathroom or pump our gas. Yet, like an invisible hand, our time budgets nudge us to fill up our stomachs while we are there. Having already taken the ten minutes to stop for petrol, we are extremely unlikely to pull off at the next exit, drive into a town to which we have never been, and search for a place that serves a healthier selection than the steaming, aromatic, and readily available options before us.

As the situation is also in our minds, the fast food industry appeals to deeply held cultural norms and beliefs. It is ingrained in our culture that a hot meal is better than a cold meal. Even most prisoners enjoy “three hots” a day. So a working parent whose choice, because of money and time constraints, is between making her son a sandwich for dinner (a sandwich that he will eat only half of) or buying him a hot Happy Meal at McDonald’s is easily persuaded to “get out” with her child. Similarly, establishments like McDonald’s are able to exploit our patriotic impulses, and perhaps also nostalgic ones, by serving a distinctly American meal and reminding us of such at every opportunity: a hamburger, fries, milkshake, and even an apple pie. Subtlety is not the name of the game: Burger King recently launched its newest offering, the Great American Burger. Thus, when we buy flame-broiled patties from Burger King, we celebrate American culture.

b. Manipulating Our Situations

So far, it does not sound like much of a problem. It is hard to see what is so bad about making our situations a little more livable by giving us what we want—convenient, hot, American food! The problems become a bit more evident, though, when we remove the dispositionist frame and look through a situationist frame. Even when sellers appear to alleviate our situational

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158 At service areas along I-95 in Connecticut, for instance, you will find just three entities: Mobil, McDonald’s, and, in two instances, Denny’s. Interstate 95 Exit Information Guide, at http://www.usastar.com/i95/restarea/rest-ct.htm (last visited Nov. 9, 2004). Exclusive deals are a key part of industry strategy. See SUSAN LINN, CONSUMING KIDS: THE HOSTILE TAKEOVER OF CHILDHOOD 84–89 (2004) (describing exclusive contractual relationships between school districts and fast food companies).

159 Elaine Walker, Burger King Says It Has Backyard Taste, Again, MIAMI HERALD, June 20, 2003, at 1C (describing launch of the “Great American Burger”).
constraints, they often contribute to them. For example, purportedly
timesaving technologies like cell phones may not give us more leisure time,
even as they increase our ability to communicate with colleagues and friends.
A cell phone frees up our schedule when we are the only person who has one,
but when everyone signs up, we are suddenly obligated to buy one and be more
or less “on call.” Hence, timesaving devices may do less to save us time than
they do to eat into the time we once saved.

Similarly, widening roads is often an ineffective way to reduce traffic
congestion in the long term, just as letting out one’s pants is a
counterproductive means of dealing with one’s obesity problem. The more
lanes that open up, the more people “choose” to drive. The same phenomenon
occurs with fast food. It saves time, except when we are expected by our boss
and our son’s drama teacher to eat on the run. Fast food does not simply
respond to hectic lives, it encourages them. But these examples only scratch
the surface of situational influence.

Vendors have identified even more tailored and controlled means of
exploiting the consumer’s interior and exterior situation. Each restaurant
chain invests in overhead speakers because wafting music has been shown to
increase overall spending. Chemical flavor configurations are developed by
groups like International Flavors & Fragrances to induce a pleasurable
response in consumers and sell the most burgers and french fries. Burger
King’s strawberry milkshake, for instance, contains forty-nine ingredients to
produce its strawberry flavor, none of which is strawberry. Moreover,
Supersizing at extremely low prices means that we buy more than we would
otherwise because the super sizes appear to be such super deals.

See generally Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1439–50
(providing examples of methods by which manufacturers manipulate consumers, using the supermarket and
gas station as examples).

discussing the role of sound stimuli in consumer buying).


Id. at 54 (“‘amyl acetate, amyl butyrate, amyl valerate, anethol, anisyl formate, benzyl acetate, benzyl
isobutyrate, butyric acid, cinnamyl isobutyrate, cinnamyl valerate, cognac essential oil, diacetyl, dipropyl
ketone, ethyl acetate, ethyl amyl ketone, ethyl butyrate, ethyl cinnamate, ethyl heptanoate, ethyl heptylate,
ethyl lactate, ethyl methylphenylglycidate, ethyl nitrate, ethyl propionate, ethyl valerate, heliotropin,
hydroxyphenyl-2-butanone (10 percent solution in alcohol), α-ionone, isobutyl anthranilate, isobutyl butyrate,
lemon essential oil, maltol, 4-methylacetophenone, methyl anthranilate, methyl benzoate, methyl cinnamate,
methyl heptine carbonate, methyl naphthyl ketone, methyl salicylate, mint essential oil, neroli essential oil,
norlin, neryl isobutyrate, orris butter, phenethyl alcohol, rose, rum ether, γ-undecalactone, vanillin, and
solvent”).
It is not just that we buy bigger portions. The real problem is that we eat bigger portions without understanding what we are doing. Subjects in one experiment who were given twelve-inch submarine sandwiches ate 12 to 23% more than subjects given eight-inch submarine sandwiches, but neither group reported feeling any hungrier or fuller than the other afterwards. Similarly, another study indicated that subjects ate more M&Ms when presented with a large container as opposed to a small one. Ultimately, the packaging at fast food restaurants may be as significant as the meal inside because individuals exhibit a strong tendency to eat entire units of food. Studies further reveal that people do not adjust their food intake elsewhere in their diet to compensate for the enlarged serving size of a particular item. We do not eat according to


Rolls et al. have shown that children aged three to five are switching from consuming in response to physiological cues to eating based on environmental influences, among them portion size. Barbara J. Rolls et al., Serving Portion Size Influences 5-Year-Old but Not 3-Year-Old Children's Food Intakes, 100 J. AM. DIETETIC ASS'N 232, 232 (2000).

165 Barbara J. Rolls et al., Increasing the Portion Size of a Sandwich Increases Energy Intake, 104 J. AM. DIETETIC ASSN 367, 367 [hereinafter Rolls et al., Sandwich]. In another experiment, subjects consumed 30% more energy (676kJ) when offered the largest portion of macaroni and cheese at lunch than when offered the smallest portion. Barbara J. Rolls et al., Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women, 76 AM. J. CLINICAL NUTRITION 1207, 1207, 1211 (2002) (“The finding that the ratings of hunger and fullness after the meal did not vary, although intake increased with the amount of food that was presented, suggests that portion size influences the development of hunger and satiety.”).

166 See Brian Wansink, Can Package Size Accelerate Usage Volume?, 60 J. MARKETING 1, 8 (1996); Brian Wansink & Sea Bum Park, Accounting for Tastes: Building Consumer Preference Prototypes, 7 J. DATABASE MARKETING 308, 308–20 (2000) (“The results from a naturalistic study of moviegoers indicated that larger container sizes . . . encouraged increased consumption more than smaller container sizes, but that perceived differences in taste did not have any significant effects on consumption of foods given two different container sizes.”).


168 Rolls et al., Sandwich, supra note 165, at 371.
rational choice, but according to how much is in front of us and other environmental cues that we are blind to—that is, the situation.\textsuperscript{169}

From a distance, the combination of super-sized bargains and increased obesity may look like an object lesson in downward-sloping demand curves. Up close, however, it looks like situation overwhelming disposition. What may feel like a bargain at the drive-thru window ultimately appears as an additional pound at the scale. Yet somehow we fail to make the causal connection, even though we are acutely aware of how costly our potbellies are, whether measured in medical costs, forgone basketball games with our children, or declined second dates. The fast food corporation, on the other hand, profits greatly because food costs often only amount to 20\% of the sale price and because most of the other expenditures—such as renting facilities, paying staff, and advertising—remain fairly constant no matter how large the portion. If the corporation makes a quarter on a $1.25 bag of french fries, charging another quarter for 50\% more fries may cost the franchise only ten more cents, leaving an additional fifteen cents pure profit.\textsuperscript{170} And to keep us from feeling like pigs eating our jumbo tub, there is always a truly gargantuan option (the Super Jumbo!) to make the extremely large portion seem less so.\textsuperscript{171}

Furthermore, what is understood as “choice” driven may more accurately be understood as affect- or even addiction-driven conduct. Ever wonder why “you can’t eat just one Lays potato chip”? Or why “the world may never know how many licks it takes to get to the center of Tootsie Roll Pop”? Have you ever had a “Big Mac attack”? Since we are genetically predisposed “to like sweet and salty foods ... [and] are predisposed to learn to prefer energy-dense foods over those more energy dilute,”\textsuperscript{172} the fast food industry fills its products

\textsuperscript{169} See Barbara E. Kahn & Brian Wansink, The Influence of Assortment Structure on Perceived Variety and Consumption Quantities, 30 J. CONSUMER RES. 519 (2004) (finding that consumption quantities are influenced by perceived variety); Brian Wansink, Environmental Factors that Increase the Food Intake and Consumption Volume of Unknowing Consumers, 24 ANN. REV. NUTRITION 455 (2004) (finding that consumption volume is influenced by environmental factors such as size, lighting, and variety) Brian Wansink & Koert van Ittersum, Bottoms Up! The Influence of Elongation on Pouring and Consumption Volume, 30 J. CONSUMER RES. 455 (2003) (finding that size and shape of drinking glass affects consumption).

\textsuperscript{170} Numbers and analysis are from Shannon Brownlee, Portion Distortion—You Don’t Know the Half of It, WASH. POST, Dec. 29, 2002, at B1.

\textsuperscript{171} See Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. REV. 630, 734 (1999) (suggesting that the addition of an irrelevant third option in consumer contexts may be designed to increase the attractiveness of the original options) [hereinafter Hanson & Kysar, Taking Behavioralism Seriously I]; Simonson & Tversky, supra note 86, at 281–82 (proposing the “extremeness aversion hypothesis” in which consumers are believed to choose an intermediate option when confronted with three choices).

\textsuperscript{172} See Birch, supra note 140, at 57.
with ingredients having the taste cues that we seek and the postingestive consequences that we crave.\textsuperscript{173} When Trenton Smith recently surveyed the McDonald’s menu, he found just that:

\begin{quote}
[S]andwiches [at McDonald’s] have an average calorie density 90% greater than the average game meat consumed by modern hunter-gatherers, and 119% greater than the average plant food; and a single sandwich provides 40% of USDA’s maximum recommended daily intake of sodium; soft drinks and shakes (excluding diet drinks) average 9% and 18% sugar, respectively.\textsuperscript{174}
\end{quote}

Moreover, the problem is not just that the foods are designed to tap into our predispositions and developed preferences. Indeed, if the soda machine was as rare a find as the beehive was for our ancestors, we might be able to maintain our weights. The real kicker is that the irresistible food is everywhere. Once we get in a “hot state,”\textsuperscript{175} we are in serious trouble because, to recall one of the lessons from Part I, “We are . . . programmed to eat everything in front of us.”\textsuperscript{176} Our depiction of the human eating system in that Part may have raised some eyebrows among our readers, but it would certainly come as no surprise to the food industry.

Surrounding humans with fats, carbohydrates, and sucrose solution has been the modus operandi of the food industry for at least the last quarter century. As Coca-Cola explained in its Annual Report several years ago, the goal is to

\begin{quote}
make Coca-Cola the preferred drink for any occasion, whether it’s a simple family supper or a formal state dinner . . . . To build pervasiveness of our products, we’re putting ice-cold Coca-Cola classic and our other brands within reach, wherever you look: at the supermarket, the video store, the soccer field, the gas station— everywhere.\textsuperscript{177}
\end{quote}

Chances are, if it is there and you are thirsty, you will soon have a Coke in hand. Today, there are over 30,000 McDonald’s restaurants in the world, and

\textsuperscript{173} See supra text accompanying notes 133–37 (describing some of the influences on our specific food choices).

\textsuperscript{174} Smith, supra note 133, at 405–06.

\textsuperscript{175} See supra text accompanying notes 130–32 (describing the work of George Loewenstein on the hot-to-cold empathy gap).

\textsuperscript{176} Nanci Hellmich, Food for Thought for a Fat Nation, USA TODAY, Feb. 19, 2002, at 10B.

even their signs have given up counting just how many billions of burgers they have sold. Despite evidence that we humans have "failed to thrive" in the new environment, the profit-making experiment continues.

Location and convenience are, in other ways, far more influential than we tend to realize. In Milgram's experiments, the location of the "researcher" and the "student" had an immense influence on the behavior of the subjects—a factor that no one predicted or even thought to predict. Similarly, when fast food companies brag about making their ingredients and nutritional information available on the Internet in response to those who ask that such information be included on the package, it does not seem possible that the two locations are significantly different. But how many people really know that the Double Quarter Pounder with Cheese is packed with 730 calories? Or how much calorie levels have changed over time? That, for instance, the average calories per serving of french fries at McDonald's in 1960 was 200, a number that increased to 320 in the late-1970s, to 450 by the mid-1990s, and that today McDonald's' Supersize fries pack a whopping 610 calories? How many people know that the Creamy Caesar salad dressing McDonald's provides for its new salads has 190 calories per serving? How many people know that one Supersize meal contains more than half of the recommended daily calorie intake for an adult man? Consider how much information you really have and how you would feel about obtaining more information.

178 BROWN, supra note 45, at 20 (analyzing the variables of immediacy and proximity in Milgram's experiments).
179 Thus, Richard Berman stresses in response to those who complain that consumers are not well informed that McDonald's "already provide[s] complete nutrition information to anyone who asks." Richard Berman, All-Out Assault by Food Cops: When Will It End?, USA TODAY, Aug. 15, 2002, at 13A.
183 See McDonald's USA, Bag a McMeal, at http://app.mcdonalds.com/ bagagmcmeal/?process=flash (last visited Oct. 25, 2004) (a meal consisting of a Quarter Pounder with Cheese, large order of french fries, and a large Coca-Cola Classic contains 1350 calories).
184 Consider, for instance, the warning placed on McDonald's coffee lids: "Warning Contents Are Hot." Well, sure. But how hot? How many degrees Fahrenheit? 140 degrees? 180? And what does that mean? Is it hotter than my coffee at home? Hotter than coffee sold at Burger King? If it spilled would it burn a little or a lot? Suppose that before transporting it in your car you wanted to know just how hot McDonald's coffee was. Would you expect anyone at the restaurant to know? Would you ask through the drive-thru speaker? Would you call a manager? Would you hold up the progress of the line to wait for someone to look up the answer? If you did so, would you expect customers and employees to view you as a reasonable person or as crazy? The situational pressures against asking such questions are strong, strong enough for most of us to buy our coffee in ignorance, while nonetheless feeling that we are well informed.
Does it matter that nutritional labels are not often readily available, while the eye-catching promotions and mouth-watering foods inevitably are?

c. Targeting Children's Situations

Situational pressures are not only aimed at adults; indeed, it is not surprising that the fast food industry goes after the most impressionable demographic—children—with some of its most potent weapons. In addition to being especially malleable subjects, children also present a more uniform and capturable target. The average child sees 10,000 television food advertisements each year, with 95% for fast food, soft drinks, candy, and sugared cereal. Of course, according to the industry, “[a]dvertising stimulates brand competition and awareness [things which are beneficial to the consumer], and has a relatively small influence on food choice, diet or consumption patterns.” That was the argument RJ Reynolds used to justify Joe Camel’s popularity and ubiquity, an argument that many people would now consider dubious, largely because tobacco has become a suspect industry. Perhaps the argument has merit in the food context, but it strikes us as implausible that the “competition and awareness” brought on by food advertising has done anything but harm the diets of our children—by making children “aware” of all sorts of processed foods that substitute for their healthier, less promoted competitors, such as fresh fruits and vegetables, for instance. In truth, the evidence suggests that the food industry is using advertising to play upon unseen factors in children’s interiors that determine food choices. Again, corporations need not be aware of the scientific research on the subject in order to profit from our interior proclivities—all they need to know is that manipulating certain aspects of our environment works to sell more food. They appear to have learned the lesson.

Watching television is, in the words of researchers David Ludwig and Steven Gortmaker, “the dominant pastime of youth throughout the

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185 Battle & Brownell, supra note 12, at 761. Indeed, as Battle and Brownell point out, the onslaught is so sophisticated that it is often difficult to tell where a show ends and a commercial begins, especially given that “the same characters are often in each.” Id.

186 JPMORGAN EUROPEAN EQUITY RESEARCH, FOOD MANUFACTURING 10 (2003) (quoting The Confederation of Food and Drink Industries of the EEC) (on file with authors).

187 For a summary of the critiques of that argument, as made by the tobacco industry, see Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1506–10.

188 See generally LINN, supra note 138, at 27–30 (reviewing advertiser justification for promoting the consumption of processed foods to children).
industrialized world,189 and the food industry has figured out exactly how to exploit that power over children. For decades, scientists have been documenting the relationship between watching television and weight gain in children, and there is a growing consensus that a major source of the problem is that television advertising by the food industry alters children's diets by inducing them to eat more junk food, drink more soft drinks, and nag their parents to take them out for more fast food.190 Thus, it is not surprising to find that the food industry spends more than $1 billion annually on advertising directed at children, most of it on television.191

Television advertisements aimed at children commonly employ the informational cues about food choices that we discussed in Part I. In many commercials, individuals—in particular, other kids and favorite cartoon characters—are shown actually eating the food products, and when they do, they exhibit visible signs of enjoyment.192 The technique seems to be very effective: Kids prefer the foods they see advertised on TV and ask for them from their parents.193 To make them even harder to resist, the advertised foods

190 See id. Researchers have also forwarded several other ways in which television watching may relate to overweight and obesity in children: first, the sedentary pursuit of television watching may displace physical activity; second, and obviously related to the first, watching television may actually depress children's metabolic rates, so they burn energy slower while watching television; and third, children may eat food while watching television, which they would not be doing if they were participating in other activities. Id. It should be noted that the inactivity involved in television watching, irrespective of alterations in food preferences, is also directly related to the situational power of the advertising. It is the advertising that pays for the programming that draws children to the couch and away from more physically strenuous activity, so that they will be sitting more or less still when the programming is interrupted with the advertising. In this sense television programs aimed at children are really best understood as advertisements for advertisements. That is the sense, undoubtedly, in which children's programming is understood by the food industry.
192 See Smith, supra note 133, at 403–05. Trenton Smith argues that “the themes emphasized in television advertisements for foods appear to be providing information that once served as a signal of nutritional value.” Id. at 404. Among other things, he points to themes showing the food product being fought over and consumption of the food product improving moods, health, or resulting in social success. Id.
193 See Dina L. G. Borzekowski & Thomas N. Robinson, The 30-Second Effect: An Experiment Revealing the Impact of Television Commercials on Food Preferences of Preschoolers, 101 J. AM. DIETETIC ASS'N 42, 42-46 (2001) (showing that exposure to a 30-second food advertisement during the course of a TV program changed food preferences in young children); DINA L.G. BORZEKOWSKI & ALVIN F. POUSSAINT, LATINO AMERICAN PRESCHOOLERS AND THE MEDIA (U. of Pa. Annenberg Pub. Pol'y Center, Report Series No. 24, 1998) (in the two weeks following watching television advertising, 67% of Latino preschooler subjects asked to be taken to a particular restaurant or store shown in the commercials and 55% requested a featured food or drink).
are packed full of sweet and salty tastes that again tap into strong interior proclivities.\textsuperscript{194}

In recent years, corporations have begun targeting children where they have already been made a captive audience and where credibility is already established—schools.\textsuperscript{195} With schools increasingly strapped for cash and looking for any way to keep providing “nonessential” programs like music and art, the fast food industry has been all too willing to exploit the situation and give schools a new “choice” for financing their curriculum.\textsuperscript{196} In other words, belt-tightened school systems are, unwittingly, yielding belt-loosened students. The progress has been remarkable with over 20\% of schools now selling high-fat fast food such as Pizza Hut and McDonald’s.\textsuperscript{197} As Dr. Kelly Brownell has documented, “there are now over 5,000 franchises operating in schools, many of whom operate under exclusive contracts with schools for their branded products.”\textsuperscript{198}

Many food and drink distributors provide schools with helpful tips on how to maximize the amount of “donations” a school receives by selling the most

\textsuperscript{194} See Krista Kotz & Mary Story, Food Advertisements During Children’s Saturday Morning Television Programming: Are They Consistent with Dietary Recommendations?, 94 J. AM. DIETETIC ASS’N 1296, 1296-1300 (1994) (explaining that many of the advertisements aimed at children are for foods high in fat and sugar).

\textsuperscript{195} In the words of Tom Harris, the Vice President of Sales and Marketing for the corporate-sponsored National Theatre for Children, schools are “where the kids are . . . . It’s a captive audience and in a world of where kids are torn between the Internet, [instant messaging], sports, TV and radio, school is the place where marketers can find them in an uncluttered environment.” Caroline E. Mayer, A Growing Marketing Strategy: Get ‘em While They’re Young, WASH. POST, June 3, 2003, at A1.

\textsuperscript{196} It is not just under-funded school administrators that the industry is looking to exploit. Anyone with a tight budget who has special access to children’s minds is a potential target. After coming under attack for selling advertising to fast food companies, Rainer Jesss, the publisher of National Geographic Kids, explained it thusly:

\begin{quote}
We do accept advertising from these companies because, from a pure economic standpoint, they're the ones with the advertising budgets and the marketing dollars to reach kids this way . . . . If this helps us to fulfill our mission to get information out to young people in a respectful way, and in a way that adheres to advertising and editorial guidelines, we will continue to do that.
\end{quote}

Nat Ives, As National Geographic Explores Obesity, Critics Question the Food Ads in Its Children’s Magazine, N.Y. TIMES, July 21, 2004, at C6. Jesss, just like many school board members, may be making a choice to take the money from fast food corporations, but it is a highly constrained one. Forgoing the funding may mean that the magazine fails to reach its audience—preventing children from receiving the beneficial educational content of the articles, and Jesss from fulfilling his primary responsibility as publisher. Hence, the strict dispositionist account of his behavior is far from the truth.


\textsuperscript{198} LINN, supra note 158, at 84–89.
products. In a 1998 letter to the principals of School District 11 in Colorado Springs, Colorado, John Bushey, the district’s executive director of “school leadership” for Coca-Cola, made it clear how to meet the necessary quota (70,000 cases of product) for an $8 million exclusive vending contract with Coca-Cola. Again, location was key:

1. Allow students to purchase and consume vended products throughout the day. If sodas are not allowed in classes, consider allowing juices, teas, and waters.
2. Locate machines where they are accessible to the students all day. Research shows that vender purchases are closely linked to availability. Location, location, location is the key. You may have as many machines as you can handle. Pueblo Central High tripled its volume of sales by placing vending machines on all three levels of the school. The Coke people surveyed the middle and high schools this summer and have suggestions on where to place additional machines.

To help advertise Coke products, he thoughtfully enclosed a calendar of promotional events.

Marketing to schools is not just about maximizing vending machine purchases or selling more chicken nuggets in the lunch line. It is about normalizing fast food and gaining lifetime customers. Hence, corporate America has turned to sponsoring plays and books and has spawned an industry of middlemen, like the Field Trip Factory of Chicago, to help get kids out of the classroom and into stores. In the wake of budget cuts, a “no-cost”

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200 John Bushey, District 11’s Coke Problem, HARPER’S, Feb. 1999, at 26–27; see also SCHLOSSER, supra note 199, at 56–57.
201 Bushey, supra note 200, at 27.
202 The Field Trip Factory reports that “[m]ore than 20,000 teachers and scout leaders in 44 states have taken their students on Field Trip Factory field trips” since its founding in 1993. Field Trip Factory, Field Report no.2, at http://www.fieldtripfactory.com/newsletter/issue031703/ (last visited Oct. 26, 2004). In enticing corporate partners to sign up as sponsors (at a cost of $1000 per performance), the National Theatre for Children (“NTC”) explains its advantage:

We Put Your Brand Center Stage!

It’s Proven, NTC programs offer prolonged brand exposure with incredible post-recognition results.

We’ve had our programs tested by independent research firms, top educators and universities and the results are tremendous. Our interactive combination of in-school performance, classroom curriculum, internet and take-home activities, all featuring your company, brand or message, really work to promote brand awareness in elementary students, teachers and parents.
field trip option is attractive to many schools, even if it forces teachers into the unenviable position of having to "come up with something" to make the trip to the Coca-Cola plant look educational. The overarching idea is to blend the line between advertising and education, and the effect may be to replace thought with food. A poster provided to teachers by the National Soft Drink Association reads:

As refreshing sources of needed liquids and energy, soft drinks represent a positive addition to a well-balanced diet. These same three sugars also occur naturally, for example, in fruits. In your

Each program is tested and evaluated for content and effectiveness throughout the development process. And we measure the results. Past program studies have found that 99% of educators believe that the use of live theater increases students' capacity to retain the key message.

Plus, a core component of our program includes press releases and publicity created specifically for you. Our clients have received both national and local exposure via newspaper articles, television special interest stories and live remotes, radio broadcasts and more.

We offer a complete turnkey solution to successfully marketing your brand and measuring the results. Give us a call to find out how we can custom fit a NTC program to your needs.

National Theatre for Children, We Put Your Brand Center Stage, at http://www.nationaltheatre.com/putyourbrand.htm (last visited Oct. 26, 2004). Making long-term customers has never been so easy, but as the website points out, there are additional benefits as well. Sponsoring plays for children also makes the corporation look like a caring member of the community. Trust in the good intentions of the corporation can pay big dividends when it comes to reducing regulation and more easily manipulating the situation.

As part of a $2 million annual contract with Coca-Cola Enterprises ("CCE"), the DeKalb County school system in Georgia received $41,000 for a field trip for fifth-graders to the World of Coca-Cola (displaying Coke memorabilia and classic products). Since state law required that field trips be educational, CCE hired several teachers to compose lesson plans that fit into the mandated curriculum. In the words of Lori Lambert, CCE's Atlanta division education sales manager, "When students see the bottling process, they can take it back into the classroom. It's truly a learning environment." Elizabeth Lee, Soft Drink Sales Provide Big Revenues, Little Nutrition, ATLANTA J.-CONST., May 5, 2003, at A5. Many school officials, like Synthia Shilling, a staff attorney for Anne Arundel County Public Schools in Maryland, seem to see the decision to increase corporate programs as a no-brainer: "It's not money that's coming out of the pocket of the school system or individual parents. We can provide kids with experiences at no cost." Mayer, supra note 195, at A14. In the much needed shower of cash, few seem to question whether certain "experiences" are worth providing or take the time to consider the real costs to children of corporate partnerships. Tom Harris of the NTC, which is currently negotiating with a major fast food chain to sponsor a play highlighting more healthy options, reports that "it's exceptionally easy to get programs into schools. We have a 95 percent acceptance rate." Id. As NTC founder and president Ward Eames admits, "Some companies think they could never go into schools . . . [but as] long as you're a good-for-you-brand—even a neutral brand—and you give them something of value that helps teach kids, you're welcomed." Michael Applebaum, Don't Spare the Brand, BRANDWEEK, Mar. 10, 2003, at 20, 24, available at http://nationaltheatre.com/brandweek.htm. Thus, the key is to bring evidence of whether or not you are a "bad-for-you-brand" into debate. If you can come off as a "neutral brand," situational pressures (in particular, dire school budget cuts) will ensure your products a place in the classroom.
body it makes no difference whether the sugar is from a soft drink or a peach. 204

If such messages displace posters explaining the metabolic reactions of the Krebs cycle, then it is not so much that our children are failing to pay attention in school—it is that we are testing the wrong things. Instead of measuring knowledge of biology, perhaps we should measure waistbands.

Heavily influenced by situational factors, children can be turned into situational pressures themselves. 205 As has been widely documented, children “now have far more disposable income than they had several decades ago and far greater influence on their parents’ buying habits.” 206 Moreover, it is well known that food and toys are topics for which children are willing to pull out the big guns—pestering, whining, and begging their way to retail quiescence. 207 Call it “familial dissonance.” The merchandising technique of configuring aisles in grocery stores and windows in malls to create that dissonance has been common for years. 208 Happy Meals, McPlaylands, and children’s movie tie-ins turn our kids into strong marketing tools, and the tantrum into a corporate weapon. Like the “teachers” in Milgram’s experiments, parents will frequently resist, but will often cave to the unseen situational pressures. For corporations, it is a simple matter of playing one member of the family against another, which is a powerful situational trick that most consumers never think to attribute to conscious design choices any more than Milgram’s subjects perceived Milgram’s deliberate manipulations.

The “personal responsibility” norm is so powerful that despite the mighty efforts by fast food corporations to infiltrate children’s situations and the widespread acknowledgement that children are especially impressionable and
persuasive, obesity in children still seems to get pinned almost entirely on parents.\(^{209}\) As the industry explains, parents are the ones with ultimate control—the only control that matters. Who did not make little Billy a healthy lunch today? Who did not ask Sara what she ate yesterday? Who does not have a wage high enough to move to an area where there are supermarkets and health food stores and not just fast food restaurants?\(^{210}\)

The choice to buy or not to buy a Happy Meal is framed as the only real choice a parent is faced with, not as one choice in a nexus of many choices. Recognizing the complexity of their situation, the experts tell parents to “choose their battles” and not to fight their children on everything.\(^{211}\) But when a battle comes up, all of us gazing down from the hilltop miss that situation and see each salient “battle” as determining the ultimate outcome of the “war” to raise a decent, healthy, and successful child. Which battles are

\(^{209}\) One recent survey by the American Council for Fitness and Nutrition found that 96% of respondents held parents responsible for their children’s health and weight. See Beyond Baby Fat, ABCNEWS.COM, Sept. 30, 2004, at http://abcnews.go.com/sections/living/US/childhoodobesity030930.html (citing American Council for Fitness and Nutrition survey).

The rhetoric of parental responsibility is very intuitive. According to Steven Rotter, chairman of the Rotter Group, which specializes in marketing towards children, “We want kids to buy our products ... But Mom and Dad, if your kid is eating too much and eating the wrong stuff, don’t let them have it.” Nat Ives, A Report Raises the Possibility that Ads Contribute to Obesity in Children; The Industry Begs to Differ, N.Y. TIMES, Feb. 25, 2004, at C3. That such a charge would come out of the mouth of a marketer is not surprising, but blaming parents is common with many who don’t have a clear vested interest in the debate. Jane Brody, for instance, takes the same stand in an article in the New York Times:

Children of all ages in America today are getting fatter and fatter, thanks to parents and caretakers who allow them to spend hours a day in front of a television set, who give them access to excessive amounts of snacks and fast foods and to oversized portions, and who do not make sure that they get regular physical activity.

Jane E. Brody, Back to Basics: The Real Risks to Children, N.Y. TIMES, July 13, 2004, at F7. As she concludes, “Most of the hazards that take the greatest toll on the health and lives of the young people in this country can be prevented, without any need for further research, legislation, environmental cleanup or any other measure that requires the action of anyone besides parents and caretakers.” Id.

