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The Fat Fight: The Risks and
Consequences of the Federal
Government's Failing Public Health
Campaign

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Abstract

The federal government has declared obesity and overweight to be one of the most pressing public health threats facing the United States today and is engaged in a “war on obesity”. Unfortunately, the main arsenal employed in this war has been ineffective media based health information campaigns that encourage people to diet and exercise. This article critically evaluates the federal government’s efforts in the “war on obesity” that emphasize individual based change and do not address the structural barriers, such as inability to afford healthy foods and a lack of safe, accessible places to exercise that keep people from following the government’s dietary and exercise guidelines. By failing to address the barriers people face in maintaining a healthy lifestyle, while promoting the message that weight loss is simply a matter of self-control, the federal government is promoting the stigma associated with being overweight and obese, while failing to meet its public health duties. This article addresses these shortcomings and argues that the federal government should shift its focus away from individual level information based campaigns and should instead collaborate with state and local governments and private actors to create environments that make the healthiest choice be the most attractive and easiest option.

When Secretary of Health and Human Services, Tommy Thompson announced new dietary guidelines in 2002, he exhorted Americans to focus on slimming down. “Tonight eat only half the dessert,” Thompson stated. “And then go out and walk around the block. And if you are going to watch television, get down and do 10 push ups and 5 sit-ups.”¹ The focus on weight loss in the dietary guidelines is not surprising, given recent concern over the “obesity epidemic.” The federal government has declared a virtual war on obesity – with almost every government agency that deals with health or agriculture addressing the issue in some way.²

As weight has increasingly become the barometer by which fitness and health are judged,³ the federal government has placed increasing emphasis on promoting dieting and exercise for the *purpose* of weight loss. Maintaining a “healthy” weight has become the focus of the federal government’s fitness initiatives. Unfortunately, the emphasis on weight loss, without realistic access to the tools necessary to maintain effective behavior change, has the potential to do more harm than good.⁴ By focusing primarily on individual level information based campaigns, the federal government risks promoting unrealistic standards, wasting money on ineffective interventions and increasing the stigma and discrimination that the overweight and obese already experience. Instead, the federal government should promote programs and

¹ Marian Burros, *U.S. Diet Guide Puts Emphasis on Weight Loss*, N.Y. TIMES, January 13, 2005 at A1.

² *See generally*, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTHY PEOPLE 2010 PROGRESS REVIEW, NUTRITION AND OVERWEIGHT, (2004) [hereinafter PROGRESS REVIEW] and OFFICE OF THE SURGEON GENERAL, PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE SURGEON GENERAL’S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY (2001) at 45 – 51 [hereinafter CALL TO ACTION]. Agencies include: The Centers for Disease Control and Prevention, the Head Start Bureau of the Administration for Children and Families, the Department of Health and Human Services, the National Institutes of Health, the National Recreation and Park Association, the U.S. Department of Agriculture, the Indian Health Service and Head Start Bureau, and the Office on Women’s Health, among many others.

³ *See* J. ERIC OLIVER, FAT POLITICS: THE REAL STORY BEHIND AMERICA’S OBESITY EPIDEMIC, 5 (2006).

⁴ *See generally* Frances M. Berg, *Health Risks Associated with Weight Loss and Obesity Treatment Programs*, 55 J. OF SOCIAL ISSUES 277, 285-291; Paul Ernsberger and Richard J. Koletsky, *Biomedical Rationale for a Wellness Approach to Obesity: An Alternative to a Focus on Weight Loss*, 55 J. OF SOCIAL ISSUES 221, 231 – 246 (1999).

regulations that encourage social and structural environments that are conducive to healthy eating and exercise.

Concern for American's fitness and nutrition is not new within the federal government. Indeed, the federal government has provided dietary advice since 1862, when the USDA was created.⁵ Concern for physical well-being has been historically linked to concerns about the competitiveness of the American citizenry. During WWII, the USDA explicitly linked the dietary habits of individuals to national security. The *National Wartime Nutrition Guide* told Americans, "U.S. needs us strong: Eat the Basic 7 every day."⁶ In his 1961 article, *The Soft American*, President John F. Kennedy wrote, "[T]he physical vigor of our citizens is one of American's most precious resources. If we waste and neglect this resource, if we allow it to dwindle and grow soft, then we will destroy much of our ability to meet the great and vital challenges which confront our people. We will be unable to realize our full potential as a nation."⁷ Similarly, in 2001 as the events of September 11 loomed large, then Secretary of Health and Human Services Tommy Thompson called upon all Americans to lose 10 pounds as part of their patriotic duty.⁸ The implicit link between duty and weight increases stigma and encourages discrimination against the obese and overweight.

Not surprisingly, the scope of governmental intervention in this area has drawn the attention of legal scholars who are mostly critical of the war on fat. Some have questioned whether there is, in fact, an obesity related health crisis.⁹ Others have questioned the appropriateness of the federal government attempting to influence what they argue is ultimately a

⁵ MARION NESTLE, FOOD POLITICS 33 (2003).

⁶ *Id.* 1t 35 (quoting WAR FOOD ADMINISTRATION USDA, NATIONAL WARTIME NUTRITION GUIDE, 1942)).

⁷ John F. Kennedy, *The Soft American*, SPORTS ILLUSTRATED, Dec. 26 1960 at 13.

⁸ Press Release, U.S. Department of Health and Human Services, Overweight and Obesity Threaten U.S. Health Gains: Communities Can Help Address the Problem, Surgeon General Says (Dec. 13, 2001), available at <http://www.hhs.gov/news/press/2001pres/20011213.html> [hereinafter Overweight and Obesity].

⁹ See generally, PAUL CAMPOS, THE DIET MYTH: WHY AMERICA'S OBSESSION WITH WEIGHT IS HAZARDOUS TO YOU HEALTH (2005).

matter of private choice¹⁰ while others are concerned that the focus on individual responsibility provides cover for regulatory practices that encourage over-consumption.¹¹ Additionally, some legal scholarship relies on common sense notions of the causes and solutions of weight gain rather than focusing on scientific research.¹² It is necessary, though, to move beyond common sense explanations and examine what is known to be effective and ineffective in health behavior change.

This paper evaluates the effectiveness of the federal government's war on obesity and proposes an alternative to the largely ineffective individual level information based education campaigns that predominate current initiatives. In doing so, this paper offers a currently missing piece to the debate surrounding the obesity war. The first section discusses the problems inherent in information based public health campaigns, and specifically the ineffectiveness of government admonitions to lose weight when weight loss may not be achievable without structural modifications that make it possible for people to eat healthy foods and get adequate amounts of exercise. Section Two details the links between moralizing about health and the federal government's historical role in providing dietary guidance and concern with the fitness of the American citizenry. In Section Three, I argue that the focus on individual responsibility through ineffective information based campaigns increases the stigma of being overweight or obese and is antithetical to the federal government's public health responsibilities. Section Four provides an overview of how research from behavioral economics and social and cognitive psychology can be utilized to provide more effective interventions and argues for an evidence-

¹⁰ See e.g. Katherine Mayer, *Note: An Unjust War: The Case Against the Government's War on Obesity*, 92 *GEOL L.J.* 999 (2004).

¹¹ Adam Benforado, Jon Hanson and David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 *Emory L. J.* 1645, 1792 (2004).

¹² For example, after noting that most explanations for the increase in obesity fail to adequately explain American's growing girth, Professor M. Gregg Bloche concludes, without empirical support, that snacking, rather than sedentary life styles or larger portion sizes, is the root cause of increased obesity M. Greg Bloche, *Obesity Policy Choices: Obesity and the Struggle within Ourselves*, *GEO. L. J.* 1335, 1358 (2005).

based approach to obesity prevention. In that section, I also propose a new paradigm for dealing with obesity that relies on modifying the environment to make healthy choices easier and more appealing.

I. Information Campaigns and the Government's War on Obesity

In recent years, the federal government has attempted to address the issue of obesity and overweight through a variety of public health initiatives.¹³ Even agencies not usually associated with health have been charged with responsibilities in the fight against obesity. For example, a 2002 executive order requires the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Interior, Labor, Transportation and Veterans Affairs and the Office of National Drug policy to “review and evaluate the policies, programs, and regulations of their respective departments and offices that in any way relate to the personal fitness of the general public” and recommend new policies and programs that “shall improve the Federal Government’s assistance of individuals, private organizations, and State and local governments to increase physical activity [and] promote responsible dietary habits.”¹⁴ Despite the involvement of larger numbers of federal agencies, the basic approach taken by the federal government has been to provide information or mandate that private actors provide information.

Most interventions at the federal level are primarily information based campaigns that seek to educate the public about the negative health effects of excess weight and encourage healthy eating and exercise. For example, the Department of Education (ED) was scheduled to spend \$70 million in fiscal year 2004 on programs to encourage “lifetime fitness activities and healthy eating habits.”¹⁵ HHS has also created several outreach campaigns including *You Can!*

¹³ See attached appendix for an overview of current federal programs in the war on obesity.

¹⁴ Exec. Order No. 132,666, 67 Fed. Reg. 42,457 (June 20, 2002).

¹⁵ *Id.* This was the most recent year in which the information was available and actual expenditures were not listed.

Steps to a Healthier Aging Campaign and *I Can Do It, You Can Do It!*, a collaborative initiative between the President's Council on Physical Fitness and Sports and the HHS Office on Disability to encourage physical activity among young people with disabilities.¹⁶ The Department of Agriculture (USDA), the ED, HHS, the CDC, and the National Cancer Institute (NCI) established the *5 A Day for Better Health Program*, to provide information about the health benefits of eating five servings of fruits and vegetables a day.¹⁷

The MyPyramid website which provides the current dietary guidelines is illustrative of the type of information made available by the federal government.¹⁸ On the "Dietary Guidelines" page, the site states:

What is a "Healthy Diet"?

The Dietary Guidelines describe a healthy diet as one that

- * Emphasizes fruits, vegetables, whole grains, and fat-free or low-fat milk and milk products;
- * Includes lean meats, poultry, fish, beans, eggs, and nuts; and
- * Is low in saturated fats, trans fats, cholesterol, salt (sodium), and added sugars.¹⁹

In a sidebar, one can follow the link on "Tips and Resources" which offers:

Tips to help you:

- * Make half your grains whole
- * Vary your veggies
- * Focus on fruit
- * Get your calcium rich foods
- * Go lean with protein
- * Find your balance between food and physical activity²⁰

¹⁶U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, HEALTHY PEOPLE 2010 PHYSICAL ACTIVITY AND FITNESS PROGRESS REVIEW (2004) at 303 [hereinafter PHYSICAL ACTIVITY AND FITNESS PROGRESS REVIEW].

¹⁷ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, HEALTHY PEOPLE 2010 NUTRITION AND OVERWEIGHT PROGRESS REVIEW (2004) at 3 [hereinafter NUTRITION AND OVERWEIGHT PROGRESS REVIEW].

¹⁸ MyPyramid, at <http://www.mypyramid.gov/> (last visited April 2, 2007).

¹⁹ MyPyramid Guidelines, at <http://www.mypyramid.gov/guidelines/index.html> (last visited April 2, 2007).

Following the link for any of the tips leads to more detailed information. For example, following the link for “Focus on fruit” yields the following advice:

In general:

- * Keep a bowl of whole fruit on the table, counter, or in the refrigerator.
- * Refrigerate cut-up fruit to store for later.
- * Buy fresh fruits in season when they may be less expensive and at their peak flavor.
- * Buy fruits that are dried, frozen, and canned (in water or juice) as well as fresh, so that you always have a supply on hand.
- * Consider convenience when shopping. Buy pre-cut packages of fruit (such as melon or pineapple chunks) for a healthy snack in seconds. Choose packaged fruits that do not have added sugars.

This advice does not provide any concrete suggestions until one has followed several links.

Further, the concrete suggestions are fairly mundane and do not provide advice on goal setting or strategies to increase fruit consumption or even point out that increasing fruit without decreasing less nutritious foods will encourage weight gain.

Similarly, the HealthierUS.gov website offers this advice regarding physical activity:

Regular physical activity is important for your overall health and well-being. Include activities that you enjoy and can easily fit into your daily routine—such as walking your dog, working in your garden, or riding your bike.

Being active for 30-60 minutes on most days can help you build strength and fitness, relax and reduce stress, gain more energy, and improve your sleep.

These benefits all add up to decreasing your risk of heart disease and other

²⁰ MyPyramid Tips, at http://www.mypyramid.gov/tips_resources/index.html (last visited April 2, 2007).

conditions, such as colon cancer, diabetes, osteoporosis, and high blood pressure.²¹

Links on the website then lead to more specific information, including an exercise diary and a website promoting “10,000” steps a day.²²

These websites provide little information that is not readily available in a variety of other forms and provide no information on how to overcome barriers. For example, the tips above for increasing exercise are impractical for many people living in cities. How many people living in New York City actually own dogs or have an opportunity to garden? How many of those who do have dogs or gardens are low-income? It is precisely the people who do not have dogs, gardens or safe places to bike who need the most help and yet, these, education campaigns largely ignore them.

The sheer number of government sponsored websites also suggests an information overload and disconnect between what is being provided and what is actually needed or will be effective. The websites sponsored by the federal government that are aimed at providing dietary or exercise advice to the public include, among others: Small Steps²³, Healthier US²⁴, The President’s Challenge²⁵, Fitness.gov²⁶, Physical Activity for Everyone²⁷ the Weight Control Information Network²⁸, MyPyramid²⁹ and MyPyramid Tracker³⁰. Sites aimed specifically for

²¹ HealthierUS Exercise, at <http://www.healthierus.gov/exercise.html#track> (last visited April 2, 2007).

²² See Just Move, at <http://www.justmove.org/home.cfm> and Shape Up at <http://www.shapeup.org/shape/steps.php> (last visited April 2, 2007).

²³ Small Step, at <http://www.smallstep.gov> (last visited April 2, 2007).

²⁴ HealthierUS, at <http://www.HealthierUS.gov> (last visited April 2, 2007).

²⁵ President’s Challenge, at <http://www.Presidentschallenge.org> (last visited April 2, 2007).

²⁶ Fitness.gov, at <http://www.Fitness.gov> (last visited April 2, 2007).

²⁷ Physical Activity for Everyone, at <http://www.cdc.gov/nccdphp/dnpa/physical/everyone.htm> (last visited April 2, 2007).

²⁸ Active at Any Size, at <http://win.niddk.nih.gov/publications/active.htm> (last visited April 2, 2007).

²⁹ MyPyramid, at <http://www.mypyramid.gov> (last visited April 2, 2007).

³⁰ MyPyramid Tracker, at <http://www.mypyramidtracker.gov/> (last visited April 2, 2007).

children and teens include: BAM: Body and Mind,³¹ Powerful Bones and Powerful Girls,³² Verb: It's what you Do³³ and Small Steps for Kids³⁴. Sites targeted towards women include: My Bright Future: Physical Activity and Healthy Eating³⁵ and Women's Health: Physical Activity³⁶. These are just a sampling of the available websites. That so many federal agencies have been enlisted in the war on obesity encourages the proliferation of web sites, as each agency establishes their own information campaign. Although information tailored to specific groups is generally helpful in encouraging health behavior change, the sites are largely duplicative, providing the same basic information. This creates an information overload that is both wasteful and hard to navigate. Further, the websites do not provide easily accessible links to programs, such as Women Infant's and Children, that do offer substantive dietary help.³⁷ Of course, a large part of these websites is simple self-promotion of the sponsoring agency's programs.

This information based individual change approach taken by most federal programs aimed at preventing obesity appeals to the American values of individualism and personal autonomy and skepticism about the role of government.³⁸ The government is supposed to protect individual rights and ensure that "the basic means to the good life are available" but "[refrain] from specifying what the content of that life should be or how individuals should

³¹ BAM, at http://www.bam.gov/sub_physicalactivity/ (last visited April 2, 2007).

³² Powerful Bones, at http://www.cdc.gov/powerfulbones/parents/activity/pa_links.html

³³ Verb: It's What You Do, at <http://www.cdc.gov/youthcampaign/> (last visited April 2, 2007).

