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THE ROLE OF LITIGATION IN COMBATING  
OBESITY AMONG POOR URBAN MINORITY  
YOUTH: A CRITICAL ANALYSIS OF *PELMAN V.*  
*McDONALD'S CORP.*

ASHLEY B. ANTLER\*

Childhood obesity is one of the most dire public health threats facing this country today. This epidemic disproportionately impacts low-income urban minority youth, and several environmental factors may contribute to the disparity in obesity rates. While there is broad debate about which legal tactics can most effectively shape public policy to combat obesity, one strategy to fight the obesity epidemic has been through litigation brought by obese plaintiffs against fast food companies.

This Note highlights an important gap in the current legal literature and obesity litigation strategies: despite public health literature demonstrating the disproportionate impact of obesity on urban minority youth, and the general debate in legal literature on the proper role of litigation in shaping obesity policy, no focused attention is paid to the role that litigation can play in combating obesity, specifically among urban minority youth. This Note argues that it would be helpful to refocus the current generalized debate about the proper role of litigation in shaping obesity policy to concentrate on targeted communities, in particular low-income urban minority youth.

The problem is illustrated by the recent and well publicized lawsuit against McDonald's, *Pelman v. McDonald's Corp.*,<sup>1</sup> a class action suit brought on behalf of overweight minors in New York against McDonald's, alleging deceptive advertising practices in violation of New York Consumer Protection Laws.<sup>2</sup> The

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<sup>1</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) ("*Pelman I*"), dismissed by, partial summary judgment denied by *Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 U.S. Dist. LEXIS 15202 (S.D.N.Y. Sept. 3, 2003) ("*Pelman II*"), vacated by, remanded in part by *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) ("*Pelman III*"), on remand at, motion granted by *Pelman v. McDonald's Corp.*, 396 F. Supp. 2d 439 (S.D.N.Y. 2005) ("*Pelman IV*"), motion to strike granted in part by motion to strike denied in part by *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006) ("*Pelman V*").

<sup>2</sup> The original complaint was dismissed; the second amended complaint ("amended complaint"), which I will analyze in this Note, only alleged violations of New York Consumer Protection Statute,

named plaintiffs in the original *Pelman* complaint are poor, urban, African-American adolescents<sup>3</sup> and the majority of named plaintiffs in the amended complaint are poor urban youth of color, but the putative class includes a much broader population of “New York State residents, infants, and consumers, who were exposed, subjected, and affected . . . by the Defendant’s deceptive nutritional, ingredient and/or nutritional disclosure schemes.”<sup>4</sup> The *Pelman* amended complaint does not acknowledge the socioeconomic context in which the majority of the named plaintiffs became obese, and avoids the critical issues of race, class, and related disparities in obesity rates. In failing to frame the lawsuit in a way that exposes the connection between obesity, socioeconomic status, and race, the *Pelman* litigation strategy fails to take account of the disparities in obesity rates that are well documented in the public health literature.

This Note uses the *Pelman* lawsuit as a case study to analyze the potential of litigation to shape obesity policy for urban minority youth. This Note further discusses how many of the theoretical arguments against obesity litigation are weakened if the debate is refocused on urban minority youth. This Note does not argue that fast food lawsuits limited to low-income, urban, minority youth will necessarily be successful. Rather, this Note posits that the relative costs and benefits of litigation as a public health strategy may depend a great deal on context, and concludes that arguments against litigation in the obesity context have less force when the debate is refocused on low-income, urban, minority youth. This Note uses *Pelman* as a case study for analyzing the potential benefits of fast food obesity lawsuits brought on behalf of low-income, urban, minority youth to mitigate the effects of the obesity epidemic in this population.

Part I discusses the childhood obesity epidemic, and its disproportionate impact on urban minority youth. As part of this discussion, the Note lays out two contrasting views of obesity as a personal responsibility issue versus an environmental issue, and outlines some of the environmental factors, which may contribute to the disparities in obesity rates. Part II addresses the role of litigation in shaping obesity policy. It begins with a brief overview of the public health law framework, and continues to discuss arguments for and against litigation as a vehicle to shape obesity policy. Finally, this section ends with a discussion of the limited empirical evidence available to assess litigation as a public health strategy, and concludes that the current obesity litigation debate is predominantly theoretical. Part III begins by revisiting the *Pelman* lawsuit, acknowledging that the named plaintiffs reflect one of the populations most dramatically impacted by defendant’s behavior, but that the class is not limited to them. This section refocuses the

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N.Y. GEN. BUS. § 349. See *infra* Part II.A. for a summary of the *Pelman* procedural history.

<sup>3</sup> 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, 696 (2007).

<sup>4</sup> More Definite Statement (Second Amended Complaint) ¶¶ 530-534, *Pelman v. McDonald’s Corp.*, 452 F. Supp 320 (S.D.N.Y. Dec. 12, 2005) (No. 02 CV 7821).

obesity litigation debate on low-income urban minority youth, and shows that by doing so, the arguments against obesity litigation are weakened and the strengths are bolstered. This section also analyzes how the *Pelman v. McDonald's* amended complaint framed the issue of obesity through its presentation of factual background information, and its identification of the class. In so doing, *Pelman* is used as a case study to illustrate the potential of litigation as a strategy to shape obesity policy for urban minority youth. This Note posits that if the *Pelman* complaint had been framed differently, to highlight the relationship between obesity, race, and socioeconomic status, the lawsuit may have been a powerful vehicle to reframe the issue of obesity as it affects low-income urban minority youth, and also may have offered an opportunity to explore the potential of litigation to combat obesity in this population. Moreover, if the *Pelman* class had been limited to the population more accurately represented by the named plaintiffs—low-income urban minority youth—the lawsuit might have been a more effective mechanism to catalyze social awareness and public policy combating obesity in this population.

## I. INTRODUCTION: THE OBESITY EPIDEMIC AND ITS IMPACT ON URBAN MINORITY YOUTH

### A. Obesity Disproportionately Affects Urban Minority Youth

Obesity is a grave public health problem facing the United States today.<sup>5</sup> Childhood obesity, in particular, is increasing at an alarming rate in this country: in 2003 to 2004, over 33% of children and adolescents from ages two to nineteen

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<sup>5</sup> See, e.g., TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA 2007 3, 5 (2007), <http://healthyamericans.org/reports/obesity2007> ("Two-thirds of American adults are obese or overweight, and in the past year, obesity rates have continued to rise in 31 states. Eighty-five percent of Americans believe that obesity is an epidemic. . . . In the past year, obesity rates continued to rise in 31 states. Twenty-two of these states experienced an increase for the second year in a row. Obesity rates have not dropped in a single state."). See also, Jess Alderman et al., *Prevention and Treatment: Solutions Beyond the Individual: Application of Law to the Childhood Obesity Epidemic*, 35 J.L. MED. & ETHICS 90, 90 (2007) (citing studies that show, "Childhood obesity is a national public health problem. Regardless of gender, race, socioeconomic status, or geographic location, children are 'gaining weight to a dangerous degree and at an alarming rate.' Since 1980, the number of overweight children has doubled; among adolescents the number has almost tripled. Today, among children who are more than six years old, about nine million are obese."); David Burnett, *Fast-Food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y & L. 357, 358-59 (2007) (citations omitted) ("Obesity is a serious problem in contemporary America. The Centers for Disease Control and Prevention recently reported the startling statistic that 'in 2005, among the total U.S. adult population surveyed, 60.5% were overweight, 23.9% were obese, and 3.0% were extremely obese.' In 2001 the Surgeon General of the United States reported that 300,000 deaths a year can be attributed to obesity, and that obese individuals have a fifty to one hundred percent increased risk of premature death from weight-related health problems. In comparison with other sources of illness, the obesity epidemic causes at least as many medical problems as do poverty, smoking, and problem drinking. A recent article in the Journal of the American Medical Association found that poor health and eating habits caused 400,000 deaths in the United States in the year 2000, just behind tobacco use and far ahead of deaths from alcohol, infection, toxins, car accidents, guns, and sexual diseases.").

were at risk of being overweight or were overweight,<sup>6</sup> compared to 28.2% in 1999 to 2000.<sup>7</sup> The number of U.S. children who are overweight has increased by more than 100% since 1971, and continues to rise.<sup>8</sup> Today, one in every three American children is obese or at risk of becoming obese.<sup>9</sup> Furthermore, 80% of obese adolescents will become obese adults.<sup>10</sup> Due to the prevalence of obesity, children today run the risk of becoming the first generation in American history with a shorter life expectancy than their parents.<sup>11</sup>

Rising childhood obesity rates are also related to significant social and economic costs. Obesity rates are associated with a rise in chronic diseases such as diabetes, asthma, heart disease, high blood pressure and arthritis.<sup>12</sup> This has resulted in increased health costs for hospitals, families, schools, and taxpayers.<sup>13</sup>

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<sup>6</sup> Austin, *supra* note 3, at 698-99. "The Centers for Disease Control uses the Body Mass Index (BMI) to determine overweight and obesity; the BMI basically assesses body fat as a matter of weight relative to height. Adults with a BMI of thirty or higher are considered obese. For children and adolescents, as to whom the category of obese is not employed, overweight is defined as a BMI at or above the sex and age-specific ninety-fifth percentile. The BMI measure of overweight and obesity is not without its critics; complaint is made that it does not necessarily represent a measure of fitness, nor does it distinguish between body fat and muscle mass." *Id.* (citations omitted).

