

**Déjeuner-conférence en compagnie de Jacob Sullum, Senior Editor du magazine *Reason*
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In June 1994 the cigarette maker R.J. Reynolds took out ads in American newspapers that criticized proposals to sharply raise tobacco taxes. "Today it's cigarettes," the company said. "Will high-fat foods be next?"

Anti-smoking activists traditionally responded to this sort of slippery-slope argument by insisting that cigarettes were unique, "the only legal product that when used as intended causes death." To suggest that anti-smoking measures might pave the way for attacks on cheeseburgers and ice cream, they said, was just silly.

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Yet six months after R.J. Reynolds tried to scare people with the outlandish prospect of a tax on fatty foods, Yale obesity expert Kelly Brownell endorsed the idea on the op-ed page of *The New York Times*, citing the precedent set by cigarette taxes.

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Brownell was serious, and pretty soon people started to take him seriously. At the end of 1997, *U.S. News & World Report* picked what it dubbed the "Twinkie tax" as one of "16 Silver Bullets: Smart Ideas to Fix the World."

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The following year, *The New Republic's* Hanna Rosin chided "alarmist" commentators who had criticized the notion of using taxes to encourage better eating habits. Aside from Brownell and a couple of other academics, she said, very few people were voicing support for the idea. One of them, it turned out, was Hanna Rosin. "It's too bad Brownell isn't more popular," she wrote.

By 2003, TV commentator Morton Kondracke, the very embodiment of inside-the-Beltway centrism, was opining in his syndicated column that "a hefty tax based on the fat and sugar content of foods would discourage consumption, provide revenue for education programs...and recover some of the billions that obesity-related illnesses cost the government in Medicare and Medicaid outlays."

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This year in Quebec, Education, Sports, and Leisure Minister Jean-Marc Fournier proposed a "junk food" tax to discourage consumption and help pay for public exercise facilities. "When you drink soft drinks or eat chips, there is no nutrition in that," he said. "We don't want to ban [junk food], but just to send the message that when you do that, you have to think about your health."

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How did we get to a point where what used to be a reduction ad absurdum is considered a serious policy proposal? The anti-smoking activists who insisted they were not interested in using the

government to discourage other risky habits may have been perfectly sincere. But the principles underlying their demands for a government-led War on Tobacco apply with equal or greater force to a government-led War on Fat.

In both cases, you have big corporations that can be demonized for using devious marketing tricks to trap children in unhealthy habits they have trouble breaking when they are old enough to know better. You have impressive estimates of diseases and deaths caused by these habits. You have the argument that government intervention is justified because unhealthy behavior imposes a financial burden on society. Most fundamentally, you have the claim that protecting “the public health” requires the government to discourage, restrict, tax, or ban behavior that may lead to disease or injury—an alarmingly open-ended license for meddling in people’s private lives.

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The logic works like this: If there’s one guy with a gut hanging over his belt, that’s a health problem.

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If there are many guys with guts hanging over their belts, that’s a public health problem.

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Through a similar sort of reasoning, public health officials nowadays target a wide range of risky habits, including smoking, drinking, owning a gun, and riding a bicycle without a helmet. Even gambling and video games, which have no obvious connection to morbidity and mortality, are matters of interest to public health researchers. In short, there is no end to the interventions that could be justified in the name of public health, as that concept is currently understood.

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Although this sweeping approach is a relatively recent development, we can find intimations of it in the public health rhetoric of the 19th century. In the introduction to the first major American book on public health, U.S. Army surgeon John S. Billings explained the field's concerns: “Whatever can cause, or help to cause, discomfort, pain, sickness, death, vice, or crime—and whatever has a tendency to avert, destroy, or diminish such causes—are matters of interest to the sanitarian.”

Despite this ambitious mandate, *A Treatise on Hygiene and Public Health* had little to say about the issues that occupy today's public health professionals. The book, published in 1879, was instead concerned with things like compiling vital statistics; preventing the spread of disease; abating public nuisances; and assuring wholesome food, clean drinking water, and sanitary living conditions.

