

# The Unbearable Whiteness of Milk: Food Oppression and the USDA

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## INTRODUCTION

The United States Department of Agriculture (USDA), as the entity responsible for the federal Dietary Guidelines, encourages Americans to avoid

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high-fat dairy products,<sup>1</sup> based on extensive medical research revealing their harmful effects.<sup>2</sup> This advice precipitated a thirty-year decline in milk sales.<sup>3</sup> To deal with the resulting surplus, the USDA, which is also responsible for the health of the dairy industry, created Dairy Management Incorporated (DMI).<sup>4</sup> DMI is a marketing branch of the USDA funded primarily through fees levied on dairy farmers.<sup>5</sup> DMI partners with fast food companies to create new products, such as Domino's seven-cheese American Legends pizzas and Taco Bell's steak quesadilla, which contain higher than usual amounts of cheese. DMI also works with the fast-food corporations to market and advertise these products. For example, DMI launched the American Legends pizza line during the 2009 Superbowl.<sup>6</sup> Domino's sales subsequently increased by 14.3%,<sup>7</sup> and the additional sales helped reduce the milk surplus. DMI also created the award-winning advertising campaign, "Got Milk?," which featured a vast array of celebrities with milk moustaches.<sup>8</sup>

The USDA's efforts to reduce the high-fat milk surplus by selling it to fast food consumers impose health costs on Americans generally, but disproportionately harm low-income African Americans and Latina/os who live in urban centers dominated by fast food restaurants.<sup>9</sup> DMI-created marketing campaigns that specifically target these populations, such as "Got Milk?" and "Toma Leche?" ads featuring African American and Latina/o celebrities, also exacerbate already significant health disparities between African Americans,

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1. High-fat dairy products include whole milk, cream, condensed or evaporated milk, ice cream, and custards.

2. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS, 2010, at 2 (7th ed. 2010); see, e.g., Candyce H. Kroenke et al., *High- and Low-Fat Dairy Intake, Recurrence, and Mortality After Breast Cancer Diagnosis*, 105 J. NAT'L CANCER INSTITUTE 616, 617 (2013) (finding that people diagnosed with breast cancer who consume more than one high-fat dairy food daily increase their chance of dying years earlier than those who eat low-fat dairy products).

3. Michael Moss, *While Warning About Fat, U.S. Pushes Cheese Sales*, N.Y. TIMES, Nov. 7, 2010, at A1.

4. 26 U.S. DEP'T OF AGRIC., REPORT TO CONGRESS ON THE NATIONAL DAIRY PROMOTION AND RESEARCH PROGRAM AND THE NATIONAL FLUID MILK PROCESSOR PROMOTION PROGRAM 10–11 (2011) [hereinafter USDA DAIRY PROMOTION REPORT] (a 143-page document reporting on the success of the USDA's dairy marketing campaigns).

5. Moss, *supra* note 3.

6. USDA DAIRY PROMOTION REPORT, *supra* note 4, at 7.

7. Sam Oches, *The Many Acts of Domino's Pizza*, QSR (Aug. 2010), <http://www.qsmagazine.com/menu-innovations/many-acts-domino-s-pizza>.

8. Moss, *supra* note 3; see also USDA DAIRY PROMOTION REPORT, *supra* note 4.

9. See generally Latetia V. Moore et al., *Fast-Food Consumption, Diet Quality, and Neighborhood Exposure to Fast Food: The Multi-Ethnic Study of Atherosclerosis*, 170 AM. J. EPIDEMIOLOGY 29 (2009) (finding that, for every standard deviation increase in fast-food exposure, the odds of consuming fast food near the home increased by eleven to sixty-one percent, and the odds of a healthy diet decreased by three to seventeen percent). Although a 2011 study reported that, in the mid-1990s, middle-income people ate more fast food than lower-income people, the study did not break down its results by race; see DaeHwan Kim & J. Paul Leigh, *Are Meals at Full-Service and Fast-Food Restaurants "Normal" or "Inferior"?*, 14 POPULATION HEALTH MGMT. 307, 314 (2011).

Latina/os, and whites.<sup>10</sup> The USDA's policy of promoting dangerous milk consumption in some communities while warning the general population against it is an example of food oppression.

Food oppression is institutional, systemic, food-related action or policy that physically debilitates a socially subordinated group. Politically and financially weak communities absorb the external costs of food oppression, rendering these costs largely invisible to the mainstream. The effects of the oppression also increase the harmed groups' vulnerability by constraining their political voices, reducing their work capacity, and draining the energy of household and community members who must care for the sick and take on the responsibilities that ill members cannot fulfill. In the long term, food oppression diminishes already vulnerable populations in numbers and in power. Illness arising from food oppression also leads to social invisibility, decreased social status, depression, and despair.

Food oppression is a difficult concept for many to embrace because of the powerful rhetoric regarding personal choice that is endemic in the United States. This rhetoric attributes ill health to individual weakness, regardless of the very real constraints that shape nutritional intake, particularly in low-income, urban communities. The focus on the individual that dominates medical, scientific, and social views of health carries harmful consequences. By ignoring the structural aspects that shape consumption choices, this myopic perspective forecloses effective prevention and treatment of illnesses that disproportionately harm vulnerable communities.

Social position, which reflects the amount of privilege individuals possess along multiple axes, including race, class, gender, sexual orientation, physical ability, and immigration status, dictates how much disposable income and access to nutritious food people have. These factors, in turn, largely determine what we eat.<sup>11</sup> More than taste, preference, willpower, or a commitment to health and fitness, structural forces shape diets.<sup>12</sup> When fast food dominates a person's diet, the reasons are complex and manifold. They include government-corporate partnerships that place fast food in schools,<sup>13</sup> government assistance checks that stretch further in a fast food restaurant than a produce aisle,<sup>14</sup> public transportation that fails to provide routes between low-income neighborhoods and grocery stores,<sup>15</sup> and government subsidies that artificially lower the price of

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10. Statistics are provided *infra* Part III, notes 68–72.

11. Adam Drewnowski & Nicole Darmon, *Food Choices and Diet Costs*, 135 J. NUTRITION 900, 903 (2005).

12. See, e.g., Michael Correll, *Getting Fat on Government Cheese: The Connection Between Social Welfare Participation, Gender, and Obesity in America*, 18 DUKE J. GENDER L. & POL'Y 45, 57–63 (2010).

13. Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CALIF. L. REV. 2221, 2234–35 (2007).

14. *Id.* at 2244.

15. One successful attempt to combat this took place in City Heights, a poor African American neighborhood in San Diego, where a community group persuaded the transit authority to

fast food.<sup>16</sup> Fast food tends to offer more bang for the buck, calories for dollars, making it a sound economic choice for many low-income African American and Latina/o households.

Fast food corporations exploit these harsh realities by devoting millions of dollars to race-targeted marketing annually, including Spanish-language advertising, McDonald's "365 Black"<sup>17</sup> and "Me Encanta" websites,<sup>18</sup> the reconfiguration of restaurants to accommodate large Latina/o families,<sup>19</sup> and the introduction of culture-specific food items.<sup>20</sup> Health problems linked to fast food, including heart disease, strokes, cancer, and diabetes, affect low-income African Americans and Latina/os more frequently and more seriously than whites.<sup>21</sup> In "Fast Food: Oppression Through Poor Nutrition," I introduced the theory of food oppression to explain how government actions and policy that lead to the dominance of fast food in low-income, inner-city African American and Latina/o communities contribute to these health disparities.<sup>22</sup>

Here I expand on the theory of food oppression, using the problem of the USDA's dual roles of nutrition adviser and dairy promoter as an example. I argue that USDA-sponsored dairy consumption, particularly in partnership with fast food companies, increases and perpetuates health disparities. Part I lays out the theory of food oppression. Part II contrasts the traditional salutary image of milk with the scientific and medical realities. Part III analyzes the structural mechanisms and cultural factors that lead the USDA to institutional strategies that result in food oppression. I conclude by exploring the role that law might play in addressing this problem.

## I. FOOD OPPRESSION

Food oppression arises from institutionalized, food-related policies and practices that undermine the physical strength and survival of socially marginalized groups. It often affects individuals who experience multiple levels of structural subordination based on race, class, sexual orientation, physical ability, age, or immigration status. These multiple sites of oppression, compounded by the debilitating effects of food oppression and its absence from most activist agendas,

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reroute city buses to provide residents with access to grocery stores. See Adam Ward, *Candidates Pledge to Improve Public Transportation in City Heights*, CITY HEIGHTS LIFE (June 7, 2012, 10:50 AM), <http://cityheightslife.com/?p=1102> (describing City Heights activists' successful efforts to get local politicians to agree to improve public transportation in the area); see also Freeman, *supra* note 13, at 2239–40.

16. Freeman, *supra* note 13, at 2242.

17. 365 BLACK, <http://www.mcdonalds.com/365black/en/home.html> (last visited Feb. 27, 2013) ("Deeply rooted in the community 365 days a year!").

18. ME ENCANTA, <http://www.meencanta.com> (last visited Feb. 27, 2013).

19. Freeman, *supra* note 13, at 2238.

20. *Id.*

21. *Id.* at 2228–29.

22. *Id.*

render resistance particularly challenging. Popular values regarding food, health, and personal responsibility also obscure food oppression by constructing a mainstream dialogue that focuses on personal choice and shifts attention away from structural factors such as the mutual interest of government and corporations in creating and maintaining a high demand for low-cost, non-nutritious food.<sup>23</sup>

Food oppression analysis draws on key principles of critical race theory. Food oppression is a “legal concept generated from the bottom” that “arises not from abstraction but from experience.”<sup>24</sup> The analysis does not essentialize, recognizing the interconnected nature of race, class, and other dimensions of power and identity.<sup>25</sup> Understanding that oppression often arises from unconscious biases<sup>26</sup> and structural forces, the analysis looks beyond intentional or explicit subordination, or “nutritional racism.” Government policy and action almost always appear couched in neutrality, even when their effects on different communities are significantly disproportionate.<sup>27</sup>

The primary goal of applying a food oppression analysis is to effect change. It is, in the spirit of Derrick Bell’s work, “unabashedly instrumental.”<sup>28</sup> Rejecting the ideologies of colorblindness<sup>29</sup> and postracialism,<sup>30</sup> food oppression analysis

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23. See, e.g., Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 762–65 (2007) (describing how obesity fuels and supports capitalism, and how the profitability of this relationship depends on its obfuscation from the view of the literal consumer).

24. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 363 (1987).

25. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (“[T]he intersectional experience [of African American women] is greater than the sum of racism and sexism.”); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (using the concept of intersectionality to illustrate unique patterns of violence against women of color).

26. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164, 1186–211 (1995) (“Subtle, often unconscious forms of bias . . . represent today’s most prevalent type of discrimination.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing against the discriminatory purpose doctrine in Equal Protection Clause jurisprudence by illustrating how “a large part of the behavior that produces racial discrimination is influenced by unconscious motivation”).

27. See, e.g., Lawrence, *supra* note 26, at 347 n.126 (arguing that facially discriminatory laws are unusual “because the governmental actor who is attempting to disguise unconstitutional motives will also avoid using an obvious suspect classification”).

28. Alan Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1881 (1981) (describing the unifying principle of Derrick Bell’s casebook, *Race, Racism, and American Law*).

29. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 2 (2009) (describing a “new racial ideology,” colorblind racism, that “explains contemporary racial inequality as the outcome of nonracial dynamics”); Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 *passim* (2007) (describing the concept of colorblindness in the context of Equal Protection jurisprudence).

seeks to uncover and name racial and socioeconomic subordination, and to guide the development of policies that transform the structural underpinnings of this subordination. It strives to generate realistic strategies that “are less likely to worsen conditions for those we are trying to help”<sup>31</sup> by finding points of interest convergence between the privileged and the less powerful.<sup>32</sup>

Most legal scholarship on food and nutrition lacks an explicit critical race and/or class analysis. Even work that takes a social justice approach to food issues, such as environmental impact,<sup>33</sup> food safety,<sup>34</sup> and genetic modification,<sup>35</sup> tends to be solutions oriented and not theoretical. While some legal literature examines race and class disparities in the context of problems such as access to healthy food,<sup>36</sup> hunger or food insecurity,<sup>37</sup> and regulatory issues,<sup>38</sup> it often does

30. See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1589 (2009) (describing postracialism as “a twenty-first century ideology that reflects a belief that due to racial progress the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle”); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 *passim* (2010) (describing the ways in which racism persists now that the election of Barack Obama has caused some to describe the modern age as post-racial).

31. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992).

32. Derrick A. Bell Jr., Comment, *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 *passim* (1980) (assessing school desegregation efforts in terms of the converging interests of whites and blacks).

33. See, e.g., Avi Brisman, *It Takes Green to Be Green: Environmental Elitism, “Ritual Displays,” and Conspicuous Non-Consumption*, 85 N.D. L. REV. 329 (2009); Jason J. Czarnetzki, *Food, Law & the Environment: Informational and Structural Changes for a Sustainable Food System*, 31 UTAH ENVTL. L. REV. 263 (2011); Eileen Gauna, *Environmental Law, Civil Rights and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 34 (2012); Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward a Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENVTL. L. REV. 493 (2011); Neil D. Hamilton, *Moving Toward Food Democracy: Better Food, New Farmers, and the Myth of Feeding the World*, 16 DRAKE J. AGRIC. L. 117 (2011).

34. See, e.g., Laura E. Derr, *When Food is Poison: The History, Consequences, and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004*, 61 FOOD & DRUG L.J. 65 (2006); Debra M. Strauss, *Achieving the Food Safety Mandate: Bringing the USDA to the Table*, 33 HAMLIN J. PUB. L. & POLY 1 (2011); Debra M. Strauss, *The Role of Courts, Agencies, and Congress in GMOs: A Multilateral Approach to Ensuring the Safety of the Food Supply*, 48 IDAHO L. REV. 267 (2012); Martha Ingram, Note, *Raw Deal: Trade Implications of the U.S. Food and Drug Administration's Pending Review of Unpasteurized Cheeses*, 12 MINN. J. GLOBAL TRADE 461 (2003); Kammi L. Rencher, Note, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418 (2012).

35. See, e.g., Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583 (2007); Margaret Sova McCabe, *Superweeds and Suspect Seeds: Does the Genetically-Engineered Crop Deregulation Process Put American Agriculture at Risk?*, 1 U. BALT. J. LAND & DEV. 109 (2012); Heather McLeod-Kilmurray, *An Ecofeminist Legal Critique of Canadian Environmental Law: The Case Study of Genetically Modified Foods*, 26 WINDSOR REV. LEGAL & SOC. ISSUES 129 (2009); Debra M. Strauss, *Genetically Modified Organisms in Food: A Model of Labeling and Monitoring with Positive Implications for International Trade*, 40 INT'L LAW. 95 (2006).

36. See, e.g., Marice Ashe et al., *Local Venues for Change: Legal Strategies for Healthy Environments*, 35 J.L. MED. & ETHICS 138 (2007); Nevin Cohen, *How Great Cities Are Fed Revisited: Ten Municipal Policies to Support the New York City Foodshed*, 22 FORDHAM ENVTL. L. REV. 691 (2011); Jada J. Fehn, *The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity*, 67

so without a structural analysis that explains why geographical, economic, and political factors exacerbate health disparities and act to reinforce social stratification. The theory of food oppression can guide broader strategies for change with the goal of identifying and reversing entrenched patterns of subordination in addition to resolving specific problems.

## II. MILK DOES A BODY GOOD?

Milk has long enjoyed the reputation of being “nature’s perfect food.”<sup>39</sup> The reality, however, is that Americans have always had an ambivalent relationship to

FOOD & DRUG L.J. 65 (2012); Sheila Fleischhacker & Joel Gittelsohn, *Carrots or Candy in Corner Stores? Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 25–30 (2010); Sonje Hawkins, *Desert in the City: The Effects of Food Deserts on Healthcare Disparities of Low-Income Individuals*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 116 (2009); Guadalupe T. Luna, *The New Deal and Food Insecurity in the “Midst of Plenty,”* 9 DRAKE J. AGRIC. L. 213, 221–26 (2004); Bekah Mandell, *Feasts of Oz: Class, Food, and the Rise of Global Capitalism*, 20 S. CAL. INTERDISC. L.J. 93, 95–98 (2010); Alfonso Morales & Gregg Kettles, *Healthy Food Outside: Farmers’ Markets, Taco Trucks, and Sidewalk Fruit Vendors*, 26 J. CONTEMP. HEALTH L. & POL’Y 20 (2009); Montrece McNeill Ransom et al., *Pursuing Health Equity: Zoning Codes and Public Health*, 39 J.L. MED. & ETHICS 94 (2011); Nareissa Smith, *Eatin’ Good? Not in This Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197, 207 (2009); Stephanie Tai, *The Rise of U.S. Food Sustainability Litigation*, 85 S. CAL. L. REV. 1069 (2012); Angelica I. Ambrose, Comment, *A National School Garden Program: A Holistic and Sustainable Approach to Combating Food Deserts*, 21 SAN JOAQUIN AGRIC. L. REV. 51 (2012); Jim Smith, Note, *Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts*, 14 VT. J. ENVTL. L. 71 (2012).

37. See, e.g., Mariana Chilton & Jenny Rabinowich, *Ending Childhood Hunger in America*, 37 HUM. RTS. 14 *passim* (2010); Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL’Y 281 (2012); A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD & DRUG L.J. 405 (2009); J.M. Greene, *Localization: Implementing the Right to Food*, 14 DRAKE J. AGRIC. L. 377 (2009); Karen Kong, *The Right to Food for All: A Right-Based Approach to Hunger and Social Inequality*, 32 SUFFOLK TRANSNAT’L L. REV. 525, 530–33 (2009); David P. Lambert, *The Quest to End Hunger in Our Time: Can Political Will Catch Up with Our Core Values?*, 6 J. FOOD L. & POL’Y 167 (2010); Christina Fox, Comment, *Teach a Man: Proactively Battling Food Insecurity by Increasing Access to Local Foods*, 4 J. FOOD L. & POL’Y 243 (2008); Kate Meals, Comment, *Nurturing the Seeds of Food Justice: Unearthing the Impact of Institutionalized Racism on Access to Healthy Food in Urban African-American Communities*, 15 SCHOLAR 97 (2012); Kathryn A. Peters, Note, *Creating a Sustainable Urban Agriculture Revolution*, 25 J. ENVTL. L. & LITIG. 203 (2010).

38. See, e.g., Rebecca L. Goldberg, *Administering Real Food: How the Eat-Food Movement Should—and Should Not—Approach Government Regulation*, 39 ECOLOGY L.Q. 773 (2012); Neil D. Hamilton, *America’s New Agrarians: Policy Opportunities and Legal Innovations to Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523 (2011); Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231 (2012); Christopher L. Burrell, Note, *Co-Signing Danger: Why the FDA Should Tighten Regulation on the Use of Trans Fat in Foods in Order to Limit Its Adverse Effects on the Health of Low-Income African-Americans*, 3 S. REGIONAL BLACK L. STUDENTS ASS’N L.J. 1, 5–10 (2009); Robert Creighton, Note, *Cheeseburgers, Race, and Paternalism*, 30 J. LEGAL MED. 249, 250–57 (2009); Eva Merian Spahn, Note, *Keep Away From Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669 (2011).

39. MELANIE DUPUIS, NATURE’S PERFECT FOOD: HOW MILK BECAME AMERICA’S DRINK 3 (2002).

cow's milk. Melanie Dupuis provides an illuminating history of the introduction of milk to American diets and the problems that plagued its consumption from the outset.<sup>40</sup> The habit of drinking milk began in urban areas in the mid-nineteenth century.<sup>41</sup> Sanitary production was not possible at this time, and opponents of this new practice claimed that forty-nine out of a hundred children fed milk died as a result.<sup>42</sup> Nonetheless, the general population, relying on powerful marketing campaigns by the dairy industry, believed that the benefits of fluid milk outweighed even these most dire of consequences.<sup>43</sup> Eventually, pasteurization eliminated the dangers of drinking contaminated milk, but new methods of mass-producing milk for human consumption, such as injecting cows with hormones, have created other health problems.

Recent studies out of Harvard and other institutions controvert the dairy industry's claims and popular wisdom that drinking milk improves health. The most common argument put forth in favor of milk consumption is that it is a good source of calcium that builds strong bones in young people and prevents osteoporosis in the elderly.<sup>44</sup> Clinical research contradicts these claims.<sup>45</sup> Instead, studies of children and adults reveal that exercise, reduced sodium, and reduced animal protein intake have significant positive effects on bone density.<sup>46</sup> Further, consuming substantial amounts of fruits and vegetables, particularly kale, broccoli, other leafy greens, and beans will ensure calcium intake adequate to protect bones.<sup>47</sup> The calcium found in cow's milk derives from the cow's diet of calcium-

40. *Id.* at 5.

41. *See id.*

42. *Id.* Concerns about milk contamination persisted for many years. *See Nebbia v. New York*, 291 U.S. 502, 516–17 (1934) (“Milk is an essential item of diet. . . . Failure of producers to receive a reasonable return . . . threaten[s] a relaxation of vigilance against contamination.”).

43. *See id.* at 5–6.

44. *See* CHOOSEMYPLATE.GOV, <http://www.choosemyplate.gov/food-groups/dairy-why.html> (last visited May 12, 2013).

45. *See, e.g.*, Diane Feskanich et al., *Calcium, Vitamin D, Milk Consumption, and Hip Fractures: A Prospective Study Among Postmenopausal Women*, 77 AM. J. CLINICAL NUTRITION 504, 504 (2003) (reporting that a Harvard Nurses' Health Study found milk consumption did not protect fracture risk in seventy-two thousand women followed over eighteen years); Amy Joy Lanou et al., *Calcium, Dairy Products, and Bone Health in Children and Young Adults: A Reevaluation of the Evidence*, 115 PEDIATRICS 736, 736 (2005) (stating that children's bone integrity showed no improvement from milk consumption).

46. M. Lunt et al., *The Effects of Lifestyle, Dietary Dairy Intake and Diabetes on Bone Density and Vertebral Deformity Prevalence: The EVOS Study*, 12 OSTEOPOROSIS INT'L 688, 695 (2001); R. Prince et al., *The Effects of Calcium Supplementation (Milk Powder or Tablets) and Exercise on Bone Mineral Density in Postmenopausal Women*, 10 J. BONE MIN. RES. 1068, 1072 (1995); David M. Reid & Susan A. New, *Nutritional Influences on Bone Mass*, 56 PROC. NUTRITION SOC'Y 977, 983 (1997).

47. Pao-Hwa Lin et al., *The DASH Diet and Sodium Reduction Improve Markers of Bone Turnover and Calcium Metabolism in Adults*, 133 J. NUTRITION 3130, 3130 (2013); Katherine L. Tucker et al., *Potassium, Magnesium, and Fruit and Vegetable Intakes Are Associated with Greater Bone Mineral Density in Elderly Men and Women*, 69 AM. J. CLINICAL NUTRITION 727, 729 (1999).



rich grasses and grains.<sup>48</sup> It is unnecessary for humans to use the cow as an intermediary when they can consume calcium directly from similar sources.

Milk is also often touted as an excellent source of vitamin D. Exposure to direct sunlight, however, is the best method to absorb sufficient levels of vitamin D.<sup>49</sup> Absent access to sunlight, fortified cereals, grains, bread, orange juice, and non-dairy milk, as well as multiple vitamins, each provide adequate amounts of vitamin D.

While extensive research underscores the exaggeration or falsity of milk's health benefits, other studies establish a strong link between dairy consumption, particularly of saturated fats found in cheese and high-fat milk, and serious medical conditions, including increased risks of heart disease,<sup>50</sup> prostate cancer,<sup>51</sup> pancreatic cancer,<sup>52</sup> breast cancer,<sup>53</sup> ovarian cancer,<sup>54</sup> diabetes,<sup>55</sup> and multiple

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48. Bill Duesing, *The Calcium Cycle*, YALE-NEW HAVEN TEACHERS INST. (2013), <http://www.yale.edu/ynhti/curriculum/units/1985/7/85.07.08.x.html>.