<sup>7</sup> Cynthia L. Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999-2004*, 295 JAMA 1549, tbl.2 (2006).

<sup>8</sup> Rachel Tolbert Kimbro et al., *Racial and Ethnic Differentials in Overweight and Obesity Among 3-Year-Old Children*, 97 AM. J. PUB. HEALTH 298, 298 (2007), available at <http://www.ajph.org/cgi/reprint/97/2/298.pdf>.

<sup>9</sup> INSTITUTE OF MEDICINE ("IOM"), *PROGRESS IN PREVENTING CHILDHOOD OBESITY: HOW DO WE MEASURE UP?* 1 (2007), available at <http://www.iom.edu/?id=37007>.

<sup>10</sup> Cheryl L. Hayne et al., *Regulating Environments to Reduce Obesity*, 25 J. PUB. HEALTH POL'Y 391, 395 (2005).

<sup>11</sup> Rogan Kersh & James A. Morone, *Obesity, Courts, and the New Politics of Public Health*, J. HEALTH POL., POL'Y, & L. 839, 842 (2005).

<sup>12</sup> MARION NESTLE, *FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH* 175 (Univ. of California Press 2002) ("Pediatricians report seeing children with high levels of serum cholesterol, high blood pressure, and 'adult' onset diabetes at earlier and earlier ages—all consequences of excessive caloric intake. Because obesity tends to persist into adulthood, this condition may well predispose overweight children to cardiovascular and other chronic diseases later in life.")

<sup>13</sup> See, e.g., Catherine Malina & John M. Balbus, *Environmental Interventions to Help Address the Obesity and Asthma Epidemics in Children*, 17 DUKE ENVTL. L. & POL'Y F. 193, 194 (2007) ("Obesity-related illnesses, such as diabetes, asthma, sleep apnea, and gallbladder disease, have also risen sharply among children in the past few decades, causing the number, length, and economic cost of hospital stays for children with obesity and obesity-related diseases to accelerate. According to a 2002 study published by the medical journal *Pediatrics*, the total days of care required by patients ages six to seventeen with obesity-related illnesses more than doubled over a twenty-year period, increasing from 152,000 days in 1979-1981 to 310,000 days in 1997-1999. During the same time frame, the proportion of hospital costs dedicated to these patients jumped nearly fourfold from 0.43 percent—or \$35 million—in 1979-1981 to 1.7 percent—or \$127 million—in 1997-1999. The rising costs associated with obesity are felt not only by hospitals, but also by families and schools, which experience great strain due to medical bills, student absences, and disrupted daily routines."); see also, Burnett, *supra* note 5, at 359 (discussing studies that show, "overweight and obesity are associated with significant personal and public harms. Being overweight creates an increased risk of heart disease, high blood pressure, type 2 diabetes, arthritis, asthma, pregnancy complications, certain cancers, and depression. Overweight people also frequently suffer from social stigmatization and discrimination. The Surgeon General estimated that obesity cost the American economy \$117 billion in the year 2000, due to the burden of treating obesity-related medical problems in addition to lost potential wages stemming from illness and premature death.").

While the obesity epidemic affects all U.S. children and adolescents, obesity rates among children in several racial/ethnic minority populations are disturbingly high or are increasing faster than average.<sup>14</sup> Obesity rates among African-American and Hispanic children and adolescents illustrate this point: in the early 1990s, among girls aged six to eleven, 23% of white girls were overweight, compared to 29% of Mexican-American girls, and 31% of African-American girls.<sup>15</sup>

The disproportionate number of overweight Hispanic and African-American children and adolescents may be the result of several factors, including socioeconomic status and cultural preferences. Individuals in lower socioeconomic groups are more likely to be obese,<sup>16</sup> and census figures show that African-Americans and Hispanics are more likely to be poor than whites.<sup>17</sup> Social and economic disparities are intimately connected with a child's risk of becoming obese, particularly since the environments of socio-economically disadvantaged youth often do not support healthy behavior.<sup>18</sup> Other factors, such as cultural upbringing, may also contribute to these disparities.<sup>19</sup>

#### *B. Obesity: Individual Responsibility or Environmental Issue?*

While there is widespread agreement about the prevalence of obesity and its disproportionate effect on certain communities, debate rages as to the causes of the problem. Viewed on an individual level, a person's weight is typically determined by the balance of how many calories one consumes, against the number of calories expended through physical activity.<sup>20</sup> However, a wide range of environmental factors also have a tremendous influence on obesity rates, and no single culprit—e.g., the fast food industry—can be held solely responsible for the childhood obesity epidemic. Both environmental and individual factors have contributed to the problem, and obesity must be seen as resulting from a confluence of these factors.<sup>21</sup>

<sup>14</sup> IOM, *supra* note 9, at 74.

<sup>15</sup> NESTLE, *supra* note 12, at 175; *see also* Stephen D. Sugarman & Nirit Sandman, *Fighting Childhood Obesity Through Performance-Based Regulation of the Food Industry*, 56 DUKE L.J. 1403, 1454 (2007) (“[A]vailable social science data . . . shows that the obesity problem is especially critical for low-income children and children of color.”).

<sup>16</sup> Burnett, *supra* note 5, at 360-61 (“[O]besity is unevenly distributed across socioeconomic strata, with higher rates of obesity found among poorer and disadvantaged Americans. This disparity indicates that sociological factors such as social class, race and ethnicity, employment, and community ties also affect the incidence of obesity.”); *see also* Sugarman & Sandman, *supra* note 15, at 1454 (“[A]vailable social science data, . . . shows that the obesity problem is especially critical for low-income children and children of color.”).

<sup>17</sup> Guadalupe T. Luna, *The New Deal and Food Insecurity in the “Midst of Plenty,”* 9 DRAKE J. AGRIC. L. 213, 222 n.53 (2004) (“[C]ensus figures reveal that African-Americans and Hispanics were more likely to be poor than non-Hispanic Whites.”).

<sup>18</sup> IOM, *supra* note 9, at 74.

<sup>19</sup> Burnett, *supra* note 5, at 360.

<sup>20</sup> Alderman et al., *supra* note 5, at 91.

<sup>21</sup> *See* NESTLE, *supra* note 12, at 175 (“The increasing prevalence of childhood obesity results from

Many politicians and interest groups, including the food industry, seek to frame the obesity epidemic solely as a personal responsibility issue, and propose that the solution to “the obesity crisis is a simple matter of changing individual lifestyles on a mass scale.”<sup>22</sup> The food industry, in particular, has a vested interest in framing the obesity issue as one of “personal responsibility.”<sup>23</sup> The “well-organized, well-financed, and politically savvy”<sup>24</sup> food industry derails attention from their role in contributing to the obesity epidemic by emphasizing individual responsibility for diet and lifestyle choices. In so doing, the food industry controls and manipulates the way in which the obesity problem is understood, and how it should be dealt with.<sup>25</sup> The personal responsibility proponents argue that the government should not get involved with individuals’ choices, and that obese people have no one to blame but themselves.<sup>26</sup>

However, the view of obesity as an individual or a personal responsibility issue oversimplifies the problem and ignores many of its causes, including the various environmental factors at play.<sup>27</sup> Framing obesity solely as an issue of personal responsibility pays no heed to the “illusory nature of many of the choices consumers supposedly make.”<sup>28</sup> The individual responsibility theory does not explain why obesity disproportionately affects certain populations more than others, nor does it account for why obesity rates have rapidly and dramatically increased in the past few decades.<sup>29</sup> Furthermore, the individual responsibility theory does not account for why minority youth are more likely to be overweight than their white counterparts.<sup>30</sup>

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complex interactions of societal, economic, demographic, and environmental changes that not only encourage people to eat more food than needed to meet their energy requirements but also encourage people to make less healthful food choices and act as barriers to physical activity.”); Burnett, *supra* note 5, at 360 (“The American obesity epidemic has many sources, including lack of physical exercise; poor diets and unhealthy dieting; cultural upbringing; failure by health-care professionals to counsel patients about obesity; excessive food portions in restaurants; junk-food advertising on children’s television programs; increasing numbers of meals eaten outside the home; and genetic predisposition.”).

<sup>22</sup> Burnett, *supra* note 5, at 400.

<sup>23</sup> *Id.* at 401.

<sup>24</sup> Kersh and Morone, *supra* note 11, at 849.

<sup>25</sup> See Jason A. Smith, *Setting the Stage for Public Health: The Role of Litigation in Controlling Obesity*, 28 U. ARK. LITTLE ROCK L. REV. 443, 446-47 (2006); Kersh and Morone, *supra* note 11, at 849.

<sup>26</sup> Kersh and Morone, *supra* note 11, at 846-47.

<sup>27</sup> Burnett, *supra* note 5, at 372. See also *infra* Parts I.C and I.D (discussing environmental factors that impact obesity rates).

<sup>28</sup> Alderman et al., *supra* note 5, at 102.

<sup>29</sup> *Id.* at 91.

<sup>30</sup> See, e.g., IOM, *supra* note 9, at 74.