\(^{210}\) See generally Jason P. Block et al., Fast Food, Race/Ethnicity, and Income: A Geographic Analysis, 27 AM. J. PREVENTIVE MED. 211 (2004) (concluding that black and low-income neighborhoods have a higher density of fast food restaurants than predominantly white, more affluent neighborhoods).

parents supposed to choose? The movies their kids watch? The parties they attend? The language they use? The friends they have? The clothes they wear? The foods they eat? The grades they get? The people they date? The cosmetics they apply? The manners they use? The websites they surf? The music they listen to? The drugs they use? The sex they have? The sports they play? The religious services they attend? The body piercings and tattoos they accumulate? The answer is all of the above, and then some. But if, as the experts advise, parents’ real focus should be on winning the war, do they participate in food fights with their kids or not? And does it matter that their dual-career lives leave no time for “home cooking”? Does it matter that the food industry is investing billions of dollars toward surrounding children with tasty, unhealthy foods and billions more to inundate them with advertising and promotions? Does it matter that many parenting experts recommend downplaying the significance of diet in order to encourage a “healthy relationship with food” and to “accept our bodies as they are”?213

As Cornel West and Sylvia Ann Hewlett recently concluded:

[S]imply heaping blame on overburdened moms and dads will not solve our problems. Modern-day mothers and fathers, like those before them, struggle to put children at the center of their lives. But major impediments and obstacles stand in their way, undermining their most valiant efforts. From early in the morning till late at night, America’s parents are battered by all kinds of pressures, most of which are not of their making.

That is their situation and our situation. As James O. Hill, a leader in obesity studies, puts it, becoming obese “is a normal response to the American environment.”215 We live in a McMilgram world, with an environment rigged to encourage behavior that increases the profits of those best able to manipulate the situation. The underlying problem is not the environment but, again, our inability to see (and our desire to disbelieve) that the environment is rigged and has influence over our conduct. That situational blindness is due in part to the second part of the two-step process.

212 See LINN, supra note 198, at 95–104 (describing widespread practices of marketing fast food and junk food directly to children).
215 CRITSER, supra note 181, at 3.
2. **Step 2: Dispositionalizing the Situation**

As if modeled on cognitive dissonance studies, at the same time that commercial interests are exploiting and manipulating the situation to encourage profit-maximizing consumer behavior, they are also working hard to assure us—their consumers—that we are actually being moved by our own dispositions. The practice is more pervasive than soda machines and golden arches because virtually every interaction with corporate America activates a causal schema that places the consumer at the helm and the corporation behind the oars loyally awaiting orders.

To hide the mutinous truth, two messages are chanted in the galley. The first is that the consumer is the one in charge and the one making the choice. He is the sovereign, the director, the captain. By contrast, the corporation plays a passive role, simply responding to the consumer’s manifest preferences and serving his interests. Just as in countless social psychology experiments, simply framing a setting as one in which the individual is making a choice convinces people that they are indeed acting solely according to their own attitudes.

The second refrain is that consumers’ choices are good ones and ones that they must be very happy with. When people act because of situational cues, they will often search for a reason for their behavior, and when that behavior conflicts with some other attitude that they hold, they will need some way of relieving the dissonance between what they are doing and what they believe they ought to be doing. This leads to a couple of possible escapes. One approach is to regret the behavior and seek to avoid acting similarly in the future, though that may be difficult if strong situational pressures continue to push individuals to contradict their attitudes. As one of Milgram’s subjects remarked, failing to appreciate the power of the situation even after being debriefed, “I hope I can deal more effectively with any future conflicts of values I encounter.”\(^{216}\) Since the counter-attitudinal action is often buying unwanted items that would otherwise not be purchased, this is the response that sellers most want to avoid. The other approach is for individuals to change or refine their attitudes, which may amount to nothing more than carving out a narrowly tailored exception for the action at hand. In the “induced compliance” peg-turning experiment that we described in Part I of this Article, individuals were forced to ask themselves why they had just performed a

\(^{216}\) MILGRAM, supra note 18, at 54. The subject’s wife, too, failed to appreciate the situational influence: “As my wife said, ‘You can call yourself Eichmann.’” Id.
menial task for a measly dollar, and the answer that came to them was that it was, indeed, fun.\footnote{217}{See supra text accompanying notes 33–34 (describing and interpreting the peg movement study as an example of "induced compliance").}

Thus, the customer who finds himself eating something he does not like based on its unhealthiness can reduce the dissonance he feels by switching his attitude to suggest that he actually loved the food all along. And that conviction can be strengthened if he believes that he chose the food in question and did not have it imposed on him. Third parties can help reduce the dissonance further by exploiting any ambiguity regarding the healthfulness of the food and the reasonableness of the judgment to eat it. Consequently, any suggestion that it was not an unhealthy choice or that other more important issues (like saving time or getting a bargain) were served will make the decision easier. Internal conflict is even alleviated by making the individual feel that he is a better person in general (for example, I am a good parent because this is a family place and my children and I are all smiling). The point is that we are motivated to make sense of our behavior and to attribute it to good, rational disposition, even when the behavior is situational. In a McMillgram world, sellers know that and will seek to provide us with all the dissonance-reducing scripts we might need.\footnote{218}{The motives and tendencies summarized here are detailed in Hanson & Yosifon, The Situational Character, supra note 16, passim; see also Hanson & Chen, Categorically Biased, supra note 16, at 1182–1211.}

With these strategies in mind, the best-known brand themes for food chains take on a different meaning. Consider the following: "Have It Your Way;"\footnote{219}{"Have It Your Way" is Burger King's slogan. See Burger King Home Page, at http://www.bk.com (last visited Oct. 26, 2004).} "You, You're the One;"\footnote{220}{"You, You're the One" is a former McDonald's slogan from the 1970s. See http://www.mcdonalds.ca/en/aboutus/marketing_themes.aspx (last visited Oct. 26, 2004).} and "We Do It All For You."\footnote{221}{Another former McDonald's slogan. Id.} Of course, as was suggested above, the real idea is to move consumers situationally while encouraging them to believe they are moved entirely by choice—choice that perfectly satisfies individual desires. Personal fulfillment slogans are extremely common in the fast food industry. McDonald's most recent advertising themes have included "We Love to See You Smile" (and its abbreviated version, "Smile"),\footnote{222}{Id.} "Every Time A Good Time,"\footnote{223}{See http://www.mcdonalds.co.nz/terms_main.htm (last visited Nov. 9, 2004).} and "I'm
lovin’ it!”

We are induced to comply and when we do, cognitive dissonance—our powerful motive to avoid contradiction—ensures that we do not rethink the purchase. In other words, we believe that if we are eating a second hamburger, it must be because we want to. We cannot go back and “un-eat” the Supersized portion, just as the individuals who were paid a dollar in the peg-moving experiment could not go back and “un-participate” in the boring task. So without realizing it, our attitudes adjust to dispositionalize our behavior. I’m gonna “put a smile on” because “I’m lovin’ it!”

Hybrid messages combining the sovereignty and satisfaction themes often seem most powerful. As McDonald’s explains on its website:

We—We are the people in the restaurants, the crew supervisors and managers that are doing everything to make your experience the most memorable.

Love—We care deeply about you, the customer of McDonald’s, and we want to show you exactly how we feel.

To See—We help create the moments. And guess what? Because we care we’re paying attention to how you react.

You—You are the one, we do it all for you. You are the reason for everything we do.

Smile—It’s what we are all about. The satisfaction you get when you come to McDonald’s . . .

“McMarketers” know that if they can engrain an image of McDonald’s as the selfless personal pleasure servant, they can make us forget about all the things that impel us to the door, remove the extra twenty-nine cents from our wallet for Supersizing, and encourage us to eat twice as much as we had planned. Thus, someone working two minimum-wage jobs in the inner city with no car and a half hour between shifts to feed the kids, who has grown up on french fries and television commercials revealing to her the pleasures and satisfactions of consumption, and whose children are whining for the latest “Finding Nemo” Happy Meal toy can still perceive a choice.

224 Id. The “i’m lovin’ it” campaign, although initially panned by some critics, has been incredibly successful by all accounts. See Nat Ives, For McDonald’s, the “I’m Lovin’ It” Phase of Its New Campaign Has Crossed Over Into the Mainstream, N.Y. TIMES, May 13, 2004, at C5. Eight months after its introduction, Larry Light, Executive Vice President and Global Chief Marketing Officer at McDonald’s, explained that the phrase is already “becoming part of the language.” Id. They’re lovin’ it!


226 See Block et al., supra note 210, at 216 (suggesting that increased exposure of black and low-income populations to fast food may be explained in part by the limited healthy food options in their neighborhoods and by the lower access to transportation in those communities).
consumer reaches the register, the first words out of the cashier’s mouth are, “How can I help you?”

Of course, the tune changes as soon as the “sovereign consumer” gets fat, although the underlying thematic principles remain the same: “You made a choice, so don’t try to blame us now for your own actions; we just gave you what you ordered.” It is Toyota’s old jingle, but with an ugly side: “You asked for it; you got it.”

C. Reinforcing the Fast Food Message

1. The Common Cause

That a car company is singing the same chorus as the fast food industry is no accident. As we noted above, dispositionism is in the interest of all commercial entities. Indeed, because it is a mutual concern, and one that each seller has an incentive to advance individually, the frame is reinforced at every turn. Sellers of all stripes help increase product sales by promoting a dispositional image of ourselves—a self-affirming vision that we are not being moved by the situation. As Fidelity Investments tells us:

You are not the kind of investor who blindly reacts to each and every new market condition. You’re informed. You’re involved. You’re focused.

...Being in control of your financial future has never been more important...

THERE ARE BULLS AND BEARS. BUT YOU ARE A THINKING ANIMAL.

In other words, you, unlike all the other animals on the planet, think, prefer, and choose, and thereby enjoy dispositional control of your life.

And it is not just the wild kingdom that we can look down upon. Advertisers do not shy away from casting the shadow of the un-American totalitarian regime—be it Nazi Germany, Communist Russia, or Taliban Afghanistan—to drive the self-affirming, dispositionist point home. For instance, one cable news network recently placed this ad:

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227 \textit{Cf. Kunda, supra note 31, at 151 (explaining that when assessing causation and responsibility, “people attempt to undo actions that are under the control of the individual they are focusing on,” which in the fast food context would lead them to focus on and place responsibility on the customer).}
\]

\[
228 \text{Fidelity Investments, Full Page Advertisement, N.Y. Times, July 14, 2002, at A15.}
\]
What makes America... America? It's the freedom to have an opinion... the freedom to speak your mind... [W]e know you can think for yourself. When it comes to covering the news, we don't have an agenda... and don't take orders from anyone. Just like every American. Just like you. America's News Channel MSNBC.229

The point seems to be not only that Americans are situationally independent—that is, able to think what they want to think and speak what they want to speak—but also that MSNBC is uninfluenced by outside forces. The network's competitor, Fox News Channel, takes the dispositionist view a step further and credits its own success to the free-choice-making dispositions of its viewers: “Thanks to the American people. You've made FOX News Channel the most watched, most trusted name in news. As active participants in the American experience, you ensure a free and fair press for all. We report. You decide.”230

This practice of portraying the consumer as in charge and nobody's fool is extremely widespread. Such reassurances seem particularly important and, thus, common when the consumer might be tempted to think otherwise. Partly for that reason, some of the most popular themes of cigarette advertising have been “choice” and “autonomy.”231 The Marlboro Man, like Joe Camel, was nothing if not autonomous and free. A look at Virginia Slims' highly effective advertising campaign slogans from 1968 until today reveals a similar emphasis on liberation, power, and independence: “You've Come a Long Way, Baby,” “It's a Woman Thing,” “Find Your Voice,” and “See Yourself as a King.”232

The message of the sovereign consumer not only encourages other consumers to purchase cigarettes, it also suggests some of the larger possible stakes that commercial interests seem to have in dispositionism. After all, if the consumer is king, then it is hard to justify making manufacturers pay for simply following orders. And this ability to place responsibility squarely on consumers—to say in a tort case, for instance, that they “assumed the risk” of their actions—has been fundamental to the industry's success in selling a product believed to cause over 400,000 deaths per year in the U.S. alone.233

231 See generally TARA PARKER-POPE, CIgARETTEs: ANATOMY OF AN INDUSTRY FROM SEED TO SMOKE 73–108 (2001) (describing the marketing practices of tobacco industry of the twentieth century).
233 Hanson & Logue, supra note 9, at 1167, 1183.
Thus, an important reason that sellers might embrace and encourage dispositionism is the hope of shifting responsibility and avoiding costly regulation or liability.\textsuperscript{234} Whatever the motive, the effect is that at every turn, commercial interests are reassuring consumers that we are the dispositional actors that we like to believe we are. So when Burger King tells us that we can have it our way and when McDonald’s tells us that we’re lovin’ it, their claims are simply part of a larger mutually reinforcing chorus of voices telling us that everything is within our control and reflects our own choices.

Competition does not solve the fundamental attribution error; it exacerbates it because all sellers have an interest in promoting it. Even industries that appear to encourage divergent behavior in their customers, like the fast food industry and the diet industry, share an interest in promoting dispositionism and, at least to that extent, are allies. To see how this works, consider the basic marketing strategy of the beauty industry.

2. \textit{The Beauty Industry: A McMilgram Variation}

In fact, the beauty, health, and self-help industries use a process of dispositionalizing the human body that is very similar to the strategy employed by fast food companies. The first step is, again, to manipulate the situation to move consumers to buy. The industries accomplish this by creating or highlighting an existing “inadequacy” in consumers. For example, numerous industries directly or indirectly promote an ideal body type or “look” that is difficult for most people to obtain.\textsuperscript{235}

\footnote{Jon Hanson & Douglas Kysar, \textit{The Failure of Economic Theory and Legal Regulation, in SMOKING: RISK, PERCEPTION, AND POLICY} passim (Paul Slovic ed., 2001) (describing how the cigarette industry succeeded in adopting just that strategy).}

\footnote{In other words, it is best if situational factors push in the opposite direction of the promoted body shape. By pointing out the potent role of corporations, we do not mean to suggest that other social, cultural, and biological forces do not also affect the body shape we desire. We hypothesize, however, that the corporate influence strongly affects the direction of the first two sets of forces, and often overpowers the second.}
The result is to create a division where none may have existed before—an in-group consisting of those with the ideal body type and an out-group composed of all those who do not measure up. With the ideal body firmly established, the corporation then offers a service or product that gives the consumer a “choice” to eliminate his or her own inadequacy and become part of the in-group. One magazine devoted to “shape” presents the simple path to “a celebrity ass,” explaining to readers that they are just a few “booty beautifying workouts” away from snagging “a J-Lo Caboose.” Another promises the secret to “a sexy stomach fast!” and just in time for “bikini weather.” Of course, for the woman who prefers to avoid the push-ups and sit-ups, there are numerous pills and powders that, if the “before and after” pictures can be believed, will transform us from out-group members to in-group members with little pain or sacrifice. And the advertisements for these solutions do seem credible, particularly with that white-coated doctor from Yale University pictured in the corner saying: “Hydroxycut is the single most effective weight-loss product I have ever used. I highly recommend it to both men and women.” It is hard to tell, but that might just be the same white coat used by the “experimenter” in Milgram’s study.

Even if you are among the stalwart souls convinced that your appearance problems were inherited, and, thus, beyond simple choice, there are still other options. One product—the unbelievably named “Anorex”—promises to “overcome the genetic link to obesity.” Of course, it is “designed specifically
for the significantly overweight” and those who are “Ready To Get Serious About Weight Loss;” it is not intended for the “casual dieter who is merely attempting to shed five or ten ‘vanity’ pounds.”

And if that sounds too good to be true, there is always the option of surgery. Staple here. Lift there. Implant this. Liposuck that.

Whatever the product—a special diet, an exercise regimen, a club membership, some concealing clothing, a motivational magazine, or a powerful pill—there is one common theme: a person’s body size, shape, and weight are matters of choice. “Taking responsibility” means making some investments.

That message promotes two mutually reinforcing dynamics. By dispositionalizing peoples’ appearance, we are more likely to categorize the old, the fat, and the ugly automatically into an out-group. And once they are perceived as members of an out-group, any adverse outcome that befalls that group or its members—from discrimination to diabetes—will be attributed to disposition and perceived as deserved. With body shape viewed as a choice, and hence a reflection of an underlying “preference,” we will feel considerably more comfortable ridiculing the “unattractive shape” or even loathing those who possess it. After witnessing a dispositionalized out-group contend with daily derision, other consumers have an added incentive to “take responsibility” and avoid the stereotype by purchasing the product. The incentive is huge.

3. Discrimination Against the Obese

For obese Americans, constant stigmatization and frequent discrimination are found in all aspects of daily life, including education, employment, health care, and interpersonal relationships. It is like being a “Rattler” in an “Eagles” world. A study by Rebecca Puhl and Kelly Brownell found that parents provide significantly less monetary support for their overweight children than for their thin children in pursuing advanced education and that 28% of teachers involved in the study said that becoming obese was one of the

237 Puhl and Brownell speculate that discrimination also occurs in areas such as jury selection, housing, and adoption, among others. See generally Rebecca Puhl & Kelly D. Brownell, Bias, Discrimination, and Obesity, 9 OBESITY RES. 788 (2001).
238 See supra text accompanying notes 43–57.
worst things that could happen to a person. Unsurprisingly, fewer fat students end up going to college.

Mark Roehling reviewed twenty-nine studies about the experiences of the obese in the workplace, and he found discrimination in nearly every aspect of the employment relationship, from hiring to wages to benefits. In fact, weight appears to elicit more pervasive discrimination than other appearance-related factors like gender, age, or race. The added discrimination reserved for the overweight and obese reflects our sense that those problems, more than the others, reflect personal choices. Isolating weight and sex, one group of researchers found that the weight of an applicant explained 34.6% of hiring, whereas sex explained only 10.4%. In another set of experiments that studied how decisions about employee discharge were colored by social stigmas, participants demonstrated stronger negative feelings toward overweight employees than they did toward ex-mental patients or ex-felons.

The wage differential is equally startling, although the effect is far stronger in women. Morbidly obese white women have wages 24.1% lower than their standard weight counterparts, and moderately obese woman earn 5.9% less. This substantiates recent work by Nancy Fultz of the University of Michigan, who found that the net worth for an obese woman fifty-seven to sixty-seven years of age was 60% less than a woman of normal weight in 1998.

Much of the discrimination occurs in areas less noticeable than hiring or wages. In one study of people who were at least 50% above their ideal weight,
more than a quarter reported that they had been denied benefits like health insurance on account of their weight.\textsuperscript{247} Moreover, 24\% of nurses in another study reported that they are "repulsed" by obese patients,\textsuperscript{248} so even when obese individuals manage to get health care there is reason to believe that it may not be the best.

Being overweight affects many social interactions. When we look at the obese we see only their fat. We miss their intelligence, their kindness, and their strength, just as we miss the broader situational influences that led them to be overweight. We see a disposition that reassuringly explains their most salient feature—fat people are weak.\textsuperscript{249} As Roehling found, overweight people are frequently stereotyped as being socially handicapped and emotionally impaired, and as having negative personality traits.\textsuperscript{250} After all, who else would choose to look like that?

Such negative stereotypes attach early on. By nursery school, children show a preference for drawings of children in wheelchairs and with facial disfigurements to those of obese children; by the time they enter elementary school, they have already begun to construct causal schemas.\textsuperscript{251} In one study, children who were asked to describe a silhouette of an obese child used words like "dirty," "lazy," "ugly," "stupid," and "sloppy."\textsuperscript{252} According to another study, the quality of life for obese children is approximately the same as that of children undergoing chemotherapy for cancer.\textsuperscript{253} Jeffrey Schwimmer, who led the quality of life study, explained: "Obesity is an extremely socially stigmatized disease, and unlike some conditions, it's not something a child can hide."\textsuperscript{254} Evidence abounds that obese people are not wanted. Sixteen percent of adult Americans would abort a baby if they knew it would be untreatably obese, whereas 17\% would abort if they were certain the child would be

\begin{itemize}
  \item \textsuperscript{247} Esther D. Rothblum et al., \textit{The Relationship Between Obesity, Employment Discrimination, and Employment-Related Victimization,} 37 J. VOCATIONAL BEHAV. 251, 255, 261 (1990).
  \item \textsuperscript{248} Puhl & Brownell, \textit{supra} note 237, at 792.
  \item \textsuperscript{249} Kelly Brownell, the Yale Researcher who has written most extensively on the role of environment in creating the obesity epidemic, is openly ridiculed and discredited by his critics because of his own weight. See, e.g., The Center for Consumer Freedom, Would You Take Dietary Advice from This Man?, at http://www.consumerfreedom.com/article_detail.cfm/article/125 (Aug. 26, 2003).
  \item \textsuperscript{250} Roehling, \textit{supra} note 241, at 969.
  \item \textsuperscript{251} Goldberg, \textit{supra} note 240 at 36.
  \item \textsuperscript{252} \textit{id.}
  \item \textsuperscript{253} Jeffrey B. Schwimmer et al., \textit{Health-Related Quality of Life of Severely Obese Children and Adolescents,} 289 JAMA 1813, 1814, 1816 (2003).
  \item \textsuperscript{254} David Brown, \textit{Study Cites Pervasive Effects of Obesity in Children,} WASH. POST, Apr. 9, 2003, at A10 (quoting Jeffrey Schwimmer).
\end{itemize}
mentally retarded. In a 1988 study, students reported that they would rather marry someone who was an embezzler, a drug addict, a shoplifter, or a blind person than someone who was obese.

It seems strange that there could be so much discrimination against the overweight in a country with so many fat people. The explanation may be that the overweight, just like everyone else, have been convinced of the desirability of the waif body and the righteousness of the dispositionist message. They made a bad choice—or many bad choices—and now fairness demands that they pay the consequences.

They look in the mirror and say, “Yes, it’s true, I am disgusting;” “I brought all this discrimination on myself;” and “I have a decision to make, just like Dr. Phil says.” This self-assessment shares much with the reflections of Milgram’s subjects who left feeling that their own evil ways, and not the situation, were solely to blame for their behavior. This is hardly the mindset needed for successful social activism. In part because of this internalization, overweight people, unlike many other groups that face

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255 Goldberg, supra note 240, at 36 (citing a study by Dorothy C. Wertz of the University of Massachusetts Medical School).

256 Id. Once our out-groups are well defined, other dynamics kick in to reinforce them. Thus, when Hollywood embraces the emaciated look, it reinforces the stereotypes and causal schemas behind our groupism. And the source is more credible because the stereotypes are not selling anything other than views of ourselves and the world we like to see. Moreover, the free advertising campaign is self-perpetuating: New stars cannot get jobs in Hollywood unless they are thin. Fatness has been banished from shows about growing up in the suburbs and living in the city, getting by on the streets and making it big on Wall Street, and being good and being bad. In Hollywood, the fallen star is often the fat star. We make faces at the sight of a portly Anna Nicole Smith. Late night talk show hosts tell Marlon Brando jokes as routine filler. Even the beloved Oprah is fair game because she cycles between fat and not-so-fat. Indeed, the only place in Hollywood where we really find any obesity is comedy. We laugh at a John Candy or a Chris Farley, and though it is harder because they are women (for whom fatness is an even greater shortcoming), Roseanne Barr and Rosie O’Donnell. And it feels okay because it was their choice to be fat—a conscious decision as a comedian. Their on-screen personas, with their bumblings and good-natured goofiness, assures us of that fact. We see only the most salient aspects of the scene: jolly fat men urging us to guffaw at their expense. We ignore the broader situation: the psychological pain and physical health problems of being obese. Both Candy and Farley struggled with their obesity, and both died young... and fat. The waif and the health buff on every channel each and every night assure us that situation must be irrelevant and confirms the notion that everyone wants to be skinny.

257 The idea that “obesity” is a disease is highly controversial—indeed, to many, it is laughable. The Onion recently ran a satirical article that poked fun at those who would portray obesity as a disease and not an issue of personal responsibility. See Report: Scientists Still Seeking Cure for Obesity, THE ONION, July 14-20, 2004. In the fictional news story, a woman laments the day when she “came down with obesity”:

I know it was hard for my husband to watch me suffer from this disease. When he caught obesity a year later, he got so depressed, he couldn’t do anything but sit on the couch. Some days, we sit and watch television from dawn till dusk, hoping for news of a breakthrough.

Id. What makes the article funny is the fact that the answer to the couple’s problems is so obvious and commonsensical to us: Just get up off the couch and do a little exercise!
discrimination, are not organized to demand fair treatment. The National Association to Advance Fat Acceptance ("NAFA") is the only national advocacy group, but since its founding in 1969 it has never had more than 5000 members.

4. Explaining a Paradox

Through this discussion we have begun to unravel a central paradox of contemporary American culture: We live in a country with both the highest per capita obesity rates and the highest anorexia rates in the world; a country in

Obese people suffer from a unique perception of culpability that seems to linger and allow for perpetual discrimination. Even Americans who are directly responsible for their disabilities seem to avoid any similar lingering effect. A man who gets drunk and drives his car into a tree, paralyzing him from the waist down, might still blame himself for the accident two years later. However, he does not accept being denied a job on account of his wheelchair or being refused a space in a movie theater. Unless he is obese, being in a wheelchair is being in a wheelchair, and decent treatment is required. The reason he is disabled in the first place is irrelevant, whereas it is constantly recalled with the fat man, even when the causal story—"man lacks self-control"—may have little truth to it.

Obese people, it seems, "choose" to be disabled just as they choose to eat too much. A recent comical blurb in *The Onion* exemplifies that theory:

Morbidly Obese Man Enjoys Disabled Privileges With Motorized Cart
MESA, AZ—Former fat lump of crap Joseph Woodring joined the ranks of the disabled Monday with the purchase of a Rascal™-brand motorized cart. "I am pleased to make the move from morbidly obese to differently abled," said the 410-pound Woodring, as he careened through East Towne Mall on his electrically powered whale transporter. "My newfound handicapped status has truly given me a new lease on convenience." Woodring then motored off to the mall's food court for a McRib Deluxe Extra Value Meal.

*News in Brief, Onion*, Jan. 8–14, 2004, at 2. It is okay to call the man a "fat lump of crap" or a "whale" because he has made a decision to buy a motorized cart. He has brought it on himself. It was not chronic arthritis in his knees or dangerously high blood pressure that made him buy a Rascal; it was for "convenience." How can we sympathize with someone who is just plain lazy?

The law reinforces the idea that this is a personal issue and not a societal issue. Title VII of the Civil Rights Act of 1964 and other fair-employment laws do not protect overweight or obese individuals from discrimination; weight is somehow different from race, religion, color, sex, and age. See *Discrimination in Employment Act of 1967*, 29 U.S.C. § 621 et seq. (2000) (dealing with age discrimination); *Civil Rights Act of 1964*, 42 U.S.C. § 2000 et seq. (2000) (dealing with race, religion, color, and sex discrimination). Indeed, only Michigan, Washington, and San Francisco and Santa Cruz, California have laws that prohibit employment discrimination on account of physical appearance. People looking for protection under the Americans with Disabilities Act have been less than successful. The few court victories have come when individuals were either morbidly obese or, more often, when an individual claimed that he or she was discriminated against not because of a disability, but because employers perceived that the individuals had disabilities when, in fact, the individuals could really perform the job. Steven Greenhouse, *Overweight, but Ready To Fight: Obese People Are Taking Their Bias Claims to Court*, N.Y. TIMES, Aug. 4, 2003, at B1.

As Dr. Conrad H. Blickenstorfer, NAFA Chairman, stated during a recent address: "Personally, I consider NAFA's mission right up there with the Bill of Rights, but as an organization, NAFA has always been relatively small and insignificant." Dr. Conrad H. Blickenstorfer, 2002 State of NAFA Address (Aug. 10, 2002), available at http://www.naafa.org/Convention2002/state_of_naa.html.
which, each year, Americans spend more than $110 billion on fast food, and $40 billion on diets and other weight loss products. How do we explain our daily fry sessions, when 63% of adults report that they want to lose twenty pounds, and many of us say we would forgo a job promotion or a dream house if it meant we could be skinny? The answer is simple: The beauty and fast food industries are not really competitors. If anything, they enjoy a symbiotic relationship in which the success of one depends in part on the success of the other.

The fast food industry exploits and manipulates our unseen situation to encourage us to eat their high-caloric, low-metabolic offerings, even while reassuring us that doing so is our choice, and that our choice is a good one ("I'm lovin' it"). When we get fat from all of the lovin', McDonald's, and the rest of the fast food industry, can sound its other jingle of "personal responsibility" in part because the beauty and health industries have also spent billions belting out the chorus of dispositionism and convincing us that the shape of our bodies is a matter of personal choice. Thanks to the creation of millions of overweight and obese people who are perceived by themselves and others as undesirable, or even repulsive, the beauty and health industries are able to cash in by selling us what we want—an escape from the out-group of "them" and a secure place among the in-group of "us." Although there are

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264 The commercial explanation is more convoluted. Given the assumption that people's choices reflect their desires, the industry asserts that people can "choose" to be fat even though most people desire to be thin because preferences and choices are different. People have many preferences, and sometimes these preferences conflict. Our desire to sit around and watch TV at night conflicts with our desire to be a healthy, "desirable" weight. By flipping on the television when we come home from work instead of going to the gym, we make our choice to be fat and effectively rank our preferences. Even though we would prefer to be skinny over being fat, we do not make the choices along the way that would lead to our desired outcome: we do not buy the exercise program, we do not balance out the fast food we are eating, and we choose to drive to McDonald's instead of walking. The corporation can only respond to external manifestations of desire. If people want to be thin, but act like they want to be fat, then they do not really want to be thin, and the corporation can do nothing. The consumer is sovereign.
265 To the seasoned reader of children's books, the process should be reminiscent of Sylvester McMonkey McBean's Star-On and Star-Off machines working at full tilt, as the Sneetches scramble to find acceptance,
certainly success stories—particularly among those whose socioeconomic situations permit—on the whole, as a population, when it comes to losing weight, our dispositions are strong, but our situations are stronger.

III. CHALLENGING THE MCMILGRAM EXPERIMENT

A decade ago, the great McMilgram experiment was largely unchallenged, unquestioned, and unnoticed. People ate what they chose and chose what they ate. Whether one was a string bean, a pear, or worst of all, an apple, one’s body shape simply reflected one’s choices. Sellers, it seemed, played only a supporting role, loyally responding to the public’s preferences, good or bad, healthy or unhealthy. And while the food industry advertised occasionally to highlight their products among an almost infinite array of options, no one seemed blindsided or coerced. Corporations were a passive force in the decisionmaking process. They were our friends—our servants really—and the economy was thriving.

Then things changed. Big tobacco, an industry that had long been immune to liability for a number of major public health issues associated with the use of its products, began to stumble, to cough, and, finally, to weaken. As internal documents emerged, the industry was revealed in its dressing gown—a gaunt and vampiric apparition; its history of misinformation and manipulation thrust out into the light. The plaintiffs’ bar, which had for a century hit the solid-walled coffin of “free choice” when it attempted to hold tobacco defendants liable, felt the muddied oak begin to splinter beneath a diligent spade. As more revelations were unearthed, plaintiffs won some big cases and big verdicts. More extraordinary, they found themselves winning in the forum of public opinion. The plaintiffs’ bar, now flush with victories, began to get notions. It began examining the possibility that other industries whose products were associated with serious health problems might likewise be the targets of successful regulation through litigation. The idea that such lawsuits might actually do some good, well beyond enriching those who brought them, was not lost on public health champions and regulators either.