49. See Michael F. Holick, *The Vitamin D Epidemic and Its Health Consequences*, 135 J. NUTRITION 2739S, 2743S (2005).

50. Eva Warensjö et al., *Estimated Intake of Milk Fat Is Negatively Associated with Cardiovascular Risk Factors and Does Not Increase the Risk of a First Acute Myocardial Infarction. A Prospective Case-Control Study*, 91 BRIT. J. NUTRITION 635, 635 (2004). See generally Dean Ornish et al., *Can Lifestyle Changes Reverse Coronary Heart Disease? The Lifestyle Heart Trial*, 336 LANCET 129, 129 (1990); Y.T. Szeto et al., *Effects of a Long-Term Vegetarian Diet on Biomarkers of Antioxidant Status and Cardiovascular Disease Risk*, 20 NUTRITION 863, 863–66 (2004). But see Rajiv Chowdhury, et al., *Association of Dietary, Circulating, and Supplement Fatty Acids with Coronary Risk*, 160 ANNALS OF INTERNAL MED. (forthcoming 2014) (finding lack of clear evidence supporting discouragement of reduced saturated fat intake to decrease coronary risk); Patty W Siri-Tarino, et al., *Meta-Analysis of Prospective Cohort Studies Evaluating the Association of Saturated Fat with Cardiovascular Disease*, 91 AM. J. CLINICAL NUTRITION 535, 535 (2010) (published by the American Society for Nutrition, an organization sponsored by Dannon and McDonald's. DAVID ROBINSON SIMON, MEATONOMICS 9 (2013)).

51. June M. Chan et al., *Dairy Products, Calcium, and Prostate Cancer Risk in the Physicians' Health Study*, 74 AM. J. CLINICAL NUTRITION 549, 549 (2001); Marilyn Tseng et al., *Dairy, Calcium, and Vitamin D Intakes and Prostate Cancer Risk in the National Health and Nutrition Examination Epidemiologic Follow-Up Study Cohort*, 81 AM. J. CLINICAL NUTRITION 1147, 1153 (2005). See generally Pinchas Cohen, *Serum Insulin-Like Growth Factor-I Levels and Prostate Cancer Risk—Interpreting the Evidence*, 90 J. NAT'L CANCER INST. 876, 878 (1998).

52. Anne C. M. Thiébaud et al., *Dietary Fatty Acids and Pancreatic Cancer in the NIH-AARP Diet and Health Study*, 101 J. NAT'L CANCER INST. 1001, 1001 (2009) (finding that dietary fat of animal origin was associated with increased pancreatic cancer risk).

53. Dorien W. Voskuil et al., *The Insulin-Like Growth Factor System in Cancer Prevention: Potential of Dietary Intervention Strategies*, 14 CANCER EPIDEMIOLOGY BIOMARKERS PREVENTION 195, 198 (2005) (indicating that prostate and breast cancers have been linked to consumption of dairy products, presumably related to increases in a compound called insulin-like growth factor (IGF)); see also Kroenke et al., *supra* note 1, at 616. See generally Joanna Cadogan et al., *Milk Intake and Bone Mineral Acquisition in Adolescent Girls: Randomised, Controlled Intervention Trial*, 315 BRIT. MED. J. 1255, 1258 (1997) (finding that IGF-I in cow's milk has been shown to occur in increased levels in the blood of individuals consuming dairy products on a regular basis).

54. Daniel W. Cramer et al., *A Case-Control Study of Galactose Consumption and Metabolism in Relation to Ovarian Cancer*, 9 CANCER EPIDEMIOLOGY BIOMARKERS PREVENTION 95, 95, 97 (2000) (finding that the body breaks down the milk sugar lactose into a sugar called galactose, which may be toxic to ovarian cells); Lawrence H. Kushi et al., *Prospective Study of Diet and Ovarian Cancer*, 149 AM. J. EPIDEMIOLOGY 21 (1999) (discussing an Iowa Women's Health Study finding that women who

sclerosis.<sup>56</sup> Research has also connected the overconsumption of saturated fats in dairy products with obesity, which may lead to various types of cancer.<sup>57</sup> Additionally, milk causes health problems in infants and children<sup>58</sup> and often

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consumed more than one glass of milk per day had a seventy-three percent greater chance of ovarian cancer than women who drank less than one glass per week); Susanna C. Larsson et al., *Milk and Lactose Intakes and Ovarian Cancer Risk in the Swedish Mammography Cohort*, 80 AM. J. CLINICAL NUTRITION 1353, 1353 (2004) (linking dairy products to ovarian cancer).

55. T. Saukkonen et al., *Significance of Cow's Milk Protein Antibodies as Risk Factor for Childhood IDDM: Interactions with Dietary Cow's Milk Intake and HLA-DQB1 Genotype*, 41 DIABETOLOGIA 72, 72 (1998) (discussing the Finnish Childhood Diabetes in Finland Study in Finland finding that insulin-dependent (type-one or childhood-onset) diabetes is linked to consumption of dairy products); see also T. Kimpimäki et al., *Short-Term Exclusive Breastfeeding Predisposes Young Children with Increased Genetic Risk of Type I Diabetes to Progressive Beta-Cell Autoimmunity*, 44 DIABETOLOGIA 63, 63 (2001) (indicating that a 2001 Finnish study of approximately 3000 infants with genetically increased risk for developing diabetes showed that early introduction of cow's milk increased susceptibility to type-one diabetes).

56. Bernard W. Agranoff & David Goldberg, *Diet and the Geographical Distribution of Multiple Sclerosis*, 304 LANCET 1061, 1061 (1974) (reporting that dairy-rich diets have been closely linked to the development of multiple sclerosis); D. Malosse et al., *Correlation Between Milk and Dairy Product Consumption and Multiple Sclerosis Prevalence: A Worldwide Study*, 11 NEUROEPIDEMIOLOGY 304 (1992) (finding an association between dairy foods and an increased prevalence of multiple sclerosis).

57. *Cancer Facts & Figures for African Americans 2011–2012*, AM. CANCER SOC'Y 15 (2011), <http://www.cancer.org/acs/groups/content/@epidemiologysurveillance/documents/document/acs-pe-027765.pdf> [hereinafter *Cancer Facts & Figures*] (“Evidence is highly suggestive that obesity . . . increases the risk for cancers of the pancreas, gallbladder, thyroid, ovary, and cervix, as well as for myeloma, Hodgkin lymphoma, and aggressive forms of prostate cancer. Increasing evidence also suggests that being overweight increases the risk of cancer recurrence, decreases the likelihood of survival for many cancers, and increases the risk of developing other illnesses following a cancer diagnosis.” (footnotes omitted)).

58. The American Academy of Pediatrics recommends that parents do not give infants below one year of age whole cow's milk due to a risk of iron deficiency. Lawrence M. Gartner & Arthur I. Eidelman, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 500 (2005). Cow's milk consumption by either an infant or a breastfeeding mother can also cause colic. Kirsi-Marjut Järvinen et al., *Cow's Milk Challenge Through Human Milk Evokes Immune Responses in Infants with Cow's Milk Allergy*, 135 J. PEDIATRICS 506, 512 n.2 (1999); Johanna Paronen et al., *Effect of Maternal Diet During Lactation on Development of Bovine Insulin-Binding Antibodies in Children at Risk for Allergy*, 106 J. ALLERGY CLINICAL IMMUNOLOGY 302, 306 n.25 (2000). Early milk consumption can lead to the development of food allergies and chronic constipation. Arne Høst, *Frequency of Cow's Milk Allergy in Childhood*, 89 ANNALS ALLERGY ASTHMA IMMUNOLOGY 33 (2002); Giuseppe Iacono et al., *Intolerance of Cow's Milk and Chronic Constipation in Children*, 339 NEW ENG. J. MED. 1100 (1998); Hugh A. Sampson, *Food Allergy. Part 1: Immunopathogenesis and Clinical Disorders*, 103 J. ALLERGY CLINICAL IMMUNOLOGY 717, 718 (1999). Despite these health risks to babies and children, efforts to promote milk consumption have long included the discouragement of breastfeeding. In the early twentieth century, doctors positioned themselves as experts on mothering and babies' health and partnered with dairy industries to advocate for the health benefits of cow's over mother's milk. DUPUIS, *supra* note 39, at 3. The campaign began with the upper classes, in whom doctors instilled the belief that breastfeeding was in poor taste, practiced only by those who could not afford to feed their offspring superior products. *Id.* at 48–50. Compounding these efforts were the challenges to breastfeeding that arose with the move from rural to urban communities. Rural women supported each other through nursing circles, communal childcare, and nursing each other's children. *Id.* at 54–55, 63. In the industrialized urban living setting, women were isolated from each other and stigmatized by the medical profession and societal values for breastfeeding, particularly in public. *Id.* at 55. This stigma continues in the present, increasing the number of infants and children who are vulnerable to the ill effects of premature milk consumption,

contains dangerous contaminants.<sup>59</sup> Dairy consumption also creates health problems for people who are lactose intolerant. Lactose intolerance is a health concern that, although not serious, decreases the quality of life of those who suffer from it. Individuals who lack the enzyme lactase, which digests the milk sugar lactose, experience gastrointestinal distress and other uncomfortable symptoms when consuming fluid milk or milk products.<sup>60</sup>

African Americans and Latina/os suffer from the most serious health conditions associated with saturated fats at higher rates than whites.<sup>61</sup> There are significant racial disparities in the number of deaths from cancer,<sup>62</sup> rates of

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usually through formula. *Id.* The World Health Organization advises mothers to breastfeed exclusively up to six months and to continue breastfeeding with complementary foods for a minimum of two years. *Breastfeeding*, WORLD HEALTH ORG., <http://www.who.int/topics/breastfeeding/en> (last visited Feb. 27, 2012). Despite these recommendations, United States hospitals send new parents home with a large, free supply of formula, and most hospitals provide inadequate support for mothers who struggle with breastfeeding initially. See CTRS. FOR DISEASE CONTROL & PREVENTION, BREASTFEEDING REPORT CARD—UNITED STATES 1 (2010), <http://www.cdc.gov/breastfeeding/pdf/breastfeedingreportcard2010.pdf>. The Obama administration, through Michelle Obama's "Let's Move!" campaign, instituted some changes intended to encourage breastfeeding (because of its association with lower obesity rates), particularly for African Americans, who have the lowest rate of breastfeeding. Lynn Sweet, *Michelle Obama to Promote Breastfeeding as IRS Gives Tax Breaks for Nursing*, POL. DAILY (Feb. 14, 2011), <http://www.politico.com/2011/02/14/michelle-obama-to-promote-breast-feeding-as-irs-gives-tax-breaks>. Government efforts to increase support for breastfeeding include tax breaks on nursing supplies, including breast pumps, encouraging hospitals to earn a Baby Friendly certification, the provision of lactation counseling and supplies to eligible women through the Special Supplemental Nutrition Program for Women, Infants, and Children, and requirements in the Patient Protection and Affordable Care Act and directives to federal agencies to provide appropriate break time and locations for working mothers to pump. *Id.*

59. Cows treated with recombinant bovine growth hormone (bGH) often experience mastitis, or inflammation of the mammary glands, a condition that requires antibiotic treatment, causing antibiotics to transfer into the milk. J.L. Outwater et al., *Dairy Products and Breast Cancer: The IGF-I, Estrogen, and bGH Hypothesis*, 48 MED. HYPOTHESES 453, 456–57 (1997). In the face of journalistic efforts to expose these practices, the dairy industry went to great lengths to suppress information regarding the harmful effects of bGH use on the public. See *New World Commc'ns of Tampa, Inc. v. Akre*, 866 So. 2d 1231, 1232 (Fla. Dist. Ct. App. 2003). Other examples of common contaminants found in milk are polychlorinated biphenyls (PCBs) and dioxins, which can have deleterious effects on the immune, reproductive, and central nervous systems. Outwater et al., *supra*, at 455–56. Studies have also linked PCBs and dioxins to cancer. A.J. Baars et al., *Dioxins, Dioxin-Like PCBs and Non-Dioxin-Like PCBs in Foodstuffs: Occurrence and Dietary Intake in the Netherlands*, 151 TOXICOLOGY LETTERS 51, 52–53 (2004). The hazards of modern milk contamination, however, have been well documented and studied. For those who can afford and access it, the simple way to avoid consuming these contaminants is to drink organic milk. This solution belies the economic and geographic realities of many affected individuals.