*C. Inequalities in the Built Environment and Its Impact on Obesity: The Effects of the Built Environment on Physical Activity and Nutrition*

Many public health scholars have argued that childhood obesity among urban minority youth is an environmental or community problem that cannot be viewed simply as an issue of personal responsibility. This Note argues that the individual responsibility theory, alone, is an inadequate explanation for why obesity disproportionately impacts poor urban minority youth, and that environmental factors must be considered.

i. The “Built” Environment

The “built environment” is a critical consideration in assessing the obesity epidemic. “[T]he built environment consists of the neighborhoods, roads, buildings, food sources, and recreational facilities in which people live, work, are educated, eat, and play.”<sup>31</sup> The built environment includes, among other things, the physical design elements of a community, such as “street layout, zoning, recreation facilities, transportation options, parks, stairs, and public spaces.”<sup>32</sup> The built environment has a tremendous impact on children’s weight by influencing their daily decisions, including physical activity and eating habits.<sup>33</sup>

A growing body of research documents an association between the built environment of low-income communities and physical activity, which is related to overweight and obesity.<sup>34</sup> Studies have shown that there are fewer recreational facilities and parks in low-income communities than in more affluent ones.<sup>35</sup> Children living in low-income neighborhoods may be prevented from engaging in physical activity due, at least in part, to the fact that lower-income neighborhoods have fewer parks, gyms, sports fields and trails compared to neighborhoods with higher median incomes.<sup>36</sup> Furthermore, poor neighborhoods often lack clean, outdoor spaces for physical activity.<sup>37</sup> Fear of crime also deters residents from walking and spending time outdoors.<sup>38</sup>

ii. The “Nutrition” Environment

In addition to neighborhood layout, the built environment also includes the multiple facets of the “nutrition environment:” nutrition sources in homes, schools,

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<sup>31</sup> James F. Sallis & Karen Glanz, *The Role of Built Environments in Physical Activity, Eating, and Obesity in Childhood*, 16 THE FUTURE OF CHILD. 89, 90 (2006), [http://www.futureofchildren.org/usr\\_doc/05\\_5562\\_sallis-glanz.pdf](http://www.futureofchildren.org/usr_doc/05_5562_sallis-glanz.pdf).

<sup>32</sup> Hayne et al., *supra* note 10, at 399.

<sup>33</sup> Sallis & Glanz, *supra* note 31, at 90.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 91.

<sup>36</sup> *Id.*

<sup>37</sup> Hayne et al., *supra* note 10, at 399.

<sup>38</sup> *Id.*



and the community that influence food consumption.<sup>39</sup> Research on nutrition environments outside the school and home falls into two categories: “community nutrition environments, which include the number, type, and location of food outlets,” and “consumer nutrition environments, which cover the availability and cost of, as well as information about, healthful and less healthful foods inside those outlets.”<sup>40</sup> An awareness of the multiple influences that shape the daily lives of low-income minority youth, especially in regards to food choices, is critical to understanding causes of the childhood obesity epidemic in this population.<sup>41</sup>

The community and consumer nutrition environments may, in part, explain the impact of obesity on low-income urban minority youth.<sup>42</sup> Poverty prevents many Americans from having access to healthy foods.<sup>43</sup> In particular, “[f]ood insecurity—[the] limited or uncertain availability of nutritionally adequate and safe foods or limited or uncertain ability to acquire acceptable food in acceptable ways,”—disproportionately impacts urban low-income communities of color.<sup>44</sup> Such food insecurity is caused in part by the dearth of well-stocked supermarkets and reliance on food programs that make an adequate diet difficult to attain.<sup>45</sup> Several studies have concluded that low-income and minority neighborhoods have fewer supermarkets and healthy food options, as well as lower quality produce available, compared to more affluent and white neighborhoods.<sup>46</sup> Access to supermarkets has been linked with healthier eating and increased consumption of fruits and vegetables by African-American adults.<sup>47</sup> Therefore, the diets of many of the poorest citizens in this country are shaped less by their free will, and more by the lack of food choices and retailers available to them.<sup>48</sup>

Amidst a lack of healthy food alternatives, there is an astonishingly high concentration of fast food restaurants in poor urban neighborhoods.<sup>49</sup> Fast food franchisors have become aware of the profits to be made by locating outlets in

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<sup>39</sup> Sallis & Glanz, *supra* note 31, at 95-97.

<sup>40</sup> *Id.* at 97.

<sup>41</sup> IOM, *supra* note 9, at 75 (citations omitted) (“Helping at-risk children and youth balance their energy intakes and their energy expenditures requires an understanding of the complex and interacting influences of the social, economic, and built environments and the adverse environmental conditions that low-income and racially/ethnically diverse populations encounter as they regularly attempt to obtain affordable foods, beverages, and meals that contribute to a healthful diet and find opportunities to engage in recreational play and physical activity.”).

<sup>42</sup> Sallis & Glanz, *supra* note 31, at 97.

<sup>43</sup> Alderman et al., *supra* note 5, at 102.

<sup>44</sup> Luna, *supra* note 17, at 213, 224.

<sup>45</sup> *Id.* at 224-25.

<sup>46</sup> Sallis & Glanz, *supra* note 31, at 98.

<sup>47</sup> *Id.* at 97 (“Supermarkets, for example, are less common in lower-income and minority neighborhoods than in other neighborhoods. And recent evidence links access to supermarkets with such indicators of healthful eating as fruit and vegetable intake among African-American adults, household fruit consumption, and a diet quality index for pregnancy.”).

<sup>48</sup> Luna, *supra* note 17, at 224-25.

<sup>49</sup> See, e.g., Jason P. Block et al., *Fast Food, Race/Ethnicity, and Income: A Geographic Analysis*, 27 AM. J. PREVENTIVE HEALTH 211, 216 (2004).

urban communities; as a result, there is a growing concern over the high concentration of fast food franchises in cities,<sup>50</sup> and in particular, low-income minority communities. For example, according to “[McDonald’s] store location directory, there are approximately 70 of [McDonald’s] stores within a five mile radius in the Bronx, New York, which is an average of 14 McDonald’s stores per square mile in Bronx County, New York alone.”<sup>51</sup> Consequently, the urban poor often rely on fast food restaurants as a major source for food.<sup>52</sup> Low-income children are likely to eat in fast food restaurants, particularly McDonald’s, at least once a week or more.<sup>53</sup>

Fast food companies target urban, low-income, and black communities. Studies show that black and low-income neighborhoods are more likely to contain higher numbers of fast food restaurants than white communities.<sup>54</sup> The percentage of black residents was found to be an even more powerful predictor of the concentration of fast food restaurants in a given community than income.<sup>55</sup>

Such targeting of urban, low-income, and black communities is troubling because it may be causing people in these neighborhoods to eat more unhealthy food. Researchers hypothesize that more convenient access to fast food may result in higher consumption of these products, and hence higher obesity rates.<sup>56</sup> Higher consumption of unhealthy foods in low-income minority communities may be fueled by the combination of several factors: limited food choices within the neighborhoods and limited transportation to other neighborhoods, as well as financial constraints, which drive people to seek out the highest number of calories for the smallest price tag.<sup>57</sup>

<sup>50</sup> Austin, *supra* note 3, at 700-01.

<sup>51</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶ 91, n.31.

<sup>52</sup> Luna, *supra* note 17, at 226 (“[A] resultant alternative for some communities of color . . . includes the concentration of less than healthful food products. Some geographically-compact minority regions are left with but one choice—fast food chains—commonly associated with high concentrations of fat, sugar, and salt . . . Feasible alternatives . . . are not presented to communities in distress.”).

<sup>53</sup> Thomas N. Robinson et al., *Effects of Fast Food Branding on Young Children’s Taste Preferences*, 161 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 792, 794 (2007) (finding that approximately one-third of the children’s parents in this study reported their children ate at McDonald’s weekly or more, and McDonald’s food was eaten more frequently than food from all other fast food restaurants combined).

<sup>54</sup> Block et al., *supra* note 49, at 214 (“Fast-food restaurants are geographically associated with predominately black and low-income neighborhoods after controlling for commercial activity, presence of highways, and median home values. The percentage of black residents is a more powerful predictor of [fast food restaurant density] than median household income. Predominantly black neighborhoods (i.e., 80% black) have one additional fast-food restaurant per square mile compared with predominantly white neighborhoods (i.e., 80% white). These findings suggest that black and low-income populations have more convenient access to fast food. More convenient access likely leads to the increased consumption of fast food in these populations, and may help to explain the increased prevalence of obesity among black and low-income populations.”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 216.

It is also worth noting that for certain minority populations, fast food restaurants have a distinct cultural significance, and serve as “destinations, [or] desirable social milieus.”<sup>58</sup> For example, one scholar of race and class oppression and the law has explained that “[d]ining at a fast food restaurant has a different significance for African-Americans than for other racial/ethnic groups and fulfills a different set of consumer tastes or preferences.”<sup>59</sup> She explains that while African-Americans are less likely to eat out in casual or family-style restaurants than other ethnic groups, African-Americans, particularly those with children, are just as likely to eat at fast food restaurants as other groups.<sup>60</sup> Finally, fast food restaurants contain menu items like fried fish and chicken, which are “staples of the soul food diet many blacks prefer.”<sup>61</sup>

Through advertising campaigns, corporate giveaways, and even the setup of their restaurants, food corporations strategically and effectively target minority communities.<sup>62</sup> For example, McDonald’s supposedly “reconfigured the seating layout of some of its restaurants in areas heavily populated by Hispanics to provide larger group areas where Hispanic families can sit together, [in recognition of] the importance of extended communities in many Hispanic communities.”<sup>63</sup> Beverage companies, such as Coca-Cola and PepsiCo, also utilize similar “guerilla-marketing tactics” to solicit African-American and Hispanic customers, in an effort to drive product sales and distribution in urban neighborhoods.<sup>64</sup>

Additionally, corporate fast food companies spend huge amounts of money marketing their products to children.<sup>65</sup> McDonald’s Operations and Training Manual for 1990/1991 instructed its restaurants to “do everything you can to appeal to children’s love for Ronald and McDonald’s.”<sup>66</sup> In 1999 alone, McDonald’s spent \$627.2 million on direct media advertising.<sup>67</sup> The authors of one recent study of low-income preschoolers found approximately seventy-five percent of parents in the study reported that they had a toy from McDonald’s in their homes.<sup>68</sup> Some critics have argued that marketing strategies used by fast food companies to target

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<sup>58</sup> Austin, *supra* note 3, at 699.