³⁴ Small Steps Kids, at <http://www.smallstep.gov/kids/flash/index.html> (last visited April 2, 2007).

³⁵ My Bright Future, at <http://www.hrsa.gov/womenshealth/mybrightfutureadult/menu.html> (last visited April 2, 2007).

³⁶ Physical Activity & Exercise, at <http://www.womenshealth.gov/faq/exercise.htm> (last visited April 2, 2007).

³⁷ In fact, in my searching through the web pages, I did not find any direct links to any of these programs. However, given the magnitude of the information and number of web sites, it is quite possible that the links exist somewhere and that I simply did not come across them.

³⁸ INSTITUTE OF MEDICINE, THE FUTURE OF PUBLIC HEALTH, 39 (1988).

behave, except to prevent them from infringing on the rights of others.”³⁹ Consequently, public health activities aimed at modifying individual behavior that does not harm others typically take the form of information provisions.⁴⁰ Such regulations include mandated warnings on harmful products and dietary information on packaged foods. They also include public health education campaigns intended to encourage healthy behaviors and discourage unhealthy ones.

Conventional wisdom typically holds that public health campaigns are harmless ways to provide information that will enable the public to make healthy choices. By supporting these campaigns, as public health law scholar, Lawrence O. Gostin notes, the government is thought to promote individual autonomy and provide the basic support needed to enable people to lead healthy lives.⁴¹ The website based information sponsored by the federal government looks very much like the kind of liberty enhancing campaigns that are easily supportable. They provide information, some of which is targeted to specific populations, and opportunities to track one’s progress. Similarly, public service announcements and advertisements encourage healthy eating and exercise without coercing people into particular behaviors.⁴² However, public health education campaigns include a variety of costs, such as the actual monetary cost of paying for the campaign, increasing the stigma and discrimination experienced by the obese and overweight and creating unrealistic expectations regarding weight loss. The costs of the campaign are particularly high when the program is promoting ineffective activities. Although information based health behavior change campaigns are appealing for a variety of reasons they are rarely

³⁹ *Id.*

⁴⁰ Mandatory seat belt and helmet laws are the exceptions to this general rule. Recent movements in many states seek to overturn motorcycle helmet laws, relying upon an individual rights’ argument. Quarantine laws, which do restrict individual freedoms, are aimed specifically at keeping sick individuals from infecting others.

⁴¹ Lawrence O. Gostin, *Health Promotion: Education, Persuasion, and Free Expression*, in PUBLIC HEALTH LAW AND ETHICS: A READER 335, 337-338 (Lawrence O. Gostin, ed., 2002) [hereinafter *Health Promotion*].

⁴² See *HHS Partners with Ad Council and DreamWorks to Combat Childhood Obesity*, <http://www.adcouncil.org/newsDetail.aspx?id=190> (February 1, 2007) for information on recent advertising initiatives.

effective in modifying complex behaviors such as dieting and exercise.⁴³ By relying primarily on these information-based campaigns, the federal government is not only wasting money on ineffective programs but also promoting unrealistic expectations that increase the stigma of being overweight and obese.

A. The (In)effectiveness of Information Based Interventions in Dealing with Obesity and Overweight

Health psychologists who study health behavior change are generally skeptical of mass media health education campaigns that are not carefully targeted.⁴⁴ Research has found that large-scale interventions designed to produce health behavior changes are largely ineffective.⁴⁵ This is particularly true for health problems such as obesity and overweight, where a variety of structural barriers, such as a lack of access to affordable healthy foods or safe places to exercise are major impediments to undertaking the necessary behaviors to sustain weight loss. In general, health messages must be carefully tailored to their target audience, be repeated frequently and vividly and include recommendations for action that can be easily implemented.⁴⁶ Ideally, health behavior change interventions will include specific action plans that can be tailored to each individual.⁴⁷

Mass media campaigns that inform individuals of the purported risks of being overweight and encourage people to eat healthy and exercise may be effective in making people believe that those things are important. But, there is a very large gap between attitudes and behavior, particularly for eating which is heavily influenced by environmental factors. Indeed, trying to

⁴³ SHELLEY E. TAYLOR, HEALTH PSYCHOLOGY, 125-127(1995).

⁴⁴ See generally, SHELLEY E. TAYLOR, HEALTH PSYCHOLOGY, 84 - 87 (3rd ed. 1995).

⁴⁵ David R. Buchanan, *Disquietudes*, in PUBLIC HEALTH LAW AND ETHICS: A READER 339, 339 (Lawrence O. Gostin, ed., 2002).

⁴⁶ *Id.*

⁴⁷ *Id.*

understand the gap between attitudes and behavior has occupied social psychologists for decades.⁴⁸

Obviously, though, having a general desire to lose weight and setting a specific goal to eat certain foods or get a certain amount of exercise cannot be the only thing necessary for people to accomplish those goals. Otherwise, there would not be such an extensive industry in diet and weight loss books. Changing eating and exercise behaviors requires enormous effort and may conflict with other goals, values and priorities. What foods we eat are influenced by a variety of factors, including cost, convenience, taste preference, early food experiences, and cultural values. Whether or not we exercise is influenced by time, weather, convenience and enjoyment, among other things. While health education programs may be able to modify our general attitudes towards weight loss, healthy eating and exercise, they cannot modify the vast majority of factors that influence our eating and exercise habits.

B. The Role of Structural Barriers in Preventing Healthy Eating and Exercise

Health education programs cannot address many of the barriers that keep people from exercising or eating a healthy diet. Adults in the United States are under increasing time pressures – working longer hours and at greater distances from their homes than ever before. Americans report that they spend approximately an hour and a half in their cars each day with an average one-way commute time of 26 minutes.⁴⁹ Increasingly, families live with a single parent or in a dual-earner home, leaving parents with little time to spend cooking nutritious meals. In many low-income neighborhoods it is hard to find healthy foods and, when they are available the

⁴⁸ See Alice H. Eagly & Shelly Chaiken, *Attitude Structure and Function*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 269 295-303; Peter Salovey, Alexander J. Rothman & Judith Rodin, *Health Behavior*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 633, 634-640.

⁴⁹ ABC News, ABC News Poll: Traffic in the United States, A Look Under the Hood of a Nation on Wheels, at <http://abcnews.go.com/Technology/Traffic/story?id=485098&page=1> (last visited December 5, 2006).

cost puts them out of reach of many families.⁵⁰ According to Texas Commissioner of Agriculture Susan Combs, “there’s a dearth of fruits and vegetables reasonably priced. Yet there’s cheap fast food. It’s certainly understandable why people opt for a burger for their 8-year-old-kid.”⁵¹

Education about healthy eating choices can do little to help those who cannot afford to buy fresh fruits and vegetable and who do not have the time or place to cook healthy meals.

Poor and minority communities are particularly affected by a lack of healthy options. Low-income neighborhoods are often devoid of supermarkets.⁵² Inability to get easily to supermarkets discourages people with limited resources from purchasing perishables, such as fresh fruit and vegetables and dairy products.⁵³ Supermarkets in low income and minority areas have less fresh fruits and vegetables than supermarkets in wealthier and primarily white neighborhoods. One comprehensive study in St. Louis, Missouri found that there were fewer supermarkets offering a large selection of fruits and vegetables in majority African-American neighborhoods than in majority white neighborhoods.⁵⁴ Similarly, the availability of fruits and vegetables in supermarkets decreased as area level income decreased.⁵⁵ In interviews, study participants reported that there were fewer produce and low fat options in supermarkets in primarily African-American neighborhoods and that they did not have “no-candy” checkout lanes, which were available in primarily white neighborhoods.⁵⁶ Fast food restaurants are more abundant in low-income neighborhoods than wealthier ones.⁵⁷ Without access to inexpensive easily prepared healthy foods, fast food and other high-calorie, high-fat options are the only

⁵⁰ Amy Winterfeld, *Overfed But Undernourished: Not Will Power, but Purchasing Power, May Determine Who Eats Healthy Foods*, STATE LEGISLATURES, Apr. 2005 at 34.

⁵¹ *Id.*

⁵² KELLY D. BROWNELL & KATHERINE BATTLE HORGEN, FOOD FIGHT 208-210 (2004).

⁵³ K. MARTIN, FOOD SECURITY AND COMMUNITY: PUTTING THE PIECES TOGETHER (2001).

⁵⁴ Elizabeth A. Baker, et al., *The Garden of Eden: Acknowledging the Impact of Race and Class in Efforts to Decrease Obesity Rates*, 96 AM. J. OF PUBLIC HEALTH 1170, 1172 (2006).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ BROWNELL & HORGEN, *supra* note 52 at 40.

available choice for many. Providing information on what is healthy without making healthy food accessible only increases the strain on already overburdened families.

The number of people working over 50 hours a week has increased and the average commute is now 45 minutes each way.⁵⁸ Eating out or ordering in is faster than cooking at home and restaurant food is generally high in fat and calories. Large portions encourage over-eating. Prepared supermarket foods are also more likely to be high in fat and calories than foods prepared at home. Even people who can afford healthier foods find that they do not have the time to prepare foods at home and eating at work or “on-the-go” contributes to over consumption and weight gain. Working more than 40 hours a week and feeling overwhelmed and exhausted by work is associated with weight gain.⁵⁹

People cannot exercise without safe and affordable places. Safe parks and sidewalks are not available in many areas, especially in predominantly low-income and minority neighborhoods.⁶⁰ Parents keep their children indoors, fearing for their safety if allowed to play outside unsupervised.⁶¹ Other studies have found that older adults, women and minorities believe that footpaths and other recreational areas for exercise are unsafe.⁶² Gym memberships

⁵⁸ JACOB GERSON, *THE TIME DIVIDE* 64 (2004); Sylvia Ann Hewlett, *Addressing the Time Crunch of Higher Earners*, in *UNFINISHED WORK: BUILDING EQUALITY AND DEMOCRACY IN AN ERA OF WORKING FAMILIES* 156, 162 (2005)..

⁵⁹ Lallukka T, Laaksonen M, Martikainen P, Sarlio-Lähteenkorva S, Lahelma E. *Psychosocial working conditions and weight gain among employees*. *INT J OBES* 2005

⁶⁰ TRANSPORTATION RESEARCH BOARD, INSTITUTE OF MEDICINE, *DOES THE BUILT ENVIRONMENT INFLUENCE PHYSICAL ACTIVITY? EXAMINING THE EVIDENCE* 3-8 (2004). *See also* Robert Garcia, Erica S. Flores & Sophia Meiling Chang, *Thirteenth Annual Symposium on Contemporary Urban Challenges: Urban Equity: Considerations of Race and the Road Towards Equitable Allocation of Municipal Services: Health Children, Healthy Communities: Schools, Parks, Recreation, And Sustainable Regional Planning*, 31 *FORDHAM URB. L.J.* 1267, 1286-1285. (2004).

⁶¹ U.S. Dept. of Health and Human Servc. and U.S. Dept. of Edu., *Promoting Better Health for Young People Through Physical Activity and Sports*, 11 (Fall 2001), available at http://www.cdc.gov/healthyyouth/physicalactivity/promoting_health/activity/promotinghealth/index.htm (last visited December 5, 2006).

⁶² TRANSPORTATION RESEARCH BOARD, *supra* note 60 at 4-6.

range from \$20 to \$80 a month, with the average person spending about \$360, for a one-year membership.⁶³ If gyms offer childcare, it is usually available only at an extra cost.

Lack of exercise options also disproportionately affects low-income neighborhoods. Low-income and poor neighborhoods are less likely to have parks.⁶⁴ They are more likely to have crime, making it unsafe to walk after dark. Children cannot play outside in crime-ridden neighborhoods. Suburban neighborhoods may also discourage exercise. The roads may be free of crime but they are often free of sidewalks, making it unsafe for pedestrians.

Health education programs, while making people aware of the benefits of weight loss do nothing to overcome the structural barriers that keep people from dieting or exercising. Common sense dictates that if information alone were enough to induce people to lose weight, the United States would not have an obesity problem. News coverage on the dangers of obesity is extensive. For example, an article in the Boston Globe begins with the opening sentence, “Obesity has become such a pervasive health threat that by the middle of this century it could reverse the long, steady rise in US life expectancy, a team of scientists report in a provocative study published today.”⁶⁵ On the same day an article in the Washington Post lead with, “Obesity has started to erode the gains Americans have made in extending their life spans and will stall the long trend toward increasing longevity unless the nation takes aggressive steps to slim down, researchers said yesterday.”⁶⁶ Americans are bombarded with the message that that they should eat healthy, exercise and watch their weight. Yet, obesity rates continue to rise. More information without structural changes will do little to help people actually eat healthy and exercise.

⁶³ Leslie Chu, *To Exercise at Home, or Away?* CHRISTIAN SCIENCE MONITOR, Sept. 26, 2001, at 18.

⁶⁴ Garcia et. al, *supra* note 60 at 1267 (2002).

⁶⁵ Raja Mishra, *Study Cites Obesity as Longevity Threat*, The Boston Globe, March 17, 2005, at A3.

⁶⁶ Ray Stein, *Obesity May Stall Trend in Increasing Longevity*, The Wash. Post, March 17, 2005, at A02.

C. *The Lure of High-Fat Food and The Distant Future*

Information based campaigns fail, in part, because they adhere to a rational actor model of behavior in which individual actors are assumed to act in their best interests by weighing the risks and benefits of a particular action.⁶⁷ Empirical research has cast much doubt on the validity of the rational actor assumption.⁶⁸ More recent analysis has recognized that people are not always rational actors and has thus applied research from cognitive psychology to illuminate how people behave in the real world. According to behavioral economics, people's rationality is bounded. Because our cognitive abilities are not infinite, we develop mental shortcuts to aid in information processing.⁶⁹ These shortcuts, though, lead to systematic errors in decision making. Food and exercise choices are particularly susceptible to problems of bounded rationality and environmental influences. For example, research shows that things such as accessibility, presentation and even the type of music being played easily affect people's eating habits.⁷⁰

Both the traditional economics and the behavioral economics approaches to the analysis of law assume that people choose their behaviors by acting upon their perceived preferences. Under the traditional economics approach, action elucidates preference. A person chooses option A over option B, because option A is more desirable. Current behavioral economics approaches hold that people's choices do not necessarily reflect actual preference. People may be unable to carry out their preferred course of action.⁷¹ For a variety of reasons, the link between attitude and behavior is often weak, especially when an attitude is general (e.g. I want to be

⁶⁷ Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1163 (2003).

⁶⁸ *Id.* at 167-170.

⁶⁹ See Christine Jolls, et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-1480.

⁷⁰ See generally, Brian Wansink, *Environmental Factors that Increase the Good Intake and Consumption Volume of Unknowing Consumers*, 24 ANNUAL REVIEW OF NUTRITION 455 (2004) [hereinafter *Unknowing Consumers*].

⁷¹ Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"* 151 U. PA. L. REV 1211, 1216 (2003).

healthy) and the behavior examined is specific (e.g. Exercise every day).⁷² They may have a general attitude and desire, to lose weight, for example, but translating that into the necessary series of successive action, such as eating less, consistently over time and exercising regularly, is extremely hard.

Eating is particularly susceptible to environmental influences, keeping people from acting on their long term preferences. According to food psychologist, Brian Wansink, people make an average of 200 eating decisions a day.⁷³ Not surprisingly, much of our eating behavior is determined by environmental cues of which we are largely unaware.⁷⁴ Further, we eat for a variety of reasons that have little to do with being hungry or conscious decision-making. Proximity to food, watching television, the number of people eating with us, the size of the package and the way food is presented all dramatically affect how much and when we eat.⁷⁵ As social and cognitive psychology have demonstrated, in many instances, particularly when preferences are weak or unknown, behaviors, such as eating, reflect the power of environmental cues rather than actual preference.

Research on humans and animals strongly suggests that, in general, people are predisposed to prefer high-fat, high-calorie foods.⁷⁶ When food was scarce, a preference for high-fat, high-calorie foods would have been beneficial. This preference for high-calorie food becomes dysfunctional, though, in the industrialized West where food is abundant and most activities are sedentary. The general preference for high-calorie food interacts with the current environment, which encourages over-consumption and discourages physical activity. According to a report on obesity by the Institute of Medicine, “The root of the problem . . . must lie in the

⁷² See SUSAN T. FISKE & SHELLY E. TAYLOR, SOCIAL COGNITION 510-524, (1991) for a more detailed discussion

⁷³ BRIAN WANSINK, MINDLESS EATING 1 (2006).