At the same time, scientists were moving in for a closer inspection of America’s burgeoning belly, and the prognosis looked serious. For decades,
the overweight rate appeared fixed at around 25%. It was a problem, but a static problem—which are often the easiest to ignore. By the 1980s, however, the graph had clearly shifted; indeed, the plot itself began to march inexorably toward the upper right hand corner, passing 40% and then 50%. The situation was not only bad; it was getting worse. And, notably, there was a hard-to-miss correlation between the growing size of our french fry containers, our soft drink containers, our pasta bowls, and our enlarging girth. That obesity seemed to be gaining on, possibly even overtaking, smoking as the number one cause of “preventable” mortality and morbidity meant that it was almost certain to grab the attention of lawyers and regulators out looking for a cause.

Overall, the last decade was a tough one for the corporate image. After the dot.com bust and the wave of boardroom debacles and securities scandals connecting large corporate interests to political influence, combined with growing distrust over globalization, we emerged less certain of the purity of our friendship with corporations. It was in that changing climate that people began to see enlarged canines and smacking lips, rather than the gracious smile of a dinner host, in the visage of the food industry. New words like “organic,” “free range,” “genetically modified,” and “mad cow” entered the vocabulary, and the food processing practices of large corporations came under increasing scrutiny. Popular books appeared on topics like living in a Fast Food Nation, Food Politics, employees of large corporations being Nickel and Dimed, and an emerging titanic global clash—Jihad vs. McWorld. Such writings combined to give many a sense that there was more going on under those golden arches than simply a desire to see us smile.

266 SCHLOSSER, supra note 199.
268 BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001).
270 The fast food industry has been attempting to respond and manage changing public perceptions, and allay growing suspicions toward the food industry. McDonald’s, which has been the subject of the most criticism, has launched a public relations response. For an overview of McDonald’s efforts to “earn your trust,” see McDonald’s Worldwide Corporate Responsibility Report 2004, available at http://www.mcdonalds.com/corp/values/socialrespons/sr_report.RowPar.0002.ContentPar.0002.ColumnPar.0003.File.tmp/SR%20Full%20Report_output.pdf. As the opening letter of that report underscores, “Critical food safety incidents and concerns about nutrition and health have changed the landscape for the food industry [over the last two years]. McDonald’s approach to corporate responsibility issues has evolved in response to these changes.” Id. at 2. “Leadership in corporate responsibility,” the letter continues, “will help us not only to build trust in McDonald’s and strengthen the reputation of our global brand, but also to be a more profitable business.” Id.
As misgivings grew and individuals began to take seriously the possibility that fast food was exercising more influence over our consumption habits than we had realized, an idea was born: force the industry to change, whether through regulation or lawsuits. And with lawyers at the ready, several lawsuits have been filed, some of which have had demonstrable effects. Legislation have also begun to put forth ideas for new forms of regulation, from new labeling requirements to fast food taxes.

IV. ENTER THE PSYCHOLOGICAL THREATS

These developments—from uncovering the deeper health and economic implications of obesity, to constructing the case for industry liability, to recognizing that our food industry friends might not be so friendly after all—represent a real threat to Americans. And that threat, we believe, helps explain the great amount of attention the lawsuits and regulatory proposals have garnered despite the limited, and in some cases preliminary, nature of the work. Although media coverage suggests the opposite, there have really only been a handful of cases brought against the food industry in a system that sees thousands of new files daily. But when our internal panic button is pressed, the actual magnitude of the threat is often irrelevant. Proposed legislation that would keep advertising out of elementary schools, for example, can dominate national headlines, even if the legislation concerns only one school district. To individualistic, choice-loving Americans, such small measures feel like an onslaught. Certainly, we may each experience the threat in different ways depending on a variety of factors, from our own body shape and dieting habits, to our ideological positions. Yet, despite individual differences, widely shared stereotypes and causal schemas have led to some more-or-less typical and predictable responses and reactions to the shared sense of threat.

271 According to Kate Zemike, there have been 10 prominent cases against the food industry so far, five of which had some success. McDonald's paid $12 million to settle a complaint that it failed to disclose beef fat in its French fries; Kraft agreed to stop using trans fats in Oreos; the makers of Pirate's Booty, a puffy cheese snack, paid $4 million to settle a claim over understating fat grams.

Kate Zemike, Lawyers Shift Focus from Big Tobacco to Big Food, N.Y. TIMES, Apr. 9, 2004, at A15.

272 For example, Senator Tom Harkin of Iowa recently introduced a bill that would once again give the Federal Trade Commission the power to restrict advertising to children. Ives, supra note 196, at C6.

273 The best known of those is described below. See infra text accompanying notes 550–60.
A. Threat to the Individual

When confronted with information about a lawsuit against a fast food corporation or news of a study linking heart disease with french fries, those who frequent fast food restaurants and who have a weight problem are likely to feel a threat to a sense of themselves as rational, intelligent, and reasonably health-conscious individuals. This is basic cognitive dissonance: The threat of regulation or litigation suggests that their decisions were not good ones. Individuals will seek to reduce that dissonance and can do so in one of two ways—by altering their eating habits, which, in light of the unseen situational influences on consumption patterns that we have been reviewing in this Article may be incredibly difficult to do, or they can look for ambiguity, question the credibility of the messenger, or seek counter-evidence to show that they did in fact make the right choice or that they are good people for other reasons.

When confronted with the same information, consumers who do not routinely eat at fast food restaurants and who are not overweight will also feel a threat. Theirs, however, will tend to relate to the fear that personal freedoms are in danger—that lawsuits and legislation will mean that they will no longer be able to eat what they want, when they want, and that they will have to pay higher prices or read intelligence-insulting warnings. These individuals feel like they are being punished even though they made good choices under the old regime, and even though they are irrefragably capable of taking care of themselves without the heavy-handed matron of government interference.

B. Threat to the In-Group

Both types of responses—and many individuals will feel some of both—tend to lead people to fall back on common stereotypes to characterize the sources of our discomfort—lawyers, regulators, public policy advocates, and the obese themselves. These stereotypes tie directly into another type of threat: the threat posed to the groups of which we are a part. As highlighted earlier, group threats often increase our tendency to dispositionalize. 274

The images spawned by the threat are commonplace in political cartoons. There is Uncle Sam telling us he wants us to stop smoking, wear a seatbelt, and eat less red meat. There is the “waistline patrol” racing to save the day, just as our silly, misguided ancestors tried to save the day by outlawing alcohol.

274 Recall how the introduction of competition between the Rattlers and the Eagles resulted in strong out-group stereotyping (“sneaky, smart-aleck stinkers”). See supra notes 44-49 and accompanying text.
Other stereotypical images are already deeply ingrained in our culture and can be easily called-upon in the dissonance reduction campaign. Lawyers, for instance, are already seen in a strongly negative light. We know that they are often greedily trying to interfere with our ability to make choices by playing the “victim card” and disingenuously claiming that their clients had no choice.

**FIGURE 2:** The Opportunistic Lawyer

In general, people stereotype out-groups as either opportunistic or intrusive, and always as taking something away from one’s own in-group or groups. In the obesity context, we view out-groups as, on the one hand, intermeddling, power-hungry “nannies” and incompetent government regulators who try to impose their values on us while removing our free choice; and on the other hand, lazy “fat people” who get to cash in for their own ignorance and sloth, while regular Joes and Janes, like us, get nothing. The typical “fat person” stereotype, depicted in cartoons, is a middle class white male—potentially the least vulnerable demographic.

Conjuring with ease this stereotypical image, we can safely dispositionalize obesity more generally, applying the same stereotype to other out-groups that are under more obvious situational constraints, like the overweight African American child, living in an inner-city public housing project, with a single mother who works two jobs. Although the obesity problem and its health
effects are far greater among the poor, among blacks and Hispanics, and among the least educated, it is a point that is rarely noted. We see only choice.

**FIGURE 3: The Typical Target**

![Cartoon of a person blaming fast food restaurants for their weight.

C. Threat to the System

The last type of threat posed by the obesity crisis is one to the social system. We see a threat to capitalism and democracy, to our sense of justice, and to our country’s foundations in “personal responsibility.” The arguments and actions of lawyers and regulators suggest that the system as we know it is unjust and has untoward effects on many people. This is a deeply disturbing proposition and one that all demographics must deal with swiftly and harshly.

The strong motive for justifying the system may help explain why people of all body shapes tend to blame the obese for their condition. According to a recent Gallup poll, 89% of Americans oppose holding fast food corporations legally responsible for the weight-related health problems of people who eat at their chains on a regular basis.\(^{275}\) Most notably, overweight individuals (89% opposed) are not significantly more likely to blame the fast food industry for

their woes than underweight people (88% opposed) or optimal weight people (90% opposed). When faced with a perceived threat, non-overweight individuals find that their self-affirming motive ("I make good choices"), group-affirming motive ("I am a member of a group that makes good choices"), and system-affirming motive ("I am part of a system in which people who make good choices end up healthy, attractive, and at the top") all align to justify their high status position. Overweight individuals, on the other hand, find their self-affirming and group-affirming motives conflicting with their system-affirming motive. Since overweight individuals are not on top—everyday experience shows that they are beleaguered by health problems and disparate treatment—they cannot have made good choices. Either that, or the system itself is flawed. As the surveys and experiments outlined earlier would predict, overweight individuals tend to take responsibility for their "bad" choices, just as low-income Americans choose to take responsibility for being poor. Self-loathing is the answer to the dissonance inducing conundrum posed to the obese by the system-justification motive.

V. COUNTERING THE THREAT TO INDUSTRY

Although the psychological effects are clearly powerful, the actual threat may or may not be real for the general population. For the food industry, on the other hand, litigation and regulation represent an immediate and tangible threat—though less obviously a long-term threat—to their interests. It is a threat to the bottom line encompassing potential tort damages, profit-reducing regulations, and a loss of business from those who decide to reduce their fast food consumption after the health consequences are rendered more salient or taxes push up prices. Most importantly, for all commercial interests the threat is a challenge to the dispositionist worldview, a worldview that has allowed corporations to rise to their preeminent position in this country. To respond, all industries need to persuade policymakers, the public, and their customers that the critics are misguided and dangerous. Doing so requires a unified message. Before examining that message, though, it is useful to understand the equally important need for credible messengers.

276 Id. A recent study at Michigan State University revealed similar evidence. The study showed that two-thirds of the residents in Michigan, the nation’s most overweight state, believe that obesity is about individual choices and is not something that ought to be dealt with by society as a whole. Gisgie Gendreau, Survey: Obesity a Personal Matter, Not Public Concern, MSU NEWS BULL., Mar. 27, 2003, at http://www.newsbulletins.msu.edu/march27/obesity.html.

277 See supra text accompanying notes 69–76.
A. Third-Party Messengers

When commercial interests perceive a significant threat and the population seeks reassurance, many companies go on the offensive to reestablish a favorable public outlook. Although corporations sometimes respond to critics directly, that strategy tends to be less than effective, in part, because corporations are seen as having a clear stake in the outcome. Choosing a credible third party to convey the dispositionist rebuttal to a perceived threat is thus vital. In fact, social psychology teaches us that people often seem to give greater scrutiny to the identity of the party than to the information the party ultimately provides. As Milgram found as he varied the parameters of his initial experiment, "A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority."\(^{278}\) What was critical in the experiment was not so much what the experimenter said, but that he was a scientist in a white lab coat saying it.

Indeed, when Milgram replaced the "experimenter" with an "ordinary man" to give the orders, the percentage of "teachers" who administered the maximum shock (450 volts) dropped from approximately 65% to around 20%. It turns out that we often do judge a book by its cover. More to the point, we tend to judge a book by the blurbs on its back cover, blurbs that never contain a review by the author herself, precisely because the author's opinion, assuming it is positive, is suspect.

**Figure 4: The Credible Messenger Complete with Stethoscope**

![Image of a doctor with text: "Hydroxycut is the single most effective, natural weight-loss product I've ever used. I highly recommend it to both men and women." - Dr. Christine Lyon, MD, Yale Medical School]

\(^{278}\) Milgram, *supra* note 21, at 75.
In response to the need for third party messengers, corporate interest groups have adopted a strategy of sponsoring knowledge production on a variety of levels that can appeal to a variety of audiences—from giving grants to scholars at elite universities and seed money to think tanks to promoting popular media and acting through public relations firms—all of which can credibly be deployed as “independent” of the industry itself. Such knowledge production attempts to develop two types of credibility: science and common sense. “Science” knowledge—be it economic analysis or laboratory studies—is valuable because it is seen as objective and can be used to counter evidence offered by public health experts. “Common sense” knowledge is powerful because it suggests obviousness, believability, and time-tested reliability. It taps into many of our basic cognitive tendencies. The messages frequently play off of each other, and the credibility of one level of production can often be used to bolster another. Thus, an academic like Richard Epstein, a preeminent law and economics scholar, will back up one of his dispositionist claims in a law review article by suggesting that it is “common sense”—of the same type peddled by radio talk show hosts. Likewise, a figure like Rush Limbaugh will reinforce one of his broadcast “monologues” by employing the credibility of a study from a conservative think tank.

At the most sophisticated level of knowledge production—elite universities—commercial interests have invested heavily in promoting credible support for dispositionism. On the surface their efforts may appear haphazard and disorganized, hardly anything suspect or unfair. Thus, by conventional accounts, the triumph of law and economics, presently the dominant legal-theoretic paradigm, appears to be simply the result of the best theory winning out in the most objective and meritocratic of arenas—academia. Upon closer examination, however, the success of law and economics may reflect less its objective superiority and more its axiomatic commitment to dispositionism and resultant faith in free choice and markets. That commitment has led those who

279 When introducing carefully orchestrated bills that protect the food industry from liability, politicians often steer clear of legalese, and instead, they employ the “everyman” rhetoric. Congressman Ric Keller’s comments in support of the Personal Responsibility in Food Consumption Act are typical:

We believe there should be common sense in a food court, not blaming other people in a legal court whenever there is an excessive consumption of fast food . . . . We think that most people understand that it’s common sense that if you eat unlimited amounts of supersize fries and milkshakes and Big Macs . . . that can possibly lead to obesity and things like diabetes [and] cardiovascular disease.

stand to gain from dispositionism to adopt a far more strategic—situational—
approach to the competition for dominance in legal theory, one whose very
purpose is to make sure that the playing field is not level and that the strongest
theory does not necessarily win. And they have done so in response to the
same general threat that today motivates the food industry.

William Simon, one of the forces behind the John M. Olin Foundation, a
group that has awarded tens of millions of dollars to prominent law schools for
the promotion of law and economics scholarship in the last decades,
understood early on the need for business interests to actively promote a
strongly dispositionist worldview that celebrated markets and minimized
government. Simon considered the knowledge being produced and taught at
American universities in the early 1980s, when he first came to head the Olin
Foundation, to be dangerously antithetical to those ends. For Simon, this
problem was tantamount to a war of liberty versus totalitarianism—a war that
in his view had to be waged simultaneously on several fronts:

(1) Funds generated by business . . . must rush by multimillions
to the aid of liberty, in the many places where it is beleaguered . . . .
[Foundations established by such funds must] serve explicitly as
intellectual refuges for the non-egalitarian scholars and writers in our
society who today work largely alone in the face of overwhelming
indifference or hostility. They must be given grants, grants, grants,
and more grants in exchange for books, books, and more books . . . .

(2) Businesses must cease in the mindless subsidizing of colleges
and universities whose departments of economics, government,
politics, and history are hostile to capitalism and whose facilities will
not hire scholars whose views are otherwise . . . . America’s major
universities are today churning out young collectivists by legions,
and it is irrational for businessmen to support them . . . .

(3) Finally, business money must flow . . . to media which are
either pro-freedom or, if not necessarily ‘pro-business,’ at least
professionally capable of a fair and accurate treatment of
procapitalist ideas, values, and arguments. The judgment of this
fairness is to be made by businessmen alone—it is their money that
they are investing . . . .

These are the three fronts on which to act aggressively if we are
to create a sophisticated counter-force to the rising despotism.280

Simon, with the support of the Olin Foundation, was aware that he was trying
to alter the playing field on which academic debate takes place—and that the

way to do so was situational. He realized that the idea of American individualism, a cousin concept to what we have been calling dispositionism, had to be fashioned, promoted, and reinforced to maintain its power of social policymaking. And he understood that dispositionism was good for business.

Olin money has had, and does have, a significant influence not only in encouraging certain types of scholarship that entrenches dispositionism,281 but also in increasing the credibility of that scholarship. It establishes “centers” dedicated to law and economics theory, provides seed money for journals that can provide stamp of legitimacy bestowed through “peer review” by other law and economics scholars, pays for workshops to showcase economic oriented legal scholarships at leading law schools, and provides scholarships and fellowships to law students who agree to participate in law and economics seminars and produce law and economics scholarship. In short, Olin money has helped to create and advance a critical mass of legal scholars who begin with the strongly dispositionist axioms of neoclassical economics, who write largely for one another and for policymakers, and who view themselves (and who are viewed by many others) as the only genuinely social scientific members of the legal academy.

Capturing legal academia, while a valuable first step, has only been the top layer of a multi-layered process of promoting dispositionist knowledge production. Probusiness ideas emerging at Olin Centers around the country have found their way into think tanks with similar goals and funding sources. For example, the American Enterprise Institute for Public Policy Research (“AEI”), one of the largest and most widely referenced private think tanks in the United States, describes its mission as being “dedicated to preserving and strengthening the foundations of freedom—limited government, private enterprise...—through scholarly research, open debate, and publications.”282 AEI’s “open debates,” like a recent one entitled “Obesity, Individual Responsibility, and Public Policy,” provide platforms for the same “independent scholars” whose work in the academy is sponsored by the Olin Foundation. The results of this supposedly free exchange of ideas can then be broadcast in magazines that appeal to an even larger audience, such as Reason,


a magazine self-described as a publication of “free minds and free markets.”

The credibility of the elite university, the think tank, and common sense overlap in coverage of the event. As Ronald Bailey explained in his *Reason* article on AEI’s obesity conference, “Fortunately, AEI invited the always reasonable . . . Richard Epstein to sort through the issues,” who settled the debate by pointing out that “[m]ost people pretty much know that eating ice cream is fattening.”

An essential aspect of creating credible third-party messengers is emphasizing the objectivity of the third party and masking any connection to the corporate interest group. What Olin does for commercial interests in general, public relations firms accomplish for particular industries, corporations, and individuals. The leading public relations firm of Burson-Marsteller ensures its clients that it can have their client’s messages about their products or services “communicated through a credible third party such as a trusted journalist, physician, television or radio commentator, entertainer, or influential Internet figure. In essence, a public relation agency optimizes the power of endorsement by successfully influencing those who influence a targeted audience.”

Another public relations firm, Berman and Company—a favorite among the restaurant, alcohol, and cigarette industries—makes clear to its clients that it can go much further than simply influencing legislators to support their client’s view on a contested issue—it can “change the debate” to promote the client’s interests:

Many PR firms promise access to the media. Law firms pledge to defend their clients. Lobbying firms promise access to friendly legislators. At Berman and Company we do all this. But we go further. We change the debate. If necessary, we start the debate. . . . Our success is based on three core competencies: credible research as the foundation for effective messages disseminated via aggressive communications.

As the website emphasizes, the “key” to Berman & Company’s approach “is getting the most credible messengers to carry the strongest messages.” To

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ensure a steady supply of such messengers, Berman & Co. reports that it has engendered what it calls an "[a]cademic research network" to "commission more than a dozen major research projects each year to independent academics at leading research universities," including the University of Chicago, University of Texas, and Massachusetts Institute of Technology.\(^\text{288}\) This work is supported at another level by "building and maintaining sophisticated grassroots activation systems;" "drawing industry allies from associations, think tanks, or the private sector;" "providing data, information, and refined messages that others use to make their cases—and ours—in the policy arena;" and the ultimate in credibility creation, "develop[ing] strong ties to individuals who are often perceived as 'anti-industry' but who agree with focused messages that we seek to publicize."\(^\text{289}\) When no "anti-industry" spokespeople can be found, Richard Berman himself is happy to step into the role and write seemingly independent articles and opinion columns for mainstream newspapers such as \textit{USA Today}.\(^\text{290}\)

\textbf{B. The Message}

The messengers require a message. To counteract the threats posed by those pointing to the importance of environmental factors in explaining obesity and the importance of the food industry in exercising situational influence over consumers, the messengers assert four basic conclusions: first, the obesity problem is vastly overblown; second, if there is a problem, fast food is not its cause; third, if fast food is connected to obesity, then the causal link between the two is consumer choice; and fourth, any nonprivate attempt to alter the status quo threatens our system and freedom itself.

\begin{footnotes}
\footnotetext{289}{\textit{Id.}}
\footnotetext{290}{See Berman, \textit{supra} note 179. Details of where knowledge is coming from and who is paying for it are often missed. Many of us do not read the byline, or if we do, we do not have enough information to determine if the writer has a conflict of interest. Another recent story in \textit{USA Today}, entitled "Fast Food 'Addiction' Feeds Only Lawyers," seems, at first glance, to be an objective analysis of the addictive effects of high-fat food by a psychiatrist "who specializes in treating conventional drug addicts." Sally Satel, \textit{Fast Food 'Addiction' Feeds Only Lawyers}, \textit{USA Today}, Mar. 12, 2003, at 13A, \textit{available at} http://www.aei.org/news/newsID.16535,filter/news_detail.asp. It turns out, however, that the author, Sally Satel, M.D., is a W.H. Brady Jr. Fellow at AEI. Even having this information is not likely to be useful to most people, unless they happen to know AEI's agenda and where it gets its funding.}
\end{footnotes}
The first and second conclusions provide individuals with the reassuring information they need to reduce the two types of dissonance discussed earlier. Recall that overweight individuals experience discomfort when told that they are overweight and that their diet is unhealthy, while other consumers experience discomfort when told that external forces largely determine their actions. Both kinds of dissonance can be reduced if either the evidence can be made to appear ambiguous or the credibility of the messengers of the disturbing news can be challenged. Hence, the first two conclusions, which reassure the overweight consumer of the correctness of the choice to consume fast food and everyone else of the correctness of their dispositionist view of the personally irresponsible overweight and obese, serve to establish the third conclusion, that dispositionism explains any negative outcomes witnessed in the food consumption market.

To advance the first conclusion—that there really is no obesity crisis—the food industry encourages attributional ambiguity by suggesting that maybe Americans are not so dangerously overweight after all. To this end, they have begun to call into question measuring devices, like the Body Mass Index ("BMI"), that scientists use to categorize overweight and obesity. As one critic puts it:

[T]he Body Mass Index (BMI), used by government researchers to distinguish between naughty and nice physiques, is notoriously unreliable. Muscle weighs more than fat, and the BMI doesn’t account for this. By current standards, half of the NBA is overweight, and many Hollywood heartthrobs are downright obese. And the feds used sleight-of-hand to redefine obesity a few years ago, officially making 30 million Americans “overweight” without gaining an ounce.291

After all, if Brad Pitt is “overweight,” then clearly the “scientists” do not know what they are talking about.292


292 See Betsy McKay, Who You Calling Fat? Government’s Standard Lumps Hollywood Hunks, Athletes Together with Truly Obese, WALL ST. J., July 23, 2002, at B1 (explaining how fat and muscle are treated the same in estimating BMI). Our point is not to suggest that BMI is the best possible measuring device. We readily acknowledge that one of its particular drawbacks is that it does not account for body shape, which is important, given that carrying excess weight around the abdomen may be less healthy than carrying it around.
Others, while not denying that we are fat, argue that fatness may be proof of our success rather than a sign of our failure. Todd Buchholz, in a U.S. Chamber of Commerce commissioned report titled *Burger, Fries and Lawyers*, commissioned by the U.S. Chamber of Commerce, suggests that crying "obesity epidemic" is just one of the "latest fads," and that for thousands of years being plump was actually a positive thing—a sign of being healthy and wealthy. According to Buchholz, extra calories at lower prices have benefited mankind greatly by creating "a more equal social status, as well as a more equal physical stature." Furthermore, other organizations point out the hips and thighs. See Denise Grady, *Fat: The Secret Life of a Potent Cell*, N.Y. TIMES, July 6, 2004, at F1. The problem is that most attacks on BMI are really just a way to write off the idea that we are overweight and discredit those who suggest that we are. One somewhat unusual vantage on the viability of BMI as a useful measure of probable health concerns is Paul Campos’s *The Obesity Myth*. Campos argues, as have others who we have reviewed in this section, that there is "no credible scientific basis" for the government’s categories of overweight and obesity based on BMI. *Paul Campos, The Obesity Myth* 175 (2004). Campos’s broader purpose, however, does not appear to be to beat the drum of dispositionism and personal responsibility. Rather, his goal seems to be to alleviate the discrimination, demonization, and personal anguish that the overweight and obese experience, by making clear to all of us that there is actually nothing wrong—morally or with respect to health, with being fat. He writes: "This book is for everyone who lives with the daily consequences of the lies that an eating-disordered culture tells them about their bodies." *Id.* at xxi. While we share his basic position on the misguided moral calculus of conventional conceptions of the obesity problem (our central theme has been that we must change our focus from individual behavior to the situational sources of that behavior), this Article takes as its starting point what we believe is a strong consensus within mainstream biologic science concerning the health consequence of overweight and obesity. Campos’s project is to show that the obesity crisis is a "myth;" our purpose is to show that the dispositionist explanations for the obesity crisis are part of a powerful myth that keeps us from appreciating the real sources of what is a real problem.

293 Buchholz, supra note 1, at 23.

294 Id. at 8. As Buchholz argues:

"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 back-stabbing Cassius had a "lean and hungry look."

Id. Clearly, the important point for those endorsing the dispositionist (fast food company) message is not to be historically accurate. Few people have either existing knowledge or the time to find out that the phrase "lean and hungry look" was actually written by William Shakespeare (not an ancient) in his play *Julius Caesar*, or the fact that, with the line, Caesar is actually suggesting that "Cassius looks dangerously dissatisfied, as if he were starved for power"—not as if he were hungry for food. *New Dictionary of Cultural Literacy* 130 (E.D. Hirsch, Jr., et al. eds., 3d ed. 2002) (emphasis added).

295 Buchholz, supra note 1, at 8. Fast food has played an important role by "actually help[ing] to push down the cost of protein, a key building block to good physical health." *Id.* at 5.
that although obesity rates have been increasing, so have life expectancies. Overall, a bit of obesity may be a small price to pay for these larger benefits.

Buchholz goes on to promote the second conclusion that even if there is an obesity epidemic, “poor” diet is not behind it. According to Buchholz, no one, not even health experts, knows what is objectively good or bad for us. Nutritional recommendations are always changing and are often contradictory. What is proven to be healthy one moment is proven to be unhealthy the next. Kids who were once forced to eat beef liver because it was “iron-rich” are no longer encouraged to do so because it is “cholesterol-laden.” As his most damning evidence, Buchholz suggests that even the Department of

296 The Center for Consumer Freedom, Special Report, supra note 291 (quoting the Times of London as stating that “Americans may be getting fatter . . . but they are living longer than ever before”).
297 BUCHHOLZ, supra note 1, at 11–12 (“Until recently, employers paid employees to exert energy and burn calories. In contrast, [today] employers pay workers to stay in their seats.”) (emphasis omitted).
298 See id. at 18 (“What has been more fickle than diet recommendations over the years, which continuously spark new fads?”).
299 The common argument that calorie-rich, low-nutrition foods and beverages can be part of a healthy diet, while correct on its surface, misses the fact that most Americans’ diets are not balanced. See Judy Putnam et al., Per Capita Food Supply Trends: Progress Toward Dietary Guidelines, FOOD REVIEW, Sept–Dec. 2000, at 2, 2, available at http://www.ers.usda.gov/publications/foodreview/septdec00/FRsept00.pdf (“[T]he average American diet is heavily weighted to added fats and sugars found at the tip of the [Food Guide] Pyramid and falls short of recommendations for fruits and dairy products.”). If most Americans are consuming large amounts of junk food and relatively little healthy food, then the point is moot. A study of children ages two to nineteen showed that only 2% met all five federal recommendations for a healthy diet. Kathryn A. Muñoz et al., Food Intakes of US Children and Adolescents Compared with Recommendations, 100 PEDIATRICS 323, 324 (1997); Kathryn A. Muñoz, Errors in Food Intake Article, 101 PEDIATRICS 952, 952–53 (1998).

Moreover, what is especially troubling about the approach is that companies like McDonald’s make bold statements about how “[n]utrition professionals say that [fast] food can be and is a part of a healthy diet based on the sound nutrition principles of balance, variety, and moderation,” Roger Parloff, Is Fat the Next Tobacco?, FORTUNE, Feb. 3, 2003, at 51, 54, at the same time, they are spending millions to influence government policy on what “good nutrition” is. See NESTLE, supra note 267, at 102–07. Seemingly small changes in government directives mean big differences in profit. Thus, after enormous lobbying efforts, “eat less red meat” became “eat more lean meat.” Id. at 43. The money is hard to resist, and even the country’s main professional dietetic association now has a website, sponsored by the National Soft Drink Association, that is devoted to choosing beverages. Kelly D. Brownell & David S. Ludwig, Fighting Obesity and the Food Lobby, WASH. POST, June 9, 2002, at B7.

Moreover, many companies actively refuse to disclose their ingredients and nutritional information on packaging. For Burger King, the justification for hiding calorie and fat information comes down to choice and, once again, better serving the customer. There are so many different ways to order a Whopper that it would be impossible to print up uniform nutritional information. In the words of Rob Doughty, Burger King spokesman, “If we put it all on the menus, our menus would be like phone books . . . . It’s unrealistic and not user-friendly.” Knight Ridder News, Fast-food Companies, Experts Arguing over Obesity in U.S., MONTANA FORUM.COM, July 11, 2003, at http://www.montanaforum.com/redne ws/2003/07/11/build/health/us-obesity.php?nnn=4.
300 BUCHHOLZ, supra note 1, at 18.
Agriculture's food pyramid is open to doubt by quoting the chairman of the Nutrition Department of the Harvard School of Public Health: "[S]ome 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."\(^{301}\)

Although the rhetoric may seem unpersuasive to many, the tactic has a proven pedigree. Keeping the scientific analysis looking like a debate proved to be very powerful during the many years of tobacco litigation.\(^{302}\) Tobacco companies found that they did not have to convince people that cigarettes were safe. They only had to suggest that the question was up in the air, and people would do the rest on their own since smokers were motivated by a strong desire not to see cigarettes as a health threat (protecting the industry's profits), and nonsmokers were eager to put the blame on the smokers (protecting the industry from regulatory and liability costs).\(^{303}\)

Another means of accentuating ambiguity is also borrowed from the tobacco playbook. Fast food companies, or more accurately their messengers, go to great lengths to highlight the importance of other causes, including genetics and sedentary lifestyle, as determining factors in becoming

\(^{301}\) *Id.* at 19 (quoting and commenting on *A Voice of Reason on Diet*, *DISCOVER*, Mar. 2003, at 16).