<sup>59</sup> Regina Austin, “*Bad for Business*”: Contextual Analysis, Race Discrimination, and Fast Food, 34 MARSHALL L. REV. 207, 226 (2000).

<sup>60</sup> *Id.* at 227 (“Black customers’ patronage of fast food establishments . . . seems understandable in light of blacks’ material conditions, their social circumstances, and their resulting expectations on one hand, and the characteristics of fast food establishments, on the other. Not only do blacks have less discretionary income than whites, they also have historically suffered discrimination in places of public accommodations like full-service restaurants . . . . There is much about fast food restaurants that appears to be democratic and egalitarian. It is little wonder that blacks then find them inviting alternatives to family-style and casual dining . . .”).

<sup>61</sup> *Id.* at 229.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (brackets in original).

<sup>64</sup> NESTLE, *supra* note 12, at 201.

<sup>65</sup> Robinson et al., *supra* note 53, at 794; see also Alderman et al., *supra* note 5, at 97.

<sup>66</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶105.

<sup>67</sup> NESTLE, *supra* note 12, at 22.

<sup>68</sup> Robinson et al., *supra* note 53, at 794.

children is “blatant exploitation.”<sup>69</sup> Fast food companies’ and food corporations’ aggressive marketing activity toward children, minority groups, and low-income neighborhoods helps reinforce disparities in diet and health between members of differing socioeconomic and ethnic groups.<sup>70</sup>

The effect of this marketing on consumers and the resultant impact on increasing obesity rates is well documented in a broad body of literature.<sup>71</sup> Advertising has a pernicious effect on consumer choices. There is growing support for the idea that pervasive advertising and increased portion sizes have tremendous impacts on our food choices, leading to the conclusion that food decisions are not purely driven by individual preferences.<sup>72</sup> The authors of one recent study, examining the effects of McDonald’s branding on taste preferences of low-income preschoolers concluded that, by the time low-income preschool children turn three to five years old, their tastes are already influenced by aggressive marketing activities.<sup>73</sup> These researchers found that children “preferred the tastes of foods and drinks if they thought they were from McDonald’s, demonstrating that brand identity can influence young children’s taste perceptions.”<sup>74</sup> The authors added that, “[t]his was true even for carrots, a food that was not marketed by or available from McDonald’s.”<sup>75</sup>

Thus, the disproportionate obesity rates among low-income urban minority youth should be understood as the result of a complex interplay of individual and environmental factors. Obesity among urban minority youth is a public problem that can only be combated by looking beyond individual responsibility to environmental solutions. Public health litigation presents one potential strategy for catalyzing environmental solutions.

## II. PUBLIC HEALTH LITIGATION AS A TOOL TO COMBAT THE OBESITY EPIDEMIC

### *A. Pelman v. McDonald’s: An Overview*

Litigation against fast food companies has been among the most controversial public health strategies to fight the obesity epidemic. There has been a broad legal response to the obesity epidemic,<sup>76</sup> involving litigation, legislation, and

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<sup>69</sup> NESTLE, *supra* note 12, at 174.

<sup>70</sup> *Id.* at 27.

<sup>71</sup> *See, e.g.,* Alderman et al., *supra* note 5, at 97.

<sup>72</sup> *See* Sugarman & Sandman, *supra* note 15, at 1408.

<sup>73</sup> Robinson et al., *supra* note 53, at 794.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> While a comprehensive discussion of the alternative legal tactics to combat obesity, and their relative merits is beyond the scope of this Note, it is important to acknowledge that a flurry of activity on both the national and state levels is occurring. In particular, a great amount of legislative and regulatory activity on both the state and local levels to combat obesity has occurred in the absence of substantial federal action towards combating obesity. *See, e.g.,* Alderman et al., *supra* note 5, at 94 (“[L]ocal movements, social pressure, and the federal regulation vacuum have given rise to state

regulation.<sup>77</sup> *Pelman v. McDonald's Corp.*<sup>78</sup> is arguably the most well-known example of these obesity lawsuits.

*Pelman* is a class action lawsuit that was filed in 2003 by parents of minors Ashley Pelman and Jazlyn Bradley, on behalf of minors in New York State against McDonald's Corporation. The class members claim they were subject to McDonald's deceptive advertising and nutritional disclosure practices, in violation of New York Consumer Protection Laws, and led to purchase and consume large amounts of McDonald's food.<sup>79</sup> All of the class members were "Heavy-Users"—defined as those who ate McDonald's at least once or more per week—or "Super-Heavy Users"—consuming McDonald's at least four times or more a week—during the period when the alleged deceptive advertising was occurring.<sup>80</sup>

Plaintiffs' amended complaint currently contains three claims:

Count I alleges that the combined effect of McDonald's various promotional representations during this period was to create the false impression that its food products were nutritionally beneficial and part of a healthy lifestyle if consumed daily. Count II alleges that McDonald's failed to adequately disclose that its use of certain additives and the manner of its food processing rendered certain of its foods substantially less healthy than represented. Count III alleges that McDonald's deceptively represented that it would provide nutritional information to its New York customers when in reality such information was not readily available at a significant number of McDonald's outlets in New York visited by the plaintiffs and others.<sup>81</sup>

Plaintiffs allege that McDonald's deceptive advertising and representations led them to believe that McDonald's food "w[as] healthy and wholesome, not as detrimental to their health as medical and scientific studies have shown, . . . [and]

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legislative action and a large number of school nutrition bills. Tracking services that follow the proliferation of bills, such as one provided by the National Conference of State Legislatures (NCSL), optimistically reported that 2005 was 'a watershed year for state legislation dealing with school nutrition.' The Health Policy Tracking Service (HPTS) was equally upbeat; it reported that for '[2005] alone, 42 state legislatures have enacted or proposed measures that require or recommend nutritional guidance for schools.' In all, twenty-one states were successful in passing a total of thirty-four bills . . . . The number of federal bills related to obesity prevention or treatment that began as a trickle in the 106th Congress—there were twelve—has steadily increased through the current 109th Congress to eighty-six bills. Bills that focus specifically on childhood obesity have similarly increased from three to thirteen in the current Congress.'); see also, Kersh & Morone, *supra* note 11, at 853 ("[W]here national executive and legislative officials tread cautiously (or not at all)," state policy makers have stepped up to the plate.)

<sup>77</sup> See Michelle M. Mello et al., *Obesity—The New Frontier of Public Health Law*, 354 NEW ENG. J. MED. 2601 (2006) ("One of the newest targets of public health law is obesity. The past few years have seen a flurry of legislative initiatives aimed at improving nutrition and physical activity among children and adults, highly publicized personal-injury lawsuits against food and beverage companies, and new activities on the part of federal regulators.").

<sup>78</sup> See *supra* note 1.

<sup>79</sup> More Definite Statement (Second Amended Complaint), *supra* note 4.

<sup>80</sup> *Id.* ¶¶ 39-40.

<sup>81</sup> *Pelman III*, 396 F.3d at 510 (citations omitted).

of a beneficial nutritional value.”<sup>82</sup> Plaintiffs also assert that they “would not have purchased and/or consumed the Defendant’s aforementioned products, in their entirety, or on such frequency but for the aforementioned alleged representations and campaigns.”<sup>83</sup>

Plaintiffs further allege that as a result of their exposure to McDonald’s deceptive business practices, defendant caused them to suffer economic losses from purchasing McDonald’s food, and that prolonged use of McDonald’s products caused “adverse health effects and/or diseases.”<sup>84</sup> Specifically, plaintiffs allege that their use of McDonald’s products:

caused significant or substantial factors in the development of diabetes, coronary heart disease, high blood pressure, obesity, elevated levels of Low-Density Lipoprotein, or LDL, more commonly known as ‘bad’ cholesterol, and/or other detrimental and adverse health effects and/or diseases as medically determined to have been causally connected to the prolonged use of Defendant’s certain products.<sup>85</sup>

In “*Pelman I*,”<sup>86</sup> the court dismissed plaintiffs’ original five-count complaint, which alleged deceptive acts and practices in violation of New York’s Consumer Protection Act, and two counts of negligence. In “*Pelman II*,”<sup>87</sup> the court dismissed plaintiff’s amended complaint, which alleged deceptive acts in violation of New York Consumer Protection Laws.<sup>88</sup> The plaintiffs appealed this dismissal, and on appeal in “*Pelman III*,” the Second Circuit vacated the lower court’s dismissal of plaintiff’s claims under section 349 of the New York General Business Law, which prohibits “deceptive acts or practices in the conduct of any business, trade, or commerce, or in the furnishing of any service in this state.”<sup>89</sup> On remand to the district court, in “*Pelman IV*,” the court granted defendant’s motion for a more definite statement.<sup>90</sup> In “*Pelman V*,”<sup>91</sup> the court denied McDonald’s motion to strike and dismiss the second amended complaint in its entirety, and ordered McDonald’s to answer the remaining portions of the second amended complaint.<sup>92</sup>

With *Pelman* in the background, Part II.B. discusses the pros and cons of public health litigation as a tool to combat the obesity epidemic. Part II.C. provides

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶ 41.

