

# The Center For Consumer Freedom

**STATEMENT OF RICHARD BERMAN**

**EXECUTIVE DIRECTOR**

**THE CENTER FOR CONSUMER FREEDOM**

**PUBLIC HEARING ON H.R. 339**

**“THE PERSONAL RESPONSIBILITY  
IN FOOD CONSUMPTION ACT”**

**U.S. HOUSE OF REPRESENTATIVES**

**COMMITTEE ON THE JUDICIARY**

**SUBCOMMITTEE ON  
COMMERCIAL AND ADMINISTRATIVE LAW**

**JUNE 19, 2003**

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*Executive Director*  
*The Center for Consumer Freedom*

Good morning. Thank you for the opportunity to testify before this subcommittee on the issue of obesity and the role of food retailers. It has been convenient for some commentators to target the restaurant and foodservice industries as culprits behind the so-called “obesity epidemic.” Before the nation turns to draconian solutions (whether directed at the foodservice industry or any other) we need to step back and make certain we understand the nature of the problem.

### **Measuring the Problem**

Let’s start with the numbers. We have all heard that there are 300,000 “obesity-related” deaths each year. But to qualify as an “obesity-related” fatality, the death need not have anything at all to do with body weight. If an obese man dies in a car crash, the death is “obesity-related.” The *New England Journal of Medicine* has reported, “although some claim that every year 300,000 deaths in the United States are caused by obesity, that figure is by no means well established. Not only is it derived from weak or incomplete data, but it is also called into question by the methodologic difficulties of determining which of many factors contribute to premature death.”<sup>1</sup> Perhaps that’s why the Department of Health and Human Services instead characterizes the same 300,000 deaths as resulting from “physical inactivity.”<sup>2</sup>

More confusion arises from calculations: the body mass index (BMI). In 1998, the federal government shifted its definition of acceptable weight categories, following

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<sup>1</sup> Kassirer JP, Angell M., “Losing weight--an ill-fated New Year's resolution,” Editorial, *New England Journal of Medicine*, Volume 338, January 1998, p. 52-54.

<sup>2</sup> President’s Council on Physical Fitness and Sports, “Fact Sheet: Physical Activity and Health,” available at [http://www.fitness.gov/physical\\_activity\\_fact\\_sheet.html](http://www.fitness.gov/physical_activity_fact_sheet.html) (citing U.S. Department of Health and Human Services and other federal agency data). Accessed 15 June 2003.

considerable pressure from the World Health Organization. As a result, 30 million Americans became “overweight” overnight – without gaining an ounce. Is this a useful definition? We need something that can truly measure the obesity problem and be an education tool for the public. Telling people that they are fat if they have bodies like Michael Jordan won’t inspire weight loss; overstating the problem will only spur us to create solutions that will have little overall impact on public health.

### **Is Obesity About What We Eat or What We Do?**

Having said that, Harvard Institute for Economic Research has found that since the 1960s, the average man has gained 12 pounds while the average woman has gained 10.<sup>3</sup> Whether you think that is a large increase or not, we first need to understand that this weight gain did not occur in a vacuum. Researchers at the National Bureau of Economic Research attributed 60 percent of this weight gain to sedentary lifestyles.<sup>4</sup> At the turn of the century, over one-third of jobs involved physical labor; today, only 5 percent.

Automation has taken us out of the field and places us behind a keyboard. Over time, that kind of shift makes a considerable difference. Economists have found that being in a sedentary occupation for one year leads to a small increase in weight, but staying in that occupation for 14 years causes a significant increase.<sup>5</sup> At an American Enterprise Institute event last week on the problem of obesity, more than one commentator noted that we once exercised to make money; now, we spend money to join health clubs.<sup>6</sup>

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<sup>3</sup>Cutler, David M.; Glaeser, Edward L.; and Shapiro, Jesse M., “Why Have Americans Become More Obese?” Harvard Institute of Economic Research, Discussion Paper Number 1994, January 2003. Downloadable from <http://post.economics.harvard.edu/hier/2003papers/2003list.html>. Accessed 16 June 2003.

<sup>4</sup> Lakdawalla, Darius, and Philipson, Tomas, “The Growth of Obesity and Technological Change: A Theoretical and Empirical Examination,” NBER Working Paper No. w8946, May 2002, p. 25.