\(^{302}\) See generally Hanson & Kysar, *Taking Behavioralism Seriously II*, supra note 154, at 1483–96. Part of the process is always to counter data with other data, regardless of whether it comes from a clearly biased source. When federal data showing a massive increase in soft drink consumption came out, Coca-Cola's director of nutrition, Maxime Buyckx, quickly pointed to data from the National Soft Drink Association showing that middle and high school students had not significantly changed their drinking habits. Lee, *supra* note 203, at A5 ("We think [weight gain in children is] about sedentary lifestyles."). Similarly, when the American Institute for Cancer Research recently released a survey indicating that increased portion sizes were partially to blame for the obesity epidemic, Steven C. Anderson, President and Chief Executive of the National Restaurant Association, pointed to a University of North Carolina study funded by the National Soft Drink Association showing that individual caloric intake has remained the same for years while exercise rates have declined. Margaret Webb Pressler, *Survey Links Obesity with Food Portions*, WASH. POST, July 18, 2003, at A3.

Since we are continually reminded that people can manipulate statistics to show anything, another successful technique for creating doubt is to accept the data but question the conclusions or the agendas of those making them. In response to a 2001 study in the British medical journal *The Lancet* showing that soft drink consumption is associated with obesity in children, Sean McBride, spokesman for the National Soft Drink Association, stated that "[t]he observations and conclusions the author drew were vastly different from what the data showed." Lee, *supra* note 203, at A5. Of course, it is possible that the conclusions were incorrect, but what is striking is how time and again, spokespeople for industry groups act as if the scientists are the ones who have a vested interest and cannot be trusted. See generally Benforado & Hanson, *Naive Cynicism*, *supra* note 16 (describing this practice in more detail).

\(^{303}\) See generally Hanson & Kysar, *supra* note 234, at 240–58.
overweight. Of course, genetics probably do play a role. However, as numerous public health experts have emphasized, genetics are fairly stable and are an unpromising explanation for the sudden explosion in obesity rates. Moreover, although sedentary lifestyles are also a factor, they are symptomatic of the same situation that the food purveyors have sought to exploit. We are sedentary, in part, because we can get food fast, indeed without even stepping out of our cars. We are sedentary, in part, because of the television programming designed to draw us to the couch where we are encouraged to sit passively and watch advertising for fast food. Still, by emphasizing these other factors, food purveyors give us the simple, nonthreatening explanations we crave.

The distorting effect of our desire for such causal models is compounded by the fact that, as social psychology informs us, we use positive-test theories to analyze the evidence we confront. If we want proof that fast food does not make people fat, and that it is, in fact, a matter of genes or watching too many Friends reruns, all we have to do is go into any McDonald’s and our eyes and minds will fix on the one or two skinny people wolfing down Big Macs. Indeed, attorneys defending McDonald’s have reportedly used Don Gorske, the six foot tall, 170-pound world record holder for eating Big Macs (over 20,000 as of July 2004) as proof that eating fast food in copious quantities does not make one fat.

Ultimately, our dispositionism may drive us to seek a person, rather than a situation, in whom we can rest blame—and corporations or foods themselves do not fit the bill. This leads to the third response to the critics of fast food corporations, which is also the overriding theme of this Article—even if too

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304 Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1488–94 (describing a similar strategy adopted by the tobacco industry with respect to the harms associated with smoking).

A common argument made on behalf of fast food corporations is that although "the increase in obesity and the proliferation of fast food venues [have] coincided temporally... mere coincidence does not prove a causal relationship." Ruth Kava, Foreword to BUCHHOLZ, supra note 1, at I. Ruth Kava points out that, in fact, "[m]any facets of Americans' lives have changed since the 1970s, only one of which is the increased availability of fast foods." Id.

305 See supra note 155 and accompanying text.

306 Associated Press, Man Chomps 20,000th Big Mac, FOXNEWS.COM, July 20, 2004, at http://www.foxnews.com/story/0,2933,126390,00.html ("He has been eating the fast food sandwiches since 1972 at a rate of at least one a day."). Likewise, suggesting that a food may have beneficial effects in one situation can be used as proof that it is safe and should not be restricted in any situation. For example, during a New York State Assembly speech concerning a bill that would greatly limit the selling of junk food in school vending machines, William L. Parment stated, "I object to this inclusion of chocolate in non-nutritious foods... Chocolate has helped many downed pilots survive." Marc Santora, Taking Candy from Pupils? School Vending Bill Says Yes, N.Y. TIMES, June 2, 2004, at B4.
much fast food can make you fat, all responsibility should be placed on the
person choosing the giant tub of french fries.\textsuperscript{307} In the words of the World
Federation of Advertisers, “[f]oods cannot be categorized as healthy or
unhealthy. There are no inherently ‘good’ or ‘bad’ foods, only unbalanced
diets.”\textsuperscript{308} The National Soft Drink Association insists: “All food and
beverages, including soft drinks, fit in a balanced and healthy lifestyle.”\textsuperscript{309} The
National Restaurant Association (“NRA”) put it this way: “The nation’s
870,000 restaurants have long provided and will continue to offer a wide
variety of choices and options that meet any individual’s dietary needs.”\textsuperscript{310}
Chip Kunde, senior vice president of the International Dairy Foods
Association, echoes the argument: “I think that the food industry is providing a
wide variety of choice, and certainly if you look at some of the recent market
trends, you’re seeing a major increase in the good-for-you foods category.”\textsuperscript{311}

\textsuperscript{307} As Buchholz argues, “[I]f consumers choose with some level of prudence from [fast food] menus, they
can eat fairly nutritious meals.” \textit{Buchholz, supra} note 1, at 18.

\textsuperscript{308} \textit{JPMorgan, supra} note 186 (quoting WFA). In general, trade associations fight against governmental
dietary guidelines that single out specific foods or types of food, but tolerate more abstract recommendations
to cut down on nutrients like saturated fat without mentioning the most prominent food sources of fat. \textit{See
Nestle, supra} note 267, at 77. The third prong is frequently combined with the second: “Food, per se, is not
the problem. Rather, overeating, imbalanced diets and inadequate physical activity are symptoms of radical
social, cultural and lifestyle changes.” \textit{JPMorgan, supra} note 186 (quoting Ketchum’s Global Food &
Nutrition Practice).

\textsuperscript{309} National Soft Drink Association, About Soft Drinks, High Fructose Corn Syrup and Soft Drinks, \textit{at
states:

\begin{quote}
Although there have been studies in the media attempting to link [high fructose corn syrup] with
obesity, there is no scientific justification for this association. Obesity is caused by an imbalance
in energy intake and energy output. Thus, too many calories and not enough exercise are the
primary factors contributing to obesity. No one sweetener or single food can be blamed for
causing obesity.
\end{quote}

\textit{Id.} These industries, while manipulating the situation and putting the blame on consumers’ dispositions,
pretend to have done all they can to assist the consumer in making proper decisions. \textit{See National Soft Drink
Index.html}} (last visited Oct. 28, 2004) (“The soft drink industry has a long commitment to promoting a healthy
lifestyle for individuals—especially children.”). Rhona Applebaum of the National Food Processors
Association states that the goal of the food industry is “good nutrition and health for everyone.” \textit{Hellmich,
supra} note 176, at 16B. That industry disposition, she points out, may sound altruistic, but is actually
informed by the profit motive: “It’s in our best interest to have healthy consumers, because healthy consumers
live longer, and they are our best consumers.” \textit{Id.}

\textsuperscript{310} \textit{Press Release, National Restaurant Association, National Restaurant Association Supports Prevention
of Abusive Lawsuits Against Food Industry} (Jan. 28, 2003), \textit{at http://www.restaurant.org/pressroom/pressre­
lease.cfm?ID=549}. And, thus, the NRA concludes, “Restaurants should not and will not be blamed for issues
of personal responsibility and freedom of choice.” \textit{Id.}

\textsuperscript{311} \textit{ABC News.com, Who’s to Blame?: Obesity in America: How to Get Fat Without Really Trying, \textit{at
With all those choices it all comes down to disposition: “Ultimately it is a matter of personal choice . . . . I mean we can’t dictate what people choose to eat, so yes at some point what people choose to eat or how they choose to move is ultimately the issue here.”312 Bringing the dispositional actor into a neutrally framed situation is a classic strategy; as the other “NRA” has long maintained, “[G]uns don’t kill people, people kill people.”313

Dispositionist arguments benefit tremendously from their intuitive plausibility—in effectuating the third conclusion, fast food companies only have to reassure us that we were correct all along. And that they do, both by amplifying the basic dispositionist message and by heightening our desire to hear it.

To firmly establish the perception that control and responsibility lie in the hands of the consumer, corporations increase the volume on its “your way” message. Reinforcing the consumer sovereignty trope may be simply a matter of creating and advertising a few healthy alternatives like McDonald’s salads or the low-fat chili at Burger King, and then hammering on the fact that people know what they are getting when they order a Big Mac. Even a few relatively healthier alternatives or chains, like Subway, can deflect the perception of blame from the entire industry. Place one good apple in a barrel of rotten apples and the whole bushel can be passed off as fine. What few people notice is that this message—that consumers know what is healthy and unhealthy and make corresponding choices—conflicts directly with the fast food lobby’s argument that no one knows what a healthy diet is and that hamburgers and french fries are not bad for you. The fast food companies frame the

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312 Id. Advertisers rely on the same consumer sovereignty script. As Paul Kumit, founder and president of the youth advertising firm KidShop explains when asked if he cares about the health of the products he promotes: “I care that the product has a positive role in a child’s life . . . . It is not my fundamental responsibility to be sure that that product in and of itself fulfills a complete diet.” Id. But when questioned about the fact that his campaigns have increased demand for highly processed and highly caloric foods, Mr. Kumit falls back on the foods-are-neutral script:

> I’ve played a role in making all kinds of products appealing to kids and the issue of less healthy is a judgment call that you can make,

> You are absolutely correct that I am not going to get the same return on investment for a client in advertising asparagus and spinach to a kid as advertising some of the so-called less healthy products to kids . . . . Guilty as charged.

Id.

313 See Press Release, Senator Carl Levin, Levin Urges Ban on Sales of Handguns and Assault Weapons to Minors (May 6, 1999), at http://levin.senate.gov/newsroom/release.cfm?id=209390 (“Yes we have all heard the glib rhetoric of the NRA, guns don’t kill people, people kill people. This bumper sticker logic obscures the real truth.”).
contradictory arguments as consistent, and most consumers view the arguments that way because they do not have any motive to see differently. But they are not consistent—not if they both purport to be about the truth of how people actually think about food. But they are highly stylized conclusory slogans pandering to and manipulating our misguided intuitions.

Promoting ambiguity can thus serve different ends and appeal to different people, or to the same people at different moments.314 When individuals need to form a decision about something, they automatically look for evidence that supports their desires and beliefs.315 Consequently, when I go to buy my hamburger and Supersize fries, I recall hearing that the food pyramid is a sham and that there is no such thing as “bad” food. I think to myself that I probably will not eat all the fries anyway but, at that bargain, there is no sense paying nearly the same amount and leaving hungry. Plus, experts do not say that I should never eat certain foods, but only that I should choose from a variety of foods and eat fat and sugar in moderation.316

Or maybe I do not think at all and simply cooperate with the expectation of the clerk who, complying with her training script, asked me if I wanted to Supersize my meal. The clerk responds to my wishes, I make my purchase, and because the fries are there on my tray, hot and irresistible, I end up eating nearly the entire order—all but two of them, that is, since I showed restraint. Later, when I hear on the radio about some girls from the Bronx claiming that they did not know how many calories were in a Quarter Pounder, I agree with the snorting radio host flabbergasted about the suit, saying, “Come on, everyone knows fast food makes you fat—you chose it.” These girls and their argument pose a number of threats: a danger that I may not be able to get the food I want in the future, or that I have made bad diet decisions in the past; a danger that some other people may be cashing in while my group gets nothing but higher prices and insulting warnings; and a danger that our great capitalist system may crumble beneath the weight of mammoth lawsuits. With my consumer-sovereignty crown in jeopardy, I experience great pressure to dispel the threats and maintain my throne.

In case we did not notice the danger posed by the obese girls suing McDonald’s, corporate America is there with a bullhorn telling us exactly what

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314 See text accompanying notes 217–18, discussing role of ambiguity in fast food industry efforts to promote dissonance reduction among consumers concerning their own behavior.
315 See id.
316 See NESTLE, supra note 267, at 72–78 (deconstructing the USDA’s 2000 Dietary Guidelines for Americans).
we stand to lose. By emphasizing and exaggerating the threat that taxes, tort liability, and regulation pose to our way of life, our identity groups, and our place within a functional, legitimate, and just system, fast food companies can vastly increase our tendency to dispositionalize. Given that we are already inclined to do so, especially when it comes to deeply stereotyped groups like fat people and lawyers, and given that most of us already feel the threats, corporations barely need to whisper into the mouthpiece to stymie any changes to the status quo in which they enjoy a preeminent position. It turns out, however, that they are shouting.

In appealing to the individual, the most common technique is to bolster the perception that basic rights are under attack. In the ominous words of the Center for Consumer Freedom, “It’s your food. It’s your drink. It’s your freedom.”317 As the argument goes, if the overzealous public health “experts” and intermeddlers have their way, you may not get to eat the foods you like anymore, or at the very least you may have to pay a lot more for them when you do. For heavy consumers, an equally effective technique is to ratchet up the threat to one’s honor and respectability. The sovereign consumer narrative is linked to the ideal of the self-reliant individualist—think Marlboro man—who makes his own decisions and faces up to the consequences of his actions, good or bad. The overall message is that big government—all those “lawmakers who use the cudgel of government to appear ‘enlightened’ enough to be reelected”318—think that consumers are too stupid or too immature to make choices on their own.

318 Berman, supra note 179, at 13A.
Part of the stated goal of Richard Berman’s Center for Consumer Freedom is to expose and resist what they call the “Nanny Culture”—“[t]he growing cabal of ‘food cops,’ health care enforcers, militant activists, meddling bureaucrats, and violent radicals who think they know ‘what’s best for you.’” Critics similarly warn, “Food cops . . . are seeking government control of everything you eat.” Correspondingly, corporations hold up the free market as the ideal toward which society should strive because it maximizes personal and parental freedom and enjoyment.

The inherent fairness and, perhaps more centrally, the equality of voice embodied in the market are also upset when certain groups look to gain an unfair advantage. Of course, according to the threat-mongers, corporations do not cause the distortion—fat people and their lawyers trying to bilk us do. In a surprisingly effective flip, corporate interest groups frame the controversy as a
matter of the rich and powerful looking to gain at the expense of the innocent and defenseless in our country. Steven C. Anderson, president and chief executive of the NRA, recasts tort litigation aimed at fast food corporations as “frivolous lawsuits that only enrich the trial bar at the expense of the restaurant operators and their employees, who are the hardest working Americans.” In essence, he argues that the lawsuits have nothing to do with responding to the obesity epidemic; they are just about padding the personal coffers of the lawyers. As a spokesperson for the Grocery Manufacturers of America expresses: “What we think is counterproductive is finger-pointing, reckless accusations, and lawsuits that won’t make anyone any thinner.” Attacking money-hungry lawyers seems to be an especially successful technique and has been a central theme in the broader push to reduce corporate tort liability. Since the stereotype of lawyers as wealthy, uncaring, and willing to argue any side of an issue for the right price is already imbedded, it is a snap to attach the negative association to a lawsuit.

321 Press Release, National Restaurant Association, supra note 310. Todd Buchholz casts the pending tort litigation in a similar light: greedy plaintiffs’ lawyers “digging into the pockets of franchise owners, employees and shareholders in order to pull out gold.” BUCHHOLZ, supra note 1, at 23. According to Buchholz:

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.

322 Parloff, supra note 299, at 54.

323 A related approach is to shift anyone who points to fast food as a cause of obesity from appearing to be a “public advocate” (in-group member) to being seen as a “dissenter,” “radical,” or “extremist” (out-group member). The “dissenter” category already carries strong negative associations. “Dissenters” inhabit the fringe of society, they complain and threaten things that everyone else likes, and in most cases, they turn out to be wrong. Todd Buchholz offers a prime example of this tactic by suggesting that all those who criticize fast food are part of the same camp—a camp of outcasts:

These condemnations often come from high-brow sources who claim 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.

BUCHHOLZ, supra note 1, at 6 (emphasis added). For a more complete description of this technique, see Benforado & Hanson, Naïve Cynicism, supra note 16.
And it also makes sense to us that the burger-hungry obese, who we already presume to have many negative personality traits, are looking to ruin it for the rest of us. If we already perceive fat people as lazy, it is especially persuasive when we hear that they are looking to cash in on everyone else’s hard work. We never liked the black sheep in the flock in the first place. Tell us they are actually wolves in sheep’s clothing and see how quickly we run for our guns.

The threat, though, is to more than just our fair stake in the herd. It is not just about wolves taking what is rightfully ours or disrupting our daily routines. Corporate messengers are quick to remind us that the whole farm is at stake. The image of a “slippery slope” is often conjured up whenever anyone suggests tort liability. As lawyers for McDonald’s warn, a single successful suit could very well result in “an uncontrollable avalanche of litigation against other restaurants and food providers, as well as other industries (such as the

324 See Katrina Woznicki, Restaurant Obesity Liability Considered. Advertisement in Newsweek (quoting Keith Ayoob, spokesman for the American Dietetic Association: “Where’s it going to stop? Should you sue your employer because you’re too busy to work at the gym?”) (advertisement on file with authors).
pizza, ice cream, cheese, and cookie industries)." Hence, the entire American economy is at risk. And deeper still, we are told that a "victim culture" threatens to disrupt the very moral foundations of our country. If "common sense" continues to be thrown by the wayside, the future looks grim; we will be a country of "not me's"—complainers and finger pointers—beset by problems but too irresponsible to do anything about them.

C. Super Size Me: A Case Study

1. The Film

The obesity issue recently made a foray into our cultural consciousness with the release of Super Size Me, a documentary in which filmmaker Morgan Spurlock embarks upon and records the effects of a thirty-day diet of nothing but McDonald's food. Inspired in part by the now notorious New York lawsuit, Spurlock's regimen had three simple rules: (1) eat only what was available over the counter; (2) try everything on the menu at least once; and (3) agree, if asked, to Super Size his meal. In addition, he reduced his physical activity to the American average of not more than 5000 steps per day. At the outset, Spurlock was the picture of health. By the end of the month, Spurlock had gained 24.5 pounds (nearly one pound per day), his cholesterol and blood pressure shot up to dangerous levels, he suffered from mood swings, lethargy, headaches, and a decrease in libido, and one of his supervising doctors observed that his liver was turning into "pâté." The results were significantly more severe than those same doctors had predicted. Indeed, Spurlock's physicians were concerned enough to urge Spurlock to give up his experiment.

The film explores questions beyond the four comers of the McDonald's experiment and looks at the obesity issue more generally. In Spurlock's words, "The film isn't an attack on McDonald's, it's an attack on the fast food culture that's taken over our lives, including our schools . . . . I want people to

325 Parloff, supra note 299, at 54.
326 See generally Philip K. Howard, The Death of Common Sense: How Law Is Suffocating America (1996) (arguing that out-of-control lawsuits and paternalistic government policies have undermined the practical utility of common sense and threatens to undermine the values upon which American society is based).
327 Super Size Me (Roadside Attractions 2004). The rest of the information in this paragraph was also obtained from the movie.
328 See infra text accompanying notes 550-60 (briefly describing the lawsuit and the judge's dismissal of it).
walk out of this movie and be infuriated."\textsuperscript{329} The film certainly has had a significant effect on its ever-expanding audience; after much acclaim on the festival circuit, \textit{Super Size Me} has grossed more than $11 million since its U.S. theatrical release,\textsuperscript{330} it has debuted in countries around the world, enjoyed a widely-publicized DVD release, and has been the foundation of Spurlock's successful high school and college speaking tour.\textsuperscript{331}

2. \textit{The McResponse}

McDonald's official response to the film was one of denunciation and disassociation. Even before seeing it, spokespeople characterized it as a "distortion of reality" and "shock TV" and stated that the obesity problem currently plaguing the country is "really not about McDonald's [but] more about personal responsibility."\textsuperscript{332} These themes were echoed in McDonald's one and only American press release in direct response to the movie: "This movie is all about one individual's decision to act \textit{irresponsibly};" "Our customers are smart. They know what's best for themselves and their families;" "We continually listen to our customers to add even more choice and variety to our menu;" and, presumably in contrast to Spurlock, "McDonald's is working closely with real experts on nutrition and fitness: scientists, government leaders, educators, and national advocacy groups. Morgan Spurlock is late to the national dialogue. By shocking instead of informing, he has missed an opportunity to be part of the solution."\textsuperscript{333}

And the solution to any problem that does actually exist, according to McDonald's, is at hand, because they were already on their way toward helping consumers with their choices. McDonald's, for instance, phased out their Supersizing options.\textsuperscript{334} Although the timing of that decision seemed to correspond to the release of Spurlock's movie, McDonald's publicly

\textsuperscript{329} Susan Dominus, \textit{You Want Liver Failure with That?}, \textsc{N.Y. Times}, May 2, 2004, at 18.


\textsuperscript{334} Dave Carpenter, McDonald's Downsizes From Super-Size on Fries, Drinks, \textsc{AP Wire}, at http://www.kansascity.com/mlk/kansascity/business/8088696.html (Mar. 3, 2004) (stating that McDonald's will stop selling supersize fries and drinks by the end of 2004, "except in promotions").
disavowed any causal connection. Instead, they claimed that their policy was a response to the need for menu simplification and the company’s ongoing project of healthy lifestyle initiatives. McDonald’s contemporaneously introduced the “Balanced Lifestyles Platform,” a multi-year plan to “address obesity in America” and “to educate, assist, and engage consumers in ways that change individual behavior, resulting in better food/energy balance in their lives” by focusing on enhanced menu choice, physical activity and consumer education. McDonald’s launched a series of promotions as a part of this platform, including the “McDonald’s Go Active! American Challenge” led by Oprah’s personal trainer; the introduction of the “Go Active! Happy Meal” for adults, which includes a Premium Salad, a bottled water or drink of choice, a Stepometer, and an information booklet with exercising tips; and an enhanced commitment to children’s health and education, including new fruit and beverage choices for Happy Meals. The company’s general message is that they are not moved by profits, much less by any desire to fatten their customers. Far from it, McDonald’s is devoted primarily to listening to consumers’ voices, responding to their preferences, and supplying whatever those consumers demand. The new initiatives at McDonald’s reflect nothing more than the company responding sensitively to the changed preferences of sovereign consumers—who love to see smile.

335 Id. (quoting spokesman Walt Riker as saying “the phasing out of super-sizing has nothing to do with that (film) whatsoever”).

336 Id.; see also Marian Burros, Hold the Fries. Hey, Not All of Them!, N.Y. TIMES, Mar. 10, 2004, at F1, available at http://www.nytimes.com/2004/03/10/dining/10WELL.html?ex=1394254800&en=32702f59973de8d8&ei=s007&partner=USERLAND (quoting Riker as stating that supersize items were being phased out because “[s]upersize fries were a slow-moving item” and “sales of supersize soft drinks were nowhere near the sales of other drinks”).


338 Press Release, McDonald’s Corporation, McDonald’s Introduces First-Ever Happy Meal for Adults (May 6, 2004), available at http://www.mcdonalds.com/usa/news/current/pr05062004.html; see also McDonald's, Disinfopedia, at http://www.disinfopedia.org/wiki.phtml?title=McDonald%27s&display=printable="yes" ("Our customers were telling us that they wanted more choice and balance. We started working vigorously on the plan to pull things together. A lot of stuff that was announced today was in the making for one or two years.") (quoting corporate VP for balanced lifestyles and CEO and president of the Ronald McDonald House Charities Ken Barun).


340 See, e.g., A Balanced Diet. A Balanced Debate, at http://www.supersizeme-thedebate.co.uk/ (last visited Nov. 1, 2004) ("We’ve always listened to our customers and recognized that their tastes and expectations change. Therefore we were already working on the issues long before the film, and who knows, in the near future we may be as famous for our salads as we are for our hamburgers.")
That was the McDonald’s response before the movie was released. After its release in the United Kingdom and Australia, however, McDonald’s opted for a more direct approach. Guy Russo, CEO of McDonald’s Australia, publicly came out in opposition to the film, describing Spurlock’s actions as “stupid” and “totally irresponsible.” According to Russo, a more aggressive stance was required after consumer research showed that the silent approach was being taken as an admission of guilt on the part of McDonald’s. Thus, a television and cinema ad campaign was launched. Russo personally appeared in commercials describing the documentary as “about a person that decides to overeat” and noting, “Surprise, surprise—he finds out it was an error. I could have told him that.” While Spurlock was on his Australian tour, he reported that Russo sent out discrediting media alerts before his arrival and systematically tracked Spurlock’s interviews, requesting a right to respond shortly after each concluded.

In the UK, McDonald’s took out full-page newspaper ads to coincide with Spurlock’s promotion of the film at the Edinburgh Film Festival and set up a website especially to showcase its response. The company’s response took a slightly less aggressive tone than in Australia, but largely echoed the American corporate position, emphasizing that its customers “know their own diet and lifestyle best,” and that Spurlock made “little contribution to the wider debate taking place on nutrition and lifestyle,” and that it should be “hardly surprising” that he gained weight as a result of his caloric intake, which is “not

the way people live their lives.”\textsuperscript{348} The difference from the US response was that in the UK, McDonald’s explicitly agreed with the message of the film regarding the importance of a balanced diet and exercise for a healthy lifestyle,\textsuperscript{349} which it seeks to promote through its own initiatives and partnerships.\textsuperscript{350} As a result, it took the clear position, for apparently the first time, that McDonald’s hamburgers and fries should only be part of a broader balanced diet,\textsuperscript{351} although it underscored that the balance can now be found at McDonald’s with its enhanced menu choices and new ingredients.\textsuperscript{352}

3. Dispositionism and Critiques of the Movie

McDonald’s response to the film and the media critiques that followed its release shared certain common threads with the critique of the obesity issue generally. Most significantly, they all occurred within a dispositionist frame and borrowed heavily on the nearly exclusive themes of choice and personal responsibility. Furthermore, as the next subsection summarizes, they employed the basic techniques of naïve cynicism to discredit and dismiss their critics—for example, describing Spurlock as dispositionally ill-motivated and biased, and indicating that Spurlock and his ilk pose a significant threat to our freedom.

a. Spurlock’s Disposition for Shocking Stunts

\textit{Ad hominem} attacks on Spurlock himself were a common theme.\textsuperscript{353} In claiming the movie was nothing but “another sick reality show” by an “ambitious prankster who sees dollar signs where the rest of us see dinner,”\textsuperscript{354}
one journalist implied, not so subtly, that there was nothing but shock value in
the film and that Spurlock was, like plaintiff lawyers, in this for his own take.
Spurlock has been described as "a big con man" whose "antics" amount to an
"outrageously dishonest and dangerous piece of self-promotion" that "absolves
us of responsibility for our own fitness,",355 as well as a "freak" and
"blockhead" engaging in "obsessive, self-destructive behavior."356 For
support, critics often pointed to Spurlock’s previous MTV show I Bet You Will,
in which he dared people to do unpleasant things for money;357 made
comparisons between Spurlock and Michael Moore (as though the comparison
were itself discrediting); and attributed to Spurlock an economic motivation
akin to that of "shark"-like and greedy trial lawyers in order to discredit
Spurlock and portray the film as a "super size con"—that is, to show that
Spurlock is a con artist hoping to encourage people to blame McDonald’s and
absolve themselves for their own bad choices.358

While McDonald’s direct response was somewhat more muted, its position
that Spurlock was not acting as a responsible contributor to the public debate
followed the same line of reasoning. Noting his "extreme"359 and "over-the­
top behavior,"360 it dismissed the film as a "distortion" fueled by a single
individual making irresponsible choices instead of being a productive
participant in a "balanced" debate.361

Of course, this critique failed to take account of the movie’s own self­
described intention of being a "satirical," "tongue in-cheek ... look at the
legal, financial and physical costs of America’s hunger for fast food"362 rather
than a scientific study. It also ignored the probability that the film was an
important catalyst for a reinvigorated public debate on obesity, which is
precisely why the movie generated so many responses and reactions, including

http://www2.techcentralstation.com/l051/printer.jsp?CID=1051-032504F; see also Alert! What You Need To
Know About the Film Super Size Me: Super Size Me & Morgan Spurlock: The Facts About Nutrition &
FACTSHEET.doc.
356 Doug Kern, Super Size Thanks, Tech Central Station, at http://www2.techcentralstation.com/1051/
357 See, e.g., Berman, supra note 354.
358 See generally Benforado & Hanson, Naive Cynicism, supra note 16.
359 Keith O’Brien, McDonald’s Begins Efforts Against Film, PRWEEK, May 10, 2004, at 5.
360 McDonald’s, Disinfopedia, at http://www.disinfopedia.org/wiki.phtml?title=McDonald%27s&printabl
361 Id.
362 About the Movie, Super Size Me: A Film of Epic Proportions, at http://www.supersizeme.com/home.as
px?page=aboutmovie (last visited Nov. 1, 2004).
the negative ones. Except perhaps among academics or highly educated consumers, before the release of *Super Size Me*, there was neither a meaningful public debate about the sources of obesity trends nor much deviation from dispositionist presumptions about those trends. By bringing evidence of the epidemic and some of its possible sources to a wider audience in an entertaining and accessible way, *Super Size Me* arguably created or contributed to a more balanced debate.

b. Spurlock’s “Irresponsible” Choice To Overeat

In a similar vein, a second line of dispositionist attack attributed the ill-health consequences of Spurlock’s experiment to his own irresponsible choice to overeat and limit his physical activity. Weight gain is the result of the simple equation: “calories in—calories out.” That lesson has nothing to do with McDonald’s, beyond the fact that they make an easy target. There are no bad foods, only bad choices. Spurlock would have packed on as many pounds had he consumed the same calories eating any kind of food, be it brussel sprouts or bonbons. His rush to blame McDonald’s for what is just “basic physics” is an insult to the audience’s intelligence. According to Dr. Ruth Kava, nutrition director for the American Council on Science and Health: “All

363 According to a study by Regina Lawrence, the discourse on obesity in newspapers, particularly the *New York Times*, has evolved significantly over the past two decades. Regina G. Lawrence, *Framing Obesity: The Evolution of News Discourse on a Public Health Issue*, 9 HARV. INT’L J. PRESS/POLS. 56 (2004). Specifically, a situationist account of obesity’s causes emerged in news coverage to compete with the traditional dispositionist wisdom. *Id.* at 64-69. Increasingly, that portion of the media reported on America’s “toxic food environment” and the culture of fast/junk food. *Id.* at 63, 69. Lawrence found a precipitous growth in specific claims attributing obesity to systemic, situational factors in *New York Times* front page and op-ed news items. *Id.* at 67 tbl.2. In 1996, only one news item linked obesity to situational factors, whereas, in 2003, forty-two such claims appeared in the *New York Times*. *Id.* Of the forty-two claims in 2003, twelve spoke to the processing, packaging, and marketing of fast/junk food. *Id.* It is worth noting that the focus on situationism is what made the stories newsworthy, inasmuch as the studies, findings, and research being described in the articles challenged the conventional dispositionist assumptions. Dispositionism’s messengers and advocates were quick to mobilize, however, in response to the mounting challenge by situationism in the news. In 2003, dispositionist arguments were “making a strong comeback, with many news articles, op-ed pieces, and especially letters to the editor articulating general claims about the need for individuals to take responsibility.” *Id.* at 68. For example, in 2003, the number of appeals to general personal responsibility in *New York Times* news items jumped to fifteen, up from only one in the year prior. *Id.* at 67 tbl.2. Further, in 2003, the number of dispositionist claims (thirty-six, up from twenty-three the year prior) nearly matched the number of situationist claims. *Id.* Despite the coverage of situationist, environmental factors giving rise to obesity among news outlets, Lawrence notes that the dispositionist, individualistic frame continues to dominate news discourse on culpability and voluntariness associated with becoming obese. *Id.* at 71.


