The Sixth Deadly Sin

In the early nineteenth century French intellectuals considered an appreciation of fine food and the development of the palate a subject worthy of philosophical discourse. The most famous instance is The Physiology of Taste, written in 1826 by the erudite gentleman lawyer Jean-Anthelme Brillat-Savarin. In counterpoint to Brillat-Savarin’s physical and philosophical enjoyment of food was the Roman Catholic Church’s proscription against the sixth deadly sin, gluttony. One could savor, but not to excess. And, unlike those who indulged in the other sins, people who regularly committed gluttony wore the evidence for all to see. (King Louis XVI seems to have paid the ultimate temporal price for his self-indulgence.) Yet even though gluttony was considered a deadly sin, most of the faithful never had the luxury of enough food to face that particular temptation.

Issues of food and its relationship to the body found particularly fertile intellectual ground in the United States, where numerous food fads arose during the nineteenth century. Will Keith Kellogg’s belief in the social need for clear bowels and vegetarianism led to the development and popularization of corn flakes, a food that revolutionized the American breakfast. Kellogg founded the W.K. Kellogg Company in Battle Creek, Michigan, in the pursuit of the health, both mental and spiritual, that could be attained by eating right. A bowl of breakfast cereal became a catalyst for social change, based on consumer response to its perceived health benefits.

Today, there are still plenty of health food gurus who promote various panaceas to American excess at the table, but increasingly it is lawyers who are shaping the way our society thinks about food. These lawyers are not as sympathetic as Brillat-Savarin, however. Rather than celebrate food, they choose to punish it through damaging lawsuits. We also have a Congress and state legislatures that scramble to limit such lawsuits by passing laws in knee-jerk reaction to them. Restaurants, food and beverage manufacturers, and others are being forced to find a balance between two basic American values—seeking redress in the courts and the freedom to make personal choices.

The Next New Enemy

Obesity has emerged as the primary domestic health problem of the new millennium, displacing smoking. Before smoking was seen as an enemy to public health, diseases, rather than activities, were considered the causes of sickness. Even the demon of the temperance movement, alcohol, generated arguments about morality and religion, not about health. It took years to establish smoking as an enemy to public health.

We have changed from a country whose wealth has made people grow taller and be healthier to one whose very wealth and sense of plenty have become the problem. Now we must try to impose balance on ourselves, and this is no mean trick.

Almost twenty years have elapsed since 1988, when Surgeon General C. Everett Koop made his first remarks about nicotine. Cigarette advertisements on television were soon banned, and eventually, laws were enacted that prohibited smoking in government buildings, office buildings, and restaurants. Over the past few decades smoking has been transformed from a habit that was seen as cool and sophisticated to one that is vilified. Today, if smokers become sick from smoking, they are just as likely to suffer a “What did you expect” as to receive a sympathetic “I’m so sorry.”

A small backlash has developed against the crackdown on smoking. Smokers’ advocates argue that those who smoke have the right to do so. This argument is countered...
nonsmokers, who complain that they are forced to endure secondhand smoke, a by-product of the smokers’ habits. These countervailing positions illustrate the conflict between exercising personal freedom and not infringing on the rights of others.

When in 1954 smokers first sued tobacco companies for compensation for injuries to their health caused by smoking, the tobacco industry argued that the plaintiffs chose to smoke their legally produced products despite health warnings on the label. The early suits were dismissed because the courts found that (1) there was no causal relationship between smoking and cancer; and (2) smoking was volitional, therefore even if there was a causal relationship, the plaintiff had chosen to smoke. The downfall of the tobacco industry came only with the discovery that the tobacco companies had intentionally increased the level of nicotine in cigarettes.

Addicted to the nicotine, people bought more cigarettes, and the companies enjoyed larger profits. The companies also publicly denied what they were doing. When the truth came out, the public perception of smoking changed dramatically, as did the behavior of the tobacco industry. This new approach eliminated the enemy. A void was created. A new enemy was needed.

The new enemy, it appears to me, is obesity. Obesity brings with it the plethora of health problems necessary to qualify as a public enemy—diabetes, high blood pressure, heart disease, stroke, and more. It is a disease that could exact a very high public health and social cost. It appears to be a public sin caused by eating too much, denoting a lack of self-control that in turn engenders embarrassment and feelings of self-loathing. This disease is complicated by the contemporary societal standard of beauty, which is defined as thin, leaving the obese to suffer consequences that are not only physical but also psychological.