<sup>85</sup> *Id.*

<sup>86</sup> *Pelman I*, 237 F.Supp.2d 512.

<sup>87</sup> *Pelman II*, 2003 U.S. Dist. LEXIS 15202.

<sup>88</sup> In the amended complaint, plaintiffs alleged four causes of action, but informed the court that they were dropping their fourth cause of action, “which alleged negligence by McDonald’s because of its failure to warn plaintiffs of the dangers and adverse health effects of eating processed foods from McDonald’s.” *Pelman II*, 2003 U.S. Dist. LEXIS at \*5.

<sup>89</sup> *Pelman III*, 396 F.3d at 511 (internal citations omitted) (quoting N.Y. GEN. BUS. § 349 (2004)).

<sup>90</sup> *Pelman IV*, 396 F. Supp. 2d at 446.

<sup>91</sup> *Pelman V*, 452 F. Supp. 2d 320.

<sup>92</sup> *Id.* at 328.

an overview of the claims typical of “Tobacco-Style Obesity Litigation,” of which *Pelman* is a prime example. Part II.C also lays out the arguments for and against obesity litigation. Part II.D. acknowledges the limited empirical evidence available to support either argument. Part III returns to the *Pelman* lawsuit in order to refocus the obesity litigation debate on low-income urban minority youth.

### *B. An Overview of the Public Health Law Approach*

The focal points of the public health discipline<sup>93</sup> are environments and populations.<sup>94</sup> By focusing on environments and populations, public health scholars acknowledge that an individual’s health is often the result of the environment she inhabits, rather than the result of her own individual choices.<sup>95</sup> The goal of public health is to improve and to protect the entire population’s health.<sup>96</sup> An issue becomes a public health problem if it requires large systemic interventions because an individual, acting alone, cannot protect herself.<sup>97</sup> Many public health lawyers see the law as a mechanism to alter the environment in order to enable people to lead healthier lives. They also believe that government should, and has a duty to, regulate private behavior with the goal of achieving better public health.<sup>98</sup> Many public health lawyers believe that litigation may be an important vehicle for reframing the issue of obesity as an environmental issue.<sup>99</sup>

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<sup>93</sup> It should be noted that scholars debate the proper scope of the public health discipline. Political conservatives, like Richard Epstein, tout the merits of the “old public health,” which was “confined (not perfectly, but by and large) to those goods, or bads that raised serious issues of market failure . . . . As such, it applied only to situations where competitive markets based on strong individual rights of private property could not be relied on to achieve anything close to the social optimum.” Richard A. Epstein, *Let the Shoemaker Stick to His Last: A Defense of the Old Public Health*, 46 PERSP. IN BIOLOGY & MED. S138, S141 (2003). The “new public health,” in contrast, “is broader in its reach than the . . . public health agenda Epstein would prefer: it looks beyond control of infectious disease to physical, social, economic, and other environmental risk factors for illness more generally.” Lawrence O. Gostin & Gregg M. Bloche, *The Politics of Public Health: A Response to Epstein*, 46 PERSP. IN BIOLOGY & MED. S160, S164 (2003). The new public health emphasizes the “multiple environmental and life circumstances that shape people’s health, and on the importance of broad-based private as well as public action to promote health.” *Id.* at S164, n.2.

<sup>94</sup> Smith, *supra* note 25, at 443.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 444.

<sup>98</sup> Mello et al., *supra* note 77, at 2601.

<sup>99</sup> At this juncture, it should be acknowledged that the decision to label obesity as an “epidemic” is a controversial and political decision, related closely to what one identifies as the proper scope of the public health discipline. See *supra* note 93 for a discussion of the debate around the proper scope of the public health discipline. Labeling obesity as an epidemic “blurs some key distinctions and makes some causal links. In one sense, obesity is a public health problem because it affects the health of a large proportion of the public. On the other hand, it is not a public health threat like an epidemic of avian influenza. Obesity is neither a disease nor the result of one.” KENNETH R. WING ET AL., PUBLIC HEALTH LAW 576 (LexisNexis 2007). Political conservatives, such as Richard Epstein argue that “epidemic” is the wrong way to think about the problem because “[t]here are no non-communicable epidemics.” Epstein, *supra* note 93, at S154. Epstein argues that framing obesity as a “public health epidemic” implies that state intervention is warranted, a role he believes should be left to “private institutions and foundations without governmental coercion.” *Id.* Alternatively, as this Note and other public health lawyers argue, the government has a duty to regulate behavior, in order to alter the

*C. Litigation to Combat Obesity: A Beacon of Hope or a Recipe for Disaster?*

## i. Overview of Tobacco-Style Obesity Litigation

Advocates have used litigation as a tool to combat various public health problems.<sup>100</sup> Historically, litigation has been used as part of a public health strategy in the areas of tobacco and gun control.<sup>101</sup> Recently, however, litigation against fast food companies has also been applied as part of a broader public health approach to combat the obesity epidemic.

Even proponents of obesity litigation acknowledge that it should not be relied on as a unitary strategy. Instead, it should be one part of a multi-faceted approach to improving the public's health.<sup>102</sup> Although obesity litigation, alone, is not a solution, it is an important public health strategy that has garnered a significant amount of attention and controversy.

There is no single definition of fast food obesity lawsuits; rather, many different legal claims are being classified under the label of obesity litigation.<sup>103</sup> Broadly speaking, obesity lawsuits "claim that companies failed to warn consumers of the harmful contents of their food; that food advertising is misleading or deceptive; that food is addictive . . . ; or that defendants' food contributed to consumers' obesity."<sup>104</sup> "Tobacco-Style lawsuits" are a distinct subset of obesity lawsuits, of which *Pelman v. McDonald's Corp.* is a prime example.<sup>105</sup> "Tobacco-Style Suits" are defined as "claims of personal injury based on eating fattening food or claims of consumer fraud based on an alleged lack of sufficient disclosure of the nutritional impact of junk food."<sup>106</sup> Scholars posit that fast food litigators have been inspired by the success of earlier tobacco lawsuits, which resulted in tobacco companies' liability for large sums of money, reimbursable to Medicaid.<sup>107</sup>

Traditionally, setting public policy through litigation has most prominently been through class-action lawsuits, often mass torts.<sup>108</sup> However, tobacco-style

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environment, and improve public health.

<sup>100</sup> Peter D. Jacobson & Soheil Soliman, *Litigation as a Public Health Policy: Theory of Reality?*, 30 J.L. MED. & ETHICS 224 (2002).

<sup>101</sup> *Id.*

<sup>102</sup> Smith, *supra* note 25, at 448.

<sup>103</sup> Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. L. REV. 427, 429-34 (2006). (discussing the various types of lawsuits included under the umbrella of obesity litigation, of which "tobacco-style suits" are but one distinct subset. Also included under the umbrella of obesity litigation are "run-of-the-mill affirmative misrepresentation" cases, as well as lawsuits brought by public interest firms against food companies that "coincide[] with action that a defendant was inclined to take anyway"—e.g., the elimination of trans fats from food products—in which industry change attributable solely to litigation, as opposed to pre-existing market pressures, is questionable.).

<sup>104</sup> Burnett, *supra* note 5, at 375.

<sup>105</sup> Frank, *supra* note 103, at 433.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Kersh & Morone, *supra* note 11, at 855.



obesity litigation may also be characterized as what one legal scholar has dubbed “social policy tort” litigation,<sup>109</sup> defined as follows:

In addition to seeking monetary compensation for individuals and public entities, [social policy tort] litigation seeks the kind of industry-wide changes in corporate products and practices that advocates have pursued, without much success, in state and federal legislatures . . . . [T]hese lawsuits have a political dimension that is not generally present in other damage class actions.

Social policy torts have successfully addressed public health issues that have been stymied in Congress.<sup>110</sup> Accordingly, some scholars assert that courts have become “the most active venue for social change in health politics.”<sup>111</sup> This is explained, in part, by the lack of political will, or political stalemate, which paralyzes elected legislative and executive officials from acting.<sup>112</sup> Furthermore, the judiciary is well-suited to address regulation of private behavior that has public consequences, such as smoking, food consumption, and gun control.<sup>113</sup> The appropriateness of judicial policy making, however, is a very controversial issue among public health and legal scholars alike.

## ii. Claimed Benefits of Obesity Litigation

Litigation can be a useful vehicle to fight the obesity epidemic and shape public health policy. This section outlines several benefits of obesity litigation. In particular, litigation can be a useful vehicle to reframe the obesity issue. It can also act as a catalyst for industry change, heightened social awareness, and cultural change. Furthermore, the judiciary may present unique advantages over the legislature for setting obesity policy.

Perhaps one of litigation’s greatest contributions to a larger public health strategy is its ability to reframe the obesity issue.<sup>114</sup> Proponents of using litigation to combat obesity argue that such litigation may be a helpful tool for framing the obesity issue as a public health issue. As discussed in Part I.B., *supra*, there are two ways to frame the issue of obesity: as an environmental issue and as one of individual choice.<sup>115</sup> The appropriate public policy response to the obesity epidemic is the direct result of how the problem is framed; redefining the problem as either one of individual responsibility or as one of an unhealthy food environment “redefines the politics” surrounding the solution.<sup>116</sup>

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<sup>109</sup> *Id.* (citing legal scholar Deborah Hensler).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 854.