Mr. Spurlock demonstrated is that gluttony does not lead to weight loss. We already knew that.\textsuperscript{367} As James Glassman put it: “He got fat. Duh.”\textsuperscript{368}

Whether or not it was obvious that Spurlock’s regimen would lead to nearly a pound per day in weight gain, this “common sense” argument fails to address the surprising health consequences of the McDonald’s diet that went beyond mere weight gain. Perhaps because of our culture’s emphasis on outer beauty (i.e. body weight, as promoted by the beauty industry), the tendency of the movie’s critics to omit health considerations is not so surprising. But the team of health experts that Spurlock retained to monitor his progress were themselves very surprised at the extent to which his cholesterol levels skyrocketed and that his liver began to pickle in response to the McDiet. The movie’s critics rarely, if ever, accounted for those effects, along with the mood changes, the decrease in libido, the symptoms of addiction he experienced, or the link that he sought to explore between fast food and child behavioral issues such as Attention Deficit Hyperactivity Disorder. As noted by Spurlock himself: “What [McDonald’s] never talks about is how these foods can be linked to diabetes, elevated cholesterol, heart disease, liver disease.”\textsuperscript{369} If the documentary is to be taken seriously, there is much more than just “common sense” and “basic physics” at play.

c. Customers’ Disposition To Make the Right Choices

Another technique of minimizing the significance of Spurlock’s work was to suggest that his deliberate choice to eat excessively and to cut out exercise, resulting in the harmful consequences that ensued, simply reveals the power of choice. People make their own choices and must live with the consequences. Particularly with the recent expansion of McDonald’s menu—after phasing out Supersizing because of the need to “trim” its menu\textsuperscript{370}—the choices are even healthier. A balanced diet can be achieved at McDonald’s now that McDonald’s customers have the option of ordering salads and bottled water instead of higher calorie foods. Moreover, parents can now offer their children healthier food options, like apple slices and low-fat milk. As McDonald’s


\textsuperscript{368} Glassman, \textit{supra} note 355.


\textsuperscript{370} Carpenter, \textit{supra} note 334 (“The company cited the need to trim a menu that has expanded in recent years and said eliminating super-sizing is only part of that effort.”).
nutritional director notes: “It’s not where you eat, it’s what you eat and, especially, how much you eat.”371 In conjunction with McDonald’s Balanced Lifestyles Platform, a healthy body and active life is available to all its customers—all they have to do is choose.

At times, Spurlock seems to embrace fully the idea of healthy food choice and sees his movie as simply encouraging people to be fully aware of the choices they are making, the consequences of those choices, and the influences that can shape those choices. In response to the criticism that his diet of over 5000 calories a day was unrealistic and that his intake included snacks rather than only three meals per day, he has responded that many Americans do eat this way, although perhaps not just at McDonald’s, but also at KFC, Pizza Hut, Taco Bell, and other fast-food joints. To the idea that purposely limiting his physical activity was simply irresponsible and over-the-top, he has reminded critics that the rationale was to reflect the average daily activity of the average American. In response to the expansion of “lighter” choices now offered at McDonald’s, he notes (in the movie) that the introduction of those items coincided with the addition of even more tempting menu choices that lack any “health” appeal, such as the McGriddles. What’s more, many of the “lighter” options are often no lighter in fat, salt, or caloric content than traditional McDonald’s fare. These “light” choices are like “light” cigarettes: same harmful consequences, but a new, reassuring label.372

This observation has been echoed by others who have seen “healthful-sounding alternatives” come and go from fast-food menus in the past: “[T]he reputation of the traditional fast-fooders is low enough that any alternative is apt to be seen as more healthful,” even when it’s not.373 Restaurants capitalize on the automatic association most people have between “salad” and “healthy” in order to appear to respond to consumer demand for lighter choices, but then offer high fat dressing or add-ins for taste, or entice customers with more appetizing, higher-calorie alternatives. One commentator offered this skeptical metaphor:

The decision by McDonald’s to phase out supersizing drinks and french fries is reminiscent of superpower decisions in the bad old days of the Cold War.

371 Alexander, supra note 332.
372 See Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1473–79 (describing the tobacco industry’s health-reassurance strategies).
373 Fast Food: Adding Health to the Menu, 69 CONSUMER REPORTS 28 (Sept. 2004) (also making comparisons with new more upscale fast-food restaurants that seem to cater to the desire for healthier choices).
Periodically, they would agree to do away with a few of their nuclear weapons while retaining the bulk of their stockpiles and simultaneously adding new, more powerful nuclear weapons. Without supersizing, McDonald's continues to stockpile menu items extraordinarily high in calories, fat, cholesterol, salt and all those other things that are killing so many of us so early. Recently, McDonald's has added presumably more healthful salads, some of which have been found to have more calories than its Big Mac.

... Yes, consumers can just say no to Big Macs ..., and they should. But they must attempt to do so in a world in which great sums of money are invested in making such things easily obtainable, highly alluring, even impossible to resist.374

Still others have questioned whether McDonald's initiatives to educate children about healthy eating habits are simply another marketing tactic to capture lifetime customers at a young age. One commentator, in reflecting on the Yums, new characters in the UK that are meant to teach children about keeping fit and eating healthy, notes:

[The segment] looks more like a piece of editorial. Therein lies the real danger. This "ad" is not advertising a product and it looks like a programme; but every kid knows who Ronald McDonald is [who introduces the Yums] and will associate him with yummy burgers. When I saw it on TV the other day it surfed neatly on the editorial endorsement of the surrounding programming and that makes it a far more invidious, offensive plug than any McDonald's ad that shows a big burger and fries.375

In this light, it is not so clear who is "conning" us out of exercising our personal choice, or to point the finger of blame, or "absolving" someone of personal responsibility.

d. The Experts—Helping Us Make the Right Choices

Other responses to the film reflect the wider debate on obesity, questioning the scientific basis for the position that obesity is a crisis issue and impugning

374 George Ritzer, Fries Just the Tip of Our Larger Obsessions, SUN SENTINEL, Mar. 24, 2004, at 29A.
the scientific foundation of the research that takes that position.376 For instance, some question whether obesity is indeed problematic for our culture or whether it is just “an unintended [and curable] consequence of a more productive, healthier society.”377 Others argue that obesity is surely a bad thing, but that the extent of the problem is exaggerated. The “crisis” is simply the result of some individuals manipulating statistics and using “junk science” to deceive us into espousing their own personal agenda.378 While critics claim that McDonald’s is pushing junk food, McDonald’s supporters respond that its critics are pushing junk science.

For McDonald’s to counter fully the messages of Super Size Me, it is not enough to assert that Spurlock and his message are unreliable. McDonald’s must also find a way to convey its message credibly, lest the message come across as little more than the defensive spin of a partisan.379

Thus, McDonald’s is quick to note that it works with “real experts.”380 Their nutritional director has been very vocal and active in promoting McDonald’s health philosophy and the company was only eager to draw the “contrast between someone who has spent her life in science and in health . . . [and] a comedian that made a gross-out movie.”381 In addition, McDonald’s newly created Global Advisory Council on Balanced Lifestyles is teeming with widely published professors and doctors from around the world, as well as a six-time Olympic medalist. The mandate of this impressive group is solely to provide McDonald’s with “independent, expert guidance on activities that address the need for balanced, healthy lifestyles.”382

376 Yet again, this strategy mimics that of the tobacco industry, which sought to create doubts about the scientific evidence linking its product to lung cancer, heart disease, and so on. See Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1484–94. The manipulation of science and other “credible third-parties” is an integral component of “deep capture.” See Hanson & Yosifon, The Situation, supra note 13, at 269–84. We have already discussed these techniques more generally in the section entitled “The Message.” See supra notes 290–316 and accompanying text.


379 See Hanson & Yosifon, The Situation, supra note 13, at 270.

380 McDonald’s Corporation, supra note 333. This contrasts, presumably, also with the health practitioners that supervised Spurlock’s diet in the film, sleights against whom we have yet to see.

381 O’Brien, supra note 359.

The Council has encouraged McDonald's to consider initiatives that address:

—Additional menu choices, including fruit and vegetable options.
—Promoting physical activity.
—Focusing on our employees.
—Setting goals and working to measure the impact of our initiatives.
—Supporting broader research in the areas of health and nutrition.  

But McDonald's does not rely on their directly hired experts alone. Because those experts are so closely linked to McDonald's, they need to avoid saying things that are too obviously favourable to the company's interests or too nasty about their opponents. Similarly, their role is purportedly to advise McDonald's in constructing positive initiatives for responsible contributions to the public debate; it is not to do movie reviews of films that they claim are not constructive additions to the health discussion. McDonald's, therefore, declined to directly respond to the film, taking the following position in its official US press release: "We see no reason to respond to Morgan Spurlock when so many other experts have already spoken out on the film's distortions and irresponsibility, including those consumers who voluntarily are conducting their own independent 30-day McDonald's diet to disprove his over-the-top behavior." And, indeed, the statement was correct; an army of seemingly independent "experts" led the counterattack.

4. Deep Capture of Knowledge Production

So, who are some of these "other experts"? They consist of what can only be described as a network of groups that operate more or less in concert to speak out against Morgan Spurlock. That network includes groups devoted primarily to developing certain procommercial (dispositionist) ideas, like the Competitive Enterprise Institute and the American Council on Science and Health, and those devoted primarily to promoting those ideas in broadcast forums, such as Tech Central Station and Fox News. The distinction is loose,

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384 Press Release, McDonald's Corporation, supra note 333.
because, as we describe, each group engages in both the development and dissemination of promarket dispositionism. 385

a. Competitive Enterprise Institute

McDonald’s reference to “consumers” independently conducting their own thirty-day McDonald’s diet undoubtedly refers to Soso Whaley, a filmmaker who, in reaction to Spurlock’s movie, ate for two months at McDonald’s and lost eighteen pounds. 386 The Competitive Enterprise Institute (“CEI”) hosts the website that includes Whaley’s diaries and articles. 387 Entitled “Debunk the Junk,” the project, which will eventually be turned into a film, is meant to “explore the issue of personal responsibility in eating and lifestyle choices [and] ... the use of junk science which too often today passes for legitimate science.” 388 While Whaley has been given an adjunct fellowship from CEI to work on the film, receives help from the staff in her work, and may be sponsored by them for a screening of the film, the Washington think tank “has not contributed any money” 389 to the project.

The support of CEI may not be particularly surprising since the $3 million “public policy organization [is] dedicated to the principles of free enterprise and limited government. [CEI] believe[s] that consumers are best helped not by government regulation but by being allowed to make their own choices in a free marketplace.” 390 Their mission statement says: “Consumers should be allowed to make choices in a free marketplace unshackled by government regulation.” 391 But why would a “think tank” be so active in promoting a nonscientific experiment of one woman whose goal is to demonstrate (the fairly obvious conclusion) that it is possible to eat only at McDonald’s and lose weight? The answer is surely that CEI is focused less on thinking about

385 Above we described The Center for Consumer Freedom, see supra text accompanying notes 317–20. Here, they are one of numerous other groups that have been contributing to the “counterattack” on Spurlock. See, e.g., The Center for Consumer Freedom, Supersized Con Job, at http://www.consumerfreedom.com/news_detail.cfm/headline/2494 (May 5, 2004).
387 See Competitive Enterprise Institute, Debunk the Junk: Soso Whaley’s McDonald’s Adventure, CEI.org, at http://www.cei.org/pages/debunk/debunk_the_junk.cfm (last visited Nov. 2, 2004).
389 Higgins, supra note 386.
“economic freedom” and more concerned with actively promoting “economic freedom”:

CEI is not a traditional “think tank.” We frequently produce groundbreaking research on regulatory issues, but our work does not stop there. It is not enough to simply identify and articulate solutions to public policy problems; it is also necessary to defend and promote those solutions. For that reason, we are actively engaged in many phases of the public policy debate.

We reach out to the public and the media to ensure that our ideas are heard, work with policymakers to ensure that they are implemented and, when necessary, take our arguments to court to ensure the law is upheld. This “full service approach” to public policy helps make us an effective and powerful force for economic freedom.\(^{392}\)

That approach also makes the nonprofit “think tank” quite valuable to firms and industries seeking to resist profit-reducing regulation and to all groups and individuals promoting market solutions and procommercial forms of deregulation.\(^{393}\) It is for these reasons that Soso Whaley’s “adventure” figures prominently on the CEI website. Soso’s first daily diary entry contains this telling description of Spurlock’s movie and her motive to produce an alternative:

[Spurlock’s] anti-corporate, anti-fast food take on the “evil” McDonalds is nothing more than simple junk science and should be relegated to the comedy section at Blockbuster once it is distributed. To be honest, I’ve had it with all the doom and gloom, alarmist, anti-everything attitude of certain individuals and organizations who want to control my life, your life, everyone’s life with little regard for individual tastes, freedom of choice and personal responsibility . . . .

. . . I, on the other hand, am motivated to eat at McDonalds for 30 days to show just how easy it is to skew results of any test to reflect your preconceived notions and come up with just exactly the results you want to see. In my case I’m going to use some of the same parameters Mr. Spurlock used but I would rather see results which show I can maintain a healthy lifestyle and actually lose weight at

\(^{392}\) About CEI, supra note 390.

\(^{393}\) CEI no longer reports its sources of funding, but the list of contributors from the early 1990s includes many consumer product corporations (including Coca-Cola and Philip Morris) and ideologically conservative foundations (including the Koch and Scaife Foundations). For an overview of some of CEI’s projects and its funding sources, see Improaganda Review, PR Watch.org, at http://www.prwatch.org/improp/cei.html (last visited Nov. 2, 2004), and Grant Data Matrix: Competitive Enterprise Institute, Media Transparency, at http://www.mediatransparency.org/search_results/info_on_any_recipient.php?81 (last visited Nov. 2, 2004).
McDonalds, so I will not be scarfing down Double Quarter Pounders with cheese.\footnote{Soso Whaley, \textit{Daily Dairy—Debunk the Junk}, CEI.org, at \url{http://www.cei.org/gencore/003,03932.cfm} (Apr. 2, 2004).}

As she expected, Whaley achieved what she set out to prove. The question that Whaley and CEI never considered, however, was how the insight about easily skewed results fits into a more general assessment of ourselves and our institutions—and, more specifically, how Soso Whaley’s “adventure” produced “knowledge” that legitimates, among other things, the practices of large commercial entities.

When one journalist asked Whaley “what she [had] to say about the view that CEI is an ideologically-driven front for corporations,”\footnote{Brian Zoromski, \textit{A Look Inside the PR Battle Against Super Size Me}, IGN FilmForce, at \url{http://filmforce.ign.com/articles/512/512414p1.html?fromint=1} (May 7, 2004).} her response was: “Well, everyone has to have someone to speak out for them. And, you know, I don’t know why we want to demonize corporations so much . . . . [M]ost of the corporations out there are just trying to provide people with what they want.”\footnote{Id.}

\textbf{b. American Council on Science and Health}

A second group of seemingly independent experts, the American Council on Science and Health (“ACSH”) also has actively defended McDonald’s from the scrutiny brought on by \textit{Super Size Me}. The President and Co-Founder of ACSH, Dr. Elizabeth Whelan, asserts that the mission of her organization is to: “a) promote sound science in regulation, in public policy, and in the court room; and b) assist consumers, via the media, in distinguishing real health threats from purely hypothetical ones.”\footnote{Elizabeth Whelan, \textit{Where did ACSH come from?}, at \url{http://www.acsh.org/news/newsid.852/news_detail.asp} (Apr. 29, 2004).} When responding to the release of \textit{Super Size Me}, McDonald’s vice president of corporate communications, Walt Riker, triumphantly informed news sources that “the American Council on Science and Health [was] putting out an aggressive, independent third-party response.”\footnote{O’Brien, \textit{supra} note 359.} Indeed it did, with its Nutrition Director, Dr. Ruth Kava, being especially vocal in denouncing the movie and Spurlock’s actions.\footnote{Ruth Kava, \textit{A Supersized Distortion}, at \url{http://www.acsh.org/news/newsID.175/news_detail.asp} (Feb. 10, 2004).}
Kava sought first to characterize Spurlock as a publicity hound doing whatever he could do to achieve fame. She opened one of her articles by stating: “Morgan Spurlock wanted to be in a movie.”\(^{400}\) In a follow-up piece, she states that Spurlock’s “antics” involved “gorg[ing] his way to fame by overeating at McDonald’s restaurants for a month, putting on nearly thirty pounds and developing a fatty liver in the bargain.” In yet another, she describes Spurlock as having a “[s]upersize[d] [e]go.”\(^{401}\)

It’s not just the messenger who she attacks; Kava called the movie’s message a “supersized distortion” for ignoring the fact that “any calorically-dense foods, eaten to excess, can add inches to one’s girth, especially if unaccompanied by calorie-burning exercise.”\(^{402}\) As Kava concluded, “that should be the real message—not that cheeseburgers and fries . . . automatically make one fat!”\(^{403}\) Although some of her own readers accused Kava of misconstruing or misstating the “real message” of *Super Size Me*,\(^{404}\) we are less concerned here with her view of the movie’s message than we are with her message. According to Dr. Kava, the nutrition scientist, the problem of obesity boils down ultimately to one of personal and parental choice:

> Food of all sorts is readily available these days, to an extent never seen thirty or forty years ago. That act is not likely to change. Consumers must learn to make appropriate food choices and to increase physical activity to balance the calories they consume. Further, we must teach our children to do likewise or the negative health consequences of obesity will be epidemic as well.\(^{405}\)

The situation is taken as given, the only thing that needs to change are the dispositional choices that people are making.

Many critics have accused ACSH of being a shill for the food and petrochemical industries.\(^{406}\) Elizabeth Whelan, ACSH’s president, begs to differ. The fact that the group was initially promoted and funded solely from a

\(^{400}\) *Id.*  
\(^{402}\) *Id.* (containing letters from Danika Dinsmore explaining that Spurlock is “trying to address a larger issue” and that “[h]e’s not finger-pointing at McDonald’s” and from Jay Kenney arguing that Kava’s article ignores important differences across foods).  
\(^{403}\) *Id.* (containing letters from Danika Dinsmore explaining that Spurlock is “trying to address a larger issue” and that “[h]e’s not finger-pointing at McDonald’s” and from Jay Kenney arguing that Kava’s article ignores important differences across foods).  
small number of procommercial foundations, such as the John M. Olin Foundation, and was not directly funded by individual corporations, constitutes evidence, in her view, of independence.\textsuperscript{407} Similarly, the fact that ACSH has changed its policy and now receives approximately 40\% of its funding directly from food, chemical, and petroleum companies whose products ACSH routinely defends also, Whelan claims, misses the point.\textsuperscript{408} After all, Whelan underscores, ACSH only accepts money from corporations when no strings are attached.\textsuperscript{409}

To be sure, the ACSH website claims that ACSH “advocates sound science” and “protects consumer freedom.”\textsuperscript{410} But much of ACSH’s actions speak louder than its words, and its words in one context to one audience often contradict its words in another context to a different audience. In promoting itself to potential donors, for example, ACSH underscores its commitment to defend the food and petrochemical industries.\textsuperscript{411} According to one story, when the Kellogg Company decided not to renew its annual donation of $10,000, ACSH, through Whelan, responded by

accusing Kellogg of “trying to manipulate scientific findings” by withholding funding because the ACSH does not support the company’s argument that dietary fiber helps prevent colon cancer. Whelan pleaded for Kellogg to reconsider, noting her organization’s lengthy history of combat with the Center for Science in the Public Interest (CSPI), a group that, unlike ACSH, has regularly criticized the food and restaurant industries.

“We’ve been there to counter CSPI’s claims as [it] has attacked virtually every aspect of modern-day food technology, whether it be caffeine, sugar, dietary fiber, the fat-replacer olestra, dietary fat and cholesterol, moderate consumption of alcohol—or whatever other

\textsuperscript{407} Whelan, supra note 397, at 396 (“ACSH adversaries have over the years referred to ACSH as a creation of ‘the petrochemical industry.’ In fact, though, ACSH did not accept funding—even general operating funding—from any corporation or trade association for the first two years of operation.”).

\textsuperscript{408} Id. (“For two years we tried [to accept donations only from private foundations], but the media still regularly implied that ACSH had industry support . . . . The ACSH Board of Directors concluded that what critics objected to was not ACSH’s funding but ACSH’s views—and that in avoiding corporate donations we were limiting ACSH’s fundraising potential to no avail.”).

\textsuperscript{409} Id.


\textsuperscript{411} Stauber & Rampton, supra note 406 (“Since its founding in 1978, [ACSH] has actively courted industry support, offering itself as an off-the-shelf, available-on-demand source of ‘sound scientific expertise’ in defense of virtually every form and type of industrial pollution known to the 20th century.”); see also Howard Kurtz, \textit{Hiding a Lobby Behind a Name: Why Not Truth in Labeling for Interest Groups?}, \textit{WASH. POST}, Jan. 27, 1985, at C5 (describing how ACSH put its name on an amicus brief that was paid for by an individual corporation on behalf of an industry).
alleged carcinogen, toxin, or 'killer' ingredient [CSPI] has singled out for indictment," Whelan stated.412

Finally, despite its claims that it is not beholden to corporate interests, ACSH opted to stop disclosing corporate donors in the early 1990s.413

c. Tech Central Station

A third group to provide an “independent” expert critical of Super Size Me was Tech Central Station (“TCS”). TCS founder and “host,” James Glassman, has spoken out strongly against the movie on the organization’s website and in newspaper editorials. But TCS is devoted largely to publishing and promoting the work of other like-minded experts. It was on Tech Central Station where ACSH’s Ruth Kava’s pan of Super Size Me was published. Indeed, the TCS website houses an entire section dedicated to the “Super Size Con”—that is, Spurlock’s movie and its message—which is a sponsored link on Google.com for certain key search terms (including “Morgan Spurlock” and “Super Size Me”).414

In a display of cooperation between all three “independent” organizations, Dr. Kava, as Nutrition Director for ACSH, recently published another article on TCS, reporting on Soso Whaley’s diet—which is also posted on the CEI website415—as further proof that Spurlock’s methodology was flawed.416 Like its compatriots, TCS has an established world view of: “free markets, free

412 Id.
415 Competitive Enterprise Institute, supra note 387.
416 Ruth Kava, 30 Day McDiet: Results are In, at http://www.techcentralstation.com/090804G.html (Sept. 8, 2004).
trade, sound science and a strong defence of America. Unlike ACSH however, TCS discloses its sponsors:

Tech Central Station is supported by sponsoring corporations that share our faith in technology and free markets. Smart application of technology—combined with pro free market, science-based public policy—has the ability to help us solve many of the world’s problems, and so we are grateful to AT&T, Avue Technologies, The Coca-Cola Company, ExxonMobil, General Motors Corporation, Intel, McDonalds, Merck, Microsoft, Nasdaq, PhRMA, and Qualcomm for their support. All of these corporations are industry leaders that have made great strides in using technology for our betterment, and we are proud to have them as sponsors. However, the opinions expressed on these pages are solely those of the writers and not necessarily of any corporation or other organization.

Perhaps the opinions are not those of the sponsoring corporations, but, for several reasons, that seems unlikely. First, the individuals behind TCS’s knowledge production share a strong commitment to the dispositionism that their sponsors seek to promote. It would be surprising, therefore, if their views substantially conflicted. Second, as a matter of fact, there is little evidence of any such conflict. As Nicholas Confessore of the Washington Monthly observes, “it is startling how often the opinions of the TCS’s writers and sponsors converge.”

Third, it is doubtful that the firms “sponsoring” TCS would continue to do so if TCS were not successfully promoting their ends. Indeed, one can see why a firm like McDonald’s would value a seemingly independent group that, say, attacked any of its detractors in ways that McDonald’s cannot. McDonald’s, for instance, would very likely not be able to credibly set up its own web page called “The Super Size Con” with articles that describe Spurlock as a “[a] prankster and scamster from way back,” and his movie as

an outrageously dishonest and dangerous piece of self-promotion. Through his antics, Spurlock sends precisely the wrong message. He absolves us of responsibility for our own fitness. We aren’t to blame for being fat; big corporations are! And the remedy, he suggests, is

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418 Id.
419 Id.
to file lawsuits and plead with the Nanny State and the Food Police for protection. 422

And McDonald's, it is true, may not credibly be able to publicly endorse the sorts of threat-mongering conclusions that the website promotes, such as:

Are you really as dumb as Spurlock and the agents of the Food Police who appear on the film—like lawyer John Banzhaf, who sees a tobacco-like pot of gold—think you are?

What Americans need is balance: Sensible eating plus exercise. Staying fit is a matter of personal choice and responsibility—which are just what this con man and his co-conspirators want to take away from you. 423

Why would McDonald's "respond to Morgan Spurlock when so many other experts have already spoken out on the film's distortions and irresponsibility"? 424 McDonald's and other businesses that might similarly benefit from such defenses simply need to sponsor those who will do the deed. They can "contract out," in effect, a task that is better done by others than by themselves. This strategy is fundamental to the deep capture of knowledge production. And the very existence and success of TCS and the other groups that McDonald's points us to, suggest how "knowledge" is created through the creation of or influence over third-party spokespeople.

Indeed, a careful examination of TCS reveals that it is the creature of the DCI Group, which itself is simply a sophisticated and successful public relations firm. 425 The DCI Group describes itself on its website as:

[A] full-service public and government affairs firm comprised of more than 150 veterans of federal and state politics and public policy. We offer a full suite of public affairs services, including:

- Corporate Grassroots Campaigns
- Federal and State Lobbying

422 Id.; see also James K. Glassman, Dishing It Out, But Not Taking It, Tech Central Station, (May 27, 2004) at http://www.techcentralstation.com/052704G.html (describing the movie as "a repulsive and dishonest piece of puerile entertainment," in which Spurlock "send[s] a terrible message to America: Obesity is not your responsibility. It's the fault of greedy corporations").
423 Id. But see Susan Dominus, You Want Liver Failure with That?, N.Y. TIMES, May 2, 2004, at 18 (quoting Spurlock, "[L]awsuits are a terrible way to go with this sort of thing. It shouldn't have to get to that point.").
424 Press Release, McDonald's Corporation, supra note 333.
425 Confessore, supra note 420 ("DCI's business is to influence elite opinion in Washington. But instead of publishing articles, DCI specializes in what's known as 'corporate-financed grass-roots organizing' such as setting up front groups to agitate for a client's position, placing letters to the editor with key newspapers, and using phone banks to generate calls to politicians.").
Our team of professionals possesses extensive grassroots and government affairs experience. Team members include Washington, DC-based lobbyists, public relations professionals, political operatives, and a national field team of legislative and grassroots professionals based in all 50 states that helps shape public opinion and outcomes "outside the Beltway." This combination of factors makes DCI virtually unchallenged in the public and government affairs community.426

In describing how they serve their clients, DCI emphasizes the importance of using third-party support: "Corporations seldom win alone. Whatever the issue, whatever the target—elected officials, regulators or public opinion—you need reliable third[-]party allies to advocate your cause. We can help you recruit credible coalition partners and engage them for maximum impact. It's what we do best."427 TCS is just such a third-party ally.428

d. Fox News

It is widely believed that the "fair and balanced" coverage of Fox News is neither fair, nor balanced.429 Indeed, Fox News has become a favorite target for liberals who argue that Fox is highly biased and its success—combined with other larger dynamics in the cable news business—is driving other news outlets in the same, rightward direction.430 Of course, Fox News spokespeople

428 Confessore, supra note 420 ("In the past decade, corporate lobbying has evolved to influence—and, where possible, control—the arguments emanating from [public opinion] sources. It's why corporations have put so much money into think tanks, issue advertisements, and consulting arrangements with economists and other academics. It's how firms like DCI have flourished by orchestrating pseudo-grassroots movements to simulate or amplify constituent opinion on behalf of corporate clients. After all, it's only human nature to put more trust in the arguments of seemingly independent observers than those of paid agents of an interested party. And that's why a journalist willing to launder the arguments of corporations and trade groups would be so valuable.").
430 Eric Alterman, Think Again, Fox Outfoxes Itself, (July 15, 2004) at http://www.americanprogress.org/
would argue that they appear biased only in comparison to the left-leaning standard set by the rest of the "liberal media."

This is a debate that we cannot and need not resolve here. But we can shed some light on it by looking at how Fox Cable News has dealt with the conflicting stories of Morgan Spurlock and Soso Whaley. As it turns out, Morgan Spurlock's *Super Size Me* has been heavily criticized on Fox, while Soso Whaley's *Downsize Me* has been celebrated. Moreover, the interviews of Spurlock and Whaley contain the ingredients that we would predict from the framework we have been elaborating in this article. On one hand, Spurlock is attacked for making obviously bad diet and exercise choices and for attempting to place the blame solely on McDonald's. When Spurlock indicates that Whaley is biased, his suggestion is dismissed. Whaley, in contrast, is praised for proving the truth of our common-sense dispositionism and is inoculated by the interviewer against any suspicion of bias. Furthermore, Whaley's interviewer devotes a good bit of time to underscore the threats posed by people like Spurlock and the lawyers who might use his work to threaten our freedom.

On *The O'Reilly Factor*, Tony Snow built his interview of Spurlock around the "the McDonald's critique." Snow asked questions and made statements such as: "Well, didn't you purposely gorge yourself;" "you were also lying around, you didn't get exercise. The whole thing was designed to gain a lot of weight;" "You were trying to sandbag them;" "Now your critics are going to say, and I think they're right, that what you're trying to do is to create the impression that everybody who eats at McDonald's is going to get fat . . ." Snow then brought up Soso Whaley's experience of losing weight and asked: "So why are you attacking her? Why won't you debate her?" Spurlock acknowledged that Whaley lost weight, but pointed out that she did things most Americans don't: eat less and exercise. When Spurlock argued that Whaley "works for a lobby group in Washington, D.C., that's funded by the tobacco companies, the petroleum companies as well as the food industry," Snow denied the point: "Wait a minute. I know these guys, I've known them for 20 years. And you know what, that doesn't wash."
Interviewing Soso Whaley, the network praised Soso’s “choices” but spent most of the interview demonizing Spurlock and the inevitable parade of lawyers that would follow him and his film. Soso “chose healthy” and “picked items individually,” while Spurlock “ate meals,” which we are to assume was either abnormal or unwise. Soso generously offered herself up to testify against plaintiffs who might make use of Spurlock’s film.436

In both interviews Fox managed to discredit Morgan Spurlock and promote the interests of McDonald’s and, indeed all corporate interests, by reducing the issue to dispositional choice. In the process, Fox was working cooperatively with Soso Whaley to promote her project and, indirectly, with CEI (whose website contains not only Soso’s diary but also links to both of these interviews), and with ACHS and TCS who, as we described, were likewise acting to discredit Spurlock in part by highlighting Whaley’s experience.

e. Summary

The multi-layered strategy that we reviewed here with respect to McDonald’s response to Super Size Me, is widely effective in significant part because of the fundamental attribution error. We miss the situational influences on the conduct of a group or individual and focus instead on dispositions. Arguing about whether the individuals at TCS, ACHS, CEI, or Fox News are “bought and paid for” misses the point. The groups themselves exist and have resources and a public voice because they are valuable to companies who are willing to pay for the appearance of objectivity, and who need these organizations’ assistance to credibly alter the situation of knowledge production. The groups themselves may be genuinely motivated to sell dispositionism, but they succeed because they offer valuable schemas and causal stories that corporations are willing and able to pay for, and that we are all too eager to digest to mitigate the dissonance posed by work like Spurlock’s to our familiar dispositional knowledge structures.