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Today public health textbooks discuss the control of communicable diseases mainly as history. The field’s present and future lie elsewhere. *Principles of Community Health*, for example, explains that “the entire spectrum of ‘social ailments,’ such as drug abuse, venereal disease, mental illness, suicide, and accidents, includes problems appropriate to public health activity....The greatest potential for improving the health of the American people is to be found in what they do and don't do to and for themselves. Individual decisions about diet, exercise, stress, and smoking are of critical importance.”

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Public health used to mean keeping statistics, imposing quarantines, requiring vaccination of children, providing purified water, building sewer systems, inspecting restaurants, regulating emissions from factories, and reviewing drugs for safety. Nowadays it means, among other things,

banning cigarette ads, raising alcohol taxes, restricting gun ownership, forcing people to buckle their seat belts, and making illegal drug users choose between prison and “treatment.”

In the past, public health officials could argue that they were protecting people from external threats: carriers of contagious diseases, fumes from the local glue factory, contaminated water, food poisoning, dangerous quack remedies. By contrast, the new enemies of public health come from within; the aim is to protect people from themselves rather than each other.

In a sense, the change in focus is understandable. After all, Americans and residents of other developed countries are not dying the way they once did. They no longer live in terror of smallpox or cholera. For the most part, they are dying of things you can't catch: cancer, heart disease, and trauma. Accordingly, public health specialists are focusing on those causes and the factors underlying them. Having vanquished most true epidemics, they have turned their attention to metaphorical “epidemics” of unhealthy behavior.

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In this context, it's not hard to see why cigarette smoking was treated as a public health problem and why, as Ontario Minister of Health Promotion Jim Watson puts it, “fat is the new tobacco.”

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And if cigarette taxes are a legitimate public health tool designed to discourage consumption of a product that contributes to morbidity and mortality, there's no reason in principle why junk food taxes could not serve a similar function. To be sure, there are practical difficulties. As Kelly Brownell acknowledges, classifying food as healthy or unhealthy would be a highly contentious process. And calculating the ideal level of consumption for each food and the price necessary to achieve it, which is what Brownell seems to have in mind, would amount to centrally planning a big chunk of the economy.

The problem of tackling obesity through taxes becomes even more complicated when you consider calorie expenditure as well as calorie intake. Ideally, you'd want to tax not only calorie-dense foods but products that contribute to a sedentary lifestyle, such as TV sets, video games, computers, automobiles, and books.

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In addition to raising the prices of products that play a role in obesity, anti-fat activists want to restrict or ban advertising that encourages people to buy them. Here, too, the cigarette precedent is powerful, since cigarette ads are increasingly rare as a result of various legal restrictions.

Bill Jeffery, national coordinator of the Canadian Centre for Science in the Public Interest, advocates a nationwide ban on advertising aimed at children under 13, similar to the policy in Quebec. He says “the vast majority of advertising directed at children, particularly on television, is for junk food and products that promote sedentary play.”

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Free speech issues aside, it's not at all clear that advertising plays an important role in making kids fat. The empirical issue is similar to the one raised by tobacco advertising: the extent to which ads boost overall consumption, as opposed to shifting it around among competing brands and products.

In a recent paper Todd Zywicki, former director of the U.S. Federal Trade Commission's Office of Policy Planning, noted a problem with drawing a link between fat kids and fat ad budgets: If anything, children are less exposed to food commercials today than they were when they were thinner. The frequency of food ads has not increased, while kids are spending less time watching broadcast television and more time playing video games, using computers, or watching cable TV, DVDs, or videotapes—media with fewer or no food ads. Zywicki also notes that places where advertising food to children is illegal, such as Quebec and Sweden, do not have noticeably lower obesity rates than otherwise similar places with different policies.

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At this point the public does not seem persuaded that an ad ban is the right way to go.

A January survey by Decima Research found that 75 percent of Canadians agreed that "it's up to parents to make sure their children eat well, rather than rely on that type of government regulation." But people might change their minds if they start to view Big Food in the same light as Big Tobacco.

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New York University nutritionist Marion Nestle, who favors a complete ban on advertising aimed at kids, warns that "food companies will make and market any product that sells, regardless of its nutritional value or its effect on health. In this regard, food companies hardly differ from cigarette companies." She adds that, "like cigarette companies, food companies...expand sales by marketing directly to children."