We can make analogies in this case to the path taken against smoking and the tobacco companies. Those who benefited from lawsuits against tobacco companies can similarly attempt to find the culprits behind obesity and bring them to their knees in court. They can claim lots of money to fight obesity and restore public health (and become wealthy in the process). If America indeed has a weight problem, it must be somebody’s fault. And that somebody had better have deep pockets.

The Legal Argument

I am starting from the proposition that we in the United States have defined public policy through law. Alexis de Tocqueville described this phenomenon in his book *Democracy in America*, which was based on his observations of the United States in the early nineteenth century. Everyone has the opportunity to get into the act: the executive branch through executive orders and regulation; the legislative branch through enacting laws; the judicial branch through its rulings and interpretation of laws; and the public, directly by bringing lawsuits and indirectly by influencing legislation and regulation. To watch the debate over the new enemy, we need only observe what is happening in the legal process. But first we must review the legal arguments involved and the matters that have to be proved.

Let us begin with John F. Banzhaf III. Banzhaf is the self-proclaimed ringleader of the anti–tobacco company lawsuits and a professor at George Washington University Law School. He makes no bones about his desire to bring the fast-food restaurant industry to its knees. On his Web site, www.banzhaf.net, he has posted his manifesto. Unlike Brillat-Savarin, who appreciated the complexity of the conditions that can lead to the enjoyment of food, Banzhaf presents his legal arguments brusquely, without subtlety. He clearly draws the analogy between fast food and tobacco and attempts to rally the forces around this position, claiming to be a proponent of consumer protection.

The legal argument in the tobacco cases was simple: (1) smoking tobacco was the direct cause of the illness of the plaintiffs; (2) the tobacco companies sold tobacco; and (3) the tobacco companies ensured that the act of smoking...
was not volitional by knowingly manipulating the nicotine level in tobacco to make it addictive. This argument essentially made the tobacco companies directly responsible for the illness of the plaintiff, in a manner similar to the person who causes injury while driving a car.

But does the legal argument against fast foods follow the same simple paradigm?

Defining the New Enemy

It is easy to say that obesity is a national problem. One can find statistics to support the mental and physical health risks associated with obesity, although, on the other side, the latest scientific evidence indicates that the obesity problem is not as widespread as has been believed. Social and economic problems are associated with obesity. Airlines, for example, have recalculated the average weight of passengers, a change that affects both the size of the seats (and hence the profitability of each flight) and the cost of fuel needed to support the increased weight load.

But, unlike the case with tobacco, obesity is not accompanied by a simple solution. The solution to preventing the health problems associated with smoking is to stop smoking. One can live without smoking. It is a choice. But there is no similar univalent solution to obesity, which is caused by multiple factors. And one cannot live without eating. It’s easy enough to recite the cause of obesity: we eat too many calories for the number of calories that we burn. Excess calories are stored in the form of fat. In other words, we eat too much and exercise too little.

Lawyers who bring what can collectively be called obesity lawsuits must establish a direct link between the obesity suffered by the plaintiff and the illness that the person has contracted (the obesity is the probable cause of the malady); that the defendant (read “culprit”) was the source of the obesity; that the food eaten in excess was somehow nonvolitional and the fault of the defendant, not the choice of the plaintiff. And unspoken, but nevertheless important, is the need for the culprit to have deep pockets. Call me naïve, but I am still trying to figure out what can be gained should there be a successful plaintiff in an obesity lawsuit. A money judgment will not cure a plaintiff’s obesity. That person is still eating too much and exercising too little. And I can hardly see how, in legal terms, one could sustain the burden of proof. There are simply too many questions. Does merely being obese without health problems entitle a person to compensation? That is, are the social issues alone sufficient to trigger a fault/responsibility response in a lawsuit?

The Direct Link

If we analyze the legal dots that have to be connected to establish a legally viable case, it becomes clear that the problem is vast. Let’s start with the cause of obesity: overeating. To establish that a particular food is at fault, the plaintiffs would have to demonstrate that that particular food caused the obesity. The lawsuit filed in 2002 by Caesar Barber, plaintiff, named McDonald’s, Burger King, Kentucky Fried Chicken, and Wendy’s as defendants. It would have been Barber’s burden to establish that each of those defendants had caused his obesity. He withdrew the lawsuit. Since that time, new suits have focused on child plaintiffs. By using children as plaintiffs, the attorneys representing them can avoid the defense that eating the product is volitional, claiming that parents, not children, are responsible for their offsprings’ diet.