60. Patricia Bertron et al., *Racial Bias in Federal Nutrition Policy, Part I: The Public Health Implications of Variations in Lactase Persistence*, 91 J. NAT'L MED. ASS'N 151, 152 (1999).

61. Alvaro Alonso et al., *Dairy Intake and Changes in Blood Pressure Over 9 Years: The ARIC Study*, 63 EUR. J. CLINICAL NUTRITION 1272, 1274 (2009); Eva-Elisa Álvarez-León et al., *Dairy Products and Health: A Review of the Epidemiological Evidence*, 96 BRIT. J. NUTRITION S94, S95–S99 (2006); Edward A. Chow et al., *The Disparate Impact of Diabetes on Racial/Ethnic Minority Populations*, 30 CLINICAL DIABETES 130, 130 (2012); Rafael Pérez-Escamilla & Predrag Putnik, *The Role of Acculturation in Nutrition, Lifestyle, and Incidence of Type 2 Diabetes Among Latinos*, 137 J. NUTRITION 860, 862 (2007).

62. Black men die of cancer thirty-two percent more frequently than white men, and black

cervical cancer,<sup>63</sup> rates of prostate cancer and the likelihood that a person with prostate cancer will die from it,<sup>64</sup> and rates of lung cancer.<sup>65</sup> African Americans often receive cancer diagnoses at a later stage than whites do, resulting in fewer and less effective treatment options.<sup>66</sup> African Americans and Latina/os suffer from heart disease,<sup>67</sup> high blood pressure, high cholesterol, and diabetes<sup>68</sup> at higher rates than whites do.

Lactose intolerance also affects more African Americans and Latina/os than whites.<sup>69</sup> Even the phrase “lactose intolerance” reflects a cultural bias. A significant percentage of individuals from all communities, with the exception of Scandinavian and Northern European whites, do not retain the enzyme lactase through adulthood.<sup>70</sup> Northern Europeans and Scandinavians developed this enzyme as a response to living in climates hostile to creating sustainable food sources, which compelled them to resort to drinking their herds’ milk.<sup>71</sup> Although statistics vary, seventy-nine percent of African American adults, forty-five percent of African American children, seventy-four percent of Mexicans from rural communities, ninety-eight percent of Southeast Asians, and ninety percent of Asian Americans cannot digest lactose.<sup>72</sup>

It would therefore be more appropriate to label people who retain the enzyme lactase as “lactose persistent,” instead of pathologizing the lack of the enzyme.<sup>73</sup> Characterizing lactose intolerance as abnormal appears to reflect the belief that the experiences of whites define the baseline of normal, and any departure signifies an unusual and undesirable condition. This framing, in addition

women die of cancer sixteen percent more frequently than white women. *Cancer Facts & Figures*, *supra* note 57, at 10.

63. Latinas and black women have higher rates of cervical cancer than white women. *Id.* at 10, 12; see also *Cervical Cancer Rates by Race and Ethnicity*, CTNS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/cancer/cervical/statistics/race.htm> (last visited Feb. 27, 2013).

64. Black men have the highest incident rate of and are more likely to die from prostate cancer than any other group. *Cancer Facts & Figures*, *supra* note 57, at 10.

65. Black men have the highest rates of lung cancer. *Id.*

66. *Id.* at 7.

67. The white population suffers 187.6 heart disease deaths per 100,000 individuals; the black population suffers 247.1 such deaths per 100,000 individuals. *Id.* at 1.

68. Black women have higher rates of high blood pressure, high cholesterol, and diabetes than white women. *Who Gets Angina?*, SPEAK FROM THE HEART, <http://www.speakfromtheheart.com/who-gets-angina.aspx> (last visited Feb. 27, 2013).

69. Razib Khan, *Lactose Tolerance/Intolerance*, GENE EXPRESSION (Jan. 19, 2004, 2:55 PM), <http://www.gnpx.com/MT2/archives/001681.html>.

70. Dallas M. Swallow, *Genetics of Lactase Persistence and Lactose Intolerance*, 37 ANN. REV. GENETICS 197, 198 (2003).

71. Bertron et al., *supra* note 60, at 152.

72. The most recent statistics on lactose intolerance categorized by race and ethnicity are as follows: Southeast Asians, 98%; Asian Americans, 90%; Alaskan Eskimo, 80%; African American adults, 79%; Mexicans from rural communities, 73.8%; North American Jews, 68.8%; Greek Cypriots, 66%; Cretans, 56%; Mexican American males, 55%; Indian adults, 50%; African American children, 45%; Indian children, 20%; North Europeans and Scandinavians, 5%. Khan, *supra* note 69.

73. Bertron et al., *supra* note 60, at 151–53.

to perpetuating a belief in white physical superiority, serves the interests of the dairy industry and the USDA, because it allows for the continued promotion of dairy products to individuals and communities upon whose health and quality of life it has a detrimental effect. Conventional wisdom about the healthfulness of milk, derived from powerful marketing techniques, effectively subverts and replaces personal experience.

### III. STRUCTURAL AND CULTURAL ANALYSIS OF THE USDA'S PROMOTION OF THE DAIRY INDUSTRY

#### *A. Structural Analysis*

Although the USDA is a government agency, its operation model has developed over time into one more akin to a privatized corporation. Guided by principles of corporate neoliberalism, the USDA seeks to maximize the profits of the dairy industry or, at the very least, to minimize losses. A “revolving door” between USDA members and representatives of corporate entities, such as McDonald’s and the Dannon Institute,<sup>74</sup> facilitates a close relationship between agency and industry. It also ensures a consistent flow of insider information to the USDA on how to build and maintain the corporate business model.<sup>75</sup>

#### *1. Challenges Facing the USDA as a Multi-Role Agency*

The USDA has two distinct and conflicting roles that define its relationship to the dairy industry.<sup>76</sup> These are “expanding markets for agricultural products” and “improving nutrition and health by providing . . . nutrition education and promotion.”<sup>77</sup> These dual responsibilities create a tension that has led to solutions

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74. *Doctors Sue Federal Government for Deceptive Language on Meat, Dairy in New Dietary Guidelines*, PHYSICIANS COMM. FOR RESPONSIBLE MED. (Feb. 17, 2011), [http://www.pcrm.org/news/doctors\\_sue\\_feds\\_deceptive\\_language\\_meat\\_dairy\\_dietary\\_guidelines\\_110217.html](http://www.pcrm.org/news/doctors_sue_feds_deceptive_language_meat_dairy_dietary_guidelines_110217.html) [hereinafter *Doctors Sue Federal Government*]. The group also brought a suit against the USDA in 2000 alleging that the 2000 Guidelines had been prepared in secret by a committee consisting of representatives of the meat, dairy, and egg industries. *Doctors Announce Final Victory in Dietary Guidelines Lawsuit*, PHYSICIANS COMM. FOR RESPONSIBLE MEDICINE (Dec. 6, 2000), <http://www.pcrm.org/media/news/doctors-announce-final-victory-in-dietary>.

75. See Emily J. Schaffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?*, 57 *FOOD & DRUG L.J.* 371, 407 (2002).

76. See *Mission Statement*, U.S. DEP’T OF AGRIC., [http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION\\_STATEMENT](http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT) (last visited Feb. 27, 2013). The original role envisioned for the USDA was much narrower. See 7 U.S.C. § 2201 (2006) (signed into law by President Lincoln in 1852) (“There shall be at the seat of government a Department of Agriculture, the general design and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, rural development, aquaculture, and human nutrition, in the most general and comprehensive sense of those terms, and to procure, propagate, and distribute among the people new and valuable seeds and plants.”).

77. *Mission Statement*, *supra* note 76.

that benefit industry at consumers' expense and disproportionately harm socially vulnerable consumers.

The challenges facing agencies tasked with multiple roles are not unique to the USDA.<sup>78</sup> These agencies' most salient dilemmas are deciding how to prioritize goals and to resolve direct conflicts.<sup>79</sup> In his survey of the economic and political science literature on principal-agent interactions in the context of governmental organizations, Eric Biber suggests that agencies charged with conflicting tasks will systematically overperform on the tasks that are easier to measure and have higher incentives.<sup>80</sup> They will concomitantly underperform on the tasks that are harder to measure and have lower incentives.<sup>81</sup>

Reducing the milk surplus is an easily quantifiable, concrete objective. Doing so through partnerships with fast food companies provides the added benefit of establishing strong government connections to wealthy and powerful corporations. In contrast, the USDA has little incentive to communicate information to consumers about the detrimental effects of dairy consumption, because this act makes the first goal more difficult to accomplish. It also threatens harmonious relations between the agency and the industry entrusted to it.<sup>82</sup> Its institutional design thus leads the USDA to strategies that have a disparate impact along race and class lines.

## 2. Federal Dietary Guidelines

Since 1980, the USDA and Department of Health and Human Services have jointly published the Dietary Guidelines for Americans every five years.<sup>83</sup> These Guidelines serve as the basis for the widely disseminated food pyramid in addition to government-sponsored food and nutrition programs, such as the National School Lunch Program and the Women, Infants, and Children Supplemental

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78. See, e.g., Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1 (2009) (discussing the challenges facing the Bureau of Land Management, the U.S. Forest Service Park Service, Fish and Wildlife Service, Food and Drug Administration, Federal Aviation Administration, and Federal Communications Commission that arise out of their assignment of multiple goals).

79. Biber, *supra* note 78, at 6.

80. *Id.* at 7; see, e.g., Avinash Dixit, *Incentives and Organizations in the Public Sector: An Interpretative Review*, 4 J. HUM. RESOURCES 696, 704–07 (2002).

81. Biber, *supra* note 78, at 7.

82. See MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 46 (2d ed. 2007) (illustrating how USDA Guidelines were affected by a fear of a “political backlash” from producers).

83. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 2, at viii, 1.

Nutrition Program.<sup>84</sup> They also guide doctors and other health and nutrition advisers.<sup>85</sup>

The Guidelines' position on milk reflects a compromise between pressures from the dairy industry and the medical findings linking high-fat milk intake to serious health conditions, resulting in mixed and often confusing messages.<sup>86</sup> In 2011, the Physicians Committee for Responsible Medicine filed a lawsuit against the USDA alleging that the language the Guidelines employ to refer to the hazards of dairy consumption is deceptive.<sup>87</sup> The 2010 Guidelines use three different terms to refer to saturated fats: "solid fats," "saturated fatty acids," and "trans fatty acids."<sup>88</sup> These three separate terms may lead readers to believe that these are three distinct things, and that avoiding one and not the others might improve their diet or health.

Also, in the chapter titled, "Foods and Food Components to Reduce," there is an arbitrary, underinclusive, and overlapping list of "major sources" of saturated fats that consists of full-fat cheese; pizza; grain-based desserts; dairy-based desserts; chicken and chicken-mixed dishes; and sausage, franks, bacon, and ribs.<sup>89</sup> The division of milk products into three of these six categories appears designed to obfuscate the fact that they account for the greatest amount of saturated fats intake. The Guidelines also somewhat obliquely state that people "have no dietary requirement for saturated fatty acids" and that current intake is higher than recommended, rather than simply stating that people should not consume them.<sup>90</sup>

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84. Press Release, U.S. Dep't of Agric., USDA and HHS Announce New Dietary Guidelines to Help Americans Make Healthier Food Choices and Confront Obesity Epidemic, (Jan. 31, 2011), <http://www.fns.usda.gov/cga/pressreleases/2011/0040.htm>.

85. A personal experience that brought home the pervasive influence of dairy marketing on the medical profession occurred when I received a document from my infants' pediatrician, a piece of paper outlining when I should introduce my infant twins to different foods. The information sheet stated in small print that it was produced by the National Dairy Council. When I told the pediatrician that I thought the pamphlet overly and wrongly promoted dairy because of its source, he was completely shocked. He had been giving the information to new parents for years, but had no idea it was produced by the dairy industry.