Kelly Brownell makes a similar point when he compares Ronald McDonald to Joe Camel. In fact, from his point of view, I suppose Ronald McDonald is worse, because, unlike Joe Camel, he *explicitly* pitches dangerous products to children and hasn't had the decency to retire.

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Probably no one better symbolizes the shift from cigarettes to cheeseburgers than George Washington University law professor John Banzhaf, a longtime proponent of suing our way to a better society who treats the epithet "legal terrorist" as a compliment. In the 1960s this self-identified "Nader of the cigarette industry" asked the Federal Communications Commission, under the so-called fairness doctrine, to require that broadcasters who carried cigarette commercials also provide time for anti-smoking spots, a legal strategy that ultimately led to the demise of tobacco ads on TV and radio. Like other anti-smoking activists, Banzhaf initially resisted the analogy between tobacco and food, telling *The Washington Times* in 1997: "I've heard it since 1969, when they said if we applied the fairness doctrine to cigarette commercials, there'd be anti-automobile ads and anti-McDonald's ads. But it never happened."

Five years later, Banzhaf was serving as an "informal adviser" to New York City attorney Samuel Hirsch, who filed the first two lawsuits in which obese people blamed fast food restaurants for making them fat. Today he is the most conspicuous advocate of such litigation, which has also gained support from Richard Daynard, the Northeastern University law professor who founded the Tobacco Products Liability Project. In 2003 Banzhaf and Daynard put together a conference on food-related litigation in Boston that was reportedly well-attended by plaintiffs' attorneys.

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The lawsuits Banzhaf has in mind invoke themes that are familiar from half a century of tobacco litigation. Food sellers are said to have concealed risks associated with their products, designed their products to be irresistible, and promoted them in misleading and manipulative ways, deliberately targeting children in the hope of building lifelong brand loyalty. The main obstacle to the food lawsuits, none of which has been successful so far, is the same as the main obstacle that for decades prevented smokers from recovering damages: You can't blame someone else when you voluntarily choose to consume a product with widely understood risks.

As U.S. District Judge Robert Sweet put it when he dismissed the lawsuit that Hirsch filed against McDonald's on behalf of two obese teenagers: "Any liability based on over-consumption is doomed if the consequences of such over-consumption are common knowledge....If a person knows or should know that eating copious orders of supersized McDonald's products is unhealthy and may result in weight gain...it is not the place of the law to protect them from their own excesses. Nobody is forced to eat at McDonald's....Even more pertinent, nobody is forced to supersize their meal or choose less healthy options on the menu."

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To counteract this presumption of individual responsibility, Banzhaf thought Hirsch should have emphasized the argument that fast foods are addictive. Banzhaf is quick to latch onto any study that can be used to suggest that certain foods trigger a physiological compulsion to overeat. A couple years ago, for example, he trumpeted an article in *New Scientist* that cited, based on a review of a dozen or so studies with rats, “a growing body of evidence” that “fats and simple sugars can act on the brain the same way as nicotine and heroin.”

Just as we did not need brain scans to recognize that smokers often have difficulty giving up tobacco—a fact that people have been noting for hundreds of years—we do not need rat studies to show that people find eating pleasurable, often eat more than they initially intend, regret their overeating, and have trouble cutting back to lose weight despite the health risks and social costs of being fat. In these respects, eating high-calorie foods, like any activity that provides pleasure or relieves stress, can be addictive, leading to habits that are hard to break.

Jurors are not likely to blame fast food chains for the familiar sin of gluttony. But plaintiffs’ lawyers may be able to convince them that restaurants like McDonald’s engineer their products to maximize their addictiveness, in the same way that tobacco companies were accused of manipulating nicotine levels to make sure their customers stayed hooked.

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The possibility of government-backed litigation may pose a more serious threat to the food industry. The state governments that sued America’s leading tobacco companies, seeking compensation for the cost of treating smoking-related illnesses under Medicaid, did not win a single case. But they still managed to obtain a settlement that included payments worth more than \$200 billion over the first 25 years and a panoply of restrictions on advertising, promotion, and sales practices. A similar legal assault on fast food chains or snack food makers might produce similar results.