Spurlock’s movie attempted to challenge the popular conceptions of a food system made up entirely of “choice” and consumers in sole control of their own weight and health. Spurlock, in that sense, encouraged his audience to see more of the situation and to doubt their dispositionist presumptions—to suggest, as one journalist put it, that many of us are “being sucked into a system designed to limit our choices while apparently offering us the

world.” Indeed, McDonald’s was correct: There was no reason for them to respond “when so many other experts . . . [eagerly spoke] out on the film’s distortions and irresponsibility.” And, of course, McDonald’s to try to respond as those “other experts” did, their criticism would have been far less credible, as they would be viewed as dispositionally vested. Fortunately for McDonald’s, with the help of other large commercial interests, they have the ability to subsidize and situationally promote institutions that will promote dispositionism generally and, when necessary, in targeted ways. And, when those “other experts” respond, their audiences tend to miss the situation and assume that a disposition—framed as scientific, common-sensical, freedom-enhancing, or just fair and balanced—is controlling. Spurlock has been met at every turn with a chorus of dispositionism because, like cheeseburgers, dispositionism sells.

Nonetheless, Spurlock’s situationist insights have had a significant impact. But that is true in large part because the movie was not alone. It coincided with unmistakable trends in obesity that could not easily be written off as solely the product of dispositionist choice, with emerging theories from various academic fields that take situation seriously, and with changing situations for many people, particularly parents, who can therefore more easily see situational constraints that might otherwise be missed.

VI. DISPOSITIONISM IN POLICYMAKING

It would be naïve to expect that any of our institutions are immune to the promotion of dispositionism. There is probably no sacred ground for the American corporation, and few terrains are more trammeled than those of government policymakers, where lobbying and influence peddling come with

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437 Fiona Morrow, Rotten to the Corp: When It Comes To Attacking Corporate Ethics, Today’s Film-Makers Mean Business, TIMES (London), Sept. 2, 2004, at http://www.timesonline.co.uk/article/0,7943-1242258_1,00.html.

438 See supra note 384 and accompanying text.

439 It is important to recognize that while third-party messengers were attempting to discredit Spurlock and reinforce dispositionism, the fast food industry has nonetheless taken more seriously the crisis in perceptions. McDonald’s has announced a new approach to customer responsiveness and corporate responsibility. According to its new boss, Charlie Bell (no relation to Taco), the company has become “fat, dumb and happy . . . forget[t]ing about its customers.” To accompany the “biggest rebranding exercise in corporate history,” McDonald’s claims to be “truly opening the doors to the Golden Arches . . . to demonstrate that [they] are sincere about trying to do the right thing.” John Arlidge, Move Over Big Mac, Here Comes McSarnie, TIMES (London), Sept. 26, 2004, at http://business.timesonline.co.uk/article/0,,9070-1279123,00.html. Whether the decision to change the menu once again or to open “McCafes” will actually help address the obesity epidemic is another question.
the territory. Of course, there is good reason for corporate competitors to corral policymakers, be they legislators, administrative bureaucrats, judges, or juries; government agents, as makers and interpreters of laws, serve a critical role in knowledge (and schema) production. They are in the position not only to advance conclusions through their analyses and decisions but also to enact state-enforced policies based on those conclusions. Dispositionism has an immense effect on policymaking and our policymakers. Indeed, one of the most important and least obvious effects is on our conceptions of policymakers themselves, both as to their general role in our system and concerning the appropriate range of their behavior in individual cases.

A. A Dispositionist View of Policymakers

In lay theories as well as in academic accounts, we tend to see policymakers as dispositionally motivated—driven either by a quest for money and power or by ideology and principle.440 In another example of our naïve realism and our in-group and out-group biases, we tend to see those who share our views as acting in good faith for the public interest and those who do not share our views as acting in bad faith for their own selfish gain. Consequently, depending on worldview, one group of constituents will perceive a policymaker as a perceptive, pragmatic, and realistic leader, and another group will perceive the policymaker as a biased, self-interested corporate shill. Those who see it my way are courageous and committed to social justice; those who do not are beholden to the plaintiffs’ bar and are dangerously idealistic. When we look at our policymakers, all we ever see is disposition, good or bad.

With respect to the obesity issue, it would be easy to dispositionalize policymakers as acting solely in the interests of industry, without regard to public health. Indeed, it would be a relatively small leap to assume that influential policymakers are, in effect, in the kitchen with the food industry, concocting recipes that maximize profits and minimize regulation.

For starters, notice what policymakers have not done. For years, health experts have made a strong case for significant policy reforms responding to dietary and lifestyle changes in America, but lawmakers have remained unmoved.441 The recent history of soft drinks provides a prime example. In

440 "Regulators” and “bureaucrats,” of course, are subject to a fairly robust set of dispositionist out-grouping.

441 To address one possible explanation for regulators’ inaction, it is certainly not as if the government has been powerless to do anything to change our diets. As Dun Gifford, president of the Oldways Preservation and Exchange Trust, a nonprofit organization specializing in food, diet, and nutrition education, explains:
1942, the Council on Food and Nutrition for the American Medical Association ("AMA") stated, "From the health point of view it is desirable especially to have restriction of such use of sugar as is represented by consumption of sweetened carbonated beverages and forms of candy which are of low nutritional value." Consequently, the AMA recommended that the government take "all practical means" to limit such consumption of sugar.\textsuperscript{442} In 1995, the Institute of Health published a major report attributing the obesity problem to environment, and, since then, studies by public health scholars have confirmed that conclusion again and again.\textsuperscript{444} Yet at the same time that scientists make the case that with "each additional can or glass of sugar-sweetened drink" a child consumes every day the likelihood of becoming obese increases by 1.6 times,\textsuperscript{445} the soft-drink industry has been allowed to pursue a no-holds-barred strategy of flooding our environment with their products.

Major policymakers have done virtually nothing to consider, much less address, the situational sources of obesity or, more specifically, to stem the flow of Mountain Dew, Coca-Cola, Sprite, Dr. Pepper, and Sunny Delight into our situation. Indeed, the actions that have been taken have often served to advance that tide.\textsuperscript{446} As a consequence, soft drinks are a booming, $64 billion

There was once a very successful U.S. government program aimed at changing eating habits . . . . It happened during World War II, and it was called "food rationing." They made it a patriotic thing to change the way you ate. The government hired the best people on Madison Avenue to come to Washington and work for the War Department. It worked splendidly. To convince people to eat wisely, a determined, clever program could make a difference.


\textsuperscript{442} Jacobson, supra note 177 (quoting a 1942 statement of the American Medical Association's Council on Foods and Nutrition).

\textsuperscript{443} Id.

\textsuperscript{444} See generally BROWNELL & HORGESN, supra note 12 (summarizing scientific research and elaborating the "toxic environment" thesis).

\textsuperscript{445} David S. Ludwig et al., Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis, 357 LANCET 505, 507 (2001).

\textsuperscript{446} See generally NESTLE, supra note 267, at 199. Nestle argues that policymakers bow to industry pressure and produce recommendations that are often confusing or unhelpful. For example, as a result of lobbying, the language of the Dietary Guidelines for Americans issued by the federal government changed from "go easy on beverages and foods high in added sugars" (1999) to "choose beverages and foods that limit your intake of sugars" (February 2000) to "choose beverages and goods to moderate your intake of sugars" (May 2000). Id. at 82–83 (emphasis added). Nestle concludes that "[a]lthough the text of the final version states that soft drinks, candy, cakes, cookies, fruit drinks, and dairy desserts are the major sources of added sugars, the guideline itself obscures that point, as does the positive 'choose' as opposed to the restrictive 'go easy'." Id.
industry, with each person in America consuming more than fifty-two gallons of soda last year.\footnote{National Soft Drink Association, About Soft Drinks, Soft Drink Facts at \url{http://www.nsda.org/SoftDrinks/History/funfacts.html} (last visited Oct. 28, 2004) (noting that today, there are nearly 450 different soft drinks on the U.S. market).} The 6½-ounce bottle of Coca-Cola that was the standard throughout the 1950s has given way to the 42-ounce “super size” and even the 64-ounce “Double Gulp.”\footnote{Michael Jacobson points out that the problem with this is that “[t]he larger the container, the more beverage people are likely to drink, especially when they assume they are buying single-serving containers.” Jacobson, supra note 177.} At just under a teaspoon per ounce in most soft drinks, the Double Gulp packs in a full cup of sugar.

As a few leading policymakers have finally begun to take action in response to the spotlight recently focused on this epidemic, the question emerges: Why is so much of that action directed toward protecting the food industry and promoting a dispositionist view of obesity? In other words, how did Congressman Ric Keller bring himself to sponsor the “Personal Responsibility in Food Consumption Act,” a law aimed at shielding “manufacturers, distributors, or sellers of food or non-alcoholic beverages” from tort liability for harms their products inflict on the public?\footnote{House Bill 339, introduced in the House of Representatives on January 27, 2003, was aimed at “prevent[ing] frivolous lawsuits against the manufacturers, distributors, or sellers of food or non-alcoholic beverage products that comply with applicable statutory and regulatory requirements.” Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003). Under the proposed law:

The manufacturer, distributor, or seller of a food or non-alcoholic beverage product intended for human consumption shall not be subject to civil liability, in Federal or State court, whether stated in terms of negligence, strict liability, absolute liability, breach of warranty, or State statutory cause of action, relating to consumption of food or non-alcoholic beverage products unless the plaintiff proves that, at the time of sale, the product was not in compliance with applicable statutory and regulatory requirements.\footnote{Id. § 2(a). It was passed in the House by a vote of 276 to 139 in March 2004. Susan Jones & Melanie Hunter, \textit{House Passes ‘Job-Saving’ Cheeseburger Bill}, CNSNEWS.COM, Mar. 11, 2004, at \url{http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200403%5C20040311a.html}. Senator Mitch McConnell introduced a similar bill, the “Commonsense Consumption Act,” in the Senate on July 17, 2003. The purpose of the bill was to “prohibit civil liability actions from being brought or continued against food manufacturers, marketers, distributors, advertisers, sellers, and trade associations for damages or injunctive relief for claims of injury resulting from a person’s weight gain, obesity, or any health condition related to weight gain or obesity.” Commonsense Consumption Act, S. 1428, 108th Cong. (2003). Senator McConnell suggested that the “bill would not affect lawsuits against food manufacturers or sellers that knowingly and willfully violate a Federal or State statute applicable to the manufacture and sale of food.” 149 CONG. REC. S9596 (daily ed. July 17, 2003) (statement of Sen. McConnell). However, the section of the bill to which he alludes seems to make that possibility very real. The only other category of civil liability action that is not covered by the law, besides an action for breach of contract or express warranty, or an action involving an adulterated product, is}
Senator Zell Miller say with a straight face that "kids are obese not because of what they eat at lunchrooms in schools but because, frankly, they sit around on their duffs watching Eminem on MTV and playing video games."

Again, an easy and available answer is that special interests are just buying their way to sweet policies. The sugar industry alone poured over $16 million into the coffers of candidates for Congress between 1989 and 2004. It looks like the prototypical case of a spoonful of sugar helping the medicine go down.

Although appealing to some, that answer is probably too facile—and too dispositionist. We do not suspect a right-wing and big-food conspiracy with "bribes" and under-the-table transfers of unmarked bills behind those policies. Nor are lawmakers being encouraged to swallow what would otherwise get stuck in their throats. Like candy, the policies that these legislators advance taste great. The legislators believe in these policies and the products. A little personal responsibility and common sense feels like just what fat people need. Thus, efforts to protect industry reflect not a selfish allegiance to "Big Money," but a commitment to combating the out-of-control tort system and the "coordinated cultural war ... being waged against soft drinks."

That Senator Zell Miller hails from Georgia, home of Coca-Cola Enterprises, may give him a special concern about the regulation of soft drinks, but it does not require him to alter his view of the world or of who is responsible for a person's obesity. When Senator Mitch McConnell introduced the Commonsense Consumption Act in the Senate, he did so not because he is in the baggie pocket of Ronald McDonald, but because "[w]hat you put in your

an action in which a manufacturer or seller of a qualified product knowingly and willfully violated a Federal or State statute applicable to the manufacturing, marketing, distribution, advertisement, labeling, or sale of the product, and the violation was a proximate cause of the claim of injury resulting from a person's weight gain, obesity, or health condition related to weight gain or obesity.

S. 1428 § 3(5)(A). Proximate causation is notoriously difficult to prove for obesity-related health problems because weight gain implicates many different factors. Therefore, even if one could prove that a company willfully broke a federal statute—say, by advertising that their "magic chicken nuggets" made everyone who ate them skinner—individuals who had become fat as a result might very well be unable to collect.

Elizabeth Lee, School Lunches: Good Choices? Menu Fattens Kids, Budgets, ATLANTA J.-CONST., May 4, 2003, at A1. Like other elite sources of dispositionism, including legal scholars, legislators have found that appealing to common sense notions and everyman evidence can be a very effective tactic.


mouth is a choice you make,"\textsuperscript{453} and "[y]ou shouldn’t be able to sue someone else because of your own eating habits."\textsuperscript{454}

No one has to sell out for the sweeteners to make a difference. While candidates with the clearest commitment to procommercial dispositionism are, other things equal, likely to receive the largest portion of the sugar, it looks and feels more like a bonus than a bribe. Situational manipulation keeps everyone clean. In Georgia, for instance, a solid endorsement of “personal responsibility” means more campaign donations and more votes from those working for Coca-Cola and those who depend on its success.\textsuperscript{455} And being advantaged by common-sense views that you actually believe in means that all those contributions do not look like anything more than the rewards for voting according to level-headed common sense.\textsuperscript{456}

The study of how lawmakers are influenced by competing interests is a vast field—to too vast to review here. But one of its most significant contributors,

\textsuperscript{454} Id.
\textsuperscript{455} Senator Mitch McConnell of Kentucky has been among the most forward in proposing legislation “to shield fast-food restaurants and the rest of the food industry from lawsuits by customers who claim what they ate made them overweight.” Id. In 2002, he received over $200,000 in campaign contributions from food- and beverage-related companies, including $5000 from the National Restaurant Association, $2000 from McDonald’s, and $3000 from the Louisville-based Yum! Brands, Inc., which controls KFC, Taco Bell, Pizza Hut, A&W, and Long John Silver’s. Id. at A6. McConnell insists that he was not asked to introduce any legislation by anyone in the industry. In his words, legal reform “is just a subject I’ve had a longstanding interest in.” Id.

Senator Ric Keller’s congressional district is the home of the single largest company dedicated to casual dining, Darden Restaurants Inc., which owns both Red Lobster and Olive Garden. Schneider, \textit{supra} note 279. According to the Center for Responsive Politics, in the 2002 election cycle, Keller received $33,750 from food and beverage companies and $18,000 from food processing and sales companies for his re-election campaign. Id.

\textsuperscript{456} Thus, something deeper than campaign contributions may be at work when we see Senator Mitch McConnell bemoaning the fact that

makers of lawful products are being sued so they will change their products or offer different products—such as particular types of trigger locks or veggie burgers—even though the law or the public doesn’t require, or desire, them to do so (remember how big of a hit McDonald’s veggie burgers were with customers!).

Senator Mitch McConnell, Restoring Responsibility—Litigation, Victimization, and the Corruption of Culture, Remarks Before the Free Congress Research and Education Foundation, Apr. 10, 2003, \textit{available at} http://mcconnell.senate.gov/Releases/APR03/04102003.htm. When he jokingly reminds us about the popularity of the McDonald’s veggie burger, it is possible that he has a check from Ronald McDonald in his pocket, but a more plausible scenario is that there is no direct payoff. The dispositionist message has captured his interior. By shielding corporations from litigation he genuinely believes that he is protecting the market from corruption, our system of government from ruin, and our personal freedoms from demise.
Nobel Laureate economist George Stigler, summarized much of the work by observing that regulations do not necessarily curtail powerful groups for the sake of the "public interest"; rather, "groups possessing political influence use the political process effectively to increase their incomes." According to the "economics of regulation," as this approach was initially dubbed, causal relationships and the direction of influences are thus the reverse of what had been supposed. The seemingly autonomous administrative agency is, upon inspection, captured, and the seemingly constrained industries are liberated and enriched. The industry tail wags the regulatory dog. As Stigler laments, "no matter how disinterested the goal of public policy, the policy is bent to help politically influential groups at the cost of the less influential."

Some critics of the basic Stiglerian account and defenders of the existing policymaking system have stressed that because many regulators and legislators seem to be voting according to their ideologies, the problem of regulatory "capture" is vastly overstated. As we have attempted to demonstrate, however, disposition is largely beside the point. That a regulator or legislator may act out of ideological dispositions implies that she is free from capture no more than the changing lengths of shadows on a summer afternoon implies that the sun is revolving around the earth. Each inference misses the situation—an understandable oversight, but an oversight nonetheless.

Thus, the problem with Stigler's account is not that it is untrue, but that it is deeper than he appreciated. While Stigler focused only on administrative regulation, there is no reason to believe that any institution that can have significant effects on external groups is immune to the competition for situational influence. Similarly, there are many reasons to believe, and there

458 Stigler, like many of his contemporaries, eschewed an anthropomorphic view of the state and, true to the tenets of his discipline, looked for answers under the assumption that governments are made up of individual people who are rational actors and who behave according to the same principles and in response to the same incentives that motivate market participants. What Stigler and his contemporaries assumed about private choice, they also assumed about "public choice" (the name given to the now-immense field of research that, for the most part, is similarly premised). See Hanson & Yosifon, The Situation, supra note 13, at 202–06 (summarizing Stigler's contribution to public-choice regulatory theory).
459 That is not meant to imply that the humans who run the agency are captured by the process. According to the most basic theory, their interests are advanced by the quid pro quo inherent in the process. See id.
460 STIGLER, supra note 457, at 119.
461 See Hanson & Yosifon, The Situation, supra note 13, at 213–18 (explaining that there are many capture-worthy and capturable institutions that bear on corporate profitability beyond formal regulatory agencies or branches of government).
is much evidence to suggest, that large commercial interests are disproportionately advantaged in that competition. Furthermore, as our dispositionist culture and legal system evinces, capture has an influence not only on the institutions but also on individuals—the regulators, legislators, jurors, consumers, citizens, employees, parishioners, and solo bowlers of our society—and the way they conceptualize the world. Stigler and other capture theorists are like the commentator who removes blame from obese children and their parents, only to place it on school systems that are failing to "take responsibility" for their students’ nourishment. The commentator acknowledges situation, but only a fraction of it—the situation of the children and the parents—allowing the principal or superintendent to become the dispositionalized bad actor.

The question that should be asked is not: "Who among the regulators is corrupt or so selfishly motivated as to disregard the 'public interest'?" The question that should be asked is: "Who among us is the most powerful and most capable of capturing our exteriors and interiors and, even, of capturing what we mean by the 'public interest'?" By dispositionalizing policymakers and overlooking their situation, we all but ensure that their policies will disproportionately serve the interests of society’s most powerful entities. We lose the situational forest for the dispositional trees.

B. Choice, Personal Responsibility, and Lawmakers

The dispositionist arguments that we outlined above in Part II.B can be found in every layer and branch of government. And often times, they are indistinguishable from the rhetoric of industry spokespeople. The conjured up threats are the same: greedy trial lawyers and undeserving fat people taking away your freedom and endangering your family. As House Judiciary Committee Chairman F. James Sensenbrenner, Jr., warns, "frivolous obesity-related lawsuits against the food industry . . . threaten American jobs and raise

462 See id. at 419–22 (describing corporate advantages in competition for situational influence); Chen & Hanson, The Illusion of Law, supra note 16, at Part V (explaining how corporate law reinforces that advantage).

463 For an extensive discussion of the food industry’s influence over policy, see NESTLE, supra note 267, at 93–171.

464 See Hanson & Yosifon, The Situation, supra note 13, at 202–29 (summarizing the deep capture hypothesis and its relevance for understanding regulatory behavior).
food prices for schools and the public.465 The clear culprits are the same as well: the obese themselves. As Governor Bill Owens of Colorado puts it, "When people make wrong decisions, including overindulging in French fries, it is only fair that they take responsibility for their actions."466 Thus, for many members of Congress, as well as state legislators, the great thing about a bill like the Personal Responsibility in Food Consumption Act is that it "says 'Don't run off and file a lawsuit if you are fat...'. It says, 'Look in the mirror because you're the one to blame.'"467

Dispositionism on Capitol Hill runs deep—indeed, below partisan lines. Democratic Senator Tom Harkin may criticize the Bush administration for not taking "[m]ore aggressive steps to curb obesity" but his solution is nearly as dispositionist—"give consumers the tools to make healthy decisions."468 Even when a member of Congress is able to see some of the situation, it is incredibly difficult to avoid falling back on the familiar language of "choice." By way of example, in a recent editorial, Senator Hillary Clinton acknowledged that environment is a powerful force in our lives, but she ended up offering a dispositionist solution to the obesity epidemic:

> Individuals should understand that they put their lives at risk with unhealthy behavior. But let's face it—we live in a fast-food nation, and we need to take steps, like restoring physical-education programs in schools, that support the individual's ability to master his or her own health... It comes down to individual responsibility reinforced by national policy.469

A national policy that more or less also "comes down to individual responsibility" certainly has a friend in the current administration. The Bush camp's position on obesity starts with the basic dispositionist building block of "choice." As the Department of Agriculture's Economic Research Service concluded at a recent workshop on the Economics of Obesity: "At a basic level, weight gain and obesity are the result of individual choices. Consequently, economics, as a discipline that studies how individuals use

465 Jones & Hunter, supra note 449. As Congressman Ric Keller puts it, "The food industry is under attack and in the cross hairs of the same trial lawyers who went after big tobacco." Carl Hulse, Vote in House Offers a Shield in Obesity Suits, N.Y. TIMES, Mar. 11, 2004, at A1.
467 Hulse, supra note 465, at A1 (quoting Congressman Sensenbrenner).
limited resources to attain alternative ends, can provide unique insight into the actions and forces that cause individuals to gain excessive weight.470  

Department of Health and Human Services Secretary Tommy Thompson has summarized his agency's approach towards the obesity problem as a quasi-religious commitment to "personal responsibility":

First, we have to continue to work hard to spread the gospel of personal responsibility. Each of us has to take responsibility for making the right choices when it comes to diet and exercise. My Department has taken steps to promote this attitude—and most important, we're trying to do it in creative ways, without inflicting the guilt that turns so many people off.471

In this speech, Thompson noted research from the National Institute of Health ("NIH") concerning the multiple situational factors contributing to obesity, but makes no mention of them in his response to the problem:

We've also developed an aggressive new research strategy on obesity at the National Institutes of Health. This year, we will spend more than $400 million on obesity-related research. Because there is no single cause of all human obesity, we must explore every aspect of prevention and treatment, including behavioral, cultural, socio-economic, environmental, physiologic, and genetic factors.

The bottom line is that when it comes to the question of staying healthy, none of us can be neutral. If we haven't made an effort to make good choices and develop the right habits, chances are good that we're practicing the wrong habits.472

The message is clear: It is not the environment that is the problem; we are the problem.473  As Surgeon General Richard Carmona articulates, "[E]ven for

471 Tommy G. Thompson, Secretary of Health and Human Services, Remarks at the Time Obesity Summit in Williamsburg, Virginia, June 2, 2004, available at http://www.hhs.gov/news/speech/2004/040602.htm. The religious metaphor continued: "I began handing out pedometers, to help people walk 10,000 steps a day. Now they're a fashion statement. I've given one to each of the Cabinet Secretaries. Don Rumsfeld wears his religiously, and he and his wife have competitions to see who can take more steps." Id.
472 Id.
473 While NIH has conducted research showing how obesity is a result of environmental factors, HHS believes that any environmental reform is ultimately about increasing "choices" and "access" to environments where one can engage in healthier living. See NRPA—HHS Strategic Partnership, Memorandum of Understanding Between National Recreation and Park Association and U. S. Department of Health and Human Services, at http://www.healthypeople.gov/implementation/nrpa/nrpa_mou.htm (last visited Oct. 28, 2004). In other words, the problem is not the environment, but the person's choice of environments. A similar incorporation of situationist findings into a "personal responsibility" paradigm is found in Medicare policy.
the meals we eat out, it's still our decision what we eat, where we eat, and how much we eat." 474 The fast food industry could not have said it better itself. 475

Indeed, by forwarding the dispositionist refrain of "personal responsibility," the Bush Administration has been marching in lockstep with the industry. 476 When the World Health Organization ("WHO") and Food and Agriculture Organization ("FAO") report on "Diet, Nutrition, and Prevention of Chronic Diseases" came out offering some environmental causes of obesity including fast food advertising, 477 it was hard to tell where the administration's harangue ended and big food's began. 478 Just like the industry spokespeople, 479 in his letter criticizing the report, William Steiger, writing on

For example, the Bush Administration removed language in Medicare that prevented obesity from being classified as a disease. See Press Release, U.S. Department of Health and Human Services, HHS Announces Revised Medicare Obesity Coverage Policy (July 15, 2004), at http://www.hhs.gov/news/press/2004press/20040715.html. As a result, conservatives attacked the Bush Administration's policy as making a "private" health choice into a "public" concern. William Niskanen, Cato Institute, Obesity and Medicare, at http://www.cato.org/dailys/07-17-04-2.html (July 17, 2004) (Niskanen is the Chairman of the Cato Institute). Yet, despite these misgivings that the Bush Administration was engaging in situationism, the actual motivations for this change in coverage was to increase private choices, allowing Americans to engage in more obesity surgeries and treatments. See Johns Hopkins Bloomberg School of Public Health, Medicare Changes View on Obesity: School Researchers Explain the Significance of New Policy, at http://www.jhsph.edu/Press_Room/articles/medicareobesitypolicy.html (July 30, 2004).


475 As Surgeon General Carmona stated:

I caution people against playing the "blame game" when it comes to obesity. Some people want to blame the fast food industry for our growing waistlines, but the average person eats out only four times a week. That leaves 17 meals a week that most Americans prepare and eat at home.

Id. Evidently, it is only the "blame game" when you blame industry; blame yourself and that is just doing the right thing.

476 Moreover, the administration often avoids the food issue altogether. The HealthierUS initiative, a major component of the Bush approach to the obesity epidemic, views the obesity problem as primarily a "fitness problem." The White House, HealthierUS: The President's Health and Fitness Initiative, Chapter 3: The President's Recommendations for Improving Physical Fitness, at http://www.whitehouse.gov/infocus/fitness/chapt3.html (last visited Oct. 28, 2004) ("Fitness problems such as obesity and overweight have reached truly epidemic proportions in the United States.").


479 See Press Release, The Sugar Association, WHO Report on Diet, Nutrition and Prevention Misguided, (Mar. 3, 2003), at http://www.sugar.org/newsroom/pr_3303.pdf. The report, seen as a major threat to the industry, spawned a flurry of lobbying activity. See Lambert, supra note 441, at 58 ("WHO recommended that people limit their intake of added sugars to no more than 10 percent of calories eaten, a guideline poorly
behalf of the Department of Health and Human Services, called the conclusions into doubt by challenging their scientific bases.\footnote{480} For example, disputing a section on “energy-dense, micronutrient-poor foods,”\footnote{481} Steiger contended that:

The assertion that heavy marketing of energy-dense foods increases the risk of obesity is supported by almost no data. In children, there is a consistent relationship between television viewing and obesity. However, it is not at all clear that this association is mediated by the advertising on television. Equally plausible linkages include displacement of more vigorous physical activity by television viewing, as well as consumption of food while watching television. No data have yet clearly demonstrated that the advertising on children’s television causes obesity.\footnote{482}

Moreover, according to Steiger, it is not just that the data fails to demonstrate a link between the food industry’s practices and obesity; it is also that there is no good reason why they would want to make their customers fat. For Steiger, the industry’s role in the epidemic is ambiguous:

\footnote{480} Memorandum from William R. Steiger, Special Assistant to the Secretary for International Affairs, U.S. Department of Health and Human Services, to J.W. Lee, M.D., Director-General, World Health Organization (Jan. 5, 2004), available at http://www.commercialalert.org/bushadmincomment.pdf. Steiger also criticized the Report for jumping to conclusions:

With respect to fast food, there are two prospective studies, two cross-sectional studies, and one ecologic study, and the results are inconsistent. Therefore, HHS would consider this linkage as insufficient to possible, based on the Report’s own rules of evidence. There is only one study of the relationship of soft drinks and juice to obesity in children, and this is a prospective observational study. No such studies exist in adults. Therefore, although there is a logical mechanism to support a potential relationship between these behaviors and weight gain, the data do not provide sufficient support to be labeled “probable.”

\textit{Id.} at 15 (emphasis in original). And in another section, he stated:

There are also questions about the scientific basis for several relationships stated in the \textit{WHO/FAO Report}. These include the linking of fruit and vegetable consumption to decreased risk of obesity and diabetes, and the identification of adverse socioeconomic status, especially for women as a causative factor for obesity.

\textit{Id.} at 4.

\footnote{481} \textit{WORLD HEALTH ORGANIZATION, supra} note 477, at 68 (“Additional measures include modifying the environment to enhance physical activity in schools and communities, creating more opportunities for family interaction (e.g. eating family meals), limiting the exposure of young children to heavy marketing practices of energy-dense, micronutrient-poor foods, and providing the necessary information and skills to make healthy food choices.”).

\footnote{482} Steiger, \textit{supra} note 480, at 15.
[Industry] groups have clear incentives [to join in the fight against obesity] in some areas (such as increasing levels of physical activity because of its association with higher energy requirements) and possible disincentives in other areas (such as promoting weight loss, because of its association with lower energy requirements, i.e., decreased food consumption).\textsuperscript{483}

Thus, Steiger asserts, the industry must be thought of as a neutral player. This, of course, ties directly into calls throughout Steiger's letter for returning to norms of "personal responsibility":

[The WHO/FAO report contains] an unsubstantiated focus on "good" and "bad" foods, and a conclusion that specific foods are linked to non-communicable diseases and obesity (e.g., energy-dense foods, high/added-sugar foods, and drinks, meats, certain types of fats and oils, and higher fat dairy products). The U.S. Government favors dietary guidance that focuses on the total diet, promotes the view that all foods can be part of a healthy and balanced diet, and supports personal responsibility to choose a diet conducive to individual energy balance, weight control and health.\textsuperscript{484}

Thus, the Bush administration is making two of the classic claims that we highlighted earlier as central to the success of the tobacco industry in avoiding "responsibility" for the costs caused by smoking: first, that there is no causal connection between industry practices and the harms (in this case, obesity and its attendant effects on physical and mental health); and second, that consumers need to take personal responsibility for their choices.\textsuperscript{485} In further engraining dispositionism, it is a powerful combination.