⁷⁴ *Unknowing Consumers*, *supra* note 70 at 456 – 458.

⁷⁵ See generally, MINDLESS EATING, *supra* note 73 at 1 – 9.

⁷⁶ BROWNELL & HORGAN, *supra* note 52 at 24-28 (2004).

powerful social and cultural forces that promote an energy rich diet and a sedentary lifestyle.”⁷⁷

It is impossible to fight a war on obesity without acknowledging the powerful cultural and environmental factors that have lead to increased food consumption and decreased exercise.

In general, people will eat what is most easily accessible and costs the least. At a minimum, one cannot eat what is not available. Vending machines, for example, rarely offer fruits or vegetables. For the person running between meetings, the father rushing to pick up his children at day care, or the student with five minutes between classes, vending machines may be all that are available. It is not surprising, then, that most people do not achieve long term dieting success.⁷⁸ Most federal government campaigns encourage constant monitoring of food without acknowledging the extent to which our food decisions are influenced by the environment, including our ability to purchase and eat healthy foods. To be successful, a person must constantly consider each individual food decision and turn away from accessible and affordable food while opting for more expensive and harder to get options. In doing so, the person must ignore what is likely an inherent desire for high-fat, high-calorie food.

Dieting in order to lose weight and live longer requires a person to override immediate impulses in favor of the long-term goal.⁷⁹ This, in turn, requires successive decision-making. One must actively chose what and when to eat, rather than accepting what is readily available. Over time, though, decision-making becomes exhausting and leads to “decision fatigue.”⁸⁰

⁷⁷ INSTITUTE OF MEDICINE, WEIGHING THE OPTIONS: CRITERIA FOR EVALUATING WEIGHT MANAGEMENT PROGRAMS 154 (1995).

⁷⁸ See generally W.C. Miller et al., *A meta-analysis of 25 Years of Weight Loss Research Using Diet, Exercise or Diet Plus Exercise Intervention*, in 21 Int. J. of Obesity 941 (1997).

⁷⁹ Roy F. Baumeister & Kathleen D. Vohs, *Willpower, Choice and Self-Control*, in TIME AND DECISION 209, (Lowenstein et. al, 2003).

⁸⁰ *Id.* at 208-209.

People's ability to exercise will-power can become similarly depleted.⁸¹ Given these constraints, it is hardly surprising that health behavior change is hard to maintain in the long-term.

Eating behavior is particularly susceptible to environmental and structural cues, which is, in part, why dieting fails. Unlike behaviors such as smoking or drug use, people cannot abstain entirely from eating. Eating should be a healthy and natural part of lives. In order to continuously diet, a person must constantly monitor their food intake. However, that is not done easily, particularly given the extent to which food consumption is affected by our environment. Environmental effects are further exacerbated because people do not believe that they are personally affected by their environment and are thus unaware of the effects and do not monitor them.⁸²

Dieting, and the conscious monitoring of food, as is suggested by most information campaigns, will often fail because people are often unaware of what influences their food choices and even when given information about environmental influences, find it hard to make the appropriate adjustments. For example, people's food consumption is strongly influenced by the way food is presented, including the size of the food container. In one study, people ate more stale popcorn when they were given a large container than when they were given a small container, even though they did not enjoy the popcorn.⁸³ Because of the horizontal-vertical illusion people will pour more into short wide glasses than tall narrow glasses.⁸⁴ The size of serving containers serves as cues for how much people should serve themselves and eat.⁸⁵

⁸¹ *Id.* at 209-210.

⁸² *Unknowing Consumers*, *supra* note 70 at 456.

⁸³ MINDLESS EATING, *supra* note 73 at 16-19.

⁸⁴ See Wasnik et al., *Ice Cream Illusions: Bowls, Spoons, and Self-Served Portion Sizes*, 31 AM. J. OF PREVENTIVE MEDICINE 240, 240 (2006) [hereinafter *Ice Cream Illusions*].

⁸⁵ *Ice Cream Illusions*, *supra* note 84 at 240. It is estimated that people eat 92% of the food that they serve themselves.

People given large bowls will serve themselves more ice cream than people given small bowls.⁸⁶ Using a larger serving spoon also increases the amount of ice cream consumed.⁸⁷ Importantly, even nutrition experts were unaware that the size of the bowl or serving spoon influenced the amount of food they served themselves.⁸⁸ Unfortunately, knowledge of the effect of serving size does not lead people to significantly alter their behavior.⁸⁹

Distraction can also lead to increased consumption. People may eat while they are watching television or reading, using external cues as a signal for how much they should eat rather than their internal cues of hunger and satiety.⁹⁰ Distraction may also keep people from accurately monitoring their food intake by directing their attention away from internal cues, such as hunger and satiety.⁹¹ In one study, people who listened to a detective story while eating ate more food than people who ate in silence.⁹² Another study found that the amount of popcorn people ate was positively correlated to the amount of attention they reported paying to the movie they were watching.⁹³ Distraction may also lead people to eat more food because certain activities are associated with eating.⁹⁴ For example, people eat hot-dogs at ballgames and popcorn at movies.⁹⁵ The participation in an event or activity may initiate a script that includes food consumption even if the person is not hungry. This is consistent with research that has

⁸⁶ *Id.* at 242.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* 243.

⁹⁰ *Unknowing Consumers*, *supra* note 70 at 463.

⁹¹ *Id.* at 463-464.

⁹² France Bellisle and Ann-Marie Dalix, *Cognitive Restraint can be Offset by Distraction, Leading to Increased Meal Intake in Women*, 74 AM. J. CLINICAL NUTRITION, 197, 199.

⁹³ *Unknowing Consumers*, *supra* note 70 at 464.

⁹⁴ *Id.* at 464.

⁹⁵ *Id.*

found that people who eat snacks while watching television report being less hungry than people who eat snacks when not watching television.⁹⁶

Time of day influences how much people eat. People are less satisfied by food in the evenings and thus prone to eat more.⁹⁷ Food consumption is also encouraged by the presence of other people. One other person at a meal can increase food consumption by 33%.⁹⁸ The presence of seven or more people can increase food consumption by 96%.⁹⁹ People also report that they choose when and how much to eat based on what other people are doing. They eat because they want to eat with other people and stop eating because others stop eating.¹⁰⁰ Drinking alcohol at meals also increase total food-energy intake.¹⁰¹

The basic information campaigns supported by the federal government tell people to eat less “bad” foods, eat more “good” foods, and get more exercise. These campaigns do little if anything to help people address how they eat in the real world. People take many of their meals away from – at work or school – where they have little control over food presentation, serving size, and even food choice.

The dieting advice provided in information campaigns may actually have detrimental affects on food consumption. People who are actively watching their food consumption and weight control (i.e. dieters) are more susceptible to environmental cues than other people.¹⁰² When dieters perform mental tasks, such as remembering long number, they will eat more than non-dieters, when the taste of the food is made salient.¹⁰³ The difficulty in monitoring food

⁹⁶ *Unknowing Consumers*, *supra* note 70464.

⁹⁷ John M. Castro, *Eating Behavior: Lessons from the Real World of Humans*. 16 NUTRITION 800, 803 (2000).

⁹⁸ *Id.* at 804.

⁹⁹ *Id.*

¹⁰⁰ *Unknowing Consumers*, *supra* note 70 at 455, 458 (2004).

¹⁰¹ Castro, *supra* note 97 at 805.

¹⁰² *Unknowing Consumers*, *supra* note 70 at 459.

¹⁰³ Traci Mann & Andrew Ward, *To Eat or Not to Eat: Implications of the Attentional Myopia Model for Restrained Eaters*, 113 J. OF ABNORMAL PSYCHOLOGY 90, 93-97 (2004).

consumption may also lead people to focus on food choices rather than overall food intake, leading to higher calorie consumption.¹⁰⁴ In one study, people correctly realized that dipping their bread in olive oil would lead to consuming more fat calories. However, they did not realize that they would compensate for the reduction by consuming 23% more bread and more calories.¹⁰⁵ Education campaigns that simply provide information can do little to help people modify their environment to promote healthy choices or give them the tools to make long term changes in food consumption. They also do not address the concrete barriers such as a lack of affordable fresh fruits and vegetables and low-fat food options.

Research on eating and food choices strongly suggests that, even when they have the appropriate dietary information, most people will be unable to consistently and correctly monitor their food intake over time. When it comes to food, people are simply not rational actors, choosing the foods that will be in their long-term best interests. Instead, people respond to immediate environmental cues and will often eat unconsciously.

In general, people will eat what is easiest and cheapest so that education is also not always necessary in order to modify dietary choices. Changes in the price of food can encourage healthy eating, underscoring the role of the environment in affecting health choices. For example, one study of the pricing of food in vending machines found that sales of low-fat snacks increased by 80% when the price of the low-fat snacks was reduced by 50%.¹⁰⁶ Reducing the prices of fresh fruits, vegetables, and salads has also been shown to increase the consumption of those foods.¹⁰⁷ Lowering the cost of fresh fruit and baby carrots by 50% doubled their sales in

¹⁰⁴ *Unknowing Consumers*, *supra* note 70 at 459.

¹⁰⁵ Brian Wansink & Lawrence R. Linder, *Interactions Between Forms of Fat Consumption and Restaurant Bread Consumption*, 27 INT'L J. OF OBESITY 866, 867 (2003).

¹⁰⁶ Simone A. French et al., *A Pricing Strategy to Promote Low-Fat Choices through Vending Machines*, 87 AM. J. OF PUB. HEALTH 849, 849-851.

¹⁰⁷ Simone A. French et al., *Pricing and Promotion Effects on Low-Fat Vending Snack Purchases: The CHIPS Study*, 91 AM. J. OF PUB. HEALTH 112, 112 (2001) [hereinafter *Pricing and Promotion*]. See also Simone A. French

school cafeterias.¹⁰⁸ In a review of the literature on price reductions and food consumption, epidemiologist Simone A. French and colleagues concluded that, “Reducing relative prices on low-fat snacks was effective in promoting lower-fat snack purchases from vending machines.”

¹⁰⁹ Another study that reviewed both pricing changes and in-school educational programs similarly found that “increasing the availability, reducing pricings and providing point of purchase promotions are effective strategies to increase choice of targeted foods.”¹¹⁰ Other research demonstrates that the removal of cost constraints in laboratory studies leads to over-consumptions of snacks, further supporting the notion that people are cost sensitive relative to food.¹¹¹

Eating and dieting are not simple behaviors and are affected by a variety of factors, many of which people are unaware. Research demonstrates that no matter how hard most people try and, even when they are aware of environmental factors that affect their food choices, they are simply not able to consistently, over long-periods of time control their eating. In fact, dieters are more susceptible to environmental cues than non-dieters. Given this, it is not surprising that the dearth of dieting advice and government sponsored information campaigns have had little positive effect on the rates of obesity and overweight in the United States.

D. The Ineffectiveness of Dieting

Americans spend countless hours trying to loose weight, reading about losing weight, and watching television shows about losing weight. As many as 50 million Americans are on a diet

et al., *Pricing Strategy to Promote Fruit and Vegetable Purchase in High School Cafeterias*, 97 J. AM. DIET. ASSOC. 1008, 1008-1010 (1997).

¹⁰⁸ Robert W. Jeffrey et al., *An environmental intervention to increase fruit and salad purchases in a cafeteria*, 23 PREVENTIVE MEDICINE 788, 788-792 (1994).

¹⁰⁹ Simone A. French et al., *A Pricing Strategy to Promote Low-Fat Choices through Vending Machines*, 87 AM. J. OF PUB. HEALTH 112 (2000).

¹¹⁰ Simone A. French & Gloria Stables, *Environmental Interventions to Promote Vegetable and Fruit Consumption Among Youth in School Settings*, 37 PREVENTIVE MEDICINE 593, 608 (2003).

¹¹¹ Castro, *supra* note 97 at 803.

at any given time.¹¹² In 2004, the weight loss industry market was estimated to be worth \$43.6 billion and was projected to increase to \$61 billion by 2008.¹¹³ Local television news programs regularly carry stories regarding the “obesity epidemic.” The reality television shows, *The Biggest Loser* and *Celebrity Fit Club*, have turned weight loss into competitions with rhetoric that only reinforces the notion that weight loss is simply a matter of will power and self-control.¹¹⁴ On the *Biggest Loser*, each week the team that loses the least amount of weight must choose a person from their team to eliminate from the game. In the show, people lose dramatic amounts of weight – following an intensive and closely supervised regimen that would not be possible outside the world of reality television. Program websites encourage viewers to participate in their diet and exercise programs.¹¹⁵ Despite all of this information, both public and private, most diets are unsuccessful.¹¹⁶

All of this dieting advice is of little use to people if they do not have the means to follow it. Government guidelines and information campaigns may only add to the stigma and discrimination faced by the overweight and obese. Even when people do follow the guidelines, weight loss is not guaranteed to follow. We have less control over our weight than many health education programs would lead us to believe. In fact, there is much debate among obesity experts as to the actual cause of the current obesity epidemic.¹¹⁷ Further, once weight has been gained it is notoriously hard to lose and keep off and the standard weight loss rhetoric that treats all people as the same with regard to weight loss fails to account for individual needs.

¹¹² Jeffrey Kluger, *Can You Be Fat & Healthy?*, Time Sunday, May 29 2005

¹¹³ See *U.S. Weight Loss Market Worth \$46.3 Billion in 2004 — Forecast to Reach \$61 Billion by 2008* available at <http://www.newstarget.com/006133.html> (last visited April 2, 2007). (This is the most recent date for which figures were available.)

¹¹⁴ See, *Celebrity Fit Club*, http://www.vh1.com/shows/dyn/celebrity_fit_club_4/series.jhtml (last visited December 5, 2006)

¹¹⁵ See, *The Biggest Loser Club*, <http://www.thebiggestloserclub.com> (last visited December 5, 2006).

¹¹⁶ Kluger, *supra* note 112.

¹¹⁷ OLIVER, *supra* note 3 at 22 – 27.

Not surprisingly, then, research on dieting and weight loss has demonstrated that dieting is not necessarily an effective means of weight loss.¹¹⁸ A meta-analysis of 25 years of weight loss research, found that diet and exercise are not effective means of achieving long term weight loss, although exercise appears to have an independent positive effect on health.¹¹⁹ In fact, many researchers view dieting as a cause of, not a cure for, weight gain. For example, in one study, women who were dieting at baseline or who had a history of dieting gained more weight after two years than those who did not have a history of dieting.¹²⁰ Another review found that non-surgical weight loss programs for the obese did not lead to long-term clinically relevant weight loss.¹²¹

The extent to which weight is actually under individual control is also not clear. Several studies have found that genes account for more of the variance in body weight than environment.¹²² In addition twin studies have demonstrated that genetics plays an important role in determining weight.¹²³ Twins raised apart are as likely to have similar body weights as twins raised together.¹²⁴ Other people appear to have a “thrifty” gene that makes it easy to gain weight

¹¹⁸ W.C. Miller, *Fitness and Fatness in Relation to Health: Implications for a Paradigm Shift*, in 55 J. OF SOCIAL ISSUES 207 (1999).

¹¹⁹ W.C. Miller et al., *supra* note 78 at 941.

¹²⁰ Simone A. French, Robert W. Jeffery, Jean L. Forster, *Dieting Status and Its Relationship to Weight, Dietary Intake and Physical Activity Changes Over Two Years in a Working Population*, 2 OBESITY RESEARCH 135, 135-144, (1994).

¹²¹ Jeanine C. Cogan & Esther D. Rothblum, *Outcomes of Weight-Loss Programs*, 18 GENETIC, SOCIAL AND GENERAL PSYCHOLOGY MONOGRAPHS, 385, 407-408 (1993). According to the authors weight loss claimed as successful even when it does not lead to significant weight change. “What does it mean for a woman weight 189.5 lbs. to engage in a comprehensive program for a period of 13 weeks to find herself weight 179.8 almost 10 months after the start of this endeavor? Is this less-than-minimal weight loss worth the time, energy, emotion, and perhaps money that she is spending? Was she promised more hopeful results? How does she experience this 10 lb. loss? Because research indicates that the obese are held responsible for their condition, did she internalize her lack of continued weight loss? Given negative attitudes that others hold of the obese, did peers and family view her as a failure? (internal citations omitted).