<sup>5</sup> *Ibid*, p. 14.

<sup>6</sup> Commentators may have been collectively paraphrasing Philipson and Richard Posner from an earlier work: “...people must *pay* for undertaking, rather than be paid to undertake, physical activity.” (Emphasis

Adults may become sedentary by how they earn a living; children do the same with the help of television, video games, and computers. A recent study reported that boys were more likely to be overweight if they watched more than 4 hours of TV a day compared with those who watched less than 1 hour.<sup>7</sup> According to *JAMA* (the Journal of the American Medical Association), the average high school student will spend between 15,000 and 18,000 hours in front of a television, but only spend 10,000 hours in school.<sup>8</sup> Even when they are at school, children aren't required to exercise as much as they once were – and in many cases are nudged in the direction of their PCs: “We are seeing an erosion of physical education nationally at the high school and elementary level because we are adding other academic requirements, such as computers and art.”<sup>9</sup> Some are prevented from exercising. Asthma rates in children have doubled since 1984 and asthmatic children are 63 percent more likely to be obese than other children.<sup>10</sup> Even before our kids consume any food, they are already predisposed to a lifestyle where physical inactivity is the norm.

### **The Law of Unintended Consequences**

One elephant in the room worth mentioning is the unintended consequence of our success in beating smoking. Smoking rates have dropped 60 percent since 1985. In 1980, 6

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theirs). “The Long-Run Growth in Obesity as a Function of Technological Change,” Working Paper 99.8, The Irving B. Harris Graduate School of Public Policy Studies at the University of Chicago, 17 May 1999.  
<sup>7</sup>Eisenmann, Joey C.; Barteel, R. Todd; and Wang, Min Qi; “Physical Activity, TV Viewing, and Weight in U.S. Youth: 1999 Youth Risk Behavior Survey” *Obesity Research* Volume 10, Issue 4, May 2002, p. 379-385.

<sup>8</sup> Andersen, Ross E.; Crespo, Carlos J.; Bartlett, Susan J.; Cheskin, Lawrence J.; Pratt, Michael; “Relationship of Physical Activity and Television Watching With Body Weight and Level of Fatness Among Children: Results From the Third National Health and Nutrition Examination Survey” *JAMA*, Volume 279, 25 March 1998 p. 938-942.

<sup>9</sup> Marybell Avery, President of National Association for Sport and Physical Education, quoted in “Whatever Happened to Recess?” *Hartford Courant*, 30 May 2000.

<sup>10</sup> Epstein, Leonard H.; Wu, Yow-Wu B.; Paluch, Rocco A.; Cerny, Frank J.; and Dorn, Joan P.; “Asthma and Maternal Body Mass Index Are Related to Pediatric Body Mass Index and Obesity: Results from the Third National Health and Nutrition Examination Survey” *Obesity Research* Volume 8, Issue 8, November 2000, p. 575-581.

percent of the population resided in states that restrict smoking in the workplace; by 1999, the figure was up to 42 percent.<sup>11</sup> But anyone who has stopped will tell you about how quitting smoking – a known appetite suppressant – triggers at least some weight gain. Researchers have argued that the raising of tobacco taxes contributes to obesity. One analysis concludes: “A 100 percent rise in the price of cigarettes raises average BMI by 2 percent.”<sup>12</sup>

### **The Role of Restaurants**

On the food intake side, the HIER study found that between 1994 and 1996, Americans ate 7 fewer calories per meal than they did between 1977 and 1978.<sup>13</sup> What did increase, however, was eating between meals: 90 percent of the additional calories Americans consume are attributable to snacking. The authors found:

“The increase in caloric intake is because of greater frequency of eating, not eating more at any one sitting. The finding that increased caloric intake is from more snacks rules out two obvious accounting explanations for increased obesity. The first is that obesity is a result of increased portion sizes in restaurants (Young and Nestle, 2002). If this theory were true, calories at main meals, particularly dinner, would have increased. Similarly, the evidence also rules out the view that fattening meals at fast food restaurants have made America obese.”

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<sup>11</sup> Centers for Disease Control and Prevention, as cited by Chou, Grossman and Saffer in “An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System,” NBER Working Paper Series, Working Paper 9247, October 2002.