\textsuperscript{483} Id. at 20.
\textsuperscript{484} Id. at 3. Personal responsibility is the most important theme of the Steiger letter to the WHO. As the \textit{Washington Post} put it:

Steiger said the revisions the United States will seek are still being finalized, but the goal will be to place much greater emphasis on the role of "personal responsibility" instead of government regulation.

"We have a whole series of potential changes we'd like to see," Steiger said in a telephone interview. "One overarching example is that any strategy that deals with this subject has to deal with individual responsibility. What's lacking is the notion of personal responsibility as opposed to what the government can do."

C. The Dispositionist Deference to Markets

Dispositionist presumptions have limited government regulation of the fast food industry for several interrelated reasons. Clearly, the dispositionism that leads observers to assume that all overweight people are fat by choice and choice alone has gone a long way toward immunizing all nonconsumers from regulatory interference or liability. A second, closely linked, effect of dispositionism on regulation is that it greatly privileges “free” markets. Individuals are presumed to know what is best for them and to act in their own interests. The individual consumer is the only one in a position to assess hidden preferences, except inasmuch as they are revealed by actions. Any attempt to make people “better off” through nonvolitional means is certain to fail because regulators simply do not have access to the preferences of individuals.\(^\text{486}\) Thus, the presumption in favor of markets and contracting is quite strong. And the primary role of regulators is limited to filling in the gaps when the strong presumption of “voluntary” contract and market transactions is conclusively rebutted—a rare occurrence. The regulatory effects of dispositionism can be observed in both administrative agencies and courts.\(^\text{487}\)

1. Administrative Regulation

The dispositionist confidence in competitive markets and suspicion of regulation has protected the fast food industry from significant administrative regulation. In the words of Todd Buchholz, the world of fast food “is a super-competitive market where stores jockey for position, trying to please customers and their changing tastes for a more healthful lunch.”\(^\text{488}\) They do it all for us and let us have it our way because they love to see us smile. Because honest corporations will stand to gain in the marketplace as a result, they will expose corporations that cheat or trick consumers. The only corporations that will survive in the long term will be ones that offer exactly what the consumer wants in terms of product benefits and costs (that is, a slightly less safe product may be significantly cheaper). Thus, in a world without regulatory interference, any remaining negative results will be unpreventable outcomes at

\(^{486}\) See Chen & Hanson, The Illusion of Law, supra note 16, at Part II (describing the origins of these policy schemas); Hanson & Wright, supra note 151 (describing the connection between dispositionist presumptions and those policy schemas).

\(^{487}\) See Hanson & Yosifon, The Situation, supra note 13, at 230–50 (providing some evidence of dispositionism in regulatory and judicial settings).

\(^{488}\) BUCHHOLZ, supra note 1, at 20.
the chosen price level—risks the consumer freely chose to accept in exchange for a more than offsetting price reduction.

Regulation necessarily upsets the relationship between consumers and suppliers because it makes prices go up for those who do not need protection and would not choose to buy it ex ante. For the system to work, the key is for consumers to be well informed about products. Hence, it follows that corporations should be allowed great freedom to trumpet the benefits of their products. As Buchholz puts it, "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 like." Giving the consumer more information about the product is in the interest of the corporation because it is a way to differentiate and rise above the competition. Again, corporations that lie about their products—inflating benefits and hiding costs—will be exposed and outperformed by those who do not. Or so the script goes.

As we have indicated, the free market/dispositionist model is an incredibly powerful force in public policy circles. In the food context, it has justified not only protection from new regulations, but also the elimination of old regulations. In early July 2003, the FDA announced that it would begin to approve health claims made by corporations based on a much wider range of evidence than previously allowed. Under the new plan, scientific consensus will no longer be a prerequisite.

489 Id.
490 Marc Kaufman, FDA Eases Rules on Touting Food as Healthful, WASH. POST, July 11, 2003, at A1. Bruce Silverglade of the Center for Science in the Public Interest called it "the biggest rollback in food-labeling standards in 20 years." Id. at A7.
491 Id. at A1. Currently, food and dietary supplement labels are divided into three categories: structure/function claims, nutrient content claims, and health claims. U.S. FOOD AND DRUG ADMINISTRATION, CENTER FOR FOOD SAFETY AND APPLIED NUTRITION, CLAIMS THAT CAN BE MADE FOR CONVENTIONAL FOODS AND DIETARY SUPPLEMENTS, at http://www.cfsan.fda.gov/~dms/hclaims.html (last revised Sept. 2003). Claims about nutrient content describe the level of a nutrient or dietary substance in the product, using terms such as free, high, and low, or they compare the level of a nutrient in a food to that of another food, using terms such as more, reduced, and lite . . . . The requirements that govern the use of nutrient content claims help ensure that descriptive terms, such as high or low, are used consistently for all types of food products and are thus meaningful to consumers.

Id. (emphasis in original). Claims about structure or function describe the role of a nutrient or dietary ingredient intended to affect normal structure or function in humans, for example, "calcium builds strong bones . . . ." The manufacturer is responsible for ensuring the accuracy and truthfulness of these claims; they are not pre-approved by FDA but must be truthful and not misleading. If a dietary supplement label includes such a claim, it must state in a "disclaimer" that FDA has not evaluated the claim.
The FDA presented this change to the public with the same promarket language and schemas outlined above. Currently, the high level of bad outcomes—the number of obese or overweight Americans—is largely a result of harmful regulation that prevents consumers from having the necessary information about the healthfulness of products. Bad outcomes reflect bad choices based on bad information. To combat obesity, individuals need “accurate, helpful information that allows them to make wise food choices at home, at supermarkets and in restaurants.”

The strongest claims are health claims, and they are where the focus of the recent deregulation has been. The FDA oversees health claims on labels in three ways:

1) the 1990 Nutrition Labeling and Education Act (NLEA) provides for FDA to issue regulations authorizing health claims for foods and dietary supplements after FDA’s careful review of the scientific evidence submitted in health claim petitions; 2) the 1997 Food and Drug Administration Modernization Act (FDAMA) provides for health claims based on an authoritative statement of a scientific body of the U.S. government or the National Academy of Sciences; such claims may be used after submission of a health claim notification to FDA; and 3) the 2003 FDA Consumer Health Information for Better Nutrition Initiative provides for qualified health claims where the quality and strength of the scientific evidence falls below that required for FDA to issue an authorizing regulation. Such health claims must be qualified to assure accuracy and non-misleading presentation to consumers.

Under the new initiative, the scientific evidence for a qualified health claim would be ranked according to the level of scientific agreement concerning the veracity of the claim on an “A” (significant scientific agreement) to “D” (little scientific evidence to support the claim) scale. Press Release, U.S. Food and Drug Administration, FDA to Encourage Science-Based Labeling and Competition for Healthier Dietary Choices (July 10, 2003), at http://www.fda.gov/bbs/topics/NEWS/2003/NEW00923.html. However, “[u]ntil the FDA has completed the research agenda it is proposing today, the agency will consider the use of the standardized qualifying language for each qualified health claim that it reviews.”

The Bush Administration is committed to the idea that consumers need better information so as to facilitate free (and healthy) choices. See Press Release, U.S. Department of Health and Human Services, HHS Unveils FDA Strategy to Help Reduce Obesity: New “Calories Count” Approach Builds on HHS’ Education, Research Efforts (Mar. 12, 2004), at http://www.fda.gov/bbs/topics/news/2004/hhs_031204.html. But that information need not be provided solely by food providers. The cornerstone of the Bush policy on concurring obesity is the HealthierUS initiative instituted in 2002. See Press Release, The White House, President Bush Launches HealthierUS Initiative (June 20, 2002), at http://www.whitehouse.gov/news/releases/2002/06/20020620-6.html. The initiative’s four goals center on personal choices: “Be physically active every day; Eat a nutritious diet; Get preventive screenings; and Make healthy choices.” Thus, the initiative seeks to “educate” individuals not only on food choices, but on exercise and healthcare choices as well. The Surgeon General calls this “health literacy.” Carmona, supra note 474 (“I feel [health literacy] is a huge deficiency in our society, especially among minority groups. I define health literacy as the ability of an individual to understand, access, and use health-related information and services.”).

Press Release, U.S. Department of Health and Human Services, supra note 492 (quoting Secretary Tommy G. Thompson). Hence, a key part of the FDA strategy on obesity, as envisioned by the “Obesity Working Group,” is to increase caloric and nutritional information on labels. In the words of Secretary Thompson, “Counting calories is critical for people trying to achieve and maintain a healthy weight.”
Part of the solution is to unleash the market on the information question. Competing sellers will scramble to provide good health information, allowing consumers to make choices that better reflect their preferences to be healthy. As FDA Commissioner Dr. Mark McClellan stated:

There’s good competition now in the marketplace on price and taste and ease of preparation, but the number one area of competition should be the health consequences of a food product . . . . This [plan] is aimed at making companies want to develop healthy products and to do the science that supports their health claims.

Beneath the argument is the general metascript of policy: Unlike market participants, regulators just do not have the incentives, experience, or brains to figure out how to regulate efficiently. Indeed, the nonmarket world of public health and nutritional science does not give any answers. Nutritionists have not provided a clear picture of what is really good or bad for us. In the words of McClellan, “These issues are not settled; they are a moving target.” Hence, given that nonmarket institutions, including regulators, have failed to produce an accurate food pyramid, attempting to use more regulation to restrict people’s diets seems absurd.

The answer, which should now be familiar, is to remove any blame from foods—that is, to assume food “neutrality.” “Foods themselves are not...


495 Kaufman, supra note 490, at A1, A7.

496 Chen & Hanson, The Illusion of Law, supra note 16, at Part II (elaborating this meta-script).

497 See supra notes 151–53 and accompanying text.

498 Mark B. McClellan, Speech Before Harvard School of Public Health (July 1, 2003), available at http://www.fda.gov/oc/speeches/2003/harvard0701.htm (“[T]here is now considerable evidence that eating a diet low in fat, as many nutrition experts in and out of government have recommended, may also not improve health outcomes and particularly heart disease risk, if fats are replaced with equivalent or possibly greater calories from carbohydrates.”).

499 Id. The quotation shows a striking resemblance to a section of Buchholz’s recent Case File entitled “Is Nutrition a Moving Target?” See BUCHHOLZ, supra note 1, at 18–22.

500 The Food Guide Pyramid is currently being revised by the Department of Agriculture. Marian Burros, Food Pyramid Is in for an Overhaul, N.Y. TIMES, July 13, 2004, at A14.

501 Or even that foods are always “positive” things. As McClellan has suggested, the decreasing cost of calories “is generally a good thing in a world with lots of starvation, and even here it means people can get the calories they need for less money. But unfortunately, here in the US, our propensity to exercise has also gone down.” Mark B. McClellan, Speech Before National Food Policy Conference (May 8, 2003), available at http://www.fda.gov/oc/speeches/2003/nfpc0508.html.
inherently unsafe, or we wouldn’t allow them on the market.”502 It is people’s choices that are harmful.503 Once the assumption that “food doesn’t harm people, people do” is made, any risks from allowing for more open labeling is eliminated, and anyone who tries to block such deregulation must clearly be antifreedom—why else would someone prevent a program that can only improve matters?504 In other words, “since these foods are safe, even if only half or less of the health benefits apparent in the research to date actually pans out in the long run, we will have saved many lives over the years by making this information more available in the meantime.”505

But it is more than that. If foods are perceived as “neutral,” the responsibility for obesity more readily falls to those who consume the food excessively. Regulation prevents individuals from taking personal responsibility for what they eat. By turning the issue over to the market, consumers will be required to take individual responsibility for their choices. Sounds tough,506 but it is really about “empowerment.”507

502 McClellan, supra note 498.
503 McClellan, supra note 501 (“[I]t’s perhaps surprising that, in a debate that has often focused on foods alone, actual levels of caloric intake among the young haven’t appreciably changed over the last twenty years. While this seems counterintuitive, I think the reasons behind the rising incidence of obesity [have] much more to do with changes in diet choices people are making, and especially with lifestyle choices.”).
504 Benforado & Hanson, Naive Cynicism, supra note 16 (elaborating this common argument against regulatory intervention).
505 McClellan, supra note 498.
506 Of course, instead of deregulating to allow food companies to provide health information to consumers, a potentially more strict personal responsibility policy would be to require individuals to actively seek out the information. And in fact, the FDA is trying that as well—promoting educational measures that “[e]ncourage consumers routinely to request nutrition information when eating out.” U.S. FOOD AND DRUG ADMINISTRATION, BACKGROUNDER: REPORT OF THE WORKING GROUP ON OBESITY, at http://www.fda.gov/oc/initiatives/obesity/backgrounder.htm (Mar. 12, 2004).
507 McClellan has pointed to his own professional experience as evidence of the truthfulness of the dispositionist account:

More than ever, patients are playing a major role in their own health and medical care. The biggest difference we can make in improving the health of the public is by empowering people in the many choices they make every day that affect their health. My own experience as a physician and the experience of many of my colleagues all tell me that people want accurate, up to date, science-based information that they can trust to make smart decisions when it comes to choosing products that may affect their health. Better information means better educated consumers, consumers who are empowered to choose and use the right medical products and food products to best improve their health. And empowered consumers mean better competition: companies will be rewarded if they make healthier products, products that do more to truly help consumers.

Thompson put it, "[L]abeling can help empower consumers to make smart, healthy choices about the foods that they buy and consume."\(^{508}\)

Of course, free market advocates will concede that some government action is necessary in extreme cases to prevent exploitation in markets where complete competition and total information has not yet been achieved.\(^{509}\) In multiple statements and speeches, McClellan has referred to the FDA’s role as "rooting out modern purveyors of snake oil."\(^{510}\) The choice of images is telling. The purveyor of snake oil fits perfectly into the dispositionist account—an account that suggests that markets work great except for the occasional foul-intentioned cheat.\(^{511}\) Indeed, catching the occasional bad apple seems to prove that the system works and is just—that the rest of the barrel is fine. Of course, the problem is that by focusing on the individual bad actor with his decrepit donkey cart and shabby clothes, the one who sets up shop in the alley and only peddles his wares after dark, we miss the far more pervasive danger. The herbal remedy offered on the Internet claiming to be a one hundred percent cure for cancer for the low, low price of $19.99 is the "situation" that we cannot miss.\(^{512}\)

In general, the focus of the FDA is on either the truly absurd or the immediately dangerous—AIDS-curing soap or a diet supplement that secretly includes an active drug ingredient that could cause a fatal interaction with prescription medication.\(^{513}\) The FDA celebrates getting these items off the

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\(^{508}\) Press Release, U.S. Food and Drug Administration, \textit{supra} note 491.

\(^{509}\) As McClellan stated:

\begin{quote}
Just because FDA is working to make better information available where the science base is strong but not certain doesn’t mean that the FDA intends to relax its enforcement of the accuracy of health claims on foods and dietary supplements one bit. We are more committed than ever to making sure that food and supplement labels are based on sound science, and aren’t written in a way that is false or misleading to consumers.
\end{quote}

McClellan, \textit{supra} note 498.

\(^{510}\) Press Release, U.S. Food and Drug Administration, FDA Seizes Bogus Dietary Supplement that Claims to Cure Cancer (Sept. 18, 2003), \textit{at} http://www.fda.gov/bbs/topics/NEWS/2003/NEW00947.html. \textit{See also} McClellan, \textit{supra} note 507 ("And almost a hundred years later, we [the FDA] are still here to protect Americans from modern snake oil salesmen.").

\(^{511}\) \textit{See supra} notes 151–53 and accompanying text.

\(^{512}\) In what is typical of recent seizures, the FDA went after Forticel and Forticel Mix, products from Jean’s Greens, that “claim to treat and cure various life-threatening and serious illnesses such as cancer, although there is no scientific evidence to support these claims.” Press Release, U.S. Food and Drug Administration, \textit{supra} note 491.

\(^{513}\) As McClellan trumpeted on August 8, 2003, “Just this week, we took action against the company that makes Miracle II soap and skin moisturizers, products that among other things claimed to treat AIDS and ulcers.” McClellan, \textit{supra} note 507. Similarly,
market, which they certainly should, but it is the nonobvious and nonblatant advertising abuses and health hazards that the FDA should be most worried about, precisely because they are the most difficult for consumers to identify. The market for AIDS-curing soap is going to be small to begin with because it is the most stereotypical sort of situational manipulation and is most likely to be noticed without any government intervention. The real danger is not going to be products that kill ten people the day they go on the market, but those that kill thousands after years of use—the products that make subtle health claims or none at all and the products that are part of our day-to-day lives—as they quietly rake in millions of dollars in profits.

How has the free market/dispositionist model found its way into regulatory bodies? Once again, the story is partly about capture of regulators by commercial interests. The food industry has devoted vast resources to lobbying for greater discretion in making health claims. Moreover, corporate figures have infiltrated the ranks of government agencies. Daniel Troy, the FDA's top lawyer, once argued against the FDA before the Supreme Court in a case challenging the FDA's ability to restrict claims made by corporations about their products. Now he is making the same argument to justify the FDA's rollbacks. The point of this example is not to suggest that current trends in policy are a result of greased palms or old dispositionist notions of regulatory capture. Again, ours is an argument not about the power of buying regulators, but about the power of shaping situation, including the attributional schemas and policy schemas that we all embrace. When regulators latch onto

[o]n June 20, 2003, FDA issued a “Public Health Alert” warning consumers not to purchase or consume certain dietary supplements sold by Hi-Tech Pharmaceuticals, Inc., and related corporation National Urological Group, because FDA test results found the supplements were adulterated with the prescription-strength drug ingredient, “taldalafil.” Taldalafil is the active drug ingredient in Cialis, an Eli Lilly prescription drug product approved in Europe. An interaction between certain prescription drugs containing nitrates (such as nitroglycerin) and taldalafil may cause a drastic lowering of blood pressure. There is a real danger these supplements may be taken by patients who take nitrates, since erectile dysfunction is often a common problem in people with diabetes, hypertension (high blood pressure), high cholesterol, heart disease and in people who smoke.


514 Indeed, the seizure of Forticel and Forticel Mix, the herbal cancer remedies, netted only “385 bottles and 78 mix packages”—a booty worth a little over $4000. Press Release, U.S. Food and Drug Administration, supra note 510.

515 See Kaufman, supra note 490, at A7.
dispositionism and markets, they serve the interests of manufacturers even as they believe they are serving the interests of consumers. 516

Unfortunately, they are likely wrong, not just in their dispositionist attributions, but also regarding the effects of their policies. Deregulation is unlikely to yield better-informed consumers. The ability and incentive of sellers to lower perceptions of their products’ risks are significant. 517 And their incentive to raise perceptions of product risks (their own or their competitors’) is extremely weak. 518 Thus, although increasing the unsubstantiated health claims that sellers can make may help sell products, it is highly unlikely to induce better, more informed choices.

In 1994, legislators attempted to deregulate dietary supplements as it had considered deregulating food items before. 519 Before the Dietary Supplement Health and Education Act was passed, the FDA required companies to complete studies to demonstrate that their products did in fact help people lose weight. 520 Following the legislation, however, corporations were free to put their products straight onto the market without the ingredients receiving regulatory approval. 521

516 This process of deep capture is the focus of other work. See, e.g., Chen & Hanson, The Illusion of Law, supra note 16; Hanson & Wright, supra note 151; Hanson & Yosifon, The Situation, supra note 13.

517 See generally Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, passim.


519 Like the deregulation of food labels, the deregulation of dietary supplements is a tale of both shallow and deep capture. Senator Orrin Hatch was the principal sponsor of the Dietary Supplement Health and Education Act, and many supplement companies are based in Hatch’s home state of Utah. Moreover, his son Scott “has earned millions of dollars for firms that lobby on behalf of supplement companies.” Michael Specter, Miracle in a Bottle, NEW YORKER, Feb. 2, 2004, at 64, 69. Yet, something deeper is clearly at work—pervasive beliefs about the freedom of the individual to address his own health problems. As Dennis Gay, president and CEO of Basic Research (a major supplement company), articulates:

> We would welcome standards as long as they don’t take the choice away from the public. I wouldn’t welcome the standards that exist on the drug side. Because then you have no choice. And the American consumer is not stupid. He deserves to make his own mind up about what he does.

Id. at 75.


521 See generally id. As Michael Specter points out:

> As long as they don’t blatantly lie or claim to have a cure for a specific disease, such as cancer, diabetes, or AIDS, they can assert—without providing evidence—that a product is designed to support a healthy heart (CardiAll, for example), protect cells from damage (Liverite), or improve the function of a compromised immune system (Resist). There are almost no standards that
Has the deregulated market led to predicted results? It is difficult to say for sure, but there is little reason to be sanguine. Firms do not appear to be pouring money into research or into competing to provide reliable safety information about their products. Instead, they appear to be pouring money into marketing and promotions and competing to get as many new products as possible—healthy or not—onto the market. Similarly, the consumers of dietary supplements do not seem terribly well informed in their purchases. Indeed, according to an FTC estimate, consumers spend $6 billion each year on fraudulent diet products.

Revealing both effects, some in the industry concede that their customers are not the discerning consumers imagined in dispositionist modeling. Don Atkinson, Vice-President of Sales for Basic Research, a privately held conglomerate that distributes Zantrex-3 and Anorex, among others, puts it this way: "When I train salespeople, I say to them, 'Do you know what people are calling you for? It isn't the pill. They are calling you for hope. That is really what they want from you.'"

Snake oil, by any other name, smells just as rotten. By offering merely the hope of losing weight, individuals are encouraged to forgo promising but difficult sounding weight loss programs or to consume more in anticipation of the "guaranteed results." The unsettling outcome may be that the overweight gain more than if they did nothing at all. Meanwhile, the whole experience further convinces those who go through it that their weight problem is in every sense their problem.

regulate how the pills are made, and they receive almost no scrutiny once they are, so consumers never truly know what they are getting. Companies are not required to prove that products are effective, or even safe, before they are put on the market.
Specter, supra note 519, at 64. What is so troubling is that, according to a recent Harris poll:

[M]ost people believe that if a supplement is on the market it must have been approved by some government agency (not true); that manufacturers are prohibited from making claims for their products unless they have provided data to back those claims up (no such laws exist); and that companies are required to include warnings about potential risks and side effects (they aren't).

Id. at 68.

522 In just five years, from 1995 to 1999, spending on infomercials for diet products went from $43.1 million to $107.5 million, and in 2000 it was the fast growing infomercial category. Winter, supra note 520, at 26. There is no reason to spend money on more research or safety precautions. In the words of Dennis Gay of Basic Research, "We try to do better, but there are no clear rules. None." Specter, supra note 519, at 75.

523 Winter, supra note 520, at 26.

524 See supra text accompanying note 236.

525 Specter, supra note 519, at 66.
To be sure, the FDA can sue companies for making false claims, but the threshold for suit is high and difficult to clear. The FDA rarely takes action, and when it does it often takes years to pursue a case. That is true, as well, simply because the FDA is overextended. In fact, of the more than 25,000 supplements currently on the market, the FDA has only 8000 on file. Regulators with small budgets and dispositionist worldviews have neither the ability nor the incentive to counteract the manipulative practices of the industries they regulate.

At the end of the day, diet supplement manufacturers have made much profit as obesity rates have climbed—"hope" does not slim thighs or reduce waistlines.

The human animal has very limited vision and is largely blind to its environment and interior. The recent deregulatory trend in food labeling is likely to make matters worse. But we do not claim that returning to the stricter labeling regulation would substantially solve the obesity epidemic. Labeling regulations likely serve a palliative function, but they do not get to the root of the problem—dispositionism.

2. "Agricultural Policy"

The dispositionist outlook suggests that government interference in markets is not always bad: Regulation is only a danger when it interferes with individual choices and prevents people from taking personal responsibility. The artificial encouragement of a certain good by the government is not inherently problematic, and the result of such a subsidy tends not to be viewed as distorting rational choices. Individuals make choices based on stable, dispositional, exogenously formed preferences, and the government creation of more of a certain good on the market does not change those preferences any more than if there was a natural increase in supply. If the cost of a product is artificially reduced, it just means that a consumer is able to satisfy more of her

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526 Winter, supra note 520, at 26.
527 Id.
528 See Hanson & Kysar, Taking Behavioralism Seriously II, supra note 154, at 1555–58; Hanson & Kysar, Taking Behavioralism Seriously III, supra note 518, at 297–99; Jon D. Hanson & Kyle D. Logue, The Cost of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation, 107 YALE L.J. 1163 (1998); Hanson & Yosifon, The Situation, supra note 1, at 231–41.
529 Six out of ten American adults use dietary supplements at least once each day, and Americans spent $19 billion in 2003 on the products. Specter, supra note 519, at 64.
530 The term "agricultural policy" captures the fact that farm subsidies tend to be viewed neither as regulation nor as a free market force.
preferences, her preferences are in no way seen to be altered by the purposely inflated availability of a product. A powerful example of this dynamic comes in the area of corn subsidies.

Since the Great Depression, the federal government has subsidized farmers and farming, and that practice continues today to the tune of tens of billions of dollars per year. Indeed, numerous government programs influence what farmers grow, how they grow it, and ultimately how cheaply it is produced. Marion Nestle summarizes the price-reducing practices this way:

The most visible subsidies are price supports for sugar and milk, but taxpayers also support production quotas, market quotas, import restrictions, deficiency payments, lower tax rates, low-cost land leases, land management, water rights, and marketing and promotion programs for major food commodities. The total cost of agricultural subsidies rose rapidly at the end of the twentieth century from about $18 billion in 1996 to $28 billion in 2000.\textsuperscript{531}

We are concerned less with the largesse of these subsidies here than we are with the fact that policymakers tend to treat them as part of the unseen natural situation, and thus tend to be blind to their health effects and, more specifically, their contribution to the obesity epidemic.

Fats and oils, the dietary components the FDA’s Food Pyramid suggests we should consume “sparingly,”\textsuperscript{532} receive twenty times more subsidies than fruits and vegetables,\textsuperscript{533} which the Food Pyramid suggests “[m]ost people need to eat more of ... for the vitamins, minerals, and fiber they supply.”\textsuperscript{534} As the following paragraphs document, the process leading to this disparity has been anything but natural, and the results on America’s food consumption choices have been anything but benign.\textsuperscript{535}

Corn is the most heavily subsidized crop in the United States.\textsuperscript{536} While it would be intuitive to imagine this as a good thing for the health of

\textsuperscript{531} Nestle, supra note 267, at 19.
\textsuperscript{533} ABC News.com, supra note 311.
\textsuperscript{534} United States Department of Agriculture, supra note 532, at 5.
\textsuperscript{535} As David Ludwig explains, “It’s a perverse situation . . . . The foods that are the worst for us have an artificially low price, and the best foods cost more. This is worse than a free market: we are creating a mirror-world here.” Lambert, supra note 441, at 58, 98.
\textsuperscript{536} Oxfam, Briefing Paper No. 50, Dumping Without Borders: How U.S. Agricultural Policies Are Destroying the Livelihoods of Mexican Corn Farmers 2 (2003), available at http://www.oxfa-
Americans—a way to increase the consumption of vegetables—it turns out that most of the subsidy does not go toward producing fresh ears of corn for the local farmers market, but rather into producing inexpensive, high-calorie, highly-processed foods like soda, candy, and hotdogs.\footnote{337}

The availability of cheap corn has reshaped the entire universe of the food industry, as well as the universe of food in our society. Corn is in everything.\footnote{338} Because of its low cost and versatility, it has become a ready


Government intervention in the corn market has a long history in the United States. During the Great Depression, when the price of a bushel of corn actually reached zero, the government, understandably, intervened to support prices. Michael Pollan, The (Agri)Cultural Contradictions of Obesity, N.Y. Times, Oct. 12, 2003, § 6 (Magazine), at 41. From the 1930s onwards, “[t]he money never stopped.” ABC News.com, \textit{supra} note 311. The New Deal subsidy operated as a supported “hedge” by farmers. Congress would set a “target price” for a grain, and if the price dropped below the target, the farmer could take out a “nonrecourse loan” collateralized by his or her corn. Pollan, \textit{supra}, at 46. If the price subsequently rose, the farmer could buy back the corn and pay back the loan; if not, the corn paid the loan in total. BRUCE L. GARDNER, THE GOVERNING OF AGRICULTURE 23–24 (1981). The USDA stored this surplus corn and sold it when prices spiked, or shipped it for sale overseas. Pollan, \textit{supra}, at 46. During the New Deal, these policies worked to keep cheap grain from flooding the market.

But in the 1970s, after Nixon’s grain agreement with the Soviet Union became public and bad weather damaged Midwestern crops, corn started becoming more expensive. \textit{Id.} In response, Nixon’s Agriculture Secretary, Earl Butz, dropped the “target price,” “shuttered” the USDA grain reserve, and significantly altered the loan recourse program so that “instead of lending farmers money so they could keep their grain off the market, the government offered to simply cut them a check.” \textit{Id.} However, because the USDA no longer regulated supply, farmers dumped “their harvests on the market no matter what the price.” \textit{Id.}

The result has been a boon, not for mom and pop farmers, but for corn processors. A single company, Archer Daniels Midland (“ADM”), dominates the markets for high-fructose corn syrup and other corn-based sweeteners, cocoa processing, and cooking oil; in 1995, at least 43% of its profits came from government subsidized activities. James Bovard, Archer Daniels Midland: A Case Study in Corporate Welfare, at \url{http://www.cato.org/pubs/pas/pa-241.html} (Sept. 26, 1995).

\footnote{337} Bovard, \textit{supra} note 536.

\footnote{338} For example, according to the \textit{Christian Science Monitor}:

- Of 10,000 items in a typical grocery store, at least 2500 use corn in some form during production or processing.
- Your bacon and egg breakfast, glass of milk at lunch, or hamburger for supper were all produced with US corn.
- Besides food for human and livestock consumption, corn is used in paint, paper products, cosmetics, tires, fuel, plastics, textiles, explosives and wallboard—among other things.
- In the US, corn leads all other crops in value and volume of production—more than double that of any other crop.
- Corn is America’s chief crop export, with total bushels exported exceeding total bushels used domestically for food, seed, and industrial purposes.

substitute for numerous products, often with jarring results. Using inexpensive
corn means greater profit for the animal feed business, but it also means less
healthy meat because corn-fed beef is higher in saturated fat.\footnote{539} An even more
devastating development for our collective BMI came in 1971, when Japanese
food scientists developed high-fructose corn syrup—a substance six times
sweeter than cane sugar.\footnote{540} By the early 1980s, “both Coke and Pepsi switched
from a fifty-fifty blend of sugar corn syrup to 100 percent high-fructose corn
syrup . . . . [B]oth companies [saved] 20 percent in sweetener costs, allowing
them to boost portion sizes and still make substantial profits.”\footnote{541} Although
clinical researchers noticed early on that the body metabolizes fructose
differently from sucrose or dextrose,\footnote{542} it was not until later that the connection
was made to obesity.\footnote{543} Even then, policymakers made no serious attempts to
see the causal chain: subsidies lowered the cost of corn; cheap corn lowered
the cost of sweet, processed foods; lower prices on things like soda increased
consumption; and consuming more of these types of foods made us gain
weight.\footnote{544} What is worse is that regulators continue to act “as if” they do not
see it.