<sup>112</sup> *Id.*

<sup>113</sup> Kersh & Morone, *supra* note 11, at 840-41.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 846.

<sup>116</sup> *Id.* at 846-49.

Public health advocates are trying to reframe the issue of obesity, and have emphasized that one of the first steps in combating the obesity epidemic is framing the issue as an environmental issue, rather than one of personal responsibility.<sup>117</sup> They emphasize that obesity can only be combated through changing the environment to support healthy behavior.<sup>118</sup> In contrast, the food industry and current legislatures place attention solely on the individual's caloric consumption and ability to change.<sup>119</sup>

Lawsuits can be an effective vehicle to reframe the issue of obesity as it affects low-income urban minority youth. Litigation can also be a valuable platform to publicize the effects of the built environment on individuals. Public health practitioners can use litigation as an opportunity to frame the obesity epidemic as an environmental problem, and in so doing, can challenge industry attempts to frame obesity as a failure of personal responsibility.<sup>120</sup> If the obesity epidemic is framed in such a way so as to reveal that people are being manipulated or misled, then the politics of the policy response changes and focus is shifted from obese individuals to the environmental forces influencing their food choices.<sup>121</sup> In fact, this is what happened, in the aftermath of successful tobacco litigation, when the public became convinced that the tobacco industry had made misleading claims: the "politics" around the issue changed.<sup>122</sup> When obesity among urban minority youth is viewed as the result of the complex and unique interplay of several environmental forces discussed earlier in this Note, fast food lawsuits may pose an important opportunity for social change.

Litigation can do more than serve as a vehicle to reframe the issue of obesity. Litigation advocates suggest that obesity-related litigation can be an effective public health strategy and catalyst for social change, regardless of whether the plaintiffs win or lose.<sup>123</sup> Specifically, litigation has the potential to catalyze numerous changes, including: (1) cost sharing—large numbers of successful lawsuits would force fast food companies to bear a greater share of the costs connected with consumption of their products;<sup>124</sup> (2) industry change—litigation

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<sup>117</sup> Marlene B. Schwartz & Kelly D. Brownell, *Actions Necessary to Prevent Childhood Obesity: Creating the Climate for Change*, 35 J.L. MED. & ETHICS 78, 79 (2007) ("How the obesity issue is framed is of the utmost importance to how it is addressed. Who or what is perceived as responsible for the genesis of obesity is a prime determinant of . . . what actions are considered appropriate for both treatment and prevention. A disconnect between the real cause and perceived cause . . . can lead to . . . diversion from actions that could improve public health. We risk investing time, money, and effort into interventions based on the belief that obesity is a matter of personal responsibility, and risk missing the opportunity to make environmental changes that will have a greater impact.").

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Smith, *supra* note 25, at 447.

<sup>121</sup> Kersh & Morone, *supra* note 11, at 848.

<sup>122</sup> *Id.*

<sup>123</sup> Burnett, *supra* note 5, at 409; Michelle M. Mello et al., *The McLawsuit: The Fast-Food Industry And Legal Accountability for Obesity*, 22 HEALTH AFF. 207, 212-14 (2003).

<sup>124</sup> Mello, et al., *supra* note 123, at 212.

can cause industries to change their business practices voluntarily, for example, to provide healthier product options<sup>125</sup> in order to avoid other costly consequences or negative outcomes of litigation;<sup>126</sup> (3) increased regulation—litigation can help inspire additional supervision and regulation of the fast food industry by drawing regulatory agencies' and legislatures' attention to health risks that require government action and also by “demonizing” the fast food industry;<sup>127</sup> and (4) cultural change—litigation can increase public awareness about the negative health effects of eating large amounts of fast food, change consumer behavior, and shape public opinion in favor of increased corporate responsibility for the obesity epidemic.<sup>128</sup>

Some argue that fast food litigation has already led to several positive changes.<sup>129</sup> Obesity litigation has spurred voluntary changes in the food industry to provide more healthy products.<sup>130</sup> In addition, even negative publicity about fast food lawsuits creates public awareness about the connection between unhealthy food and obesity.<sup>131</sup> For example, the *Pelman* case received substantial national media attention, most of it mocking and sarcastic.<sup>132</sup> Despite mockery, public awareness about obesity may ultimately improve public health by heightening consumer awareness about food choices, and causing consumers to make more healthy decisions.<sup>133</sup>

The judiciary poses additional advantages for pursuing obesity policy goals. One benefit is that the judiciary has the advantage of being politically insulated, and can therefore make policy decisions that the politically accountable legislative and executive regulatory agencies have been unable to accomplish.<sup>134</sup> Proponents of litigation point to the economic and political influence that the food industry wields on the legislature and regulatory agencies, and view litigation as an opportunity to “achieve, or initiate, policy development that the captured legislative and regulatory systems have failed to produce, despite widespread public support.”<sup>135</sup> For example, the judiciary's political insulation affords courts the

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<sup>125</sup> *Id.*

<sup>126</sup> Jacobson & Soliman, *supra* note 100, at 226 (explaining that litigation may be a useful tactic in shaping public health policy because it “may induce policy changes by virtue of the industry's desire to avoid other potential outcomes of litigation.”).

<sup>127</sup> *Id.* at 213.

<sup>128</sup> *Id.* at 214.

<sup>129</sup> *But see* Frank, *supra* note 103, at 429 (“[P]laintiffs' successes [in obesity litigation] have been thin gruel and . . . the obesity litigation to date has been much more successful in transferring wealth to attorneys than in advancing legitimate public policy concerns.”).

<sup>130</sup> Burnett, *supra* note 5, at 385.

<sup>131</sup> *Id.* at 386.

<sup>132</sup> Kersh & Morone, *supra* note 11, at 862. *See e.g.*, Ralph R. Reiland, *McDonald's Made Me Fat!*, CAPITALISM MAG., Jan. 16, 2003, <http://www.capmag.com/article.asp?ID=2383>.

<sup>133</sup> Burnett, *supra* note 5, at 386.

<sup>134</sup> Jacobson & Soliman, *supra* note 100, at 225 (“A principal justification for the use of litigation to achieve public health policy objectives emerges from proponents' perception that the legislative and regulatory systems have failed.”); *see also* Kersh & Morone, *supra* note 11.

<sup>135</sup> Jacobson & Soliman, *supra* note 100, at 225.

opportunity to impose large monetary damages on the food industry, unlike Congress and the States, who may shy away from imposing large excise taxes to cover the same costs as result of industry influence.<sup>136</sup>

The judiciary's political insulation may be particularly valuable in cases brought by overweight urban minority youth, such as *Pelman v. McDonald's*. In such cases, there are potentially valid legal claims that fast food companies have withheld information or otherwise misled their highly sought after customers. Judicial review can be especially helpful in these obesity lawsuits, where the elected branches may be inclined to side with the more politically powerful industry interests. Moreover, courts can simulate other regulatory and legislative functions by imposing limitations on food corporations' marketing activities.<sup>137</sup>

Another benefit of obesity litigation in setting health policy stems from the fact that courts *must* decide the cases before them, in sharp contrast to the other, elected branches of government who may get mired in political stalemate. Rogan Kersh and James Morone posit that the court's unique ability to make decisive choices explains their central role in setting public health policy today.<sup>138</sup> They explain that "in contrast to frequent legislative impasses, courts eventually decide, one way or another. And the volume of health-related petitions keeps growing."<sup>139</sup> Thus, the claimed benefits of obesity litigation reveal that courts can play a unique and potentially effective role in combating the rise of obesity, even where political stalemate blocks legislative action.

### iii. Arguments Against Litigation as a Strategy to Fight Obesity

Obesity litigation has been controversial, as impact litigation always is. There are strong theoretical arguments against the use of litigation in setting obesity policy.<sup>140</sup> This section outlines four critiques against the use of litigation to fight obesity: (1) plaintiffs in obesity lawsuits will not be able to establish causation or commonality of claims; (2) using courts to set such policy encourages judicial paternalism; (3) allowing the courts to set obesity policy is "undemocratic" because it violates the separation of powers mandated by the U.S. Constitution; and (4) the procedural limits on the courts limit their ability to effectively make and enforce policy.

Opponents of obesity litigation point to the potential legal hurdles inherent in such lawsuits: specifically, they focus on the weak causal link between plaintiffs' obesity and fast food.<sup>141</sup> As Part I, *supra*, highlights, obesity should be seen as

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 226.

<sup>138</sup> Kersh & Morone, *supra* note 11, at 855.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., Sugarman & Sandman, *supra* note 15, at 1410 ("We are not keen on litigation as the solution to [childhood obesity].").

<sup>141</sup> Burnett, *supra* note 5, at 381 ("The shortcomings of fast-food litigation are most clear in comparison with tobacco litigation . . . . Unfortunately . . . obesity lawsuits are much less likely to

resulting from a confluence of multiple environmental and individual factors. On a related note, opponents also argue that in the class action context, plaintiffs will have a more difficult time establishing commonality, as obesity has many causes.<sup>142</sup> One critic argues that:

the individualized circumstances of . . . obesity highlight a fundamental problem with the use of class action to address obesity. Class action litigation is a procedural device to aggregate claims where common issues predominate. The causes of any person's obesity, however, will be highly individualized—different genetics, different exercise patterns, different eating patterns, and different choices. Only through abuse of class action mechanism can litigation be feasibly used by plaintiff's attorney.<sup>143</sup>

Some of these opponents argue against litigation in favor of alternate solutions, such as performance-based regulation of the fast food industry.<sup>144</sup>

Additionally, critics of litigation in the obesity context argue that reliance on the judiciary in public health matters encourages “judicial paternalism over personal choices,”<sup>145</sup> and that “libertarian concern[s] for individual choice” should be respected—i.e., that governmental intrusion into personal choices is unwarranted because individuals are best suited to decide their own preferences.<sup>146</sup> It is this line of thinking that forms the foundation for the argument that defendants such as McDonald's are not responsible for the personal choices of individual customers who choose to buy their products. Such an argument is based heavily on the view of obesity as an issue of personal responsibility. Holding individuals entirely responsible for their decisions minimizes the various environmental factors at play that shape those decisions.