86. For a detailed discussion of the enormous influence that the dairy industry has had on the USDA's Dietary Guidelines, see generally NESTLE, *supra* note 82; *see also id.* at 79–81 (describing how dairy interests have successfully tweaked the language of the Guidelines to encourage dairy consumption).

87. *See supra* note 75 and accompanying text.

88. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 2 at 24–26.

89. *Id.* at 25.

90. *Id.* at 24–25. Because the first statement implies that no intake is recommended, presumably any intake above zero is higher than recommended. Further, the half page of the Guidelines devoted solely to milk and milk products provides a more elaborate discussion of dairy consumption. *Id.* at 38. This section appears in the chapter titled "Foods and Nutrients to Increase." *Id.* It begins by stating that there is "moderate evidence" that milk intake correlates with improved bone health, lower blood pressure, and reduced risks of cardiovascular disease and type-two diabetes. *Id.* The Guidelines' definition of milk, however, includes soy beverages, so it is unclear which of these very different foods—soy milk or cow's milk—may correlate with health benefits. *Id.* The text then admonishes that most milk consumed by Americans is reduced fat or full fat (as opposed to fat-free

Despite this confusing language, the Guidelines' underlying message that excessive, or even moderate, intake of saturated fats through dairy products is unnecessary and harmful,<sup>91</sup> along with the actual health problems associated with milk consumption, led to a thirty-year decline in milk sales.<sup>92</sup> Americans now drink less than a third of the milk that the dairy industry produces daily, and much of the milk purchased has undergone a process to remove the fat, so that the surplus largely comprises high-fat milk.<sup>93</sup> Under the direction of the 2008 Farm Bill, the USDA purchased this surplus at above-market rates.<sup>94</sup> The USDA then attempted to sell the surplus to consumers.

### 3. *Distribution*

In 1995, the USDA created DMI, a marketing branch and check-off program charged with increasing demand for U.S.-produced dairy products, financed largely by a tax on dairy farmers.<sup>95</sup> DMI has had great success with two strategies: partnerships with fast food companies and an award-winning advertising campaign. In 2008, when Domino's retail sales were falling, DMI teamed up with the pizza chain<sup>96</sup> to create the "American Legends" line, which

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or low-fat milk), and that almost half of milk consumption is through high-fat cheese. *Id.* Again avoiding an explicit recommendation to replace full-fat milk with lower-fat milk, the Guidelines then assert that lower-fat milk products provide equal nutrients with less solid fat than higher fat ones, and that choosing lower-fat products may increase potassium, vitamin A, and vitamin D intake and decrease sodium, cholesterol, and saturated fatty acids intake. *Id.* The paragraphs preceding and following this one encourage increased milk consumption. *Id.* Other parts of the document also recommend selecting lower-fat milk products, but the introductory section titled "Key Recommendations" refers more obliquely to reducing intake of solid fats and saturated fatty acids (terms that the Guidelines do not define until more than twenty pages later). *Id.* at 34, 38, 93.

91. Recommendations to decrease saturated fat intake began in the 1980 Dietary Guidelines. NESTLE, *supra* note 82, at 46. Significantly, however, in spite of information that overconsumption of milk and meat was leading to early deaths from chronic diseases, the Guidelines have never advised people to eat less of these foods. *Id.* at 44, 46.

92. Michael Moss, *While Warning About Fat, U.S. Pushes Cheese Sales*, N.Y. TIMES, Nov. 7, 2010, at A1.

93. *Id.*

94. The 2008 Food, Conservation, and Energy Act directed the Secretary of Agriculture to support the price of cheddar cheese, butter, and nonfat dry milk by purchasing the surplus at above-market rates. 7 U.S.C. § 8771(b)–(c) (2006); Informational Bulletin, U.S. Dep't of Agric., Dairy Product Price Support Program (Jan. 5, 2009), [http://www.apfo.usda.gov/Internet/FSA\\_File/dpd\\_bulletin\\_090105.pdf](http://www.apfo.usda.gov/Internet/FSA_File/dpd_bulletin_090105.pdf). The 2014 Farm Bill will replace the Dairy Product Price Support Program with two new programs, the Margin Protection Program and the Dairy Product Donation Program. The Margin Protection Program will reimburse dairy farmers for rising prices of animal feed. H. R. 2642-2, 113th Cong. § 1402–10 (2014). This program will shift subsidies to corn instead of milk. Through the Donation Program, the USDA will purchase surplus dairy products packaged for consumers and give them to low-income individuals. H. R. 2642-2, § 1431.

95. Moss, *supra* note 92.

96. Approximately twenty-five percent of United States cheese is used on pizza, representing more than 25 billion pounds of annual milk production. Press Release, Midwest Dairy Ass'n, June Dairy Month Proves Perfect Pairing Time for Dairy Farmers and Domino's (Jun. 15, 2009), [available at http://www.reuters.com/article/2009/06/15/idus126946+15-jun-2009+prn20090615](http://www.reuters.com/article/2009/06/15/idus126946+15-jun-2009+prn20090615); Oches, *supra*



has forty percent more cheese than any of the company's other pizza products.<sup>97</sup> One slice of an American Legends pizza contains two-thirds of the maximum recommended daily amount of saturated fat.<sup>98</sup> To sell these pizzas, DMI financed a twelve million dollar marketing campaign that included television commercials, radio, print media, coupons, and social media, and culminated in the product's launch during the 2009 Superbowl.<sup>99</sup> The American Legends line significantly increased Domino's sales.<sup>100</sup>

DMI also worked with Taco Bell to expand the cheese in its menus through items such as the steak quesadilla, which contains eight times more cheese than any other Taco Bell menu item and delivers three quarters of the recommended daily intake of saturated fat and sodium.<sup>101</sup> Other DMI partnerships created Pizza Hut's Cheesy Bites pizza, Wendy's Dual Double Melt sandwich, and Burger King's Cheesy Angus Bacon Cheeseburger and Tendercrisp chicken sandwich.<sup>102</sup> The popularity of these products led to a growth in cheese sales of thirty million pounds.<sup>103</sup> In addition to working with fast food companies, DMI forms close relationships with grocery stores to promote greater use of cheese at home.<sup>104</sup>

DMI created the wildly successful "Got Milk?" advertising campaign, featuring sports, television, film, and political celebrities with milk moustaches.<sup>105</sup> A separate advertising campaign supported by DMI asserted that people could lose weight by consuming more dairy products. The campaign lasted four years despite the lack of research results supporting this claim.<sup>106</sup> Government attorneys defended the campaign on the grounds that the USDA had reviewed, approved, and overseen it.<sup>107</sup> DMI also runs the Dairy Research Institute, which publishes a

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note 7. More than 1.73 billion pounds of milk go into Domino's cheese alone. Press Release, Midwest Dairy Ass'n, *supra*.

97. USDA DAIRY PROMOTION REPORT, *supra* note 4, at 7. Examples of these pizzas are the Cali Chicken Bacon Ranch (chicken breast, white sauce, smoked bacon, tomatoes, and parsley with provolone and mozzarella cheeses on a cheesy Parmesan crust), the Philly Cheese Steak (steak, onions, green peppers, and mushrooms with American and provolone cheeses on a cheesy provolone crust), and the allegedly healthy Pacific Veggie (roasted red peppers, spinach, onions, mushrooms, tomatoes, and black olives with feta, provolone and mozzarella cheeses on a cheesy parmesan crust). *Id.*

98. *Id.* Consuming only one slice of pizza in a sitting is, of course, highly unlikely.

99. Moss, *supra* note 92, at A26.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. USDA DAIRY PROMOTION REPORT, *supra* note 4, at app. G, 2–6. The former Secretary of Health appeared in a "Got Milk?" advertisement. NESTLE, *supra* note 82, at 82. The campaign lasted twenty years.

106. See Amy J. Lanou & Neal D. Barnard, *Dairy and Weight Loss Hypothesis: An Evaluation of the Clinical Trials*, 66 NUTRITION CLINICAL CARE 272, 277 (2005) ("[I]ncreasing dairy product intake does not consistently result in weight or fat loss.").

107. Moss, *supra* note 92.

reference guide that instructs industry participants how to avoid legal restrictions on food labeling that could potentially lower sales.<sup>108</sup>

### *B. Cultural Analysis*

#### *1. Nutritional Racism*

The problem of the USDA's conflicting roles with respect to the dairy industry has two components. The first is structural. Institutional constraints and mechanisms lead to strategies that harm socially marginalized groups, resulting in food oppression. This type of harm does not result from government actors' ill intentions. The second, nutritional racism, is the expression of explicit bias. The USDA's and dairy industry's conduct reflects and perpetuates a historically racialized aspect of milk marketing.<sup>109</sup>

Early milk promoters associated the whiteness of milk with the putative purity of racial whiteness.<sup>110</sup> One pamphlet produced by the National Dairy Council in the 1920s proclaimed:

The people who have achieved, who have become large, strong, vigorous people, who have reduced their infant mortality, who have the best trades in the world, who have an appreciation for art, literature and music, who are progressive in science and every activity of the human intellect are the people who have used liberal amounts of milk and its products.<sup>111</sup>

Similarly, an agricultural history of New York from the 1930s asserted:

A casual look at the races of people seems to show that those using much milk are the strongest physically and mentally, and the most enduring of the people of the world. Of all races, the Aryans seem to have been the heaviest drinkers of milk and the greatest users of butter and cheese, a fact that may in part account for the quick and high development of this division of human beings.<sup>112</sup>

Modern milk marketing, in contrast, seeks to appeal directly to African Americans and Latina/os.<sup>113</sup>

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108. See DAIRY RESEARCH INST., QUICK REFERENCE GUIDE: NUTRITION CLAIMS FOR DAIRY PRODUCTS (2011), <http://www.innovatewithdairy.com/sitecollectiondocuments/qrqfinal.pdf>.

109. See *infra*, Part II.

110. DUPUIS, *supra* note 39.

111. *Id.* (citing numerous National Dairy Council publications from the 1920s).

112. ULYSSES PRENTISS HEDRICK, A HISTORY OF AGRICULTURE IN THE STATE OF NEW YORK 117–18 (1933).

113. See USDA DAIRY PROMOTION REPORT, *supra* note 4, at app. B-6 (showing a budget line item of \$6.57 million allocated for the Hispanic Program milk promotion budget for 2010); *id.* at app. C-2 at 4 (showing the National Fluid Milk Processor Promotion Board's Statement of Revenues and Expenses for 2009 expenditure of \$6.44 million of its \$95.1 million program expenses on the Hispanic Target Program (milk promotion expenses allocated to targeting the Hispanic market)); Tim Nudd, *Dairy Queen Salma Hayek Stars in a New Bilingual 'Got Milk?' Campaign That Covers Its Demographic Bases While Transcending Them*, ADWEEK (Mar. 13, 2012, 7:17 AM), <http://www.adweek.com/news/>

The “Got Milk?” advertising campaign featured many prominent African Americans and Latina/os, including tennis star Serena Williams, singer/actors Beyoncé, Chris Brown, Usher, and Jordin Sparks, National Basketball Association player Chris Bosh, boxer Muhammad Ali, baseball player Albert Pujols, television personality Sofia Vergara, model/television personality Tyra Banks, actors Taye Diggs and his son, Salma Hayek (in a bilingual spot), and comedian Whoopi Goldberg.<sup>114</sup> Activists have taken note of this targeted marketing. When film director Spike Lee appeared in a magazine advertisement wearing a milk mustache,<sup>115</sup> antimilk advocates labeled him a race traitor.<sup>116</sup> In July 2012, an advertisement at a bus stop in Berkeley, California that featured an African American father and child sipping milk from glasses with straws under the caption, “Skip juice and soda. Milk and water are the healthiest drinks” also provoked criticism.<sup>117</sup>

Fast food companies generally expend a great deal of resources on race-based promotional campaigns.<sup>118</sup> DMI’s work with these companies therefore increases the promotion of food products containing harmful amounts of saturated fats to African Americans and Latina/os. DMI also collaborated with the National Medical Association, which promotes the collective interests of physicians and patients of African descent, to create a pamphlet promoting dairy to African Americans.<sup>119</sup>

## 2. Healthism, Biomedical Individualism, and Biological Race

Healthism and biomedical individualism are two common approaches to

advertising-branding/spot-dairy-queen-138910. Although the subject is beyond the scope of this Article, international milk promotion also creates dramatic health disparities between citizens of wealthy, white-dominated nations and those of poorer developing nations who often have darker skin. For a critical overview of global food politics, see Nancy Ehrenreich & Beth Lyon, *The Global Politics of Food: A Critical Overview*, 43 U. MIAMI INTER-AM. L. REV. 1 (2011).