<sup>12</sup> Chou, Shin-Yi; Grossman, Michael; and Saffer, Henry “An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System,” NBER Working Paper Series, Working Paper 9247, October 2002.

<sup>13</sup> Cutler, David M.; Glaeser, Edward L.; and Shapiro, Jesse M., “Why Have Americans Become More Obese?” Harvard Institute of Economic Research, Discussion Paper Number 1994, January 2003. Downloadable from <http://post.economics.harvard.edu/hier/2003papers/2003list.html>. Accessed 16 June 2003.

The idea that Americans snack more now than they once did confirms another statistic, that Americans do only a small amount of their overall eating in restaurants at all. Americans eat just four meals a week in a restaurant.<sup>14</sup> A *JAMA* study indicated that over the past 30 years, the calories in a restaurant hamburger went up from about 400 to 500, while the calories in an average hamburger prepared at home went from the high 300s to the low 600s.<sup>15</sup> With this information, we can't believe additional restrictions on restaurants and food retailers will meaningfully impact the problem. As the U.S. Surgeon General said last week, "we can't blame the restaurant industry."<sup>16</sup>

But blaming the industry is big money. In just two days, trial lawyers are hosting the "First Annual Conference on Legal Approaches to the Obesity Epidemic." The program is "intended to encourage and support litigation against the food industry."<sup>17</sup> Without some response from Congress, restaurants will be repeatedly targeted and blamed for an epidemic that is far more complex than menu portions. In reality, it is a combination of misleading statistics, byproducts of technological advances, and unintended consequences of public policy trade-offs. When the draconian solutions visited upon the restaurant industry do not produce the promised reduction in obesity, what corporations will we target next?

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<sup>14</sup> Ebbin, Robert, "Americans' Dining-Out Habits," *Restaurants USA*, November 2000

<sup>15</sup> Nielsen, Samara J., and Popkin, Barry M., Ph.D., "Patterns and Trends in Food Portion Sizes, 1977-1998," *JAMA*, Volume 289, Issue 4, 22 January 2003, p. 442-449.

<sup>16</sup> Richard H. Carmona, U.S. surgeon general, Quoted at the American Enterprise Institute's conference, "Obesity, Individual Responsibility, and Public Policy," Washington, DC, 10 June 2003.

<sup>17</sup> Affidavit to participate in "Legal Approaches to the Obesity Epidemic"(attached)



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## First Annual Conference on *Legal Approaches to the Obesity Epidemic*

### The Public Health Advocacy Institute

#### Affidavit for the *Legal Strategies Workshop* - June 22, 2003

I, ( print name), \_\_\_\_\_, being duly sworn, depose, say and swear under oath and subject to legal penalties that:

1. I understand that the *Legal Strategies Workshop* portion of the First Annual Conference on *Legal Approaches to the Obesity Epidemic* (the "Workshop") is intended to encourage and support litigation against the food industry and that information acquired at this Workshop is to be considered confidential in keeping with these interests.
2. Accordingly, I agree **not to appear as an expert witness or work as a consultant or in any other capacity for or in the food industry** before December 31, 2006.
3. I understand and agree that this affidavit may be used to prove a **conflict of interest** should I violate the previous paragraph.
4. I, and **any firm/organization for which I am working**, am not currently retained by, and hereby **commit myself and my firm/organization not to take as a client, any defendant in the food industry** case before December 31, 2006.
5. I understand and agree that this affidavit may be used to prove a conflict of interest should I or my firm/organization undertake to represent or in any manner work for a defendant in the food industry before December 31, 2006.
6. Furthermore, if another firm/organization that represents a food industry prior to December 31, 2006 employs me, I undertake to inform them of my participation in this Workshop and to avoid any participation, direct or indirect, in their representation of such a defendant.
7. I pledge that I **will not reveal what I have learned at the Workshop, or share any of the materials obtained from the Workshop, with any person who works directly or indirectly for the food industry.**
8. I agree that I will **not attempt to make any tape or other audio or video recording** of any portion of the Workshop, and that I **will report to the Workshop organizers any person whom I know or suspect of doing so.**

**Signed:** \_\_\_\_\_ **Date:** \_\_\_\_\_

affidavit was signed and sworn before me on this \_\_\_\_ day of June, 2003.

\_\_\_\_\_ Notary Public

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