¹²² A.J. Stunkard et al., *The Body Mass Index of Twins Who have Been Reared Apart*, 322 NEW ENG. J. MED. 1482 (1990) [hereinafter Stunkard, *Body Mass Index*]; A.J. Stunkard et al., *A Twin Study of Human Obesity*, 256 JAMA 51 (1986).

¹²³ *Id.* at 122.

¹²⁴ *Id.*

and store fat as a protection against times of famine.¹²⁵ Other research has found a link between obesity and viruses.¹²⁶ This suggests that, at least for some people, diet and exercise will not lead to the weight loss that is being recommended.

The research on environmental cues and food choices strongly suggests that information campaigns that tell people what they should (or should not) eat will likely be ineffective. Food consumption simply cannot be monitored in the same way that people can monitor and, thus avoid activities like smoking, using tanning booths, taking illegal drugs or even drinking alcohol. Given the extent to which our eating choices are influenced by the environmental and other situational factors, it is not surprising that most diets are ultimately unsuccessful. Eating decisions are not easily amenable to the kind of conscious decision making that is advocated in most government sponsored information campaigns. In fact, the act of continuously trying to control and monitor food choices may lead to increased food consumption and binge eating. Information is simply not enough to encourage weight loss. Further, it is unclear that the types of behaviors being promoted will actually lead to weight loss or allow people to maintain a healthy weight. The information itself may encourage the unrealistic belief that weight is completely mutable and reinforce negative stereotypes about the overweight and obese.

II. Moralization: The Consequences of the War on Obesity

American's commitment to individual autonomy and limited government supports public health regulation that imposes the fewest restrictions on individual behavior as possible. Consequently, public health activities aimed at modifying individual behavior that does not harm

¹²⁵ Paul Ernsberger & Richard J. Koletsky, *Biomedical Rationale for a Wellness Approach to Obesity: An Alternative to a Focus on Weight Loss*, in 55 J. SOCIAL ISSUES 221 (1999).

¹²⁶ Frank Greenway, *Virus-induced Obesity*, 290 AM J. OF PHYSIOLOGY – REGULATORY, INTEGRATIVE & COMPARATIVE PHYSIOLOGY, R188, R188-R189 (2006); *See also* Leah D. Whigham, Barbara A. Israel & Richard L. Atkinson, *Adipogenic Potential of Multiple Human Adenoviruses In Vivo and In Vitro in Animals*, 290 AM J. OF PHYSIOLOGY – REGULATORY, INTEGRATIVE & COMPARATIVE PHYSIOLOGY, R190, R193-R194 (2006).

others typically take the form of information provisions.¹²⁷ Such regulations include mandated warnings on harmful products and dietary information on packaged foods. They also include public health education campaigns intended to encourage healthy behaviors and discourage unhealthy ones.

Conventional wisdom typically holds that public health campaigns are harmless ways to provide information that will enable the public to make healthy choices. However, the focus on the individual with exhortations to exercise and eat healthy food obscures the role of the environment and encourages negative attitudes towards the overweight. This is particularly problematic given the way in which weight and health have been connected to patriotism and morality in the United States.

A. Moralizing about Health and Weight

In the United States, beliefs about health are intimately linked to a sense of individualism, in which all people have both the right and the responsibility to take charge of their health.¹²⁸ Today, being overweight is viewed as a moral failing.¹²⁹ Fat people are thought to be lazy and responsible for their own condition.¹³⁰ People who eat a healthy diet are thought to be “good” people with the appropriate amount of self-control and individual responsibility. These views are encouraged by information based campaigns that treat weight loss as simply a matter of eating the right foods and getting enough exercise without giving attention to how the environment may

¹²⁷ Mandatory seat belt and helmet laws are the exceptions to this general rule. Recent movements in many states seek to overturn motorcycle helmet laws, relying upon an individual rights’ argument. Quarantine laws, which do restrict individual freedoms, are aimed specifically at keeping sick individuals from infecting others.

¹²⁸ Allan M. Brandt, *Behavior, Disease, and Health in the Twentieth-Century United States: The Moral Valence of Individual Risk*, in MORALITY & HEALTH 53, 64 (Allan M. Brandt & Paul Rozin, eds. 1997).

¹²⁹ Christian S. Crandall, *Prejudice Against Fat People: Ideology and Self Interest*, 66 J. OF PERSONALITY & SOCIAL PSYCHOLOGY 882, 891-892 (1994); Diane M. Quinn & Jennifer Crocker, *When Ideology Hurts: Effects of Belief in the Protestant Ethic and Feeling Overweight on the Psychological Well-Being of Women*, 77 J. OF PERSONALITY & SOCIAL PSYCHOLOGY 402, 403-404.

¹³⁰ Crandall, *supra* note 129 at 883.

make doing those things impossible or the role the role of genetics in determining actual weight. This is exacerbated by government messages that treat weight loss as a moral imperative.

These links between morality and health are rooted in traditional beliefs about the cause of illness and predate modern understandings of germ theory. The Seven Deadly Sins were associated with specific pathological conditions of the body: Pride caused tumors; sloth – dead flesh and palsy; gluttony – dropsy and a large belly; lust – pox, leprosy and discharges; avarice – gout; envy – jaundice, venom and fever; wrath – frenzy and madness. In early modern England, illness was often interpreted as both a punishment from God and a sign that people should change their behaviors.¹³¹ Native Americans' deaths from disease were seen by many as indicators that the Pilgrims were more worthy of the land.¹³² This was consistent with sixteenth century conceptions of illness which viewed disease as a punishment from God for impure living.¹³³

Historically, beliefs that achieving worldly success and protecting the body are moral imperatives have reinforced the connection between health and morality in the United States. For example, prohibitions against suicide were predicated on the belief that individuals should not do anything to shorten their life. People who endangered their health were seen as self-indulgent.¹³⁴ Consistent with individualistic ideologies, 17th and 18th century guides to longevity and health emphasized personal control and moderation. Women and men were advised to

¹³¹ Keith Thomas, *Health and Morality in Early Modern England*, in *MORALITY & HEALTH* 15, 16-17 (Allan M. Brandt & Paul Rozin, eds., 1997).

¹³² J.W. Lowen *LIES MY TEACHER TOLD ME* (1995).

¹³³ Thomas, *supra* note 131 at 17.

¹³⁴ *Id.*

control all aspects of their lives: diet, exercise, sleep, evacuations, and emotions.¹³⁵ As today, physical exercise was thought to be important and virtuous.¹³⁶

Although the United States is a secular society, it nevertheless has a history of appealing to moral codes as a way to understand current behavior.¹³⁷ Moralization allows for a redefinition of particular behaviors so that what was once considered an individual preference becomes a moral imperative.¹³⁸ For example, cigarette smoking in the United States is no longer considered an individual choice but is rather seen as part of a larger moral context in which smoking is potentially dangerous to “innocent” bystanders and costly to taxpayers who must pay the bill for medical expenses.¹³⁹ Moralization changes the status of a particular activity and gives beliefs about the activity the power to influence lives.¹⁴⁰ Moral arguments provide the opportunity to enact legal means of regulating a behavior. Social sanctions and public censure become acceptable.

The moral overtone of the information based campaigns against obesity reinforces negative stereotypes about the overweight and obese and treats overweight and obesity as a moral failing. This is particularly problematic given that information based campaigns do nothing to help people overcome the structural barriers and environmental influences that make consistent healthy eating and exercise nearly impossible for many. `

In times of crisis, the federal government has called upon citizens to protect their health to protect the very security of the country. During World War II, people were directed to care

¹³⁵ Charles Rosenberg, *Banishing Risk: Continuity and Change in the Moral Management of Disease*, in *MORALITY & HEALTH* 35, 40-41 (Allan M. Brandt & Paul Rozin, eds., 1997).

¹³⁶ Thomas, *supra* note 131 at 17.

¹³⁷ Solomon Katz, *Secular Morality*, in *MORALITY & HEALTH* 297, 301-302 (Allan M. Brandt & Paul Rozin, eds., 1997)

¹³⁸ Paul Rozin, et. al. *Moralization And Becoming A Vegetarian: The Transformation Of Preferences Into Values And The Recruitment Of Disgust*, 8 *PSYCHOLOGICAL SCIENCE* 67, 67-73 (1997).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

for their health because the United States needed strong citizens. Similarly, in December of 2001, Secretary of Health and Human Services Tommy Thompson asked that all Americans lose ten pounds as part of the “war on terror”.¹⁴¹ This rhetoric makes maintaining a certain weight a necessary and important part of being an American citizen.

This treatment of health as an individual responsibility and patriotic imperative is not neutral in its effects. While guidelines and recommendations are certainly useful, they carry with them the implication that illness is caused by individual bad behavior. In the area of weight and obesity, this raises particular concerns given already negative attitudes towards the overweight and the relationship between overweight and socio-economic status. Further, the federal government’s messages have created a sense that United State’s citizens have a moral and patriotic duty to maintain their weight and fitness.

B. The Federal Government’s Role in Dietary Guidance

The federal government became involved in making dietary guidelines because of the threat that malnutrition posed to the public health and, consequently, the nation’s security. Public health law scholar Lawrence O. Gostin notes that the federal government’s responsibility for public health is rooted in the Constitution.¹⁴²

We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and or Posterity, do ordain and establish the Constitution.¹⁴³

141 Press Release, U.S. Department of Health and Human Services, Overweight and Obesity Threaten U.S. Health Gains: Communities Can Help Address the Problem, Surgeon General Says, *available at* <http://www.hhs.gov/news/press/2001pres/20011213.html>.

¹⁴² LAWRENCE O.GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY AND RESTRAINT 9 (2000)

¹⁴³ U.S. CONST. pmb1.

The preamble to the Constitution thus asserts that providing “for the common defense” and promoting “general Welfare” are among the primary functions of the federal government. According to Professor Gostin, the phrases “common defense” and “general welfare” refer not only to the physical security of the state, but also to public health, as epidemic diseases and other health problems were among the greatest threats to civil society during the founding era.¹⁴⁴ According to public health law scholar, Wendy Parmet, the early government of the United States regulated public health in order to protect society from disorder.¹⁴⁵ In an era of frequent epidemics and disease outbreaks, “[p]ublic health was a prerequisite to public safety.”¹⁴⁶ This sense of public health as necessary to public safety has continued today even as major health threats have shifted from acute to chronic diseases that have lifestyle and environmental components.

Today, Gostin contends that public health law regulation is justified on three important grounds. First, membership in a political community includes an obligation for members of that community to provide for the basic security and welfare of the community. Second, coordinated effort on behalf of the community (as opposed to individual efforts) is necessary to protect the public health. Third, health is necessary for people to participate fully in the social, economic and political life of the community.¹⁴⁷

Parmet asserts a role for government intervention in public health based on social contract theory.¹⁴⁸ Broadly speaking, under social contract theory people consent to be governed in exchange for the expectation that the government will act to protect the common good.¹⁴⁹ At

¹⁴⁴ *Id.*

¹⁴⁵ Wendy E. Parmett, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L. Q. 267, 313-314 (1992).

¹⁴⁶ *Id.* at 314.

¹⁴⁷ GOSTIN, *supra* note 142.

¹⁴⁸ Parmett, *supra* note 145, at 308.

¹⁴⁹ *Id.* See also RONALD PETERS JR., THE MASSACHUSETTS CONSTITUTION OF 1780 136-38 (1978).

the time of the American Revolution, both republicans and liberals, saw the state as having an inherent duty to protect the common good.¹⁵⁰ “Thus we see that both reason and relation perfectly agree in pointing out the nature, end, and design of government, viz., that it is to promote the welfare and happiness of the community,” stated Samuel West in 1776.¹⁵¹

In an era of mass epidemics, protecting the public good and providing security must have included public health protections.¹⁵² Thus, the expectation that the state bore some responsibility for the protection of public health was present at the very founding of the United States. According to Dan Beauchamp, government responsibility for public health is rooted in a constitutional tradition that understands government to have an obligation to protect the common good.¹⁵³ “The common good refers to the welfare of individuals considered as a group, the public or the public generally, the ‘body politic’ . . . The public or the people were presumed to have an interest, held in common, in self-protection or preservation from threats of all kinds to their welfare.”¹⁵⁴ Protecting public health is part of protecting the public good.

The notion of public health as being necessary to public safety and national security has continued to the present day and has come to include not just a concern with infectious disease and sanitation, but also with the “fitness” of the American citizenry. As has been discussed, the federal government’s approach to the war on obesity has been largely through information-based campaigns. However, a true commitment to promoting public health must include a commitment to utilizing the most effective programs. Public health programs should not stigmatize the very individuals they purportedly seek to help. Treating fitness and health as a patriotic duty and not

¹⁵⁰ Parmett, *supra* note 145, at 308.

¹⁵¹ *Id.* at 309 (quoting Samuel West).

¹⁵² *Id.* at 313.

¹⁵³ Dan Beauchamp, *Community: The Neglected Tradition of Public Health*, in PUBLIC HEALTH LAW AND ETHICS: A READER 76, 77-78 (Lawrence O. Gostin, ed., 2002).

¹⁵⁴ *Id.*

just a matter of individual choice, without providing the means by which people can actually make healthy choices is ultimately counterproductive and works against the basic tenets upon which public health regulations are based. These programs detract from rather than promote the public good.

Under the current understanding of the war on obesity, the purported costs of obesity are considered a drain on American finances and an unfit citizenry is not prepared to be competitive in the global market. Indeed, obesity rates have increased dramatically in recent years. The percentage of American considered obese has doubled since 1980.¹⁵⁵ According to the Surgeon General's 2001 report that accompanied the *Call to Action to Prevent and Decrease Overweight and Obesity*, 61% of adults in the United States in 1999 were overweight or obese (27% of adults were considered obese).¹⁵⁶ Further, many health practitioners and experts consider obesity to be a major medical problem. According to some estimates, obesity may contribute to as many deaths as poverty, smoking, or problem drinking.¹⁵⁷ Overweight and obesity are associated with an increased risk of developing heart disease, Type II diabetes, and certain types of cancers.¹⁵⁸ Even moderate weight gain may be associated with increased risks of disease. A 10 to 20 pound gain in weight is associated with 1.25 times greater chance of suffering from coronary heart disease in women¹⁵⁹ and 1.6 times greater chance for men.¹⁶⁰ Similarly, an 11 to 18 pound

¹⁵⁵ CALL TO ACTION, *supra* note 2 at XIII.

¹⁵⁶ *Id.*

¹⁵⁷ R. Strum & K.B. Wells, *Does Obesity Contribute as Much to Morbidity?*, 115 PUBLIC HEALTH 229, 231

¹⁵⁸ PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH. CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS (1998) at 12 – 19 [hereinafter PUBLIC HEALTH SERVICE (1998)]

¹⁵⁹ W.C. Willet et al. *Weight, Weight change, and Coronary Heart Disease in Women: Risk Within the 'Normal' Weight Range*. 273 J. THE AMERICAN MEDICAL ASSOCIATION (1995) 461, 464.