The fact that “one hand of the federal government is campaigning against
the epidemic of obesity, [while] the other hand is actually subsidizing it,”\footnote{545} is
partially about shallow capture and partially about the deeper hold of
dispositionism. Lobbying by corn processors has had an undoubted effect on
the expansion of corn subsidies,\footnote{546} but it is only the most obvious part of the
story. When asked about whether he saw any link between the subsidy
programs and obesity, Tommy Thompson answered as if the question were
silly: “I really don’t . . . [b]ecause the subsidy programs are things that are
done through Congress, much more so than trying to come up with an overall

\footnote{539}{\textit{Id.}}
\footnote{540}{\textit{CRITSER, supra note 181, at 10.}}
\footnote{541}{\textit{Id. at 18.}}
\footnote{542}{\textit{Id. at 136–39.}}
\footnote{543}{In a study of 548 children in Massachusetts, nutritionists found that “regardless of what else they ate
or how much they exercised, ‘consumption of sugar[HCFS]-sweetened drinks . . . is associated with obesity in
children.’” \textit{Id. at 140} (emphasis in original) (citation omitted).}}
strategy as, as far as nutrition is concerned." The point seems to be that because Congress did not have a disposition to contribute to the obesity epidemic, Congressional policies are not at all responsible. This dispositionism stems in part, we believe, from the fact that the subsidies were not "intended" to influence public health—rather, they were intended as a means of helping certain farmers—and in part because the connections to our health are situational. Farm subsidies embody especially hard-to-see situation not only because they have been around so long that they feel natural and are accepted as given, but also because understanding how they increase health problems in the United States requires dealing with a long explanation. Marching down the causal chain is hard work, and given our resistance to explanations that do not comport with our dispositionist tendencies, few regulators make the trek.

547 ABC News.com, supra note 311.

548 It is not easy to make the connection. As Daniel R. Glickman, former U.S. Secretary of Agriculture, argues:

‘Our system for making public-policy decisions on food issues may contribute to the difficulty of addressing the obesity problem . . . [yet no] discussion of obesity can be complete without understanding how members of Congress interface with the food and agriculture industry, especially given the politics of production agriculture.


549 Once again, this is likely to be especially true when industry spokespeople are framing the issue in dispositionist terms and pointing out the great danger posed by situational accounts. Regulators are no more immune to such manipulation than the rest of us.

When ABC News broadcast a story suggesting that corn subsidies might be partially to blame for America's weight problem, ABC News.com, supra note 311, the industry reaction was immediate, angry, and overwhelmingly focused on individual choice. Corn Refiners Association President Audrae Erickson accused ABC News of attacking the tens of thousands of hard-working Americans in the corn growing and refining industries who provide our families with the safest, most abundant and affordable food supply in the world . . . .

In addition to containing numerous factual errors about refined corn products, this television program overlooked the importance of achieving a balance between fitness and nutrition to combat the problems of overweight and obesity.

Press Release, Corn Refiners Association & National Corn Growers Association, Corn Refiners, National Corn Growers Challenge Assertions in Peter Jennings Obesity Report (Dec. 10, 2003), at http://www.corn.org/PR%202012-10-04%20CRANCAGChallengejenningsreport.html (“The best way for Americans to combat obesity is to substantially increase physical activity while enjoying balanced diets and moderate consumption of all foods and beverages.”). Ron Litterer, chair of the National Corn Growers Association Public Policy Action Team argued that “[t]he cause of America’s obesity problem is obvious to everyone but the media—people are eating too much and doing too little. It’s as simple as that . . . . It’s absolutely ridiculous and insulting to hear Time and ABC repeatedly blaming farmers and the federal support system for this problem.” National Corn Growers Association, NCGA Rebuts Inaccurate Time, ABC Reports on Obesity, at http://www.ncga.com/news/notdl2004/june/060304.htm (last visited Jan. 3, 2005). Hence, Peter Jennings’
3. Judicial Regulation

In his recent dismissal of the *Pelman* obesity suit against McDonald's, Federal District Judge Robert Sweet displayed the same, now familiar, dispositionist attributional tendencies. In the first of his two-pronged attack on the plaintiff's claim seeking to hold McDonald's liable in some measure for the harms associated with plaintiff's obesity, Sweet explicitly endorsed the dispositionist presumptions on which tort law is premised and concluded that the plaintiffs had not rebutted them in this case. Because "[n]obody is forced to eat at McDonalds," Sweet stressed, "[t]his opinion is guided by the principle that legal consequences should not attach to the consumption of hamburgers . . . unless consumers are unaware of the dangers of eating such food." "If a person knows or should know that eating copious orders of supersized McDonalds' products is unhealthy and may result in weight gain . . . it is not the place of the law to protect them from their own excesses." And, according to Sweet, a person possessing common sense does or should know that eating too much fast food makes one fat. So Sweet, without ever being the recipient of campaign contributions or lobbying perks, comes to the pro-industry position that disposition is all but determinative and situation is 

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551 "[T]he Complaint fails to allege that the danger of the McDonalds' products were not well-known and fails to allege with sufficient specificity that the McDonalds' products were a proximate cause of the plaintiffs' obesity and health problems." *Id.* at 539-40.
552 *Id.* at 516 ("Laws are created in those situations where individuals are somehow unable to protect themselves and where society needs to provide a buffer between the individual and some other entity—whether herself, another individual or a behemoth corporation that spans the globe."). According to Sweet, the outcome of individual cases turns on where the line is drawn between "an individual's own responsibility to take care of herself, and society's responsibility to ensure that others shield her . . . . " *Id.*
553 *Id.* at 533 ("Plaintiffs have failed to allege in the Complaint that their decisions to eat at McDonalds several times a week were anything but a choice freely made.").
554 *Id.* at 517; *see also* *id.* at 533 ("As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer.").
555 *Id.* at 533; *see also* *id.* at 517-18 ("If consumers know (or reasonably should know) the potential ill health effects of eating at McDonalds, they cannot blame McDonalds if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonalds products.").
556 *Id.* at 532 ("It is well-known that . . . McDonalds' products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such attributes are bad for one."); *id.* at 530-31 (noting McDonald's argument that the unhealthy attributes of fast food are "so well-known that McDonalds had no duty either to eliminate such attributes or to warn plaintiffs about them"); *id.* at 518 n.5 (noting that an industry spokesperson commented that "anyone with an IQ higher than room temperature will understand that excessive consumption of food served in fast-food restaurants will lead to weight gain").
irrelevant. With no gun to their heads, the plaintiff's acts were fully volitional and informed.

As Sweet concludes, "It is only when . . . free choice becomes but a chimera . . . that manufacturers should be held accountable." Here, once again, is the rub: Social science makes clear that "free choice" can be deceiving. What commentators and policy analysts have taken to be volitional and fully autonomous choices turn out to be largely the product of unseen, but powerful, situational manipulation. Indeed, when situation is taken seriously, the quick retreat to "free choice" and "personal responsibility" is revealed, not as irrefutable answers to policy questions, but as predictable, intuitively driven attempts to place blame on bad-acting victims, rather than bad social situation.

If the goal of our legal system were truly to maximize free choice, then how would we measure it? How much free choice do any of us have to avoid paying huge medical costs associated with obesity and unhealthy diets? How much free choice do parents have to raise their children or do teachers have to teach their students, absent the ubiquitous presence of fast food, and absent the unseen influence of that food over both child and adult behavior? How much free choice do most of us have over when we eat, or over the options available to us in these narrow mealtime windows? How much free choice do urban families have when the nearest supermarket is two bus rides away, and the Popeye's is across the street? How much free choice do we really have regarding the options available at restaurants, and how can we be sure that we would not have better options if the industries that have significant control over the situation of consumers' food "choices" were made partially responsible for the consequences of their choices?

What about all the "free choice" available to industry to discover and implement any situational influence they can to promote their product? Does that count in favor or against the size of the "free choice" pie? If we are serious about holding actors responsible for their "choices," why does that imply that purveyors of unhealthy foods should be able to escape personal responsibility for theirs? If Ronald McDonald put a gun to a person's head and shouted, "Your money or your life!" we would recognize that the consumer had no choice (although, technically, two options exist). The exterior situation

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557 Id. at 533.
558 See generally Hanson & Logue, supra note 9 (describing externalities imposed by smoking behavior on non-smokers, including increased health costs, and describing externalities imposed on first-party insureds by other insureds' risky behaviors, which consumers have little option to avoid).
would be obvious to attribute outcomes in that setting to dispositional preferences. Or if a person managed to survive several foodless days lost in the wilderness and, upon finding her way out happened upon a bag of hot McDonald’s french fries, most of us would agree that she had little choice but to eat them, just as we would say that each of us has little choice but to take at least one breath in the next several minutes. Sometimes situation—be it exterior or interior—is unmistakable. Our failure is that but for those extreme circumstances—or when our countervailing motives are strong—we do not see situation, and we interpret every action we take or witness others taking as fully volitional.

While the law sometimes recognizes a concept of “imperfect information,” there is no similar concept of “imperfect autonomy.” We see “free choice” or “no choice” and nothing in between. And yet “imperfect autonomy” is the reality of our predicament. We are pushed and pulled to eat and drink foods that are harming us by forces that are indifferent to our health and our freedom, and which we find incredibly difficult to see. We may not like the conclusion, but the evidence supporting it is strong: “Free choice” has become, in Judge Sweet’s words, “but a chimera.”

D. A Final Thought: The Regulatory Attribution Error

As we have shown, much as it distorts how the world perceives policymakers and the role of policy, dispositionism infects how policymakers see the world. Most laws and regulations deal with what happens when there is a highly salient, harmful deviation from an existing norm or expectation. Social psychologists have learned over decades of research on causal attributions that when something goes wrong, we humans seek immediately to locate a causal agent. And as we have illustrated, when we make those attributions, we too frequently look for simplistic causal stories, often locating causation with the nearest dispositional agent, ignoring or downplaying more complex, situational attributions. That, again, is the fundamental attribution error. We engage in this particular causal search, in part, because we are limited by meager cognitive budgets and in part because we want to be able to predict and gain some control—or, more accurately, some sense of control—

559 Indeed, Judge Sweet announces that such a claim is essentially the only potential cause of action available to plaintiffs in a case like this—an option that he then all but eliminates by indicating that liability will attach only for statements that a reasonable defendant should know would mislead a particular class of plaintiffs who are thereby misled and injured as a consequence. See Pelman, 237 F. Supp. 2d at 533.

over what happens to us. But the attributonal process is also biased by several motives, including our motives for closure, and the self-, group-, and system-affirming motives described previously. Particularly when the harm is sizeable, those motives lead us to place as much responsibility and blame as we can on a single cause that implicates, as little as possible, ourselves, our groups, or our system.

In our attempt to "solve" or minimize the problem, we thus engage in what social psychologists call "defensive attributions." If a clear, simple "other" is plausibly the cause, we crave our pound of flesh. If no individual can comfortably be called the "criminal," the "tortfeasor," or the "injurer," then we devictimize the person harmed and leave blame there. Any attempts thereafter to move even some of the blame elsewhere re-ignites all the dissonance that led to conceptually closing the case in the first place. It is largely for that reason that Senator McConnell emphasizes that "[a]n obviously disturbing thing about lawsuits against 'Big-Fast Food' is that they promote a culture of victimhood and jettison the principle of personal responsibility." We would re-express McConnell's point this way: "An obviously unsettling thing about lawsuits against 'Big-Fast Food' is that they raise the possibility that there may be an uncompensated victim in our midst who was harmed largely by situational influences that likely implicate us all." Such a reality would be highly disturbing and create extreme dissonance within us; it is much less disturbing to place the blame fully on the fat victim, and thereby promote the culture of personal responsibility which palliates such dissonance.

When an administrator, legislator, judge, or juror is confronted with a problem, the causal models she constructs reflect these internal and external constraints—constraints that push toward dispositionism. And our legal system, too, from the introduction of a law to the mechanics of a trial, reflects a certain Clue-like obsession with simple explanatory schemas. In any cognizable case, there is a victim, dead or harmed by some palpable cause—be it a gunshot, a lead pipe, or a candlestick holder—and a culprit, some malevolent agent. There is individual motive, prompting individual action, directed at individual harm. We expect a human actor acting toward some basic human end such as money or revenge—and when it is a corporation, we stumble a bit. We may struggle even more when several corporations (fast food chains, for example) or an entire industry might have contributed to it. In

561 See supra Part I.B.
562 McConnell, supra note 456.
the *Clue* scenario, if we cannot determine which of the eight guests’ direct actions killed the victim, all eight get off.

Our dispositionist reluctance to attach blame when a particular defendant has not purposefully targeted a particular victim in a specific way is highly advantageous to commercial interests and disadvantageous to the public. When fast food chains look to influence the market, they aim their efforts at consumers as a class or set of classes based on specific profiles rather than at individuals. The expectation is not that corporations will be able to get all consumers to react in precisely the same way, but that they will find ways to influence large enough groups of individuals to make a profit. The larger the influence is, the greater the profits will be. This approach is almost identical to Milgram’s. After all, he was not attempting to understand what moved particular individuals. He was studying what sorts of variables would influence broad swaths of people and how much. There are, of course, some significant differences between Milgram’s experiments and the McMilgram variety, but those differences only underscore our point. For instance, the McMilgram research has taken place over many more years with the aid of far greater resources. And it has had the benefits of a huge sample, “real-world” conditions, immense profits, and enlivening competition.563

The fact that a company is liable only for specific acts directed at specific individuals is de facto permission for corporations to do what they do—place us in a McMilgram world.564 Corporations manipulate the entire market while

563 Finally, the success of commercial situational manipulation has been met with mostly celebration and praise, as evidence of American entrepreneurialism, while the not-for-profit variety has been met mostly with controversy and ethics-based criticism. See generally ARTHUR G. MILLER, THE OBEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE (1986) (describing widespread criticism of Milgram and the design of his obedience studies within and outside of academia).

564 It may be useful to contrast the critical reception of Milgram’s initial experiments with the reception of corporate manipulations (the great McMilgram experiment). After revealing the power of unseen situation, Milgram’s findings spawned an enormous hullabaloo. In the words of Thomas Blass:

More than any other research in social psychology, the obedience experiments have been embroiled from the beginning in a number of controversies in which they have played a central and enriching role. These include the ethics of research . . . the social psychology of the psychological experiment . . . and the deception versus role-playing controversy.

Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and Their Interactions*, 60 J. PERSONALITY & SOC. PSYCHOL. 398, 398 (1991) (internal citations omitted). It seems likely that much of the criticism found its source in the threat that Milgram’s results posed to our sense that our systems are just. To defend against that threat, Milgram’s work had to be denied, challenged, and minimized in any way possible:

The upset generated by a Milgram . . . in part stems from ethical concerns. But another part of their power lies precisely in their demonstration of how strong situational determinants are in
being relatively unconcerned with things on the individual level. And the fact that they do not know precisely who will be influenced or why only helps their case. It is never as though they set out to injure John Smith of 112 French Fry Drive.

Thus, when Judge Sweet dismissed the *Pelman* claim in part because the plaintiffs did not show causation, he meant that they did not show how McDonald's had influenced the behavior of particular individuals—that is, the plaintiffs. The fact that courts permit only claims by individuals means that courts disregard the fact that corporations set out to manipulate *groups*, knowing full well that they cannot influence all individuals equally. This tendency reflects the basic dispositionist starting point. The idea that we might be manipulated in the marketplace is no more intuitively plausible to us than it was for Milgram's subjects. And that possibility is precisely what most of us find threatening and do not want to believe. Disallowing evidence of market behavior is simply another way of dispositionalizing the situation by denying that the situation is relevant or that there could be actionable wrongdoing inherent in the nongun-wielding manipulation of the situation. 565

shaping behavior. No resort to a correlation between “those” people who do “evil” things is allowed: the subjects were randomly assigned.

Robert Helnreich et al., *The Study of Small Groups*, 24 ANN. REV. PSYCHOL. 337, 343 (1973). Despite his profound influence on psychology and the importance of his work to the fields of philosophy, political science, and education, Milgram was never granted tenure at Harvard. As Blass suggests, “Some of the opposition toward Milgram came from colleagues who felt uneasy about him, ascribing to him certain negative properties of the obedience experiment.” Thomas Blass, *The Man Who Shocked the World*, PSYCHOL. TODAY, Mar.-Apr. 2002, at 68, 72, available at http://www.psychologytoday.com/ht/docs/prod/particle/pto-20020301-000037.asp. Focusing on Milgram's protocol may well have been a cover for a deeper uneasiness about his findings—a means of delegitimizing his work and, more important, legitimizing our world.

The great McMilgram experiment, on the other hand, has been relatively uncontroversial. The very kind of manipulation that scholars after Milgram decried as inappropriate in the social scientific laboratory setting has been deemed legitimate and necessary in the marketplace. It is hard to see the difference between the protocols. Milgram situationally induced individuals to perform in a certain way (administer shocks), and they in turn took responsibility for their actions. The food industry situationally induces kids to demand yummy meals and crispy sugar puffs, and then, when they get diabetes, it actively promotes the message that parents are to blame for not making good choices. If anything, the food industry's actions are far more objectionable because McDonald's expends resources to enhance dispositionism and because the harm is real.

Part of the difference in reception seems to be that the Milgram experiments offered a challenge to the status quo, whereas the McMilgram manipulations firmly support it. With McMilgram, corporations remain in their preeminent position, the “them” continue to be plagued by bad outcomes because they make bad choices, and the “us” enjoy health, beauty, and wealth, reflecting our superior choices.

565 This is the one of numerous symptoms of the fundamental attribution error in the legal system. See P.C. Ellsworth & R. Mauro, *Psychology and Law*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 684–732 (D.T. Gilbert et al. eds., 4th ed. 1998) (“The attribution of an internal cause is so central to the law, and the tradition of judging each case on its own merits is so entrenched that the relevance of aggregate empirical data in particular cases has been viewed with skepticism.”).
VII. THE DISPOSITIONISM EPIDEMIC

Although we have focused on the obesity epidemic in this Article, dispositionism has had and continues to have an immense effect on both the framing and resolution of virtually every major social policy debate, from affirmative action to standardized testing, from gun control to school "choice," and from gay rights to the war on terrorism. Increasing numbers of scholars, if the preceding pages have been difficult to digest, it may be helpful to consider the following story as both a summary and a way of grasping the larger significance:

Many people have told the Milgram High Dispositionists that they have what it takes to be a great basketball team. One of the most respected coaches in the state has taken the squad under his wing to help them better understand the subtleties of the game. They have shot thousands of free throws, jump shots, and lay-ups. They have spent much of the summer in the weight room working on their calf muscles to increase their vertical leaps. They have bought Air Jordan sneakers, quick-dry jerseys, and headbands to keep the sweat out of their eyes.

In their first game against the dreaded Situationists of ACME Preparatory Academy, the Dispositionists strut out onto the court confident that they have done all that is possible to put themselves in a position to win. The whistle blows and the center jumps up to tap the ball to his teammates. To his surprise, it sails over his head. The Dispositionists' star power forward goes to retrieve it but is unceremoniously knocked to the floor by one of the Situationists. His coach pulls him up and screams, "Get your head in the game! You've got to hustle! You're forgetting everything we went over in practice!" When the whistle blows again, Milgram's point guard starts to dribble toward the basket only to find that the ball bounces strangely off to the side. An opposing player quickly grabs it and is off to the races. To catch up, the three-point specialist decides to let loose one of his patented high-arcing jumpers only to see it float right into the hands of an opposing player who again pushes it down the floor.

When the game is over, the team is covered in bruises, mentally and physically. 70-0. They trudge back to the locker room disgusted with themselves. One of the players eventually gets up the courage to confront the coach: "What happened?" he yells. "We trusted you and you let us down! You were supposed to control the situation—make sure it didn't get out of hand. That's what a coach is supposed to do!" That night after having more time to think, the same player goes to the mirror and takes a good hard look at himself. "You know what," he says, "I am the one to blame. If only I had worked harder on my shooting. If only I had spent a little more time on my post moves. If only I had wanted it a little bit more."

The players go to sleep accepting the drubbing and vowing that they will not make such poor preparation choices again.

The truth of the situation never occurs to the team—that what they thought was a basketball court was really a football field, and what seemed to be a basketball game was really a football game.

In fact, they may never know. Working hard to bulk up for the next game may help them hold onto the ball better when they are hit by the opposing side's linebackers. If they work on delivering crisper passes, the ball probably will not get intercepted as much. If the players can improve their V-cuts, they may get open more often and someone may actually catch a touchdown pass. They will, however, continue to lose.

Of course, the Dispositionists, for all of their losses, still have some devoted fans. They shout slogans at the players: "Play through the pain!; "Don't leave anything in the locker room!; and "You can do it, if you just give it your all!" Many of the faces in the crowd are recognizable—Mom and Dad, the florist, the town minister, the school mathematics champion. After every game there are also a number of strangers, football aficionados, who come out of the stands to offer the team advice: "In order to win at football, you need to wear pads and a helmet." "You will lose all your games in football if every time you try to run, you drop the ball onto the ground." "Long floating passes are the easiest ones to intercept." The team always gives them funny looks as they climb onto the bus, for it seems rather silly to be offering football advice at a basketball game,
writers, and scientists are offering a challenge to the common sense appeal of the personal responsibility norm, from a number of analytic vantages. As Elizabeth Warren and Amelia Warren Tyagi have shown in their new book, The Two Income Trap, even issues like personal bankruptcy that seem to offer the clearest proof of poor choices and corrupted characters are more often a matter of powerful situational forces. Indeed, oversized and growing credit card balances likely share a common source with our oversized and growing belt sizes. Nonetheless, credit card balances, late fees, and interest charges are especially when far more pressing issues are at hand, like whether the Dispositionists can win more games if they switch to blue jerseys.

The message should be clear: We are all Dispositionists. We are all players in a game in which we rarely stop to question the rules or the nature of the playing field. To win, we concentrate on the endpoint without considering where we begin. We put great effort into our preparations and excel at strategizing and conditioning for a sport none of us will ever participate in.

On the other side, the Situationists’ roster is filled with corporations—hard hitters, ringers, and professionals. Their collective profit-maximizing motive ensures that they see what we do not—a football game. Their profit-maximizing motive also ensures that they will do their best to keep us thinking we are playing basketball, for that is the most efficient way for them to win. They may compliment us on the good form of our jump shot. They may even allow us a few chest passes into the end zone so that the final score is not so obvious. But, rest assured, they will not allow us to make a habit out of winning.

At the same time, there are individuals out there who are trying to give us a little help. The experts (the football aficionados above) see that we are losing and that our losses hurt us and our school, not only in terms of morale, but also in monetary terms. They see that if we started playing football we might have a chance of winning. However, none of them ever says, “Hey guys, you are playing basketball on a football field.” They do not draw the connection for us. Instead, they provide statistics showing the decline in concession sales or give suggestions on how to win at football.

In any case, the experts are usually drowned out by the fans—the majority of Americans who buy into the cult of personal choice. They are our friends and neighbors. They tell us that only wusses cry and recount tall tales of our grandfathers winning basketball games with only three players, two of them dwarfs, against an opposing side of giants. The moral is always the same: “It was pure determination—heart—that carried them through.” They always end by telling us to stay focused on our own improvement and leave the coaching up to the coach. He is the professional—the one whose role in life is to make sure we are in good shape to meet the competition, the one who is there to make sure we do not get injured and that we are not outmatched.

The problem is that he does not end up protecting our interests. It is not that he is a self-interested backstabber. Sure, the Situationists may pay him off occasionally to throw the game, but in general he works hard to try and help us win. The problem is that he cannot seem to see that it is a football game either. He hears the crowd chanting basketball slogans and he yells, “Take it to the next level boys!”

For some of us, the sports analogy is unconvincing. We would not be caught dead on a playing field. As members of the Milgram High jazz club or debate team, we are not being pummeled on a weekly basis. It is not our loss. However, distancing ourselves from the “losers” ignores the fact that Milgram High’s relegation to the bottom of the standings affects all members of the school. When the Dispositionists lose, fewer people show up at the games, and that means fewer tickets and concessions are sold. The result is less funding for other extracurricular activities. It also ignores the very real possibility that what we think is a jazz competition is really a fencing match, and what we see to be a debate tournament is really a Miss Teen USA beauty pageant.

In the end, we are all dispositionists: nerds, jocks, dweebs, and hipsters, alike. See generally Warren & Tyagi, supra note 157.
easily, widely, and automatically chalked up to personal choice by policymakers and even by consumers themselves. This is part of what makes dispositionism so satisfying as a general view: One’s strategies of construal for one issue can be easily applied to many others, and they are all mutually reinforcing.568

For example, in recent months, some members of the Bush administration and Congress have attempted to leverage their position on the obesity epidemic to advance seemingly separate causes. With respect to welfare benefits, the administration has used rising obesity rates to justify reducing government protections and assistance to the poor. In the words of Douglas J. Besharov, Director of the AEI Project on Social and Individual Responsibility, “We are feeding the poor as if they are starving, when anyone can see that the real problems for them, like other Americans, is expanding girth.”569 The sentiment has been reinforced by Heather MacDonald, a John M. Olin Fellow at the Manhattan Institute, who suggests that:

The most powerful rebuttal of the alleged hunger crisis . . . [is] the “quiet epidemic” of childhood obesity, an epidemic that plagues poor children, especially black and Hispanic children, at a far higher rate than middle-class youngsters. Food deprivation is not the main nutritional problem facing the poor today—too much of the wrong food is.570

Because we see obese people as having freely chosen their unhealthy condition, we are less willing to believe that any of their problems are attributable to anything other than their free choices, no matter the arena. Obesity is a visible symptom of a disease—not a social disease, but a personal one. And what is worse, the rest of us are paying for it. Clearly, it is in everyone’s interest for us to stop providing so much free food in the form of food stamps and subsidized school lunches. In the words of Robert Rector, a senior research fellow at the Heritage Foundation: “Food stamps and cash welfare are two halves of a whole . . . . All the things about cash welfare that discouraged work and marriage, and encouraged long-term dependence, apply identically to food stamps.”571 Eliminating the food stamp program thus

568 See, e.g., Hanson & Chen, The Illusion of Law, supra note 16, passim (exploring the mutually reinforcing nature of dispositionism and other policy scripts).
571 Kaufman, supra note 569, at 4.
becomes a key policy ingredient in the effort to move overweight poor people to a healthy weight, to a job, and to a viable, long-term marriage.\textsuperscript{572}

CONCLUSION

This Article may feel incomplete in the end—a law review article with the word “broken” in the title ought to offer a “fix,” but none seems to have been given. There is a simple explanation: We are doing our best to be situationists, and situationists do not peddle quick and easy “solutions.”\textsuperscript{573} Our aim is rather to convince policy analysts and policymakers to begin thinking about problems and solutions from a different, counterintuitive perspective.

Our scales—the ones we use to assign blame and assess causation, and the ones we depend on to balance environment, human agency, and genetic predisposition—are not a “bit tilted.” They are not “quirky but workable.” Nor are they “good for an approximation.” They are broken. Our scales were made that way, forged in our interiors, hammered into shape by a smith who saw things at a slant—the dispositional side always to hang below the situational one. And when they were sold to the highest bidder, it only got worse, for the bidder knew which way he always wanted things to come out and added a weight to the bottom of the dispositionist cup. When he reassured us that all was on the level, we believed him because it seemed so, and we preferred not to look too closely. And so, much profit was made and much else lost.

But it need not be that way. Our eyes may lie on a tilt like the smith’s, but our necks are not frozen, nor are our fingers without feeling. We must reach beneath the cup to discover the cheat. We must find the equal plane. We are

\textsuperscript{572} More generally, this dispositionist take on obesity may help legitimize certain racist notions. What Samuel Morton once claimed to achieve by measuring skull size, we may now be doing with waist size: providing proof of racial difference. The argument proceeds as follows: nearly one-third of African Americans are obese, as compared with only one-fifth of the Caucasian population; weight is a matter of personal discipline and individual responsibility; hence, African Americans are dispositionally inferior to Caucasians. Weightism becomes a form of racism. As far as we know, such an argument has not been made explicit. But in a situation-blind population, even “color-blind” members would have a difficult time avoiding the conclusion.

\textsuperscript{573} See generally Benforado & Hanson, The Cost of Dispositionism, supra note 16.
blessed with perception and awareness. In the words of Stanley Milgram, let our awareness be “the first step to our liberation.”

Memorable Milgram Quotes, http://www.stanleymilgram.com/quotes.html (last visited Nov. 12, 2004). Although our emphasis has been on highlighting the psychology and motivations of the human animal and the situational influences of market actors, we believe that the basic outlines of an approach to the problem of America’s waistline are beginning to emerge. We need to be more sensitive to situation—external and internal—and to the problem of deep capture. Designing solutions will require first doing what many of the most influential scholars and policymakers have been disinclined to do—it will require studying the situation and all its complexity, challenging common sense assumptions about ourselves, and always being vigilant for slant in the playing field. Cf. Benforado & Hanson, Naive Cynicism, supra note 16.

Finding partial solutions may not be as hard as it at first appears. Scholars who study issues long enough often come to understand the situational problems and are able to propose situational solutions. The obesity epidemic is no exception. The problem is that most of us—including most policymakers—do not take such arguments seriously, in significant part because they are, at first blush, so obviously wrong. Taking situation more seriously means, we hope, taking the situational solutions and those who offer them more seriously. When public health experts propose, say, an “obesity tax,” it is all too easy to dismiss the idea as an egg-headed scheme designed to trample our freedom, as many of us instinctively do. See generally Michael F. Jacobson & Kelly D. Brownell, Small Taxes on Soft Drinks and Snack Foods to Promote Health, 90 AM. J. PUB. HEALTH 854 (2000) (discussing state and local efforts to tax snack foods). But when we realize the extent to which human behavior is situationally determined, it becomes clear that such proposals should not be brushed aside just because they contradict our basic understanding of ourselves and the world. Indeed, for precisely that reason, they should be taken quite seriously. For an excellent example of taking the fat tax seriously, see Jeff Strnad, Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies (Stanford Law School John M. Olin Program in Law and Econ. Working Paper No. 286, 2004), available at http://ssrn.com/abstract=561321. For an example of considering litigation as a viable approach, see Michael A. McCann, Economic Efficiency and Consumer Choice Theory in Nutritional Labeling, 2004 WIS. L. REV. (forthcoming Winter 2004) (describing how labeling requirements for fast food restaurants may facilitate better consumer choices, and how litigation may achieve this labeling).