How does a plaintiff’s attorney choose the next defendant? Coke or Pepsi? Oreo or Little Debbie? Burger King or McDonald’s? Unless a person eats only one company’s food to the exclusion of all others, it will be hard to trace the path of any particular calories to a final resting place on the plaintiff’s hips. Certainly, eating too much foie gras, too much peanut butter, even too much “health” food could cause obesity. Are these other pockets simply too shallow for the plaintiffs to pursue? The sandwich shop Subway seems to have evaded the problem that has faced other fast-food chains by touting the weight-loss benefits of eating Subway sandwiches. I am waiting for someone who doesn’t lose weight eating as Jared Fogle did (Fogle is Subway’s spokesman) to sue for false claims.

What about the other side of the equation, the expenditure of calories? Perhaps, limiting ourselves to children for the moment, we can examine latchkey kids who stay inside because their parents have to work and who live in areas where the streets aren’t safe. They eat junk food at home and don’t get enough exercise. Should they sue their parents for not giving them a better life? Should they sue the municipal government for not keeping the streets safer? Should they sue Kraft for making tasty snacks? Can we sue school systems for limiting or eliminating physical education? Can we sue Nintendo, computer manufacturers, television manufacturers and producers, the auto industry, or the federal government for building a highway system that keeps us from walking enough?

Those Pesky Deadly Sins

There are people who are obese because they eat too much. Some people eat too much even when they don’t eat junk
food. We live in a land of plenty where food is abundant and cheap, and where, when one can ride, it is not considered acceptable to walk. It is not cool to get off the sofa to use the television buttons instead of a remote control. Why would anyone use a crank can opener when an electric one is available? We have changed from a country whose wealth has made people grow taller and be healthier to one whose very wealth and sense of plenty have become the problem. All of the self-checking mechanisms of society have been eliminated, and ease is available to just about all of us. Now we must try to impose balance on ourselves, and this is no mean trick.

Whom can we blame for a society that has finally become so rich that gluttony is a real sin, not a theoretical one? Perhaps, it is only the devil finally getting his due. After roasting all those scrawny sinners, maybe he needed a few fat ones who would be tender and self-baste.

NOTES

1. In what is likely an apocryphal story, Louis XVI was said to be so gluttonous that he had to stop to eat while escaping from revolutionary forces and so was captured at the table, later to be executed.

2. Seven decades later, Dr. Robert Atkins similarly convinced people that if they eliminated carbohydrates from their diets, they could easily lose weight and acquire the health benefits of being thin. The Atkins diet became extremely popular. Fanatical adherence to it changed the way people ate to the extent that the economic viability of the grain industry was threatened. The true social changes resulting from this diet—which is simply a present-day example of the social connection between food and health—are too recent, however, for a complete assessment.

3. For updated charts of states that have enacted legislation to limit food-related lawsuits, visit www.restaurant.org. This chart also contains the status of pending legislation in other states and Congress.

4. During a 1988 trial it was revealed that a 1972 report entitled “Motive and Incentives in Cigarette Smoking” by Philip Morris Research Center characterized cigarettes as very efficient nicotine dispensers. Up until that time the tobacco companies had maintained that cigarettes were not addictive and that therefore smoking was volitional. This report proved that the industry knew that nicotine was addictive and that they used it to keep people smoking. This report did much to remove the volitional argument from the playbook of the tobacco companies. Because all of the companies knew of the report and its findings, the court found that the three big tobacco companies were in a conspiracy to hide their business plan to create addiction. By this time the link between smoking and cancer had been scientifically established, but the defense was still that it was a volitional act, i.e., the choice of the smoker. This report removed the “choice of the smoker” argument.

5. The Centers for Disease Control in Atlanta promulgated statistics from a study in 2004 that projected 400,000 deaths annually in the United States that were related to obesity and overweight. By contrast, in April 2005 researchers from the National Institutes of Health and the same Centers for Disease Control published an article in the Journal of the American Medical Association in which they claim that fewer than 26,000 deaths annually in the United States are due to obesity-related causes. See Mokdad et al. “Actual Causes of Death in the United States, 2000,” JAMA 291 (2004):1255–1257; and Flegal et al. “Excess Deaths Associated with Underweight, Overweight, and Obesity,” JAMA 293 (2005):1861–1867.

6. One indirect result of these lawsuits and the social impact of the debate surrounding them is the movie Supersize Me (2004). This documentary fuels the position that food from McDonald’s is unhealthy. Written and directed by Morgan Spurlock, it tells the story of his experience eating food exclusively from McDonald’s.

7. Jared S. Fogle, a spokesman for Subway, claims to have lost 245 pounds eating Subway sandwiches. Subway advertises the lean benefits of eating its sandwiches.