114. *Milk Mustache Celebrities*, BREAKFAST PROJECT, <http://www.milkmustache.com/celebrities> (last visited Feb. 27, 2013).

115. *The “Milk Mustache” Ads Are All Wet*, PHYSICIANS COMM. FOR RESPONSIBLE MED., <http://www.pcrm.org/search/?cid=1473> (last visited Feb. 27, 2013).

116. *Spike Lee Milk Moustache*, NOTMILK, <http://www.notmilk.com/leems.html> (last visited Feb. 27, 2013).

117. Breeze Harper, *Eating the Buddha-Barma*, BUDDHIST PEACE FELLOWSHIP, <http://www.turningwheelmedia.org/secret-buddhist-reveal-video> (last visited Feb. 27, 2013).

118. See Regina Austin, *Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 LOY. L.A. L. REV. 687, 702–05; Freeman, *supra* note 13, at 2235–39; Jennifer L. Harris et al., *Fast Food F.A.C.T.S.: Food Advertising to Children and Teens Score*, FAST FOOD MARKETING (Oct. 27, 2010), [http://www.fastfoodmarketing.org/media/fastfoodfacts\\_report\\_summary.pdf](http://www.fastfoodmarketing.org/media/fastfoodfacts_report_summary.pdf); Gergana Koleva, *Fast-Food Marketing Has Brainwashed Kids and Targets Minorities, Says Study*, DAILY FIN. (Nov. 9, 2010, 12:00 PM), <http://www.dailyfinance.com/2010/11/09/fast-food-marketing-has-brainwashed-kids-and-targets-minorities>.

119. *Key Findings: National Medical Association Consensus Report*, NAT’L DAIRY COUNCIL, <http://www.nationaldairycouncil.org/educationmaterials/healthprofessionaleducationkits/pages/keyfindingnmaconsensusreport.aspx> (last visited Feb. 27, 2013).

health problems and disparities that focus on individual, instead of institutional, accountability. This perspective limits the potential for legal and policy interventions. A biological conception of race also bolsters beliefs that regulatory and policy measures will be ineffective.

*i. Healthism*

Healthism promotes the ideals of thinness and fitness and perceives individuals who fail to adhere to or achieve these ideals to be imposing unfair costs on others.<sup>120</sup> In this paradigm, unhealthy food choices reflect a lack of will power and self-esteem. Healthism interventions therefore promote consumer education and awareness, and include prominent displays of the caloric count and nutritional value of packaged foods or restaurant items.<sup>121</sup> These strategies arise from a firm belief in the individual's capacity to improve her health through her own, better-informed actions. They also rest on the assumption of consumer choice. This view of health results in the association of thin, muscular bodies with admirable and proper self-discipline,<sup>122</sup> while obesity provokes blame and disdain,<sup>123</sup> even in the face of medical evidence that overweight and obese individuals live longer than those at putatively "ideal" or low weights.<sup>124</sup>

African Americans and Latina/os receive the highest numbers of obesity diagnoses.<sup>125</sup> According to the American Centers for Disease Control and Prevention, half of the adult African American population is obese.<sup>126</sup> The same

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120. See JULIE GUTHMAN, *WEIGHING IN: OBESITY, FOOD JUSTICE, AND THE LIMITS OF CAPITALISM* 52–55 (2011) (describing the origin and evolution of the term "healthism," and crediting sociologist Robert Crawford with originally coining the phrase).

121. For example, the Patient Protection and Affordable Care Act requires restaurants to provide nutritional information about their products. 21 U.S.C. § 343 (Supp. 2011); see also Lisa Mahlum, *Would You Like the Caloric Count with That? A Look at Obesity in America and the Need for Increased Federal Regulation of Food Retailers' Advertisements*, 17 NEXUS 109, 124–26 (2012) (proposing that the FDA extend caloric count requirements to print and television advertisements); Stephanie Rosenbloom, *Most Chains Told to Post Calorie Data*, N.Y. TIMES, Mar. 23, 2010, at B1.

122. See Christy Greenleaf et al., *Weight-Related Words Associated with Figure Silhouettes*, 1 BODY IMAGE 373, 382 (2004); see also Lori A. Neighbors & Jeffery Sobal, *Prevalence and Magnitude of Body Weight and Shape Dissatisfaction Among University Students*, 8 EATING BEHAVIORS 429, 429 (2007).

123. An interesting cultural conversation reflecting this phenomenon took place over the nudity of Lena Dunham, writer, creator, and star of the HBO series, "Girls." The fact that Dunham is overweight led critics to disbelieve her character's attraction of various sexual partners on the show. See, e.g., Rachel Krantz, *Enough About Lena Dunham's Ass!*, DAILY BEAST (Jan. 15, 2013, 3:47 PM), <http://www.thedailybeast.com/articles/2013/01/15/enough-about-lena-dunham-s-ass.html>; Lena Dunham Explains 'Girls' Romance with Patrick Wilson, ET ONLINE (Feb. 14, 2013, 12:23 PM), [http://www.etsnews.com/8301-207\\_162-57569206/lena-dunham-explains-girls-romance-with-patrick-wilson](http://www.etsnews.com/8301-207_162-57569206/lena-dunham-explains-girls-romance-with-patrick-wilson).

124. See Katherine M. Flegal et al., *Association of All-Cause Mortality With Overweight and Obesity Using Standard Body Mass Index Categories: A Systematic Review and Meta-analysis*, 309 J. AM. MED. ASS'N 71, 74 (2013); Paul Campos, *Our Absurd Fear of Fat*, N.Y. TIMES, January 3, 2013, at A25.

125. See *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/data/adult.html> (last updated Aug. 13, 2012).

126. *Id.* The exact figure given is 49.5%. *Id.*

study identified forty percent of Latina/os<sup>127</sup> and thirty-four percent of white adults as obese.<sup>128</sup> Disproportionate obesity diagnoses likely reflect cultural biases that are central to the healthism model. The accepted measurement of obesity, the body mass index (BMI), multiplies weight by height, and obesity reflects upward distance from the mean BMI classified by age group.<sup>129</sup> In other words, there is no medical basis for the measurement, it is purely statistical.<sup>130</sup> Also, it does not change according to variation in body structure, such as higher bone and muscle density, which often accounts for higher weight but may reflect stronger, sturdier constitutions (“big-boned people”), as opposed to poor health.<sup>131</sup>

Racial disparity in obesity diagnoses results in disproportionate medical and societal interventions into African American and Latina/o lives that are disruptive, paternalistic, and often characterized by surveillance and scorn.<sup>132</sup> The judgment that African Americans and Latina/os are “guilty” of obesity is also problematic because it perpetuates existing cultural stereotypes of laziness, bad citizenry, weak self-control, and lack of intelligence.<sup>133</sup> In reality, larger bodies often reflect social and cultural factors such as the effects of poverty and food insecurity,<sup>134</sup> the need to maintain large, strong bodies for physical labor, the prevalence of fast food restaurants in low-income minority neighborhoods,<sup>135</sup> and the targeting of African Americans for unhealthy foods and alcohol by corporations.<sup>136</sup> Many African American women reject the healthism model by celebrating fatness as a cultural beauty ideal.<sup>137</sup> Solutions offered to reduce these disparities focus mainly on

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127. *Id.* 40.4% of Mexican Americans and 39.1% of “all Hispanics” are considered obese. *Id.*

128. *Id.*

129. GUTHMAN, *supra* note 120, at 26–27.

130. *Id.* at 30–31; *see also* PAUL CAMPOS, *THE OBESITY MYTH* 17 (2004).

131. *See, e.g.*, GUTHMAN, *supra* note 120, at 21–22, 63–67 (arguing that “obesity” results from environmental conditions, not food choices); Samantha Kwan, *Lay Perspectives on the Biomedical Paradigm on Obesity: Theorizing Weight, Health and Happiness*, 10 *SOC. THEORY & HEALTH* 61, 61–63, (2011) (discussing scholarship that challenges the notion that being overweight jeopardizes health); Abigail C. Saguy & Kevin W. Riley, *Weighing Both Sides: Morality, Mortality, and Framing Contests over Obesity*, 30 *J. HEALTH POL. POLY & L.* 869, 882–89 (2005).

132. *See* Berlant, *supra* note 23, at 763.

133. Austin, *supra* note 118, at 713 (discussing cultural stereotypes).

134. *See id.* at 701 (suggesting that this correlation may be due to erratic eating habits based on alternating periods of scarcity and access to food, the necessity of eating dense, fattening food to stretch food budgets, or early food deprivation).

135. Jason P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 *AM. J. PREVENTIVE MED.* 211, 214–15 (2004).

136. Sonya A. Grier & Shiriki K. Kumanyika, *The Context for Choice: Health Implications of Targeted Food and Beverage Marketing to African Americans*, 98 *AM. J. PUB. HEALTH* 1616, 1619 (2008); Sayward Byrd, Comment, *Civil Rights and the “Twinkie” Tax: The 900-Pound Gorilla in the War on Obesity*, 65 *LA. L. REV.* 303, 319 (2005).

137. *See* Austin, *supra* note 118, at 708–09 (speculating that an appreciation of larger bodies in African American culture may have arisen from early deprivations, in contrast to which largeness signals prosperity, fertility, good health, and culinary talent); Alice Randall, Op-Ed, *Black Women and Fat*, *N.Y. TIMES*, May 6, 2012, at SR5 (“[T]oo many experts who are involved in the discussion of obesity don’t understand something crucial about black women and fat: many black women are fat

children, perhaps because of the complexities inherent in trying to “fix” African American and Latina/o bodies.<sup>138</sup>

The healthism model rejects protectionist regulations. Opposition to restrictions on the use of trans fats in restaurants, for example, generally focused on the cost to businesses, not the harm to individuals of consuming trans fats. In New York, small restaurant owners decried that their inability to compete with larger businesses under the regulations would cause them to fail.<sup>139</sup> New York’s regulations attempting to restrict the use of trans fats were in fact modest, however, when compared to those in countries such as Canada and Denmark that banned trans fats completely from all food products in response to adverse medical findings.<sup>140</sup>

The proposal by New York City’s Mayor Bloomberg to restrict the sale of large sodas similarly provoked derision from consumers and corporations alike.<sup>141</sup> Ironically, the NAACP and other African American and Latino civil rights organizations opposed the ban, in spite of the disproportionate harm to their communities caused by soda consumption.<sup>142</sup> Even San Francisco’s attempt to protect children from the deleterious effects of McDonald’s products by

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because we want to be.”). For discussion of this issue, see Fary M. Cachelin et al., *Does Ethnicity Influence Body-Size Preference? A Comparison of Body Image and Body Size*, 10 OBESITY RES. 158 (2002). Research also suggests that African American women’s discomfort with excess weight primarily reflects concerns with physical limitations and does not interfere with self-esteem in the same way in which it does for white women. Tiffany L. Cox et al., *Examining the Association Between Body Mass Index and Weight Related Quality of Life in Black and White Women*, 7 APPLIED RES. QUALITY LIFE 309, 320 (2012); see also Maya A. Paron, *Denying Diversity: Perceptions of Beauty and Social Comparison Processes Among Latina, Black, and White Women*, 47 SEX ROLES 65, 66–67 (2002).

138. See, e.g., Katherine Unger Davis, *Racial Disparities in Childhood Obesity: Causes, Consequences, and Solutions*, 14 U. PA. J.L. & SOC. CHANGE 313 (2011); Melissa D. Mortazavi, *Are Food Subsidies Making Our Kids Fat? Tensions Between the Healthy Hunger-Free Kids Act and the Farm Bill*, 68 WASH. & LEE L. REV. 1699 (2011); Erika B. Navarro, Comment, *No Such Thing as Free Lunch: Supplementing Federal Nutrition Laws to Effectively Combat Obesity in Minority and Low-Income Children*, 9 RUTGERS RACE & L. REV. 365 (2008).