¹⁶⁰ D.J. Galanis et. al, *Relative Weight, Weight Change, and Risk of Coronary Heart Disease in the Honolulu Heart Program*, 146 AMERICAN J. OF EPIDEMIOLOGY (1997) 379, 382.

weight increase is associated with a doubled risk of developing Type II diabetes, as compared to people who have not had similar weight gains.¹⁶¹

Proponents argue that the health risks of obesity and overweight and their attendant costs to society make government action necessary. According to Edward Sondick, Director of the Centers for Disease Control and Prevention's (CDC's) National Center for Health Statistics in 2001 these costs of obesity and overweight exceeded \$100 billion, including medical expenditures and lost wages.¹⁶² About half of the medical expenditures (approximately \$75 billion in 2003) are paid for by taxpayers through Medicare and Medicaid.¹⁶³

As the apparent costs associated with obesity and overweight have garnered greater attention it is not surprising that the federal, state and local governments have joined the fight against obesity. Food regulation and education are part of government attempts to promote public health that date back to the founding era, when disease was as great a threat to security and public welfare as was war.¹⁶⁴ Similarly, today, obesity and overweight are presented as threats to the overall economic security of our country, justifying government interference.¹⁶⁵

Although the expected cost of obesity reasonably supports government action, the focus on costs and individual level change, without additional supports increases the stigma experienced by the overweight. This is particularly problematic given the already existing tendency to moralize health and weight in the United States. It encourages a belief that the overweight and obese are not good citizens and are solely responsible for their situation without paying enough attention to the environmental and societal influences that have created a society

¹⁶¹ E.S. Ford et. al. *Weight Change and Diabetes Incidence: Findings from a National Cohort of U.S. Adults*. 146 AMERICAN JOURNAL OF EPIDEMIOLOGY (1997) 214, 216.

¹⁶² PROGRESS REVIEW *supra* note 2; See also CALL TO ACTION, *supra* note 2.

¹⁶³ Amy Winterfeld, *Overfed But Undernourished: Not Will Power, but Purchasing Power, May Determine Who Eats Healthy Foods*, STATE LEGISLATURES, Apr. 2005, at 35.

¹⁶⁴ Wendy E. Parmett, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L. Q. 267, 313-314 (1992).

¹⁶⁵ Overweight and Obesity, *supra* note 8.

in which obesity has become so prevalent. If obesity and overweight do pose a threat to American society, it is imperative that the federal government invests in programs and actions that will be effective in combating the threat.

C. The Origins of the Federal Government's Dietary Guidelines

The history of the federal government's role in promoting particular diets and exercises shows how health, fitness and national security have been linked. The USDA was created in 1862 and given the twin roles of ensuring that the United States had a sufficient and reliable food supply and to provide dietary advice.¹⁶⁶ After conducting studies on the relationship between nutrition and agriculture, in the 1890's, the USDA published tables listing the calories, protein, carbohydrate, fat, and "mineral matters" in common foods.¹⁶⁷ In addition, the director of research activities, W.O. Atwater estimated the amounts of food needed for people in different occupations to obtain their nutrient requirements.¹⁶⁸ He concluded that "the general impression of hygienists is that our diet is one-sided and that we eat too much . . . fat, starch, and sugar."¹⁶⁹ In the early twentieth century, when scientists began to identify the structure and function of vitamins, the USDA incorporated vitamin advice into its educational materials.¹⁷⁰ The concern at the time was that Americans were not consuming *enough* food or were not getting the right kinds of food to adequately support their health.

In 1940, as World War II approached, the National Academy of Sciences created a committee to advise the federal government regarding nutrition issues that might affect national

¹⁶⁶ MARION NESTLE, FOOD POLITICS 33(2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (quoting W.O. ATWATER, FOODS: NUTRITIVE VALUE AND COST 25 (1894)).

¹⁷⁰ NESTLE, *supra* note 166 at 33-34.

defenses.¹⁷¹ In May 1941, the committee issued the first Recommended Dietary Allowances (RDAs).¹⁷² The committee produced revisions in 1943 and similar committees continue to revise the RDAs every five to ten years.¹⁷³ During WWII, the USDA explicitly linked the dietary habits of individuals to national security. The *National Wartime Nutrition Guide* told Americans, “U.S. needs us strong: Eat the Basic 7 every day.”¹⁷⁴

In the 1950’s, the USDA created a new, simplified food guide after it found that Americans were not getting the necessary nutrients.¹⁷⁵ The *Basic Four*, as it was popularly known, urged Americans to eat specified servings from each of the four identified food groups: milk, meats, vegetables and fruits; and bread and cereals.¹⁷⁶ Various versions of the *Basic Four* were used until the 1970’s.¹⁷⁷

The Department of Health, Education and Welfare (HEW) (now the Department of Health and Human Services, HHS) issued *Healthy People* in 1979, a report from the surgeon general that sought to encourage “a second public health revolution in the history of the United States.”¹⁷⁸ This was the first in a series of ten year plans by the Public Health Service that set goals and outlined strategies for improving American’s health. The plan included a section on nutrition that encouraged Americans to eat more complex carbohydrates, more fish, more poultry and less red meat.¹⁷⁹ In addition, a joint commission created by the USDA and HHS issued the

¹⁷¹ NESTLE, *supra* note 166 at 35.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* (quoting WAR FOOD ADMINISTRATION USDA, NATIONAL WARTIME NUTRITION GUIDE, (1942)).

¹⁷⁵ NESTLE, *supra* note 166 at 36-37.

¹⁷⁶ Carole Davis & Etta Saltos, *Dietary Recommendations and How they Have Changed Over Time, in AMERICA’S EATING HABITS: CHANGES AND CONSEQUENCES* 36 (Elizabeth Frazao ed., 1999) available at <http://www.ers.usda.gov/publications/aib750>.

¹⁷⁷ NESTLE, *supra* note 166 at 36-37.

¹⁷⁸ *Id.* at 43.

¹⁷⁹ *Id.*

first edition of *Nutrition and Your Health: Dietary Guidelines for Americans* in 1980.¹⁸⁰ Since 1980, guidelines have been issued jointly by the USDA and HHS every five years.¹⁸¹

The *Dietary Guidelines for Americans* included a table of sex specific weights for given heights.¹⁸² The weights and heights were based on recommendations published in the proceedings of 1973 NIH conference on obesity, which were modified from the 1959 Metropolitan Life Insurance Company (MLIC) desirable weights for men and women.¹⁸³ These weights had been developed using distributions of weight and heights associated with minimal mortality among individuals who had purchased life insurance policies from 26 insurance companies from 1935 to 1954.¹⁸⁴ National weight prevalence estimates were reported for the first time in the 1984 *Health in the United States*, which is presented annually to the President and Congress by the HHS Secretary.¹⁸⁵ At the time, overweight was defined as weighing above the 85th percentile for one's sex as established by the national Health and Nutrition Examination Survey (1976-80).¹⁸⁶

After extensive development and some controversy, the *Food Guide Pyramid*, was released on April 28, 1992.¹⁸⁷ In 1990, the National Nutrition Monitoring and Related Research Act, for the first time, mandated that the USDA and HHS issue the *Dietary Guidelines*.¹⁸⁸ In the past, they had been issued voluntarily.¹⁸⁹ Each edition of the *Dietary Guidelines* has included

¹⁸⁰ Davis & Saltos, *supra* note 176 at 37.

¹⁸¹ *Id.* at 40.

¹⁸² Robert J. Kuczmarski & Katherine M. Flegal, *Criteria for Definition of Overweight in Transition: Background and Recommendations for the United States*, *AM J. CLINICAL NUTRITION* 1074, 1075 (2000) (citing U.S. DEPT. OF AGRICULTURE & U.S. DEPT OF HEALTH AND HUMAN SERVICES, *NUTRITION AND YOUR HEALTH: DIETARY GUIDELINES FOR AMERICANS* (1980)).

¹⁸³ *Id.* at 1075.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (citing NATIONAL CENTER FOR HEALTH STATISTICS, PUBLIC HEALTH SERVICE. *HEALTH UNITED STATES* (1985)).

¹⁸⁶ *Id.*

¹⁸⁷ NESTLE, *supra* note 166 at 63.

¹⁸⁸ 7 U.S.C. 5341.

¹⁸⁹ Davis & Saltos, *supra* note 176 at 44.

some criteria for “desirable” weights and is generally considered to constitute the official weight guidelines for federal agencies.¹⁹⁰ The weight recommendations in the current version of the *Dietary Guidelines* established weight cutoffs using the Body Mass Index, which is a height-to-weight ratio. According to the supporting documentation for the guidelines, the cutoff defining overweight (BMI < 25) was chosen because, according to the most current evidence at that time, a BMI greater than that was associated with an increase in morbidity and mortality.¹⁹¹ Obesity is defined as a BMI greater than 30. This is consistent with international guidelines established by the World Health Organization, which are based on epidemiological studies that indicate greater morbidity and mortality with a higher BMI.¹⁹²

The most recent version of the *Food Pyramid*, called *MyPyramid* was released on April 19, 2005.¹⁹³ *MyPyramid* is based on the 2005 *Dietary Guidelines* and, for the first time, includes a reference to exercise, as symbolized by a person climbing steps at the top of the pyramid. The *MyPyramid* program includes a website (MyPyramid.gov) that provides some personalized food recommendations.¹⁹⁴

The dietary guidelines issued by the federal government developed, in part, because the USDA interpreted its mandate to include providing dietary advice. Similarly, HEW interpreted its mandate to provide for health and welfare to include providing the American people with the information necessary to maintain a healthy diet. These understandings developed in conjunction with other governmental goals, including preventing the spread of diseases, fighting poverty and protecting national security. However, the focus on weight loss as a moral and

¹⁹⁰ Kuczmarski & Flegal, *supra* note 182 at 1077.

¹⁹¹ *Id.*

¹⁹² *Id.*; World Health Organization, Regional Office for Europe, Nutrition and Obesity, Body Mass Index, at http://www.euro.who.int/nutrition/20030507_1.

¹⁹³ Press Release, USDA, Johanns Reveals USDA’s Steps to a Healthier You (April 19, 2005) (on file with author).

¹⁹⁴ *Id.* See also <http://www.MyPyramid.gov>.

patriotic imperative has the potential to increase stigma and discrimination against the overweight and the obese if people are unable to undertake the necessary behaviors that would lead to effective weight loss and maintenance.

III. Stigmatizing the Overweight and Obese

Government sponsored health education campaigns have the full force of government authority behind them. The messages in these programs will be given special consideration because of their source and so must be considered in light of their potential for unintended influences. Health programs that target weight risk stigmatizing overweight people. Being overweight or obese has traditionally been viewed as a failure of self-control. People are thought to be fat because they overindulge in food and refuse to exercise.¹⁹⁵ Health education programs directed at weight loss tend to emphasize the controllability of weight. Certainly, the focus of most weight-loss programs is self-control, discipline and dieting.¹⁹⁶

Emphasizing control, though, has the attendant consequence of placing blame on those who are overweight. Already, overweight people face discrimination and stigma in the workplace and other areas of their lives. The emphasis on control further risks stigmatizing diseases that are related to overweight and obesity, such as diabetes and high-blood pressure. Education programs that focus on the links between weight and disease and the ability to control weight create a causal chain. People develop diabetes because they are overweight. They are overweight because they do not have self-control. This type of reasoning has potential consequences for what types of health policies and funding people are willing to support. If people can avoid diseases simply by losing weight, why should the government fund other

¹⁹⁵ Jeanine C. Cogan & Paul Ernsberger, *Dieting, Weight, & Health: Reconceptualizing Research & Policy*, 55 J. OF SOCIAL ISSUES 187, 187-205 (1999).

¹⁹⁶ Kelly D. Brownell, *Personal Responsibility And Control Over Our Bodies: When Expectation Exceeds Reality*, 10 HEALTH PSYCHOLOGY 303, 303-310 (1991).

treatments or research? Similar reasoning was thought to have profound consequences for the AIDS epidemic.¹⁹⁷ It also creates unrealistic expectations about the extent to which our health is under our control.

The overweight and obese already face discrimination in the workplace and a host of negative societal attitudes.¹⁹⁸ Much of people's negative attitudes towards the obese and overweight stems from the belief that the obese and overweight are responsible for their situation. This belief is reinforced by government sponsored health education campaigns that overemphasize the ease at which weight loss can be accomplished and maintained.

The stigma can be especially strong for children who may be bombarded by messages in their schools. Children who receive weight "report cards" may misinterpret the information, such as a six year old first grader who scored in the 80th percentile in the body mass index, which is normal, but nevertheless believed that she was being chastised for overeating by her teachers.¹⁹⁹ A mother of a child who was said to be "at risk of overweight" complained, "The school provides us with this information with no education about how to use it or what it means."²⁰⁰ The information is of little use without both education and the means to actually undertake the changes that are recommended.

Attitudes towards fat people are linked to beliefs about personal responsibility and individualism. Anti-fat attitudes are correlated with conservative attitudes and beliefs that individuals are generally responsible for their own lot in society.²⁰¹ While encouraging some

¹⁹⁷ Lawrence O. Gostin, *Health Promotion: Education, Persuasion, and Free Expression*, in PUBLIC HEALTH LAW AND ETHICS: A READER 335, 338 (Lawrence O. Gostin, ed., 2002).

¹⁹⁸ R. M. Puhl and K. D. Brownell, *Psychosocial Origins of Obesity Stigma: Toward Changing A Powerful and Pervasive Bias* 4 OBESITY REVIEWS 213, 214 (2003); *See generally*, Jane Bteff Korn, FAT, 77 B. U.L. REV. 25 (1997). R. Puhl, K.D. Brownell *Obesity, Bias & Discrimination*. 9 OBESITY RESEARCH 788, 788-805) (2001).

¹⁹⁹ Jodi Kantor, In Obesity Fight, many Fear a Note From School, NY TIMES (January 8, 2007).

²⁰⁰ *Id.*

²⁰¹ Crandall, *supra* note 129 at 891-892. *See also*, Christian S. Crandall & Rebecca Martinez, *Culture, Ideology, and Anti-Fat Attitudes*, 22 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 1165, 1165-1176 (1996).

healthy behaviors, government programs that focus primarily on changing individual habits without providing the means by which to change those habits only reinforce the negative attitudes towards the obese and overweight without doing much to without doing much to promote public health. Psychologists Christian Crandall and Monica Biernat argue that anti-fat attitudes may be a manifestation of a set of conservative ideologies that includes low tolerance for deviations from established norms and contribute to an “ideology of blame”.²⁰²

Not surprisingly, the obese and overweight face a variety of forms of discrimination. Field and laboratory studies have found that obese people are less likely to be hired than thin people.²⁰³ Obese employees are perceived to be less competent, lazier and less self-disciplined than thin employees.²⁰⁴ People report not wanting to work with overweight individuals and freely admit that body size negatively affected their perceptions.²⁰⁵ Other studies have found that after viewing videos of equally qualified job applicants, raters preferred normal weight to overweight applicants.²⁰⁶ Another study found that, after controlling for facial attractiveness and job qualifications, body weight accounted for approximately 35% of the variance in hiring decisions.²⁰⁷ Overweight employees are also disciplined more harshly for employment related infractions than normal weight employees.²⁰⁸ Parents of overweight children provide them with

²⁰² Chris Crandall and Monica Biernat, *The Ideology of Anti-fat Attitudes*, 20 J. OF APPLIED SOCIAL PSYCHOLOGY 227, 227-243 (1990).

²⁰³ Roehling MV. *Weight-based Discrimination in Employment: Psychological and Legal Aspects*. 52 PERS PSYCHOLOGY 969, 969-1017 (1999).

²⁰⁴ RJ Paul & SB Townsend, *Shape up or Ship out? Employment Discrimination Against the Overweight*. 8 EMPLOYEE RESPONSIBILITIES RIGHTS JOURNAL 133, 133-145 (1995).

²⁰⁵ C.R. Jasper & M.L. Klassen, *Perceptions of Salespersons' Appearance: Implications for Retailing and Consumer Issues*, 71 PERCEPTUAL AND MOTOR KILLS, 519, 519-528 (1990).

²⁰⁶ Klesges et. al, *The Effects of Applicants Health Status and Qualifications on Simulated Hiring Decisions*, 14 INT'L J. OF OBESITY 527, 527-535 (1990).

²⁰⁷ R. Pingitore et. al, *Bias Against Overweight Job Applicants in a Simulated employment Interview*. 31 J. OF APPLIED SOCIAL PSYCHOLOGY, 909, 909-924 (1994).