Another popular critique of obesity litigation is that judicial policymaking is undemocratic. More specifically, the argument is that the court's role should be limited to enforcing strict adherence to procedural requirements,<sup>147</sup> and that the courts undermine their credibility as unelected, objective referees when they impose legislative-type policy change.<sup>148</sup> According to these critics, allowing the courts to undermine popular politics through litigation is “undemocratic” because it permits the court to make policy decisions that should more properly be left to the legislature.<sup>149</sup> Under this view, only the legislative branch is equipped to weigh options and make the value-laden and complex policy judgments needed to

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succeed than tobacco . . . . The differences lie in the weaker chain of causation with obesity claims.”).

<sup>142</sup> *Id.* at 382; *see also* Frank, *supra* note 103, at 427, 439-40 (arguing that the nature of the class action is a “fatal flaw” of obesity suits.).

<sup>143</sup> Frank, *supra* note 103, at 427, 439-40.

<sup>144</sup> Sugarman & Sandman, *supra* note 15.

<sup>145</sup> Jacobson & Soliman, *supra* note 100, at 226.

<sup>146</sup> *Id.* at 227.

<sup>147</sup> *Id.* at 226.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

determine public health policy.<sup>150</sup> More specifically, courts are ill-equipped to make policy decisions because:

[courts] lack the ability to define policy objectives; interpret empirical data; select the ‘right’ parties to the litigation or the ‘right’ cases for policy judgments; understand the policy implications of their decisions; assess the economic impact of various policy choices; and obtain the proper information needed to resolve conflicting policy choices.<sup>151</sup>

An additional argument against litigation as a policy-setting vehicle in the obesity context centers on the procedural limits of courts, and potential detrimental effects of judicial policymaking.<sup>152</sup> Restrictions on court-ordered remedies limit the ability of courts to impose policy change. For example, courts may hesitate to impose equitable relief, or may look to limit monetary damages, or deny class action status because courts hesitate to assume regulatory authority.<sup>153</sup> Additionally, courts face particular challenges in enforcing policy change: implementing and enforcing public policy necessitates bureaucratic and political support that the courts alone do not possess.<sup>154</sup> Public health and other advocacy groups may play a large role in enforcing court judgments by demanding governmental agencies to enforce and implement these decisions.<sup>155</sup>

#### *D. Can Litigation Work to Fight Obesity? Limited Empirical Evidence For and Against Obesity Litigation*

The arguments for and against litigation as a public health strategy are largely theoretical.<sup>156</sup> There is little empirical information in the literature about the actual success of litigation in achieving public health policy goals, or about whether litigation can, in fact, achieve these goals.<sup>157</sup> Some scholars have concluded that litigation as a vehicle to set public health policy is “destined to disappoint proponents as an alternative to the political process,” because “[a]t best, the litigation has had indirect effects,” but it has not resulted in significant changes in public policy.<sup>158</sup> These authors acknowledge that “[w]ithout question [recent tobacco and gun litigation] has had salient effects that may well influence the policy agenda. Merely bringing the litigation has raised the public’s understanding

<sup>150</sup> Jacobson & Soliman, *supra* note 100, at 226.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 227.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Jacobson & Soliman, *supra* note 100, at 226.

<sup>156</sup> *Id.* at 224.

<sup>157</sup> *Id.* (“An ongoing debate among legal scholars and public health advocates is the role of litigation in shaping public policy. For the most part, the debate has . . . been based either on speculation of what litigation could achieve or on ideological grounds as to why litigation should or should not be used this way . . . . [T]here is almost no empirical support for either position.”).

<sup>158</sup> *Id.* at 233.

of the health-related consequences of gun and tobacco use.”<sup>159</sup> They suggest that litigation should remain as one, complementary aspect of public health advocates’ strategies, but should not be the centerpiece.<sup>160</sup> Used as a tool to improve public health, litigation “is effective only when its strategic focus is environmental rather than discrete. It is effective not only when it eliminates one particular risk, but when it alters the social context that shapes the behavior of entire populations.”<sup>161</sup>

In contrast, other scholars are more optimistic about the future role of the courts in setting public health policy. Kersh and Morone conclude that the policy process will necessarily become increasingly centered in the courts, particularly in the context of obesity policy.<sup>162</sup> They explain,

The politics of obesity offers the latest version of an emerging form of public health politics—one that often focuses on private behavior, generally stimulates warnings about a crisis (from public health advocates, budget hawks, or both), and finds itself bogged down in legislative stalemate. The result is a policy process increasingly centered in the courts.<sup>163</sup>

Missing from the debates about litigation as a public health strategy, however, is attention to the disproportionate effects of the obesity epidemic on low-income urban minority youth. This Note argues that the costs and benefits of litigation as a public health strategy depend a great deal on context, and therefore change when the debate is refocused on specific populations. The section that follows, returns to *Pelman* as a case study and posits that arguments against litigation in the obesity context have less force when the debate is refocused on low-income urban minority youth.

### III. ANALYZING THE POTENTIAL OF LITIGATION TO COMBAT THE OBESITY EPIDEMIC AMONG LOW-INCOME URBAN MINORITY YOUTH: A CASE STUDY OF *PELMAN V. MCDONALD'S CORP.*

Given the current, theoretical nature of the obesity litigation debate, this section refocuses this discussion in the context of low-income urban minority youth. *Pelman v. McDonald's Corp.* serves as a case study to illustrate the potential of public health litigation to combat obesity among urban minority youth.<sup>164</sup> The majority of named plaintiffs in *Pelman* represent one of the populations most impacted by the obesity epidemic, but the class is not limited to low-income urban minority youth. In the particular context of obesity among urban minority youth, many of the arguments against litigation as a vehicle to establish

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<sup>159</sup> *Id.*

<sup>160</sup> Jacobson & Soliman, *supra* note 100, at 233.

<sup>161</sup> Smith, *supra* note 25, at 443.

<sup>162</sup> Kersh & Morone, *supra* note 11, at 861.

<sup>163</sup> *Id.*

<sup>164</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶ 531.

public health policy are weakened, and many of the potential strengths of litigation are bolstered. If the *Pelman* lawsuit had been crafted differently, to make the connection between obesity, race, and socioeconomic status more explicit, it may have been an effective vehicle to help combat obesity among low-income urban minority youth.

*A. The Pelman v. McDonald's Corp. Plaintiffs and Low-Income Urban Minority Youth*

The lives of the majority of named plaintiffs in *Pelman* reflect many of the particular challenges faced by low-income urban minority youth, outlined in Part I. Ashley Pelman and Jazlyn Bradley are black females, who lived in and ate at McDonald's in the Bronx.<sup>165</sup> When the case was filed in 2003, Ashley Pelman was fourteen years old, and weighed 170 pounds.<sup>166</sup> Jazlyn Bradley was nineteen years old, and weighed 270 pounds.<sup>167</sup> The Bronx has the highest obesity rates in New York City,<sup>168</sup> and the population is predominantly composed of minority groups: it is 15% white, 31% African-American, 48% Hispanic, 3% Asian and 3% other.<sup>169</sup> Jazlyn Bradley's life exemplifies many of the challenges discussed in this Note:

Jazlyn Bradley, one of ten children, resided in a dilapidated apartment that had no kitchen sink (dishes were washed in the bathtub) before she moved to a homeless shelter where she lived between the ages of fifteen and eighteen. Given that there was no place to cook, Jazlyn was given money with which to eat out; she chose McDonald's because it was cheap and close; she might eat there up to three times a day. Jazlyn attributed her weight to the quantity of food that she ate, not its quality.<sup>170</sup>

The amended complaint also included additional named plaintiffs, the majority of whom were poor urban youth and youth of color. However, the putative class in the amended complaint includes a much broader population of all "New York State residents, infants, and consumers, who were exposed, subjected, and affected . . . by Defendant's deceptive nutritional, ingredient and/or nutritional disclosure schemes."<sup>171</sup> The majority of named plaintiffs live in urban communities such as the Bronx. They all ate at McDonald's several times a week.

Arguably, poor urban minority youth like Ashley Pelman and Jazlyn Bradley face several distinct issues not faced by youth in other, more affluent New York

<sup>165</sup> Austin, *supra* note 3, at 692-93.

<sup>166</sup> *Id.* at 692.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 693.

<sup>169</sup> *Id.*

<sup>170</sup> Austin, *supra* note 3, at 692-93.

<sup>171</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶ 531. This amended complaint also added named plaintiffs who were not urban minority youth. Even with the addition of these plaintiffs, however, the majority of the named plaintiffs in the amended complaint are urban minority youth.