139. See Angus Loten, *Restaurants Cry Foul as New York Bans Trans Fat*, INC. (Dec. 5, 2006), <http://www.inc.com/news/articles/200612/restaurants.html>.

140. *Denmark: Lower Trans Fat or Go to Jail*, NBC NEWS (Oct. 17, 2006, 8:44 PM), [http://www.msnbc.msn.com/id/15307763/ns/health-diet\\_and\\_nutrition/t/denmark-lower-trans-fat-or-go-jail](http://www.msnbc.msn.com/id/15307763/ns/health-diet_and_nutrition/t/denmark-lower-trans-fat-or-go-jail); *Trans Fats: The Move Away from Bad Fats*, CBC NEWS (Dec. 23, 2009, 1:30 PM), <http://www.cbc.ca/news/health/story/2008/07/21/f-transfats.html>.

141. Michael M. Grynbaum, *In Soda Fight, Industry Focuses on the Long Run*, N.Y. TIMES, Sept. 13, 2012, at A28; Michael M. Grynbaum & Marjorie Connelly, *60% in City Oppose Soda Ban, Calling It an Overreach by Bloomberg, a Poll Finds*, N.Y. TIMES, Aug. 23, 2012, at A19.

142. See Nicholas Confessore, *Minority Groups and Bottlers Team Up in Battles Over Soda*, N.Y. TIMES (Mar. 12, 2013), <http://www.nytimes.com/2013/03/13/nyregion/behind-soda-industrys-win-a-phalanx-of-sponsored-minority-groups.html>; see also Grace Elizabeth Hale, *When Jim Crow Drank Coke*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/opinion/when-jim-crow-drank-coke.html> (explaining that in 2000, Coke gave \$50 million dollars to the Coca-Cola foundation to support African American community programs in the wake of the \$156 million settlement of a discrimination suit).

regulating Happy Meals faced harsh criticism as unwarranted paternalism.<sup>143</sup> The formidable opposition to laws designed to improve health generally signals that regulations designed specifically to protect socially vulnerable groups would meet with similar, and potentially greater, resistance.

### *ii. Biomedical individualism*

The concept of biomedical individualism underlies the treatment of illnesses linked to excessive dairy consumption. As described by Fee and Krieger, this model “adopts the notion of the abstract individual from liberal political and economic theory, it considers individuals ‘free’ to ‘choose’ health behaviors.”<sup>144</sup> The model “generally ignores the role of industry, agribusiness, and government in structuring the array of risk factors that individuals are supposed to avoid” and leaves little room for “understanding how behaviors are related to social conditions and constraints.”<sup>145</sup>

Although Fee and Krieger developed this model in the context of the AIDS epidemic, it is equally applicable in other health contexts,<sup>146</sup> and particularly descriptive of social, medical, and policy attitudes towards food-related illness. There is no role for government under this paradigm, which posits doctors and scientists as experts and individuals as either good or bad actors who bring poor or robust health upon themselves. It is “profoundly ahistorical,” emphasizing treatment instead of prevention.<sup>147</sup> Challenges to biomedical individualism that shift the focus from medical professionals to structural, institutional factors can open the door to meaningful critiques and responses to food oppression.

### *iii. Biological race*

The deconstruction of persistent misconceptions of race as biological is key to challenging societal values that perpetuate food oppression. Scientific evidence clearly demonstrates that a biological conception of race is unfounded,<sup>148</sup> and

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143. See Lang Liu, Note, *Reshaping the American Concept of Consumer Interest in the Food Policy Debate*, 12 YALE J. HEALTH POL'Y L. & ETHICS 171 (2012); Sharon Bernstein, *Happy Meals Banned in San Francisco*, L.A. TIMES, Nov. 3, 2010, at B2; Liz Robbins, *If the Meal Is Too Fatty and Salty, a City Council Proposal Would Take the Toy Away*, N.Y. TIMES (Apr. 6, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9504e0d61f3cf935a35757c0a9679d8b63>.

144. Elizabeth Fee & Nancy Krieger, *Understanding AIDS: Historical Interpretations and the Limits of Biomedical Individualism*, 83 AM. J. PUB. HEALTH 1477, 1481 (1993).

145. *Id.*

146. See, e.g., Lisa Ikemoto, *Abortion, Contraception and the ACA: The Realignment of Women's Health*, 55 HOW. L.J. 731, 746 (2012).

147. Fee & Krieger, *supra* note 144, at 1481.

148. See, e.g., DOROTHY ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* 64–66 (2011) (noting that among multiple genetic studies, “none support dividing the species into discrete, genetically determined racial categories”); Duana Fullwiley, *Race and Genetics: Attempts to Define the Relationship*, 2 BIOSOCIETIES 221,

many legal scholars argue that a biological definition of race subverts social equality.<sup>149</sup> Nonetheless, medical and health research continues to implement racial categories, engendering confusion about how these classifications relate to physiognomy.<sup>150</sup> In addition to facilitating racial stereotyping, approaching health from a racial perspective may fuel assumptions that health disparities are natural and therefore resistant to political and legal interventions.

Race-based health statistics can have the positive effect of facilitating identification of those who are most in need of services.<sup>151</sup> The U.S. government favors collecting data on health disparities for this reason.<sup>152</sup> However, the use of race-based categories in medicine can also lead to misdiagnoses and inappropriate treatment.<sup>153</sup> Ideally, racial categorization would serve the limited purpose of drawing appropriate attention to structural conditions that cause health disparities, without negatively influencing medical providers. Viewing information categorized by race through a food oppression lens keeps structural and societal factors that shape health at the forefront of the analysis.

### 3. *The Whiteness of Food Culture*

Race also plays a part in perceptions of food culture that can impact health. Many African Americans and Latina/os view the healthy food movement, including vegan, vegetarian, raw food, and macrobiotic diets, as well as farmers' markets, as driven by and intended for white people.<sup>154</sup> The food justice

224 (2007) (describing the “myriad problems” that arise when “racial generalizations” are drawn from genetic data).

149. See, e.g., ROBERTS, *supra* note 148, at 309 (noting that race was used to resolve “the contradiction between America’s professed commitment to liberty and equality and its reliance on . . . slavery and genocide”); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 13–14 (1994); William M. Richman, *Genetic Residues of Ancient Migrations: An End to Biological Essentialism and the Reification of Race*, 68 U. PITT. L. REV. 387, 388 n.3 (2006).

150. Lundy Braun et al., *Racial Categories in Medical Practice: How Useful Are They?*, 4 PUB. LIBR. SCI. MED. 1423, 1423 (2007). The drug BiDil, designed and patented exclusively for African Americans, embodies the entrenched beliefs in race-based medicine. For discussion of different controversial aspects of BiDil, see, for example, ROBERTS, *supra* note 148, at 169–89; Rene Bowser, *Race as a Proxy for Drug Response: The Dangers and Challenges of Ethnic Drugs*, 53 DEPAUL L. REV. 1111, 1112 (2004); Shubha Ghosh, *Race-Specific Patents, Commercialization, and Intellectual Property Policy*, 56 BUFF. L. REV. 409, 449–54 (2008); Sharona Hoffman, *“Racially-Tailored” Medicine Unraveled*, 55 AM. U. L. REV. 395, 400–03 (2005).

151. See, e.g., INST. OF MED. OF THE NAT’L ACADS., RACE, ETHNICITY, AND LANGUAGE DATA: STANDARDIZATION FOR HEALTH CARE QUALITY IMPROVEMENT, at ix (2009), available at <http://www.ahrq.gov/research/iomracereport/iomracereport.pdf>.

152. See U.S. DEP’T OF AGRIC. & U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 2, at 2; INST. OF MED. OF THE NAT’L ACADS., *supra* note 151, at 1.

153. See Braun, *supra* note 150, at 1423 (citing examples where physicians believed blacks and whites could only suffer from certain, different strains of malaria, and that black cardiovascular deaths more frequently arose from syphilis).

154. See, e.g., Ain Drew, *Being a Sistab at PETA*, in SISTAH VEGAN: BLACK FEMALE VEGANS SPEAK ON FOOD, IDENTITY, HEALTH, AND SOCIETY 60, 70 (A. Breeze Harper ed., 2010)



movement and organizations such as the People for the Ethical Treatment of Animals have traditionally focused on white concerns, excluding other communities by ignoring, misunderstanding, or dictating their priorities.<sup>155</sup> Some organizations incorporate anti-racist objectives into their core agendas, but they are atypical.<sup>156</sup> While food justice advocates have largely failed to embrace issues of race, class, and other sites of oppression, social justice groups, for their parts, rarely consider food oppression issues to be paramount. One notable exception to this general rule was the Black Panther's Free Breakfast for School Children Program.<sup>157</sup>

One reason social justice groups traditionally have not embraced food justice may be that it seems trivial in comparison to other social problems, such as mass incarceration.<sup>158</sup> Mass incarceration and food oppression, however, are both forms of social control that successfully reduce the strength and numbers of besieged communities while placing the blame for this diminution squarely on the harmed individuals. There are a number of similarities between these two sites of race and class oppression. First, they are analogous in scope, affecting millions of low-income African Americans and Latina/os. Second, they lead to the physical removal of black and brown bodies from public spaces, rendering them invisible to the mainstream. This occurs either through incarceration or through food-related illness or death. Third, they impose severe physical restrictions, as well as

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[hereinafter SISTAH VEGAN]; Delicia Dunham, *On Being Black and Vegan*, in SISTAH VEGAN, *supra*, at 42, 46; A. Breeze Harper, *Social Justice Beliefs and Addiction to Uncompassionate Consumption*, in SISTAH VEGAN, *supra*, at 20, 20–37 (citing the work of Rachel Socum, Saskia Poldervaart, Arnold Farr, Narina Nagra, Chithra Karunakaran, and Liz Appel).

155. See Drew, *supra* note 154, at 60; see also Hank Herrera & Katie Bradley, *Decolonizing Food Justice* (unpublished manuscript) (on file with author).

156. ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* 75–79 (2010); TRACYE LYNN MCQUINTER, *BY ANY GREENS NECESSARY: A REVOLUTIONARY GUIDE FOR BLACK WOMEN WHO WANT TO EAT GREAT, GET HEALTHY, LOSE WEIGHT, AND LOOK PHAT* 2–4 (2010); COLOR OF FOOD (last visited Feb. 27, 2013), <http://thecoloroffood.org>; DECOLONIAL FOOD FOR THOUGHT, <http://www.decolonialfoodforthought.com> (last visited Feb. 27, 2013). West Philadelphia's Mariposa Food Co-op has a Food Justice Anti-Racist working group, see *About FJAR*, FOOD JUSTICE & ANTI-RACISM [FJAR], <http://mariposafoodjustice.wordpress.com/about> (last visited May 13, 2013), and the Growing Food and Justice For All initiative strives to “dismantl[e] racism and [empower] low-income and communities of color through sustainable and local agriculture.” *About Us*, GROWING FOOD AND JUSTICE FOR ALL INITIATIVE, [http://www.growingfoodandjustice.org/About\\_Us.html](http://www.growingfoodandjustice.org/About_Us.html) (last visited May 13, 2013). There is also a vegan hip-hop movement that includes groups such as Supa Nova Slom, Erykah Badu, DJ Cavem Moetevation, VeganHood TV, Afya Ibomu, and Kevin Tillman. See VEGAN HIP HOP MOVEMENT, <http://veganhiphopmovement.blogspot.com> (last visited Feb. 27, 2013).

157. DR. HUEY P. NEWTON FOUND., *THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS* 30–33 (2008). This program spread from one Catholic church in San Francisco's Fillmore district to every major city in the United States and was the model for a similar program instituted in response by the federal government in public schools. *Legacy Page 2*, BLACKPANTHER.ORG, <http://www.blackpanther.org/legacytwo.htm> (last visited May 13, 2013).

158. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); Haney López, *supra* note 30, at 1025.

limitations on political and social participation, on their subjects. At their extreme, they kill these subjects, and thus represent a form of genocide. Fourth, those affected become devalued and denigrated due to the stigma of criminality that never detaches from the formerly incarcerated, or, for the sick, the perception that they are literally unfit for society, or physically repellant.

If progressive organizations and individuals continue to negate or ignore food oppression, the structural mechanisms that reify and perpetuate it will remain unchecked.

### C. *Fast Food and Food Deserts*

The health costs of the USDA's strategies to dispose of the milk surplus, particularly through partnerships with fast food companies, fall disproportionately on African Americans and Latina/os who live in neighborhoods, usually urban centers, dominated by fast food restaurants, commonly known as food deserts.<sup>159</sup> A food desert is a low-income area where a substantial number of residents lack reasonable access to a supermarket.<sup>160</sup> Although no publicly available studies directly link the consumption of saturated fats in fast food to increased incidents of serious health conditions, a comparison of the occurrences of these diseases with nutritional and diet disparities leads to a logical inference of causation.

Although whites make up the majority of fast food consumers,<sup>161</sup> fast food comprises a larger percentage of the overall nutritional intake of a great number of low-income African Americans and Latina/os.<sup>162</sup> As graphically (although apolitically) demonstrated by Morgan Spurlock in the documentary *Super Size Me*, when your diet consists mainly of fast food, you get sick.<sup>163</sup> Communities with the highest proportion of fast food in their diets also experience the highest rates of food-related illnesses and deaths.<sup>164</sup>

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159. See generally Moore, *supra* note 9, at 29. Although a 2011 study reported that in the mid-1990s middle-income people ate more fast food than lower-income people, the study did not break down its results by race. See Kim & Leigh, *supra* note 9, at 314.

160. For a breakdown of factors that contribute to this definition, see the *USDA Food Access Research Atlas*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/data-products/food-access-research-atlas/about-the-atlas.aspx> (last updated May 8, 2013).

161. Sahasporn Paeratakul et al., *Fast-Food Consumption Among U.S. Adults and Children: Dietary and Nutrient Intake Profile*, 103 J. AM. DIETETIC ASS'N 1332, 1334 (2003).

162. *Id.*

163. See Austin, *supra* note 118, for a critique of Spurlock's white-centric approach to the issue.

164. Blacks and Latina/os are more likely than whites to suffer from health conditions associated with a diet high in fat. Alonso et al., *supra* note 61, at 1274; Álvarez-León et al., *supra* note 61, at S95–S99; Chow et al., *supra* note 61, at 130; Pérez-Escamilla & Putnik, *supra* note 61, at 862. Black men die of cancer thirty-two percent more frequently than white men, and black women die of cancer sixteen percent more frequently than white women. *Cancer Facts & Figures*, *supra* note 57, at 10. Latinas and black women have higher rates of cervical cancer than white women. *Id.* at 10, 12; see also *Cervical Cancer Rates by Race and Ethnicity*, *supra* note 63. Black men have a higher incident rate of both prostate and lung cancer than any other group. *Cancer Facts & Figures*, *supra* note 57, at 10. These

Efforts to eliminate disparities would require, at a minimum, relieving the USDA of its conflicting tasks, isolating the USDA from the food industry, and ensuring universal access to healthful alternatives to milk products.<sup>165</sup> Challenges to the prevailing societal perspectives on food and health are also necessary to effect positive change.

#### CONCLUSION: LEGAL STRATEGIES

Food oppression as a theoretical concept has yet to enter most dialogues about equality. Instead, efforts to improve health outcomes usually operate through the obesity paradigm or from a general health framework that may have an incidental effect on racial and socioeconomic health disparities. Traditional responses to health disparities seek to influence consumer choice through better or increased labeling<sup>166</sup> or information/education campaigns, which have proven largely ineffective.<sup>167</sup> The first step in responding to this oppression should therefore be to introduce the analysis into political and legal struggles, and reframe discussions to include a food oppression perspective.

To date, there have been a number of suits alleging corporate and government responsibility for ill health through deceptive advertising.<sup>168</sup>

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groups also consume a higher percentage of their calories from fast food than whites. Paeratakul et al., *supra* note 161, at 1334. Although this Article focuses on the harms specific to dairy consumption, other common ingredients of fast food, such as meat, salt, and sugar, also pose significant health risks that beg for analysis under the framework established here. See, e.g. MICHAEL MOSS, *SALT SUGAR AND FAT passim* (2012).

165. Movements seeking to bring healthy food to people living in food deserts do some of this work. These include farmers' markets and urban gardens supported by local food justice organizations and community-based entrepreneurial projects such as the People's Grocery in Oakland, California. Marissa Guggiana, *For Oakland Food Desert: A People's Grocery Store*, BERKELEYSIDE (Dec. 18, 2012, 7:00 AM), <http://www.berkeleyside.com/2012/12/18/for-oakland-food-desert-a-peoples-grocery-store>.

166. For an in-depth discussion of a controversial labeling law in New York City, see Jodi Schuette Green, Note, *Cheeseburger in Paradise? An Analysis of How New York State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733 (2010). Michelle Obama's "Let's Move!" campaign also successfully pushed for labeling regulations. *Let's Move! Accomplishments*, LET'S MOVE, <http://www.letsmove.gov/accomplishments> (last visited Feb. 27, 2013).

167. For a critique of this dominant form of federal health and obesity intervention, see Kelli K. Garcia, *The Fat Fight: The Risks and Consequences of the Federal Government's Failing Public Health Campaign*, 112 PENN ST. L. REV. 529 (2007). See also B Elbel et al., *Child and Adolescent Fast-Food Choice and the Influence of Calorie Labeling: A Natural Experiment*, 35 INT'L J. OF OBESITY 493, 493–500 (2011) (finding that teenagers and adults notice calorie counts when fast food restaurants provide them, but fail to alter their food selection in response); Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFFAIRS w1110 (2009); Rosanna Mentzer Morrison et al., *Will Calorie Labeling in Restaurants Make A Difference?*, USDA ECON. RES. SERVICE (Mar. 14, 2011), <http://www.ers.usda.gov/amber-waves/2011-march/will-calorie-labeling.aspx#.UyN6d4XpdrW>.

168. In 2012, the attorneys responsible for the successful lawsuits against the tobacco industry filed a series of cases against major food corporations alleging that they have mislabeled food products as healthy. See Stephanie Strom, *After Tobacco, Lawyers Set Their Sights on Food Industry*, N.Y.

Additionally, the Physicians Committee for Responsible Medicine has filed suits against the government in response to the Dietary Guidelines, alleging that they deliberately obfuscate the dangers of eating dairy products and meat through the use of confusing euphemisms and biotechnical terms such as solid fats, saturated fat, and cholesterol.<sup>169</sup> The Congressional Black Caucus has complained about the “consistent racial bias” in the Guidelines, as evidenced by their emphasis on milk products despite the lactose intolerance experienced by most African Americans.<sup>170</sup> Michelle Obama’s “Let’s Move!” campaign, although specifically targeting childhood obesity, includes in its agenda goals that complement the objective of reducing saturated fat consumption, such as asking restaurants to reduce cheese-based items on their menus and support breastfeeding.<sup>171</sup>

Future legal strategies might include a lawsuit brought by states against the USDA alleging that the USDA’s successful efforts to reduce the milk surplus harm their citizens.<sup>172</sup> This challenge, based on the disproportionate effects of promoting the consumption of saturated fats on African Americans and/or Latina/os, could originate in Mississippi, which has the highest rates of African Americans suffering from heart disease,<sup>173</sup> or West Virginia, which has the highest rates of African Americans with diabetes.<sup>174</sup>

An Equal Protection challenge to the USDA’s actions might be possible, if African American or Latina/o plaintiffs suffering from saturated fat-related conditions could demonstrate the discriminatory impact of these actions and establish the agency’s discriminatory intent.<sup>175</sup> The evidence of racial health

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TIMES, Aug. 19, 2012, at A1. Findings for plaintiffs in these suits could raise more awareness of the role that corporations play in health deception. Up to now, plaintiffs have not been successful in holding corporations accountable for health problems. *Id.*

169. *Doctors Sue Federal Government*, *supra* note 74.

170. NESTLE, *supra* note 82, at 73; *see also* Dawne M. Carroll, *Food Pyramid on Shaky Ground over Race Bias*, SF GATE (Mar. 5, 2000, 4:00 AM), [http://articles.sfgate.com/2000-03-05/news/17640994\\_1\\_lactose-milk-and-dairy-dairy-products](http://articles.sfgate.com/2000-03-05/news/17640994_1_lactose-milk-and-dairy-dairy-products).

171. WHITE HOUSE TASK FORCE ON CHILDHOOD OBESITY, SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 60 (2010), *available at* [http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce\\_on\\_Childhood\\_Obesity\\_May2010\\_FullReport.pdf](http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf).

172. *See* Massachusetts v. EPA, 549 U.S. 497 (2007) (holding that Massachusetts had standing to challenge the Environmental Protection Agency’s failure to regulate greenhouse emission in new vehicles because the state had a special interest in protecting the health and welfare of its citizens); *see also* Calvin Massey, *State Standing After Massachusetts v. EPA*, 61 FLA. L. REV. 249, 268–69 (2009) (arguing for the extension of *parens patriae* standing to any generalized claim of injury suffered by all of a state’s citizens that would not be judicially cognizable if brought by an individual).

173. *Number of Heart Disease Deaths per 100,000 Population by Race/Ethnicity, 2009*, STATE HEALTH FACTS, <http://www.statehealthfacts.org/comparabletable.jsp?ind=79> (last visited Feb. 27, 2013).

174. *Number of Diabetes Deaths per 100,000 Population by Race/Ethnicity, 2009*, STATE HEALTH FACTS, <http://www.statehealthfacts.org/comparemappable.jsp?cat=2&ind=76> (last visited Feb. 27, 2013).

175. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (holding that a plaintiff with an Equal Protection claim must establish both a discriminatory effect and a discriminatory purpose).

disparities in the relevant illnesses would likely suffice to demonstrate discriminatory impact. Discriminatory purpose, however, would be difficult to prove, unless a court would be willing to accept that no other explanation for the USDA's actions and their disproportionate effect on a suspect class exists.<sup>176</sup>

Through legislation, one way to resolve the immediate problem of the overconsumption of saturated fats, particularly in fast food meals, would be simply to restrict the amount that restaurants may lawfully serve in their products. This type of regulation would be similar to the limits imposed by New York on the amount of trans fats that restaurants can use.<sup>177</sup> Although it would be desirable to limit saturated fats in restaurant meals, this approach does not resolve the specific problem of the USDA's responsibility for supporting the dairy industry, as the litigation proposed above might do, nor does it respond to the greater issue of food oppression.

Lobbying efforts might instead focus on inserting health into the antidiscrimination laws to prohibit health discrimination on the basis of race, national origin, and other social factors. Similar laws prohibit discrimination in employment,<sup>178</sup> housing,<sup>179</sup> credit,<sup>180</sup> contracting,<sup>181</sup> and property dealings.<sup>182</sup> One challenge to implementing an effective health discrimination law would be the need to allow proof of discrimination through disparate impact. Congress and the courts have been reluctant to allow the establishment of discrimination through disparate impact outside of the employment context.

Any potential solution is incomplete. Even if the USDA relinquishes responsibility for the Dietary Guidelines, the food industry will retain its strong lobbying power. Similarly, even if the USDA ceases subsidizing the dairy industry, allowing supply to decrease to match demand, thereby eliminating the surplus, health disparities will likely persist. The first step toward eradicating food oppression is to identify it. Advocacy and strategies against it will follow.

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176. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (inferring a discriminatory purpose from a disparate impact on African Americans); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (finding a statute unconstitutional in part because it affected Chinese-owned businesses in disproportionate numbers).

177. N.Y.C., N.Y., HEALTH CODE tit. 24, § 81.08(a)–(b) (2008).

178. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2006).

179. Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2006).

180. Equal Credit Opportunity Act of 1974, 15 U.S.C. § 1691(a)–(f) (2012).

181. 42 U.S.C. § 1981 (2006).

182. *Id.* § 1982.