²⁰⁸ Janna Fikkan & Esther Rothblum, *Weight Bias in Employment*, IN KELLY D. BROWNELL ET. AL (EDS). WEIGHT BIAS: NATURE, CONSEQUENCES AND REMEDIES, 15, 15 (2005).

less financial support for college than the parents of thin children, controlling for factors such as family size, income and education.²⁰⁹

Issues of class and race often exacerbate the problems faced by the obese and overweight. Obesity rates are higher among people with lower socio-economic status.²¹⁰ Obesity rates are also higher among African-Americans, Latinos and Native Americans.²¹¹ Thus, the obese and overweight may face multiple layers of discrimination.²¹² Further, the stereotypes associated with being obese and overweight – particularly those of being lazy and less self-disciplined are consistent with prevailing stereotypes of the poor and minorities. Health education campaigns that portray losing weight as simply being a matter of eating the right foods or getting enough exercise reinforce these stereotypes. Social psychological research that has found anti-fat attitudes linked to racism and conservative ideologies supports the contention that overweight poor and minorities are more likely to be blamed for their conditions than others.²¹³ That a poor person is also obese serves as confirmation that the person does not have the discipline or will power to succeed.

Health education programs that encourage weight loss through ineffective means and treat weight loss as being easily attainable contribute to the stigma of overweight and obesity. Health education programs that treat weight as simply being a matter of self-control encourage beliefs that the obese and overweight lack will-power. These beliefs, in turn, contribute to discrimination against the overweight and obese by feeding already existing stereotypes that the obese and overweight are lazy. This is particularly problematic when weight loss and health are

²⁰⁹ Chris Crandall, *Do parents Discriminate Against their Heavy-weight Daughters?* 21 PERSONALITY AND SOCIAL PSYCH BULLETIN, 724, 724-735.

²¹⁰ CALL TO ACTION, *supra* note 2 at 12.

²¹¹ *Id.* at 13.

²¹² R. Puhl & Kelly D. Brownell, *Psychosocial Origins of Obesity Stigma: Toward Changing a Powerful and Pervasive Bias.* 4 OBESITY REVIEWS, 213, 214 (2003).

²¹³ Crandall & Biernat, *supra* note 202.

treated not only as an individual responsibility but also as citizen's duty. Overweight people will be seen, not just as lazy, but as a drain on resources and a risk to our national security.

IV. Modifying the Environment to Make Healthy Choices Possible

If we are to take seriously the notion that valid public health regulations include the promotion of health for both the benefit of the citizenry and for the benefit of American security and fitness, we must move beyond the standard admonitions to eat healthy and exercise and consider the ways in which the government can effectively promote and support healthy choices. Instead of focusing so heavily on individual level change, the federal government should take action to shape actively the environment to promote health by encouraging healthy behaviors and discouraging unhealthy ones. As has been discussed above environmental and societal factors profoundly influence eating and exercise behavior. People cannot eat healthy foods if they are not available and they cannot exercise without safe places and the time to do so.

As community health advocates have noted, in order to combat obesity within the communities, it [is] essential not only to provide information about nutrition and physical activity but also to create the infrastructures (e.g. supermarkets with a larger selection of high-quality fruits and vegetables to enable people to make healthy choices).²¹⁴

The federal government should seek ways to create environments in which the healthiest thing is the easiest and cheapest thing, taking advantage of the extensive research on food preferences and choices. This approach has the advantage of being neither coercive nor liberty limiting, as it increases options, and is consistent with the federal government's role in promoting public health.

Modifying the environment not only makes good policy sense, it reflects the way people act in their everyday lives. People manipulate their own environments to make it harder for themselves to act on their short-term preferences. Modifying the environment will also utilize current understandings of health and fitness that emphasize the role of society and the built environment in affecting health. This approach to the obesity war would decrease the stigma and discrimination experienced by the obese while providing the means by which people could make healthy choices.

A. New Understandings of Health and the Obesity War

Prior to the twentieth century, acute disorders, such as tuberculosis, pneumonia and other infectious diseases accounted for the majority of deaths and illnesses in the United States.²¹⁵ As

²¹⁴ Baker et. al, *supra* note 54 at 1171.

²¹⁵ SHELLEY E. TAYLOR, HEALTH PSYCHOLOGY at 3-8 [citing M.M. Sexton, *Behavioral Epidemiology*, in BEHAVIORAL MEDICINE: THEORY AND PRACTICE, 3, 3-22 (O.F. Pomerleau & J.P Brady eds, 1979) & NATIONAL CENTER FOR HEALTH STATISTICS, PUBLIC HEALTH SERVICE, HEALTH, U.S. (1992)].

modern medicine became capable of treating many of these diseases, chronic illnesses became the major source of death and disease in the United States.²¹⁶ The concern about obesity has developed as part of an understanding of disease that is not just biologically based, but also includes environmental and lifestyle components.

Changing patterns in illness have been accompanied by changes in the way the medical field views illness and health. In the past, health practitioners' understandings of illness were dominated by the biomedical model, which sees illness as the result of biological malfunction.²¹⁷ An underlying assumption of this model is that disease development and progression are mostly independent of social and psychological processes.²¹⁸ The biomedical model implicitly assumes a mind body dualism and, with its focus on aberrant biological processes, emphasizes illness over health.²¹⁹

In contrast, the biopsychosocial model of health, which has been gaining prominence in recent years, views health and illness as the result of complex interactions among biological, psychological and social factors.²²⁰ The biopsychosocial model emphasizes health, which is defined not only by the absence of disease but also as a state of optimal well-being. The biopsychosocial model of health is consistent with the broader understandings of public health discussed above that see public health as the constellation of things society does to promote health. This model provides a template for a new approach to the obesity war – one that emphasizes environmental, social and psychological factors that affect weight and eating and exercise choices. The model further informs the argument that the state has an interest in promoting environments that encourage healthy behaviors.

²¹⁶ *Id.* at 8.

²¹⁷ TAYLOR, *supra* note 215 at 12.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

Social and cognitive psychologies tell us that the environment influences our behavior and our behavior influences our attitudes. People tend to do the thing that is easiest but in the United States, and many other industrialized nations, getting exercise or eating healthy foods requires extra effort, time and money. The United States, with its car culture, sprawling suburbs, long work days and commitment to fast food is structured to promote a sedentary lifestyle and the over-consumption of high-fat, high-calorie food. Successful interventions in the war on obesity must take into account how people actually behave in the real world. Just as people will try to modify their environments to encourage behaviors they want, government programs should attempt to modify environments to make the healthiest choice be the easiest choice. Such interventions should be designed to make it possible for people to choose the healthiest option and be consistent with the biopsychosocial model of health.

Health behaviors are particularly susceptible to interference from short term preferences. Generally, there is no immediate connection between any particular health behavior and a health outcome. Eating a cupcake today does not lead to heart attack today. The effects of most health behaviors are cumulative. Eating a cupcake today will not have much impact on having a heart attack ten years from now, although eating a cupcake everyday might. The health aspects of many behaviors are not particularly salient. The taste of the cupcake is more salient than its artery clogging aspects.

Health behaviors are directed at outcomes that may occur in the future. People are generally unrealistically optimistic regarding future outcomes and underestimate the likelihood that they will develop a health problem.²²¹ People also tend to underestimate the extent to which their own behaviors will affect disease while overestimating the extent to which factors outside

²²¹ N.D. Weinstein, *Unrealistic Optimism about Susceptibility of Health Problems*, 2 J. OF BEHAVIORAL MEDICINE, 125, 125-140 (1981).

of their control may affect diseases.²²² Because the onset of disease may be in the distant future, people also have a tendency to believe that there is no reason to take immediate action as they will change their behaviors in the future.²²³ Therefore, even though a person may be aware that exercise is important in preventing disease, that person is likely to underestimate the importance of preventing her, specifically, from developing a disease. This may keep people from explicitly intending to engage in health behaviors.

Even when people set a health behavior goal for themselves, the time lag between the health behavior and the outcome may make it hard to consistently meet the goal. Successful health behavior change requires consistent modification over time. For exercise to be effective, one must exercise three to five times a week for a minimum of thirty minutes throughout a lifetime. Under any circumstances, people find it hard to delay gratification. Health behavior change, though, has the additional problem that the gratification is hard to conceptualize and often comes in the form of a negative (e.g. not getting a disease).

As discussed above, dieting in order to lose weight and live longer, requires a person to override immediate impulses in favor of the long-term goal.²²⁴ One must actively choose what and when to eat, rather than accepting what is readily available. Such successive decision making is exhausting and leads to “decision fatigue”²²⁵ and depleted will-power.²²⁶

Successful public health initiatives to combat the spread of HIV and AIDS have sought to work with human nature rather than against it. Condom distribution programs in schools have been successful in encouraging condom use without increasing sexual activity among

²²² *Id.*

²²³ *Id.*

²²⁴ Roy F. Baumeister & Kathleen D. Vohs, *Willpower, Choice and Self-Control*, in *TIME AND DECISION* 209, (Lowenstein et. al, 2003).

²²⁵ *Id.* at 208-209.

²²⁶ *Id.* at 209-210.

teenagers.²²⁷ The most successful programs make getting condoms the least costly by making the available anonymously and free of charge. Needle exchange programs have been similarly successful in decreasing the rate of HIV transmission among intravenous drug users without increasing drug use.²²⁸ Needle exchange programs may even serve as an entry for drug users to seek other health care and receive drug treatment.²²⁹ In contrast, health information campaigns, such as the now infamous, “This is your Brain on Drugs,” campaign and the in school DARE program have been largely ineffective.²³⁰

Social and cognitive psychologies tell us that the environment influences our behavior and our behavior influences our attitudes. People tend to do the thing that is easiest. They will also try to manipulate their own environments to mitigate the effect of emotional states and encourage themselves to maintain their own goals. Successful interventions in the war on obesity must take into account how people actually behave in the real world. Just as people will try to modify their environments to encourage behaviors they want, government programs should attempt to modify environments to make the healthiest choice be the easiest choice. Such interventions should be designed to make it possible for people to choose the healthiest option.

²²⁷ See e.g., Sally Guttmacher et al., *Condom Availability in New York City Public High Schools: Relationships to Condom Use and Sexual Behavior*, 87 AM. J. OF PUBLIC HEALTH 1427, 1432-1433.

²²⁸ NATIONAL INSTITUTES OF HEALTH, CONSENSUS DEVELOPMENT STATEMENT: INTERVENTIONS TO PREVENT HIV RISK BEHAVIORS (1997) AT 7-8; See also, David Vlahov & Benjamin Junge, *The Role of Needle Exchange Programs in HIV Prevention*, 113 PUBLIC HEALTH REPORTS 75, 75-80 (1998).

²²⁹ Vlahov & Junge, *supra* note 228 at 77.

²³⁰ See generally, Susan T. Ennett et. al, *How Effective is Drug Abuse Resistance Education? A Meta-Analysis of Project DARE Outcome Evaluations*, 84 AM. J. OF PUBLIC HEALTH 1394 (1994); Donald R. Lynam et. al, *Project DARE: No Effects at 10-Year Follow-Up*, 67 J. OF CONSULTING AND CLINICAL PSYCHOLOGY, 590 (1999).

Interestingly, despite the ineffectiveness of the DARE program it maintains widespread popularity. One problem with early anti-drug campaigns is that they were often hyperbolic and unrealistically exaggerated the effects of drug use, making teenagers skeptical of any information contained in the campaign. Newer campaigns that more realistically portray drug use may prove to be more effective. Many of the current war on obesity campaigns have an analogous problem, in that they provide unrealistic information. For example, as previously discussed, many of the information campaigns encourage behaviors with the goal of promoting weight loss, but the research on weight loss programs strongly suggests that these behaviors will be unsuccessful for most people. As people try to follow the advice in the campaigns and fail to either be able to follow the advice or to lose weight even when they have followed the advice, they are likely to become disenchanted with all the entire campaign and disregard even that information and advice which might have proven useful.

B. A New Focus for the Federal Government

Government efforts to prevent obesity must take into account the ways in which people actually behave with regards to health behaviors. One way to do this is by, whenever possible, making the healthy choice be the easiest choice. The environment establishes a kind of default rule for behaviors. As already discussed, when preferences are weak people will do what is easiest and cheapest. If there is a sidewalk and the store is close people will be more likely to walk. If there is no sidewalk, people will be more likely to drive, even if the store is close. The presence of sidewalks creates the default rule of walk. The lack of sidewalks creates the default rule of drive. People, who want to walk even when there is no sidewalk, will be discouraged from walking because it might not be safe. When there is a sidewalk, they can walk. People who did not have a preference before the sidewalk will be encouraged to walk once it is in place. People who want to drive will still be able to drive. The federal government should intervene in ways that create healthy defaults, making it easier for people to follow the recommended dietary and exercise guidelines. Creating an environment in which the healthiest choices is the easiest choice will effectively promote healthy behaviors without increasing stigma and discrimination. This type of intervention should be informed by research on health behavior promotion and will incorporate new understandings of illness that emphasize the environment and social influences on health. A shift away from weight loss and towards behavior change encourages healthy behaviors that may lead to decrease in illness even if they do not lead to weight loss. Further, this approach addresses the structural barriers that discourage healthy behaviors and that have a disproportionate impact on low-income and minority individuals.

State and local governments have been at the forefront of programs that are targeted towards modifying the environment. For example, California and restricts “junk food” sold in

the schools.²³¹ West Virginia does not allow soft drinks to be sold during breakfast and lunch periods.²³² At least 21 other states have considered legislation that would restrict foods sold through vending machines.²³³ Five states have created “Safe Routes to Schools Programs” or have implemented other programs to encourage children to walk to school. These states include: California, Delaware, Florida, Oregon and Texas.²³⁴ Seven states (Arkansas, Florida, Georgia, Maryland, Massachusetts, Oregon, and Virginia) mandate the creation of public space that can be used for physical activity. Most of these either allocate funding to create walking or bike paths or require that new transportation programs include walking or bike paths.²³⁵ Massachusetts, though, allows school gymnasiums to be used for adult physical education programs after school.²³⁶

States are more likely than the federal government to initiate environment modifying initiatives largely because the those types of initiatives are outside of the scope of the federal government’s powers. However, the federal government can redirect money currently being spent on ineffective and potentially damaging information based campaigns towards state and local initiatives that promote environmental change. *Steps to a HealthierUS*, which is part of the *HealthierUS* initiative awards grants to state and local health programs. The program has awarded more than \$100 million dollars to 40 communities.²³⁷ Most of the programs included interventions aimed at decreasing obesity through exercise and/or dietary changes. However, the federal government should provide more grants to programs, such as the Philadelphia *Steps*

²³¹ Cal. Health and Safety Code §104550

²³² W. Va. Code § 18-2-6a

²³³ EXCERPT FROM ISSUE BRIEF ON NUTRITION AND OBESITY, *supra* note 233.

²³⁴ Cal. Education Code § 4542, Cal. Streets & Highways Code § 233.5, Del. Code. Ann. Tit. 17, § 1021, Fla. State. Ann. § 355.066, Or. Rev. Stat §195.115, Texas Education Code Ann. § 201.614

²³⁵ Ark. Stat. Ann § 6-16-132, Fla. State. Ann. §335.065, CA Code Ann. §36-22-1, Mass. Gen. Laws Ann. Ch. 111, §206, Md. Transportation Code Ann. §8-630, Or. Rev. Stat § 366.514, Va. Code § 33.1-23.03:001

²³⁶ Mass. Gen. Laws Ann. Ch. 111, §206

²³⁷ Steps to a Healthier US at <http://www.healthierus.gov/STEPS/> (last visited December 5, 2006). Communities include cities, states and tribal entities.

initiative which seeks to encourage local restaurants to provide healthier options on menus, support local initiatives to reduce crime and increase safety in areas where people could exercise, and expand current programs that provide supervised physical activity for students with chronic diseases such as asthma, diabetes, and obesity.²³⁸ Further, federal-state partnership subsidy programs, such as Food Stamps, should be designed to encourage the purchase of healthy food options.

Programs to encourage healthy behaviors can range from initiatives to place healthy foods in prominent positions in school or other government cafeterias, programs to encourage farmers markets or the placement of supermarkets in low-income neighborhoods to city planning regulations that require sidewalks and bike paths to accompany any new road development. These initiatives could also include public/private partnerships that encourage private actors to develop healthy environments. Efforts to make healthy foods more accessible can be extended to include private businesses through incentives that encourage business to stock vending machines with healthy foods or reduce the cost of fresh fruits and vegetables in workplace cafeterias. The suggestions below are only a sample of ways in which government intervention can be used to modify the environment to promote healthy choices and make it possible for people to eat healthy foods and to exercise safely.