State communities. Thus, the majority of named plaintiffs in *Pelman*—low-income urban minority youth—represent a group of individuals uniquely affected by defendant's behavior, and perhaps more focused on an especially troubling aspect of the obesity problem, but the class is not limited to them. The representativeness of the named plaintiffs to the larger putative class in *Pelman* is therefore questionable. If the class in *Pelman* had been limited to low-income urban minority youth, the issue of obesity would look very different, and could perhaps reflect many of the trends discussed in social science literature, and outlined in this Note.

*B. Refocusing the Debate on Obesity Litigation: Focus on Low-Income Urban Minority Youth*

There is much debate in the literature over litigation as a strategy to combat obesity, but the debate tends to treat obesity as something that affects everyone equally, when the public health literature shows this is not the case. Despite the vast literature on the appropriateness of litigation in shaping obesity policy, there is scant consideration of the specific role of litigation as a tool to combat obesity among urban minority youth. As Part I explains, obesity disproportionately affects low-income urban minority youth. An analysis of litigation as a strategy to combat obesity in this population is especially critical considering the disproportionate and rapid rise in obesity rates within this population.<sup>172</sup> Given the environmental forces impacting the health and nutrition of urban minority youth,<sup>173</sup> combined with public health law's focus on shaping the social context<sup>174</sup> and its purported ability to initiate policy development where the legislative and regulatory systems have been stymied,<sup>175</sup> public health law seems to present an opportunity for action.

When the obesity litigation debate is refocused on some of the communities most affected by the epidemic, particularly low-income urban minority youth, the arguments against litigation in the obesity context have less force. First, the libertarian argument against judicial involvement with public health policy is undermined in the obesity context to the extent that obesity is not primarily a matter of individual choice, and in light of the fact that urban minority youth are unlikely to get their way through majoritarian politics. When fast food companies strategically and aggressively market their products towards urban minority communities and children, and place high numbers of their restaurants in poor urban neighborhoods, the rhetoric of individual choice is undermined. Judicial intervention seems more justified in a context where corporate entities are arguably taking advantage of a vulnerable and therefore marketable population. Furthermore, in light of the political stalemate blocking significant legislative and

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<sup>172</sup> See *supra* Part I.A.

<sup>173</sup> See *supra* Parts I.B and I.C.

<sup>174</sup> Smith, *supra* note 25, at 443.

<sup>175</sup> Jacobson & Soliman, *supra* note 100, at 225.

regulatory action against obesity, the courts may pose a unique role as an alternative to legislative action.

Criticisms that the plaintiffs in obesity lawsuits will have a hard time establishing causation and commonality are also weaker in the context of low-income urban minority youth, in light of the social science literature describing the common environmental factors that may be driving the disproportionate surge in obesity rates in this population. The chain of causation between plaintiff's obesity and fast food may be stronger in light of fast food companies' conscious marketing schemes toward children and urban minority populations. Many authors highlight fast food companies' aggressive marketing to children as one of their major vulnerabilities in future obesity lawsuits.<sup>176</sup> However, the literature does not seem to pick up on fast food companies' vulnerabilities due to their conscious marketing schemes toward minority populations, and more specifically, poor urban minority youth. Furthermore, establishing commonality among a class of urban minority youth may be easier than for other classes of obese litigants, as many of these children face similar environmental hurdles in regards to healthy food choices.

Finally, the criticism that judicial policy making is undemocratic is also undermined in this context, where disenfranchised populations are arguably being taken advantage of by a more politically powerful constituency. In such a situation, there is a stronger argument for the court to impose a counter-majoritarian judgment, and protect minority populations whose will is not reflected in the political sphere.

The point here is not that fast food lawsuits limited to low-income, urban, minority youth will necessarily be successful. Rather, it is that the relative costs and benefits of litigation as a public health strategy may depend a great deal on context. The arguments against obesity litigation are weakened in the context of urban minority youth, and the claimed benefits of such litigation are bolstered. Despite the social science literature documenting the impact of obesity on low-income urban minority youth, this information has not made its way into the legal literature or current litigation strategy. *Pelman v. McDonald's Corp.* is a useful case study to think about the potential for obesity litigation to shape policy for urban minority youth.

### C. *Pelman v. McDonald's Corp.: A Missed Opportunity to Catalyze Social Change?*

The *Pelman* lawsuit did not explicitly deal with the connection between race, socioeconomic status, and obesity, and thus represents a missed opportunity to catalyze social change around childhood obesity. In their 166-page second amended complaint, the *Pelman* plaintiffs spend a great deal of time setting up the

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<sup>176</sup> Kersh & Morone, *supra* note 11, at 863.

factual background of the case. In so doing, however, they seem to ignore the issues of race and class—issues critical to addressing the obesity epidemic among urban youth of color. For example, in discussing the obesity epidemic, the plaintiffs state, “[o]besity and related conditions cuts across all ages, racial and ethnic groups, and both genders, and has been increasing in every State in the Nation that has reached epidemic proportions.”<sup>177</sup> Although this may be true, it dilutes attention away from the unique impact of obesity on low-income minority communities. The factual background also contains a section discussing “Socio-economic ramifications.”<sup>178</sup> However, this section does not mention the association between socioeconomic status, fast food, and obesity; instead it focuses on the direct and indirect costs of obesity to this country.<sup>179</sup> The complaint further discusses “[h]eavy concentration of sales to Defendant’s users.”<sup>180</sup> However, here too, plaintiffs seem to avoid the critical issue of aggressive fast food marketing to minorities and the urban poor. In a footnote, the plaintiffs allude to the astonishingly high concentration of McDonald’s stores in the Bronx,<sup>181</sup> but never mention the urban poor. Rather, the complaint focuses on McDonald’s sales to “heavy users” and “super heavy users,” without discussing the racial or socioeconomic demographics of those users.<sup>182</sup>

In seeking to understand why the *Pelman* lawyers did not deal with race/ethnicity, gender, and class in a forthright way, the shortcomings of tort law may provide an explanation:<sup>183</sup>

Tort law makes little allowance for the fact that risk varies with race/ethnicity, gender, and class. The law of torts, with its articulated goal of objectively balancing economic interests, eschews much of any reference to the disparities in the distribution of cultural, social, and economic capital that make some groups of people more vulnerable to physical and emotional harm and economic over-reaching than others. Correcting or compensating for that imbalance is not a goal of tort law. In addition, the courts pay almost no heed to the lack of due regard for the damage and financial losses incurred by these same groups that results in the undervaluation and under-compensation of their injuries . . . . [T]he law of torts pays little attention to contextual matters like race/ethnicity, gender, and class . . . .<sup>184</sup>

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<sup>177</sup> More Definite Statement (Second Amended Complaint), *supra* note 4, ¶ 67.

<sup>178</sup> *Id.* at 22.

<sup>179</sup> *Id.* ¶¶ 88-89. (“The associated health problems and effects of obesity and overweight classification have substantial economic consequences for the United states health care system and individuals . . . . In 1995, the total estimated (direct and indirect) costs attributable to obesity amounted to an estimated \$99 billion. In 2000, the total cost of obesity was estimated to be \$117 billion . . . .”).

<sup>180</sup> *Id.* at 23.

<sup>181</sup> *Id.* ¶ 91 n.31.

<sup>182</sup> *Id.* ¶¶ 90-100.

<sup>183</sup> Austin, *supra* note 3, at 713.

<sup>184</sup> *Id.*

The emerging “social policy tort” lawsuits, which seek industry-wide change that the captured legislature has been unable to accomplish, seem to present a hopeful opportunity for socioeconomic and racial inequality to enter into tort law claims. This litigation may represent a catalyst for social and environmental change in regards to obesity among urban minority youth. Framed differently, *Pelman v. McDonald’s* might have been one such lawsuit to combat obesity among urban minority youth.

If the *Pelman* complaint had been crafted in such a way to make the connection between obesity, race, and socioeconomic status more explicit, the lawsuit could have been a valuable opportunity to reframe the obesity issue to highlight its effect on low-income urban minority youth. Furthermore, as scholars have already pointed out, even if such a lawsuit were to fail, it could still have many positive benefits, including mobilizing public action by drawing public awareness to the issues of obesity among urban minority youth. Additionally, if the *Pelman* complaint were crafted in such a way to expose the problem of obesity and urban minority youth, it might have been less ridiculed in the mainstream media than it has been in its current incarnation. The possibility of garnering more positive media attention, regardless of the ultimate outcome in the case, would be a positive step forward in catalyzing change to halt or perhaps mitigate the obesity epidemic among urban minority youth. Positive media attention would highlight disparities in obesity rates that have been outlined in the public health literature. Such a complaint might also spur “voluntary” changes in fast food companies’ marketing policies and practices of concentrating stores in poor, urban, and predominantly minority neighborhoods.

#### IV. CONCLUSION

This Note seeks to highlight a critical gap in the current legal literature and litigation strategy for obesity lawsuits: despite the well-documented disparities in obesity rates, there has not been focused attention on the role of, and potential for, litigation to shape obesity policy for urban minority youth. This Note discusses how many of the theoretical arguments against litigation as a policy setting vehicle are weakened in the context of low-income urban minority youth, and how many of the potential strengths are bolstered. Furthermore, as was the case with tobacco litigation, if the public becomes convinced that urban minority youth are being misled or manipulated by the food industry, then the politics of fast food lawsuits may change. *Pelman v. McDonald’s Corp.*—in which the majority of named plaintiffs are low-income urban adolescents of color—represents a helpful reference point for thinking about the role that litigation can play in combating the obesity epidemic in this population. This analysis is absent from the current legal literature and deserves more focused attention in the future.