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The rationale for such lawsuits is also one of the main rationales for the War on Fat. As Banzhaf put it in a 2003 press release, “obese patients are contributing to skyrocketing Medicare and Medicaid outlays and costing thin taxpayers tens of billions of dollars a year.”

A 2003 study in the journal *Health Affairs* estimated that the health care costs associated with excessive weight amount to something like \$93 billion a year in the U.S., half of it covered by Medicare and Medicaid. “If people want to be 200 pounds,” said the study’s lead author, Eric Finkelstein, “then that’s their choice. But ultimately, if the taxpayer is paying for those choices...that is where the justification for government involvement comes from.”

As Finkelstein and his co-authors acknowledged, however, it’s not clear that taxpayer costs are higher, on balance, than they would be if everyone were thin. In the case of smokers, economic analyses indicate that taxpayer savings from less health care in old age and fewer Social Security payments (because of shorter life expectancies) outweigh the costs of treating tobacco-related diseases.

I suspect concerns about obesity’s fiscal impact resonate even more in Canada than in the U.S., since Canadian taxpayers cover everyone’s medical expenses, not just those of the poor and elderly. Jim Watson offers this response to skepticism about a government role in fighting sloth and gluttony: “For those who...say, well, it’s none of the government’s business, well, I’m sorry, but as a taxpayer I don’t want to fund this person’s quadruple bypass because they haven’t taken care of themselves.”

Several years ago I was in Canada to promote my book about the anti-smoking movement, and a radio show caller raised this same argument to justify government efforts to discourage tobacco consumption. I suggested that, even if we assume that the net effect of smoking is to increase government spending, the problem is not smoking so much as the policy of forcing taxpayers to

subsidize other people's health care. That observation roused the ire of the show's otherwise cordial host, who asked how I dared come to Canada and lecture Canadians about the Canadian way of life.

Having been chastened by that experience, I want to be clear: This has nothing to do with Canada per se. Subsidizing health care inevitably means subsidizing risky habits. You may support government-funded health care in spite of this drawback, but that means accepting the possibility that your money will be used to pay for some fat guy's quadruple bypass.

More to the point, the argument based on government-funded health care proves too much. If the size of your gut is the government's business, if your neighbor may legitimately demand that you stop eating so much cheesecake and start working out regularly because your current lifestyle is hitting him in the wallet, why stop at Twinkie taxes, advertising restrictions, and fast food lawsuits?

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Instead of taxing ice cream and cheeseburgers, which are consumed by the thin as well as the fat, why not tax people for each pound over their ideal weight? That would impose a fee proportionate to the burden they are imposing on taxpayers, and it would create a direct incentive to lose weight.

Kelly Brownell doesn't like that idea. He says a weight tax puts too much emphasis on individual responsibility rather than the environment. But if the prices people pay for food are part of the environment that encourages obesity, so is the price they pay for being fat.

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Similarly, John Banzhaf says, "I don't think the government can order [people] to exercise." My response is, why not? Which is more likely to make people thinner: suing McDonald's, or mandatory calisthenics in the public square every morning? If you assume that slimming us down is a proper goal of government, it's hard to see the objection to policies that show promise of actually working, as opposed to enriching lawyers or making a statement.

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The argument that people covered by government-funded health care have a duty to keep fit also proves too much in the sense that it can be extended to anything that carries a risk of disease or injury. If eating and exercise are legitimate targets of regulation, so are sex, hard work, sleep, stress, dental hygiene, and a wide range of recreational activities. Here taxpayer protection converges with public health protection, if public health is understood as the combined health of the collective.

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That view of public health, which treats risky behavior as if it were a communicable disease, obscures some important distinctions. Behavior cannot be transmitted to other people against their will. People do not choose to be sick, but they do choose to engage in risky behavior. The choice implies that the behavior, unlike a viral or bacterial infection, has value to them. It also implies that attempts to control the behavior will be resisted.

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The question, then, is how the government should respond to that resistance. "The first step is persuasion," says Jim Watson. "Let's see how that works."

I think he has skipped a step: First we need to think a little more deeply about whether we want to live in a world where our risky habits are everyone else's business.

Jacob Sullum est senior editor du magazine Reason, un mensuel américain qui traite d'enjeux politiques, économiques et culturels.