1. Target Information Campaigns and Incentives to Businesses and Local Governments

Information campaigns can also be successfully used as a tool to induce environmental changes. However, the focus of information campaigns should shift from individual level

²³⁸ Steps to a HealthierUS, Philadelphia at http://www.cdc.gov/steps/steps_communities/cities_communities/philadelphia_pa.htm (last visited December 5, 2006).

change to encouraging local government's and businesses to implement programs that would make healthy choices more likely.

Employers bear much of the brunt of the cost of obesity related health problems through higher insurance premiums and loss of productivity at work. Employers are also in the best position to make changes that would encourage healthy behaviors. As discussed above, food choices are greatly affected by availability and environmental factors, such as presentation and placement. Government information campaigns can inform businesses of the effects that simple changes, like placing fruits and vegetables at the front of the line in cafeterias or ensuring that fruits and vegetables are available in vending machines, can have on health. They could also encourage employers to offer breaks for exercise or provide incentives for using the stairs rather than the elevator. The federal government could provide tax incentives that would encourage employers to make these types of changes.

Similar information campaigns could be aimed at local governments to promote innovations in government offices and educate local planners on the importance of making healthy choices available. Local governments should be encouraged to provide healthy choices in their cafeterias, including those, such as courtroom cafeterias, that are open to the public. Local governments should also be encouraged to design their buildings in ways that are both handicap accessible and that encourage exercise and walking. Information campaigns could also educate local decision makers on the importance of implementing programs and providing incentives that encourage healthy eating and exercise, such as trying to attract supermarkets and farmers markets to underserved areas or making school gymnasiums and practice areas available to the public for off season or after-hours use.

Information campaigns can be very useful when directed at the appropriate level. People spend considerable amounts of time at work and the work environment greatly influences their behavior. Similarly, local government decision-making has the greatest effect on shaping the environment. Information campaigns that educate employers and local government decision makers on the importance of the environment in shaping healthy behavior and help produce real change.²³⁹

2. Modify Government Subsidy Programs to Provide Healthier Options

The federal government, in conjunction with state and local governments, currently provides a variety of subsidy programs to assist the poor in getting adequate nutrition. Most of these programs were designed when under-consumption was a problem and have incentive structures that now encourage the over-consumption of unhealthy foods. Today, though, inadequate nutrition for poor people in the United States is primarily a problem of having too much unhealthy, high-fat, high-calorie food and not enough fresh fruits and vegetables.²⁴⁰

The Women Infants and Children (WIC) program provides nutrition education, counseling and food to pregnant women, mothers and their children.²⁴¹ Infants and postpartum mothers are provided food that is worth about \$120 each month. Children, ages one through four, receive food that is worth about \$35.²⁴² Although the food is relatively high in nutritional value, it is also calorie rich and includes fruit juice, milk (which may be whole milk), cereal,

²³⁹ Of course, it is important that these campaigns are aimed at providing information on the how the environment shapes our health choices and what employers and local governments can do in order to create environments that promote healthy choices. In order to encourage employers to undertake change, it would also be necessary to discuss the benefits of a healthier workforce. However, it would be extremely important that campaigns do not just focus on the costs of obesity and leave the impression that employers should simply tell their workers to exercise or eat healthy. This could have a very detrimental effect on the obese and overweight, who already face workplace discrimination.

²⁴⁰ BROWNELL & HORGAN, at 21

²⁴¹ *Id.*

²⁴² *Id.*

eggs, peanut butter and formula, enriched juice and fortified cereals for infants. If these were the only foods the family was consuming, this diet would make sense. But these foods are supplements.²⁴³

The WIC program's food allotment should be modified to provide healthier foods.²⁴⁴ For example, fruit juice, which is high in calories, could be replaced with fresh fruits, such as oranges and apples, which have long shelf lives. Only skim milk should be provided and cereals could be replaced or supplemented with whole grains, such as brown rice. Eggs could be replaced or supplemented with low fat cheeses, yogurt and other low-fat protein rich foods. While mothers should be made aware of the availability of formula, it should only be provided upon request.²⁴⁵ WIC should provide breast-pumps to mothers and other services that would support breast-feeding.

The Food Stamp Program provides subsidies for poor families to purchase food. About 20 million people receive food stamps each month.²⁴⁶ Food stamps can only be used in stores and cannot be redeemed for other purposes. This encourages people to purchase food they might not need so that they will not waste the stamps.²⁴⁷ The Food Stamp Program could be modified to provide incentives for purchasing healthy foods, such as doubling the value of the stamp for the purchase of fresh fruits and vegetables or other healthy foods. Kelly Brownell and Katherine Hogan propose using cash rather than stamps to decrease the incentive to over purchase foods.²⁴⁸ Although this might not be politically feasible, programs could be instituted

²⁴³ *Id.* at 211-212.

²⁴⁴ *Id.* at 235.

²⁴⁵ Poor women may be more likely than other groups to face barriers to breast-feeding, such as extremely limited time off from work and inflexible jobs that make pumping or storing breast milk impossible. Therefore, it is very important that this group still have access to formula.

²⁴⁶ BROWNELL & HORGAN, *supra* note 76 at 212.

²⁴⁷ *Id.*

²⁴⁸ BROWNELL & HORGAN, *supra* note 76 at 212.

that would allow people to redeem stamps for non food items. Any changes would have to be carefully designed so as not to create perverse incentives.

Most government programs that provide food supplements to the poor encourage the over-consumption of high-fat and high calorie foods and do not provide incentives for healthy eating. These programs should be modified to encourage the consumption of healthy foods and discourage over-consumption.

3. Provide Incentives for Zoning and the Built Environment to Encourage Exercise

An extensive literature already provides support for importance of the environment in discouraging (or encouraging) exercise and other healthy behaviors.²⁴⁹ According to this research the built environment can constrain or facilitate physical activity.²⁵⁰ Although the exact effect of the built environment on different populations is unknown, certain things emerge from the available research.²⁵¹ Primarily, people cannot engage in discretionary physical activity if they have no place in which to be active. Environments that provide more opportunities for safe physical exercise will encourage physical exercise.²⁵²

Additional research suggests that the built environment is related to the amount of exercise in which people engage.²⁵³ Pleasant scenery, including tree-lined sidewalks and useful

²⁴⁹ See TRANSPORTATION RESEARCH BOARD, INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, DOES THE BUILT ENVIRONMENT INFLUENCE PHYSICAL ACTIVITY? EXAMINING THE EVIDENCE (2004) [hereinafter THE BUILT ENVIRONMENT EVIDENCE]; Garcia et. al, *Considerations of Race and the Road Towards Equitable Allocation of Municipal Services: Health y Children, Healthy Communities: Schools, Parks, Recreation, And Sustainable Regional Planning*, 31 FORDHAM URB. L.L. 1267 (2004); M.N. Bagley & P.L. Mohktarain, *The Impact of Neighborhood Type on Travel Behavior: A Structural Equation Modeling Approach*, 36 ANNALS OF REGIONAL SCIENCE 279 (2002); A.C. King et al., *Theoretical Approches to the Promotion of Physical Activity: Forging a Transdisciplinary Paradigm*. 23 AM. J. OF PREVENTIVE MEDICINE 15 (2002).

²⁵⁰ THE BUILT ENVIRONMENT EVIDENCE, *supra* note 250 at ES-3.

²⁵¹ *Id.*

²⁵² *Id.* at ES-5.

²⁵³ Stephen Kaplan & Rachel Kaplan, *Health, Supportive Environments, and the Reasonable Person Model*, 93 AM. J. PUB. HEALTH 1484, 1487 (2003).

destinations (such as shops or libraries) encourages physical activity.²⁵⁴ A study of elderly Australians found that physical activity increased when safe-foot paths were available and the elderly had access to parks or recreation centers.²⁵⁵ One study examining the effects of the California Safe Routes to Schools Programs in 10 schools throughout the state found that improvements made by the program increased walking and cycling, especially when the improvements were made directly along a child's route to school.²⁵⁶ In fact, many children would prefer to walk to school, if walking were possible.²⁵⁷

The federal government could provide grants so that city and state governments can make building and maintaining parks a priority, particularly in low-income neighborhoods.²⁵⁸ Existing zoning regulations should be modified to encourage mixed (retail and residential) use, which would make it easier for people to walk or bike to activities and decrease reliance on cars.²⁵⁹ Cities should require all new developments to include sidewalks. States could also require any new road construction to include bike and walking paths. Schools and other public buildings with appropriate facilities could be made available to the public after hours for recreation.²⁶⁰ Local planning commissions should require new developments to be designed to encourage physical activity.

²⁵⁴ *Id.*; N. Humpel, N. Owen & E. Leslei, *Environmental Factors Associated with Adults' Participation in Physical Activity: A Review*, 22 AM. J. PREV. MED. 188, 188-199. (2002); A. C. King et al. *Personal and Environmental factors Associated with Physical Inactivity Among Different Racial-Ethnic Groups of US Middle-Aged and Older-Aged Women*, 19 HEALTH PSYCHOLOGY 354, 354-364 (2000).

²⁵⁵ M.I. Booth et al., *Social-cognitive and Perceived Environmental Influences Associates with Physical Activity in Older Australian*, 31 PREV. MED 15, 15-22 (1998).

²⁵⁶ TRANSPORTATION RESEARCH BOARD, INSTITUTE OF MEDICINE, DOES THE BUILT ENVIRONMENT INFLUENCE PHYSICAL ACTIVITY? EXAMINING THE EVIDENCE 4-5 (2004). (citing M.G. Boarnet et. al, *Urban Form and Physical Activity: Insights from a Quasi-Experiment*. Presentation at the Active Living Research Annual Conference, Del. Mar, Calif. (2004)).

²⁵⁷ Ontario Ministry of the Environment, *Ontario Walkability Study, Trip to School: Children's Experiences and Aspirations*, <http://www.greenestcity.org/asrs/Walkability%20Study%20Report.pdf> (2002).

²⁵⁸ Garcia et. al., *supra* note 64 at 1282-1285.

²⁵⁹ THE BUILT ENVIRONMENT EVIDENCE, *supra* note 250 at ES-5.

²⁶⁰ Garcia et. al., *supra* note 64 at 1288-1289.

4. Modify Building Codes to Promote Exercise Friendly Buildings

Buildings can be designed to encourage exercise. Stairs, in particular, can be made more accessible. The focus on accessibility for handicap individuals in buildings has discouraged the prominent placement of stairs. In many multi-story building the elevators are clearly marked in the center of the building, while the stairs are hidden in side entrances. Stairwells often appear dark and, when intended as fire exists only, may not allow for re-entry. In certifying that state and local building codes meet the requirements of the Americans with Disabilities Act, the Department of Justice should consider whether the codes encourage exercise friendly buildings while still providing handicap access.²⁶¹

At a minimum, buildings should be required to provide clear signage that indicates the location of stairs and stairwells that allow for re-entry. Stairwells should be kept clean and well-lighted. New buildings should be given incentives to use designs that encourage stair use and walking. The incentives could take the form of a reduction in the price of energy that is linked to reductions in energy consumption caused by decreased elevator use.

Buildings can be designed to encourage exercise while remaining accessible to individuals with handicaps. Innovative thinking about building design should be encouraged and rewarded. The federal government could take the first steps by making sure that federal buildings encourage exercise and by ensuring that ADA regulations do not discourage the use of accessible stairs and walkable ramps.

5. Promote Supermarkets, Farmer's Markets and Community Gardening

²⁶¹ This may require modification of the ADA but making sure that people are able to take the stairs if they would prefer to is consistent with the principal of equal access that underlies the ADA.

The federal government should encourage the establishment of programs that will allow people to have fresh produce whenever possible. This could include using the *Steps to a HealthierUS* to encourage farmer's markets and supermarkets that carry fresh fruits and vegetables in urban centers and areas where fresh produce is often unavailable. The federal government should also encourage local community gardening programs, which allow low-income families to grow some of their own food and sale the food they do not consume at local markets. Many of these programs have been successful in allowing low-income city residents to supplement their incomes with fresh food that would not otherwise have been available to them.²⁶²

Making fresh produce available and accessible is necessary to encouraging healthy diets. As discussed above inner-city residents have less access to supermarkets than suburban and rural residents and the markets that are available are less likely to carry fresh produce. Further inner-city residents often have to pay more for the food that is available. Markets tend to be smaller and chains avoid the inner city so that lower-income families do not get the same benefits of scale that their more affluent suburban neighbors receive. Farmer's markets, community gardening programs and the construction of supermarkets would make produce more accessible to lower-income and inner-city residents.

The federal government is necessarily limited in its ability to directly shape things such as the development of sidewalks and building codes. However, through its various grant programs it can encourage state and local governments to design programs that make it possible and easy for people to eat healthy and exercise. Based on current research, these types of program are likely to be more successful than continue to fund information based campaigns in a

²⁶² See e.g. Food Justice, Green Guerrillas, at <http://www.greenguerillas.org/info.asp> (last visited April 2, 2007); Discovering the Food System: A Primer on Community Food Systems: Linking Food, Nutrition & Agriculture, <http://foodsys.cce.cornell.edu/primer.html> at (last visited Aprils 2, 2007).

society that is already saturated by the message that thin is healthy and permanent weight loss is just one diet away. The interventions discussed above, though, are just a small sample of what is possible if government officials were to think creatively and use an evidence-based approach to the obesity war.

V. Conclusion

In July 2006, the federal government unveiled a new campaign to promote breast feeding that included a pregnant woman riding a mechanical bull, with a voice over asking, “You wouldn’t take this kind of risk with your baby, so then why would you take the risk by not breast-feeding?”²⁶³ The campaign immediately incited criticisms that the government was using scare tactics and shaming to make women feel bad about not breast-feeding without addressing the often insurmountable barriers many new mothers’ face. In an open letter to the HHS Secretary Mike Leavitt the National Organization for Women (NOW) stated:

The harsh commercials ignore the real barriers for women who want to breastfeed.

Equating a woman’s decision not to breastfeed with log-rolling or mechanical bull riding while pregnant insults the millions of women who are physically unable to breastfeed, are advised not to breastfeed due to illness medical treatment [sic], or are unable to breastfeed for six months because of inadequate workplace accommodations.²⁶⁴

²⁶³ Elizabeth Vargas, Lee Hoffman, Ann Varney, Is the Breast Best? Ad Campaign Rattles Mothers on Breast Feeding Controversy, at <http://abcnews.go.com/2020/story?id=2188066&page=1> (June 13, 2006).

²⁶⁴ National Organization for Women, Open Letter to the Department of Health and Human Services Secretary Mike Leavitt, available at <http://www.now.org/issues/mothers/060718breastfeeding.html> (last visited April 1, 2007).

NOW proposed a variety steps that HHS should take instead to actually enable women to breast-feed for the recommended six months such as: advocate for a federal pregnancy accommodation law that would include breastfeeding, advocate for Congress to clarify in law that women breastfeeding or using a breast pump should not be subject to indecent exposure laws, provide funding so that low-income mothers can have access to breast pumps, and amend the welfare-to-work requirements so that poor mothers can delay seeking employment until they stop breastfeeding.²⁶⁵ This leaves people frustrated and without the tools necessary to make healthy changes.

The federal government's campaign against obesity is similar to the breast-feeding campaign. Information is being provided in a context that blames the individual for failing to meet weight goals without any provisions that would truly enable people to make the suggested changes. In a society such as the United States that strongly protects individual rights and is generally skeptical of governmental intervention, it is not surprising that, when choosing its arsenal in the "war on obesity" it has relied heavily on information-based campaigns. Unfortunately, in this case, the information based approach fails to adequately address the problems the have promoted weight gain and encourages behaviors that are likely to be ineffective, at best. Further, the focus on individual responsibility reinforces negative stereotypes about the overweight and obese and encourages unrealistic expectations regarding the benefits of weight loss and the amount of weight loss that can be achieved. As one parent, whose daughter received a report from her school on her Body Mass Index said, "The school provides us with this information with no education about how to use it or what it means."²⁶⁶

²⁶⁵ *Id.*

²⁶⁶ Jodi Kantor, In Obesity Fight, many Fear a Note from School, NY TIMES (January 8, 2007).

In fighting the war on fat, the federal government has largely ignored the public part of public health. Certainly, the federal government should provide health information that would otherwise be unavailable or inaccessible to the public. Dietary guidelines and mandated nutritional information on food all provide necessary information that would not be available without government action. However, as is indicated by the multi-billion dollar a year diet and weight loss industry, there is no market failure when it comes to providing information on dieting and exercise. Diet and exercise books abound. Multi-hour infomercials hawk exercise equipment. Television new programs regularly have information on weight loss, dieting and exercise.

Public health campaigns should focus on the public and undertake programs that would not be possible without government intervention. Just as NOW called upon HHS to support programs that would enable women to breast-feed, public health advocates should call upon the federal and state governments to enact programs and legislation that would enable people to engage in healthy behaviors. The federal government should encourage the building of parks and safe places for recreation and the modification of building and zoning codes to make exercise more accessible. The federal government should also support programs that would make healthy foods available and accessible in low-income neighborhoods. Such programs do not need to be subsidies, but could include the development of farmer's markets and community garden projects. Public health advocates concerned about diet and exercise can build coalitions with people in the built environment movement. Creative thinking and advocacy can lead to host of feasible and cost-effective measures that will encourage healthy behaviors without stigmatizing the overweight and obese.

According to psychologists, Roy F. Baumeister, Todd Heatherton and Dianne M. Tice, “Self-regulation failure is the major pathology of the present time . . . All over the country, people are miserable because they cannot control their money, their weight, their emotions, their drinking, their hostility, their cravings for drugs . . .”²⁶⁷ Health behaviors are easily susceptible to self-regulation failure. The cupcake will always taste good and the heart attack will always seem impossibly distant and unlikely. Not surprisingly, then, given the availability of cheap, high-calorie food and lack of opportunities to exercise, obesity rates are rising. Rather than continuing to invest money in ineffective education campaigns that stigmatize the overweight and obese, federal government programs to prevent obesity must rely on what is known about effective health behavior change and promote an environment that is conducive to healthy eating and exercise.

²⁶⁷ BAUMEISTER ET AL., LOSING CONTROL: HOW AND WHY PEOPLE FAIL AT SELF-REGULATION 3 (1994).

**Appendix:
Overview of Federal Government Programs in the War on Obesity**

1. The President's Council on Physical Fitness and Sport

President George W. Bush has undertaken a variety of initiatives addressing obesity and physical fitness. The President's Council on Physical Fitness and Sport was first established in 1956 by President Dwight D. Eisenhower and called the President's Council on Youth Fitness. Eisenhower created the council in response to a report that American children were less physically fit than their European counterparts.²⁶⁸ In its present incarnation under President George W. Bush, the Council "promotes daily physical activity for disease prevention and health; vigorous physical activity, stretching, and strength training for fitness and added health benefits; and sports participation, including the values of sportsmanship."²⁶⁹ To accomplish its mission, the Council, "collaborates with federal, state, and local agencies and with the private sector and non-profit organizations to achieve mutual goals and objectives. The Council is composed of twenty volunteer members who are appointed by the President. A program office, located within the Department of Health and Human Services (HHS), Office of Public Health and Science, supports the Council's activities."²⁷⁰

The Council conducts the President's Challenge which provides awards for physical activity. The relatively new Presidential Active Lifestyle Award is given to adults and children who engage in specified amounts of exercise over a six week period. The State Champion Award, in conjunction with state departments of education, provides an award to the three schools in each state with the most winners (as a proportion of the student body) of the Presidential Physical Fitness Award. The National School Demonstration Program awards

²⁶⁸ THE PRESIDENT'S COUNCIL ON PHYSICAL FITNESS AND SPORTS, PRESIDENT'S COUNCIL OVERVIEW (January 18, 2005) at http://www.fitness.gov/about_overview.htm.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

schools with the highest quality physical education classes.²⁷¹ The Council also works with a variety of other initiatives including *HealthierUS* and *Steps to a HealthierUS*, Healthy People 2010. On May 2, 2005 the Council sponsored the HealthierUS Fitness Festival in Washington D.C.²⁷² In addition, the Council maintains the website www.fitness.gov, which provides information on physical activity and links to health information available at other government and non-profit websites.

Finally, the Council publishes President's Council on the Physical Fitness and Sports Research Digest, which "synthesizes scientific knowledge about topics related to physical activity/fitness and exercise" and is distributed to fitness professionals and made available on the Council's web site.²⁷³ The recommendations made in the Research Digest tend to focus on the individual choice approach to promoting physical fitness and reducing obesity. For example, according to the January 2004 issue of *Research Digest*, "Urbanization, mechanization, and the associated cultural and environmental changes have lowered daily energy expenditure."²⁷⁴ The Digest cites research by the International Obesity Task Force that found that sedentary lifestyles, which increase the risk of obesity, are related to social changes that discourage physical activity, such as increased traffic hazards that discourage pedestrians and cyclists and decreased opportunities for people in the developing world to participate in recreational activities.²⁷⁵ Nevertheless, the Digest recommends individual level interventions, "In general, we need to provide education and skill development, opportunities to build self-efficacy and encourage modeling of physical activity and health eating by peers, teachers, parents and co-workers."²⁷⁶

²⁷¹ *Id.*

²⁷² HealthierUS Fitness Festival at <http://www.fitness.gov/Flyer-ScheduleForWeb-04.26.05.pdf>.

²⁷³ *Id.*

²⁷⁴ PRESIDENT'S COUNCIL ON PHYSICAL FITNESS AND SPORTS, RESEARCH DIGEST (2004) at 3.

²⁷⁵ T. Lobstein et al. *For the IASO International Obesity Task Force. Obesity in Children and young people: A Crisis in Public Health*, 5 OBESITY REVIEW 4, 45 (2004).

²⁷⁶ *Id.* at 5.

There is no mention of reducing work hours, creating walkable cities or reducing time spent commuting – all things which would address the affects of urbanization and mechanization. However, an earlier Digest written by the Task Force on Community Preventive Services to the President’s Council on Physical Fitness and Sports does discuss research showing that structural factors such as having exercise equipment in the home and availability of places to engage in physical activity within neighborhoods are related to exercise levels.²⁷⁷

The current administration’s initiatives implemented through the Council largely focus on individual responsibility and motivation. Programs such as the Fitness Challenges, attempt to encourage individuals to exercise through rewards but do not directly address impediments to exercise. Publications produced by President’s Council on Physical Fitness and Sports also emphasize personal responsibility.

2. HealthierUS and Steps to a HealthierUS

HealthierUS is a presidential initiative aimed at helping American’s live longer healthier lives and is “based on the premise that increasing personal fitness and becoming healthier is critical to achieving a better and longer life.”²⁷⁸ *HealthierUS* includes specific polices and initiatives related to promoting fitness and health. Under the rubric of *HealthierUS* the President mandated the maintenance of the *HealthierUS* web site and promoted collaboration between governmental agencies to encourage physical activity and healthy eating.²⁷⁹ For example, the President announced a national nutrition education program facilitated by the USDA called “Eat Smart-Play Hard,” which seeks to encourage pre-school and school aged children to eat healthy

²⁷⁷ PRESIDENT’S COUNCIL ON PHYSICAL FITNESS AND SPORTS, RESEARCH DIGEST (2003) at 6.

²⁷⁸ HEALTHIERUS: THE PRESIDENT’S HEALTH AND FITNESS INITIATIVE (2002) at Executive Summary.

²⁷⁹ *Id at* Chapter 3.

foods and exercise regularly. The campaign includes an interactive website with “behavior focused and motivational messages.”²⁸⁰

Steps to a HealthierUS, which is part of the *HealthierUS* initiative awards grants to state and local health programs. Describing the program Secretary of HHS Tommy Thompson said, “We are heeding President Bush’s call to reach Americans in the places where they live, work and go to school in order to encourage healthier choices. We are building a healthier nation by motivating Americans to eat nutritious foods, be physically active and not use tobacco products.”²⁸¹ According to Thompson, diabetes, asthma, overweight and obesity were targeted for intervention because of their increasing prevalence in the United States and because individuals can control and prevent their onset through exercise, diet and other strategies.²⁸²

3. *Healthy People 2010*

Healthy People 2010 “is a comprehensive set of disease prevention and health promotion objectives for the Nation to achieve over the first decade of the new century.”²⁸³ *Healthy People 2010* is one of three similar initiatives established by the federal government that have established ten year health objectives for the nation.²⁸⁴ The goals of *Healthy People 2010* are to “increase quality and years of healthy life” and to “eliminate health disparities.”²⁸⁵ To achieve

²⁸⁰ *Id* at Chapter 4. See also http://www.bam.gov/flash_dan.html.

²⁸¹ Press Release, United States Department of Health & Human Services, HHS Awards \$35.7 Million to Support Community Programs that Promote Better Health and Prevent Disease (Sept. 28, 2004), available at <http://www.hhs.gov/news/press/2004pres/20040928.html>.

²⁸² *Id*.

²⁸³ OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *HEALTHY PEOPLE 2010* available at <http://www.healthypeople.gov/About/whatis.htm>.

²⁸⁴ U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, PUBLIC HEALTH SERVICE, OFFICE OF THE ASSISTANT SECRETARY FOR HEALTH AND SURGEON GENERAL, *HEALTH PEOPLE: THE SURGEON GENERAL’S REPORT ON HEALTH PROMOTION AND DISEASE PREVENTION*. (1979) and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, *HEALTHY PEOPLE 2000 NATIONAL HEALTH PROMOTION AND DISEASE PREVENTION OBJECTIVES*. (1990).

²⁸⁵ OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *HEALTHY PEOPLE 2010* available at <http://www.healthypeople.gov/About/goals.htm>.

these goals, the *Healthy People 2010* identified ten “leading health indicators” to target for change. The first indicator is “physical activity” and the second is “overweight and obesity.”²⁸⁶

Under *Healthy People 2010*, the Centers for Disease Control (CDC) has supported the Kidswalk-to School program, provided funds to 28 states in 2004 to hire staff and develop physical activity and funded collaborative research with academic centers and community organizations to increase physical activity.²⁸⁷ The Department of Agriculture (USDA), the Department of Education (ED), HHS, the CDC, and the National Cancer Institute (NCI) established the *5 A Day for Better Health Program*, to provide information about the health benefits of eating five servings of fruits and vegetables a day.²⁸⁸ The National Institutes of Health (NIH) established an Obesity Research Task Force and issued a report entitled, *Clinical Guidelines on the Identification, Evaluation and Treatment of Overweight and Obesity in Adults: Evidence Report*.²⁸⁹ In addition the NIH is collaborating with the NCI and Food and Drug Administration (FDA) to “encourage guidance messages on fruit and vegetable products that meet the *5 A Day for Better Health Program* criteria.”²⁹⁰ The FDA also established an Obesity Working Group that will create a plan to improve food labeling in a way that is supposed to help prevent weight gain and reduce obesity and that will facilitate the development of treatment for obesity. In addition the FDA is working with the Federal Trade Commission to provide consumers with better nutrition information.²⁹¹ The Department of Education (ED) was scheduled to spend \$70 million in fiscal year 2004 (the most recent year for which figures were

²⁸⁶ OFFICE OF DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *HEALTHY PEOPLE 2010* available at <http://www.healthypeople.gov/LHI/lhiwhat.htm>.

²⁸⁷ PHYSICAL ACTIVITY AND FITNESS REVIEW, *supra* note 16 at 3.

²⁸⁸ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, *HEALTHY PEOPLE 2010 NUTRITION AND OVERWEIGHT PROGRESS REVIEW (2004)* at 3 [hereinafter *NUTRITION AND OVERWEIGHT PROGRESS REVIEW*] available at http://www.healthypeople.gov/data/2010prog/focus19/Nutrition_Overweight.pdf 2004 is the most recent year for which a progress review was available.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

available) on programs to encourage “lifetime fitness activities and healthy eating habits.”²⁹²

HHS has also created several outreach campaigns including *You Can! Steps to a Healthier Aging Campaign* and *I Can Do It, You Can Do It!*, a collaborative initiative between the President’s Council on Physical Fitness and Sports and the HHS Office on Disability to encourage physical activity among young people with disabilities.²⁹³ *Steps to a HealthierUS* is also part of the *Healthy People 2010* initiative.

Healthy People 2010 also includes direct education programs. For example, the federal government launched *VERB It’s What you Do*, a media campaign aimed at increasing physically activity in 9 to 13 year olds.²⁹⁴ The *Healthy People 2010* website also includes information aimed directly at the American public. This information includes exhortations for people to take care of their own health because it is a duty. One pamphlet on the initiative says “As an American you are encouraged to take every opportunity to improve your own health, the health of your loved ones, and the health of your community.”²⁹⁵

Collaboration on *Healthy People 2010* also occurs at the state level. Every state has a *Healthy People 2010* state coordinator. Most states have developed implementation plans.²⁹⁶ These plans are available on the Internet for 20 states and the District of Columbia.²⁹⁷ Congress

²⁹² *Id.*

²⁹³ PHYSICAL ACTIVITY AND FITNESS REVIEW, *supra* note 287.

²⁹⁴ *Id.*

²⁹⁵ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTHY PEOPLE 2010, STEPS TO A HEALTHIERUS, HEALTHY PEOPLE 2010: THE CORNERSTONE OF PREVENTION (2004) *available at* <http://www.healthypeople.gov/Publications/>.

²⁹⁶ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTHY PEOPLE 2010, STATE HEALTHY PEOPLE PLANS AND RELATED WEB SITES, *available at* <http://www.healthypeople.gov/implementation/stateplans.htm>.

²⁹⁷ The states with online plans include Alabama (<http://www.adph.org/administration/ha2010.pdf>), Arizona (<http://www.azdhs.gov/phs/healthyaz2010/>), the District of Columbia (http://dchealth.dc.gov/information/healthy_people2010/index.shtm), Iowa (http://www.idph.state.ia.us/bhpl/healthy_iowans_2010_chapters/introduction.asp), Kentucky (http://chs.state.ky.us/publichealth/healthy_ky_2010.htm), Louisiana (http://www.legis.state.la.us/leg_docs/99rs/CVT9/OUT/0000FRQ3.pdf), Maine (<http://www.maine.gov/dhhs/boh/healthyme2k/hm2010a.htm> and <http://www.maine.gov/dhhs/boh/healthyme2k/hm2010b.htm>), Maryland

has also adopted the *Healthy People 2010* objectives in order to assess a variety of programs that include, the Indian Health Care Improvement Act, the Maternal and Child Health Block Grant, and the Preventative Health and Health Services Block Grant.²⁹⁸

(<http://www.cha.state.md.us/olh/html/proj2010.html>), Michigan (http://www.michigan.gov/mdch/0,1607,7-132-2944_5327-17501--,00.html), Minnesota (<http://www.health.state.mn.us/divs/chs/phg/intro.html>), Missouri (<http://www.dhss.state.mo.us/StrategicPlanning/StratPlan04.html>), Montana (<http://www.dphhs.state.mt.us/hpsd/pubheal/healplan/pdf/2001.pdf>), New Hampshire (<http://www.healthynh2010.org/>), New Jersey (<http://www.state.nj.us/health/chs/hnj.htm>), North Carolina (<http://www.healthycarolinians.org/healthobj2010.htm>), Pennsylvania (<http://www.dsf.health.state.pa.us/health/cwp/view.asp?a=169&q=229309&PM=1>), Rhode Island (<http://www.health.ri.gov/hri2010/index.php>), Vermont (<http://www.healthyvermonters.info/admin/pubs/hv2010/hv2010.shtml>), Virginia (<http://www.vdh.state.va.us/hv2010/index.html>), West Virginia (<http://www.wvdhhr.org/bph/hp2010/default.htm>) and Wisconsin (<http://dhfs.wisconsin.gov/statehealthplan/index.htm>).

²⁹⁸ U.S. Department of health and Human Services, *Healthy People 2010, How Will the Objectives be Used?* at <http://www.healthypeople.gov/About/objused.htm>.